

UPDATES TO THE 2014 NEW MEXICO CHILD WELFARE HANDBOOK <http://childlaw.unm.edu/resources>

This is the second semi-annual report on updates to the 2014 New Mexico Child Welfare Handbook. The 2014 Handbook was published in July 2014 and updated in a five page document in January 2015. This July 2015 update covers the period January 1, 2015 to June 30, 2015. **It is important to check these updates when using the Handbook.**

Only a few abuse-related laws came out of the 2015 Legislative Session while the Supreme Court issued the *Strauch* opinion, which makes it clear that “every person” is a mandatory child abuse reporter. The Supreme Court also decided a number of criminal child abuse cases and approved a significant new set of jury instructions on intentional and reckless child abuse, while also issuing a new opinion on rehearing in *Antonio T.*, a delinquency case. The Court of Appeals issued a number of opinions relating to termination of parental rights, placement, and other issues arising from abuse and neglect cases in Children’s Court.

Congress passed the Justice for Victims of Trafficking Act, which amended the Child Abuse Prevention and Treatment Act, or CAPTA, while the federal Children’s Bureau issued a Program Instruction on state implementation of the Preventing Sex Trafficking and Strengthening Families Act. A major event was the Bureau of Indian Affairs’ publication of new guidelines for Indian Child Welfare Act cases; this marks the first time that the BIA Guidelines have been updated since they were first issued in 1979. The BIA has also issued proposed regulations to support ICWA implementation.

These developments are addressed in more detail below. References to affected sections of the Handbook appear in parentheses after the description of each development.

Changes to the Children’s Code and Other State Laws

2015 N.M. Laws, Ch. 51 (HB 53). **Section 32A-4-6 of the Abuse and Neglect Act** was amended to include a new subsection (B) providing that a child may not be taken into protective custody solely on the grounds that the child’s parent, guardian or custodian refuses to consent to the administration of a psychotropic medication to the child. House Bill 53 also added a new section to the Public School Code to prohibit schools from denying access to programs or services to children whose parents refuse to place the student on psychotropic meds. (Handbook §§ 12.5, 13.7.2)

2015 N.M. Laws, Ch. 28 (HB 277). The **Kinship Guardianship Act** was amended to delete the requirement that ICWA kinship guardianship cases be decided beyond a reasonable doubt, such that now the standard of proof is clear and convincing evidence for all cases. The law was also amended to clarify that the court must set a date for hearing that is between 30 and 90 days from the date of filing of the petition, and the petition no longer has to state the child’s marital status. (Handbook §§ 30A.2.1, 30A.2.2)

2015 N.M. Laws, Ch. 13 (HB 101). The **Sexual Exploitation of Children Act** was amended to make it a second degree felony to knowingly hire or offer to hire a child under 16 to engage in a prohibited sexual act (as defined in the law). (Handbook § 34.5.5)

Changes to Supreme Court Rules

Proposed Rules Pending in the Supreme Court

A proposed **Rule 10-316** would require that an **educational decision maker** be named in a court order at the custody hearing and reviewed at subsequent hearings in every case. (The Children's Court forms adopted in 2014 already provide for the naming of an educational decision maker in the custody order, as well as in subsequent orders.) (Handbook § 13.11, 16.12.6)

A new **Rule 10-323** on the **conduct of hearings** in abuse and neglect cases in Children's Court is being considered. The proposal focuses on the persons who may be present at a hearing and who should be excluded. (Handbook § 13.4)

Rules governing **court-connected mediation services** were proposed and offered for public comment in early 2015. These proposed rules, if adopted, would apply to court-connected mediation in abuse and neglect cases. (Handbook § 29.4)

Criminal Child Abuse UJIs

The Uniform Jury Instructions on criminal child abuse have been revised and reissued as UJI 14-611 – 14-625. The former instructions, UJI 14-602 – 14-610, have been repealed. The new instructions set forth the elements that the Supreme Court has been addressing in cases such as *Consaul* (see January 2015 update) and *Montoya* (below). Because of the confusion it causes, the word "negligence" has been replaced altogether with "recklessness" since "reckless disregard" is the minimum level of culpability required to sustain a conviction for child abuse. (Handbook §§ 34.3.1, 34.3.2)

Case Law

State v. Strauch, 2015-NMSC-009 (No. 34,435, March 9, 2015). The Supreme Court reversed the Court of Appeals, holding that both privately and publicly employed social workers are mandatory reporters under the child abuse reporting statute, §32A-4-3(A). As a result, statements made to a social worker by an alleged child abuser in private counseling sessions are not protected from disclosure in a court proceeding by the evidentiary privilege in Rule 11-504(D)(4). ¶ 2. In reaching the conclusion that the reporting statute must be read broadly, the Court reviewed at length the history of the mandatory reporting requirement. The Court pointed out, for example, that for many years the statute provided that "every person, including but not limited to" the people listed, must report child abuse. In 2003, the phrase "but not limited to" was taken out as a matter of routine clerical cleanup in accordance with the Legislative Drafting Manual, which instructed that the word "include" already implies an incomplete list. The Court wrote: "There is absolutely no indication in the legislative history that by complying with its own technical drafting manual, the Legislature intended to make an unannounced policy change from the universal reporting requirement that had existed for thirty years to a sharply limited

requirement.” ¶ 37. Attached to the Court’s opinion is an appendix compiling all of the statutory language on child abuse reporters since 1965. (Handbook §§ 27.4, 34.1, 34.3, 34.6.2)

Abuse and Neglect

State ex rel. CYFD v. Casey J., In the Matter of Tichelle J., 2015-NMCA-____ (No. 33, 409, June 22, 2015). Father challenged the termination of his parental rights (TPR), not to restore those rights but to mandate a relative placement for the children. Both parents and the children were members of the Navajo Nation and ICWA applied. Father contended that CYFD did not make active efforts to prevent the breakup of his family because Children were not placed with relatives and were not always placed together in one foster home. The Court of Appeals held that the focus of an active efforts challenge to TPR is on CYFD’s efforts to provide the parent with remedial services and rehabilitative programs, not on placement. ¶ 15. However the Court proceeded to address the placement issue and concluded that ICWA placement preferences had not been violated. In affirming the lower court’s decision, the Court reviewed the testimony and findings at the many hearings at which CYFD workers reported on efforts to comply and Navajo Nation workers serving as the qualified expert witness (QEW) testified to good cause for not following those preferences. ¶¶ 25-64. Note that Judge Wechsler concurred in the result but argued that, under ICWA, failure to comply with placement preferences is not a basis for invalidating a TPR. ¶ 82. (Handbook §§ 15.5.6, 15.11.3, 16.9, 22.4.5, 39.3, 39.5.2)

State ex rel. CYFD Concerning the Mercer-Smiths, 2015-NMCA-____ (Nos. 31,941 and 28,294, June 18, 2015). On the parents’ motion, the district court held CYFD in contempt for violating the court’s Placement Order and awarded compensatory damages to the parents for loss of enjoyment of life because the possibility of reconciliation with their children had been reduced by CYFD’s contumacious conduct. The Court of Appeals upheld the contempt order as well as the damages award. (Handbook § 28.5)

State ex rel. CYFD v. Melvin C., In the Matter of Daevon Dre C., 2015-NMCA-067 (No. 33,605, April 27, 2015). The Court of Appeals held that when a parent pleads no contest to abuse and neglect and the lower court proceeds with an adjudication on that basis, the court, if it terminates parental rights, must proceed under §32A-4-22(B)(2). The children’s court had allowed CYFD to pursue TPR based on abandonment despite its earlier finding of abuse or neglect and discussions at the adjudication about a treatment plan. The appellate court held that, once the court entered a finding of neglect, it was statutorily required to conduct a dispositional hearing and implement a treatment plan. The court distinguished *State ex rel. CYFD v. Christopher B*, 2014-NMCA-016, because the allegations of abuse or neglect had been dismissed in that case and hence were a non-issue. ¶¶ 17-19. (Handbook §§ 22.4.2, 22.4.3, 22.4.4)

State ex rel. CYFD v. Jerry K., In the Matter of Claudia K., 2015-NMCA-047 (No. 33,341, Jan. 12, 2015), *cert. denied*, April 15, 2015. The Court of Appeals affirmed the district court’s order terminating Father’s parental rights. The children had been placed in the legal custody of the state for neglect. When Father was sentenced to 35 years in prison, CYFD moved for TPR because efforts to reunify would be futile owing to the length of Father’s incarceration. ¶¶ 13, 21. Father was willing to relinquish provided the children could be adopted by the Schultzes, a family he said were “fictive kin” and who would be willing to facilitate his maintaining a relationship with the children. (Father refused to relinquish to allow Children’s present foster

parents to adopt them.) ¶ 32. Father argued on appeal that the lower court erred in excluding evidence of his efforts to arrange for placement with the Schultzes. The Court of Appeals held that “while Father could and did express his preferences in regard to Children’s placement, once Children were [in the legal custody] of the Department, Father was not in a position to decide where or with whom Children would be placed.” ¶ 31. The Court also noted that Father failed to provide any authority for the proposition that he could lawfully relinquish on condition that the children be adopted by the Schultzes. ¶ 33. (Handbook §§ 22.3.3, 22.4.3)

Delinquency

State v. Antonio T., 2015-NMSC-019 (No. 33,997, June 22, 2015). On rehearing, the Supreme Court withdrew the opinion that was filed October 23, 2014 and summarized in the January 2015 update. In the opinion filed June 22, 2015, the Supreme Court held that statements elicited by a school official in the presence of a law enforcement officer may not be used against the child in a delinquency proceeding unless the child was advised of his or her statutory right to remain silent and made a knowing, intelligent, and voluntary waiver of that right. ¶¶ 22. The presence of the law enforcement officer turned the principal’s interrogation of the child into an investigatory detention and therefore triggered the protections provided by §32A-2-14(C). Because the State failed to prove waiver under § 32A-2-4(D), the statements were inadmissible. ¶ 26. (Handbook §33.5.4)

Criminal Child Abuse

Ohio v. Clark, 576 U.S. ____ (June 18, 2015). The U.S. Supreme Court decided that the introduction at trial of statements made by a three year old to his preschool teachers after they asked him about the injuries on his body were not testimonial and did not violate the Confrontation Clause. The Court held that the teachers elicited the statements for the primary purpose of protecting the child in the context of an on-going emergency involving suspected child abuse, circumstances similar to the 911 call in *Davis v. Washington*, 547 U.S. 812 (2006). The Court indicated that statements of the very young and statements made to teachers will not likely be testimonial. (Handbook §§ 27.4, 34.6.7)

State v. Cabezuela, 2015-NMSC-016 (No. 33,781, May 7, 2015) (*Cabezuela II*). On remand from the Supreme Court in *State v. Cabezuela*, 2011-NMSC-041 (*Cabezuela I*), Defendant was re-convicted of intentional child abuse resulting in the death of a child under 12. In *Cabezuela II*, the Court held that the fact that the pathologist, Dr. Aurelius, testified in part about work done by a pathology fellow working under her supervision did not violate the Confrontation Clause. She supervised and worked alongside the fellow and made independent personal observations and knowledge about the injuries. On the other hand, the admission of her statements about alleged bite marks did violate the Confrontation Clause because she had consulted a forensic odontologist and relied on his opinions in her testimony. Nevertheless, the Court concluded that the error had only a negligible impact on the verdict and was harmless error. ¶¶ 29-31. The Court also reviewed the jury instructions for the role of failure to act and clarified that, even if failure to act is not an element of intentional child abuse, it may be considered among the circumstances to prove intent. ¶¶ 40-41. (Note that the UJIs have since been revised.)

While the Court upheld the conviction, it remanded to the district court for resentencing. The Court held that a conviction for intentional child abuse resulting in the death of a child under 12, while carrying a life sentence, is not a capital offense requiring a minimum sentence of 30 years before parole. Defendant is entitled to present mitigation evidence and have the district court consider allowing parole eligibility after twenty years. ¶¶ 8-13 (Handbook §§ 34.3.1, 34.6.7)

State v. Montoya, 2015-NMSC-010 (No. 33, 967, March 12, 2015). The Supreme Court affirmed defendant's conviction for intentional child abuse resulting in the death of a child under 12, but remanded the case for re-sentencing because the district court failed to consider mitigating circumstances before imposing a life sentence. ¶ 68.

The Supreme Court held that the jury instructions were sufficient to properly instruct the jury in the case. The Court distinguished *Cabezuela I*, 2011-NMSC-041, in which the verdict form made it impossible to tell whether the jury convicted defendant of intentional or reckless child abuse. The verdict forms in *Montoya* were clear in asking the jury to specify whether it was finding intentional or reckless child abuse. ¶¶ 28-29. The Court also found that the Court of Appeals went too far in *State v. Davis*, 2009-NMCA-067, when concluding that negligent (now "reckless," see *State v. Consaul*, 2014-NMSC-030) child abuse is not a lesser included offense of intentional child abuse. ¶ 38. The Supreme Court held that reckless child abuse is a lesser included offence and put defendants on notice that they will have to defend against both intentional and reckless child abuse when the abuse results from the same conduct. ¶ 43.

Defendant argued on appeal that the testimony of the expert forensic pathologist lacked specificity and allowed the jury to speculate on the cause of death. The Court disagreed. The pathologist was clear in stating that multiple blunt force injuries together were the cause of death, and there was ample evidence outside her testimony to support a finding of guilt by the jury. The Court distinguished *Consaul*, wherein expert medical testimony provided the only evidence that a crime had been committed. ¶¶ 49, 55-56. (Handbook §§ 34.3.1, 34.3.2, 34.3.3, 34.6.6)

State v. Tufts, 2015-NMCA-___ (No. 33,419, April 7, 2015). The Court of Appeals reversed Defendant's conviction for sending forbidden obscene images to a child under 16 by means of an electronic communication device under § 30-37-3.3 because the statute was not intended to apply to images hand delivered to a child on a storage device (SD) or memory card. Hand delivery of an SD device is not "sending" the image. ¶¶ 4, 12. Rather, the conduct in question is covered by § 30-37-2(A), which prohibits delivering or providing sexually oriented material harmful to minors. ¶ 13. (Handbook § 34.5.6).

State v. Bailey, 2015-NMCA-___ (No. 32,521, June 9, 2015). The Court of Appeals upheld the lower court's admission of evidence of uncharged bad acts of Defendant under Rule 11-404(B) to prove intent in a criminal sexual penetration of a minor case (CSPM). Intent was an element of the crime charged and Defendant had claimed that his conduct was without sexual intent. ¶¶ 13, 22. (Handbook §§ 34.5.1, 34.6.8)

State v. Tapia, 2015-NMCA-048 (No. 32,934, Feb. 17, 2015), *cert. granted*, May 11, 2015. The Court of Appeals reversed Defendant's kidnapping conviction but upheld his convictions on several counts of criminal sexual contact of a minor and CSPM. The Court rejected Defendant's jury instruction and substantial evidence challenges, and found that "in light of the requirement

that penetration minimally occur to any extent” the evidence was sufficient for the jury to find that the penetration element of CSPM was met. ¶ 9. (Handbook §§ 34.5.1, 34.5.2)

Federal Law

The **Justice for Victims of Trafficking Act of 2015**, P.L. 114-22, enacted May 29, 2015, makes a number of changes to federal law to improve justice for victims of trafficking. These changes include amendments to the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. 5106a. These amendments require states, as a condition of receiving CAPTA funds, to provide assurances and include in their state CAPTA plan provisions and procedures for:

- Identifying and assessing all reports involving known or suspected child sex trafficking victims; and
- Training protective services workers about identifying, assessing and providing comprehensive services to children who are sex trafficking victims.

The state is also required to collect and report the number of children who are victims of sex trafficking, as part of the National Child Abuse and Neglect Data System. These changes to CAPTA take effect in two years. (Handbook §38.2)

Most of the requirements of the **Preventing Sex Trafficking and Strengthening Families Act**, P.L. 113-183, that apply to state protective services will take effect September 29, 2015. These requirements are conditions of receiving federal funds for foster care and are described briefly in the January 2015 Handbook Update. The state must, for example, provide for transition planning to begin at age 14 rather than 16 and, for children with a permanency plan of another planned permanent living arrangement, assure that at reviews and permanency hearings the court ascertains whether the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities. On June 26, the Children's Bureau issued Program Instruction 15-07 on state program compliance: <http://www.acf.hhs.gov/programs/cb/resource/pi1507>. (Handbook §§ 16.6, 17.9, 18.5, 19.9, 38.4)

New ICWA Guidelines were published on February 25, 2015. The updated Guidelines for State Courts and Agencies in Indian Child Custody Proceedings provide guidance to State courts and child welfare agencies implementing ICWA and supersede and replace the guidelines published in 1979. See <http://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf>. The BIA has also proposed a set of regulations to improve ICWA implementation; these regulations are intended to complement the updated Guidelines and address significant developments in jurisprudence since ICWA's inception. They were developed in part because of comments and recommendations suggesting that actual regulations were needed to fully implement ICWA. See <http://www.bia.gov/cs/groups/public/documents/text/idc1-029629.pdf>. (Handbook Ch. 39)

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Since the New Mexico Child Welfare Handbook was updated in June of 2014, the New Mexico Supreme Court has approved a number of changes to the Children's Court Rules and Forms and issued a few decisions affecting abuse and neglect, kinship guardianship, delinquency, and criminal child abuse. On September 29, 2014, the President signed into law the Preventing Sex Trafficking and Strengthening Families Act, which amends Titles IV-B and IV-E of the Social Security Act pertaining to foster care and adoption assistance.

These developments are addressed in more detail below. References to the relevant section(s) of the Handbook will appear in parentheses after the description of each change.

Changes to the Children's Court Rules and Forms

The Supreme Court has amended a number of rules and concluded a major effort to update the forms and develop new forms to reflect current law and procedure. The forms have also been reorganized for ease of use. Article 4 now contains the forms that apply to delinquency and youthful offender proceedings. A new Article 5 contains the abuse and neglect forms while a new Article 6 contains forms applicable to proceedings under the Children's Mental Health and Developmental Disabilities Act. (Handbook §§ 12.1, 12.5, 13.2, 22.5.3, 26.1, 32.10)

Though these rules are not addressed in the Handbook, **Rule 10-104** and related appellate **Rule 12-307** include new provisions worth noting. One permits service on an attorney to be made by leaving a copy of the document at a location designated by the court for that purpose and the other applies special rules to documents filed and served by an inmate confined to an institution.

Abuse and Neglect

Rule 10-102(B) was amended and **Form 10-501A** adopted to require that a party information sheet be filed with the petition in all abuse and neglect cases. The form of petition, formerly **Form 10-454**, was itself amended and recompiled as **Form 10-501**. (Handbook §§ 12.1, 12.3)

As noted in the committee commentary, new **Rule 10-317**, Notice of Change in Placement, is substantially modeled after § 32A-4-14. However, it also requires CYFD to notify the court of any change in the child's placement, including when the child's foster parents or substitute care provider requests the change. **Forms 10-565** (advance notice of change in placement) and **10-566** (emergency notice of change in placement) have also been adopted. (Handbook § 28.4)

New **Rule 10-323** and **Form 10-567** require that a completed party dismissal sheet—for administrative purposes only and not to be included in the record—accompany any order filed with the court that dismisses a respondent or child from a case for any reason and at any stage.

Rule 10-343 was amended to change the requirements for extensions of time for adjudicatory hearings. Amended **Rule 10-343** no longer provides for the Supreme Court to rule on extensions

of time and reinstates the pre-2009 requirement of mandatory dismissal with prejudice for failure to comply with the time limits for adjudications. The maximum period of time for all extensions is 60 days, except upon a showing of exceptional circumstances. (Handbook §§ 15.2.2, 15.2.3)

Forms 10-451 through **10-453**, pertaining to ex parte custody motions, affidavits, and orders, were withdrawn and new **Forms 10-503, 10-504, 10-505A, and 10-505B** adopted. (Handbook §§ 12.5, 12.6, 38.4)

Form 10-456A, affidavit of indigency, is now **Form 10-510**. (Handbook §§ 5.1, 13.5)

New **Forms 10-511** (motion to appoint counsel), **10-512** (order appointing counsel), and **10-550** (motion to withdraw as counsel) were adopted while a number of notice, motion, and order forms relating to the appearance or appointment of counsel were amended and recompiled. See **Forms 10-551 to 10-555**. (Handbook Chapters 4, 5 and 6; Handbook §§ 12.7 and 13.5)

Service by publication is addressed in **Forms 10-513** through **10-516**. (Handbook § 12.8)

New **Form 10-521** provides a form of notice for cases in which the Indian Child Welfare Act applies. (Handbook §§ 12.10, 13.2, 39.2.5)

New **Form 10-520** is a detailed custody order. (Handbook § 13.11) New **Forms 10-522A** through **10-522D** contain four new adjudicatory judgment and dispositional orders for contested and non-contested and ICWA and non-ICWA cases. (Handbook §§ 15.11-15.12, 16.12)

Forms 10-530, 10-531, 10-532, and 10-533 contain new forms applicable to judicial review, permanency, and permanency review hearings. (Handbook Chapters 17-21).

Form 10-470, related to termination of parental rights (TPR) motions, was amended and recompiled as **Form 10-540**. Among other things, **Form 10-540** enumerates the statutory grounds for TPR (§§ 32A-4-28(B)(1), (2), and/or (3)), and provides that more than one person may be named as father per § 32A-5-17(A)(4) and (5) and as mother per *Chatterjee*. (Handbook §§ 12.4, 22.4.2, 22.5.3, 25.1)

Form 10-471, report of mediation, was amended and recompiled as **Form 10-563**. (Handbook §§ 14.4, 29.4.3)

New **Form 10-564** was adopted and language included in **Forms 10-520** and **10-522** through **10-533** to provide for the appointment (or re-appointment) of an educational decision maker at each step in the abuse or neglect case. The purpose is to eliminate confusion about who may make decisions about a child's education, obtain and release a child's educational records, and consent to educational testing. (Handbook § 16.12.6)

Children's Mental Health

Forms 10-491, 10-493, and 10-494, related to the Children's Mental Health and Developmental Disabilities Act, were amended and recompiled as **Forms 10-601, 10-602, and 10-603**. **Forms 10-492** and **10-495** were withdrawn. (Handbook §§ 6.5.1, 6A.4.4, 32.10)

Delinquency

As directed by the Supreme Court in *State v. Jones*, 2010-NMSC-012, the Children's Court Rules Committee revisited the question of which rules best protect the rights of alleged youthful offenders. Under **Rule 10-101(A)** as amended, alleged youthful offenders are no longer subject to the Rules of Criminal Procedure and are now governed by the Children's Court Rules for the duration of the proceedings, except as otherwise provided in the Children's Court Rules. (Handbook §§ 33.5.1, 33.5.7) A number of changes have been made to the delinquency rules to implement this decision. (Note also: The citation to Rule 101(A)(1)(c) in Handbook § 22.5.7 should now be to Rule 101(A)(1)(d).)

Rule 10-227, applicable to admissions, no contest pleas, and consent decrees in delinquency proceedings, was withdrawn and has been replaced by amended **Rule 10-226**, which supplements and clarifies the procedures for plea negotiations and agreements in both delinquency and youthful offender proceedings. (Handbook §§ 33.5.6, 33.5.8)

Rule 10-243 was amended and **Rule 10-243.1**, applicable to youthful offender proceedings, was adopted. These rules provide for the Children's Court to decide all requests for extensions of time and reinstate the pre-2009 requirement of mandatory dismissal with prejudice for failure to comply with the time limits for adjudications. Under **Rule 10-243**, the maximum period of time for all extensions is 90 days, except upon a showing of exceptional circumstances. For youthful offender proceedings, **Rule 10-243.1** requires that the adjudicatory hearing be commenced within 6 months and allows the court to grant up to two 6-month extensions. The aggregate may not exceed one year except in exceptional circumstances. (Handbook §§ 33.5.4, 33.5.6)

Rule 10-245 was amended and new **Rule 10-245.1** was adopted. The rules set forth the procedural requirements for jury trials in delinquency and youthful offender proceedings. (Handbook § 33.5.4)

New **Rule 10-247** establishes procedures and other requirements for amenability hearings in youthful offender proceedings and makes it clear that the Rules of Evidence apply. New **UJI 14-9005** requires the jury to make special findings to assist the court when deciding amenability. (Handbook § 33.5.7)

The provisions on appeal, including the advisement of the right to an appeal, were moved out of **Rule 10-251** and into their own rule, new **Rule 10-253**. New **Rule 10-251.1** applies to youthful offender judgments. (Handbook § 33.5.9)

New **Forms 10-432** (waiver of arraignment in youthful offender proceedings) and **10-433** (waiver of preliminary examination and grand jury proceeding) were adopted.

Case Law

In the Matter of Mahdjid B. and Aliah B., State ex rel. CYFD v. Djamila B., 2014-NMSC-__ (No. 34,583, Dec. 15, 2014). Affirming the Court of Appeals' decision on different grounds, the Supreme Court held that kinship guardians have a statutory right to a revocation hearing in accordance with the revocation procedures of the Kinship Guardianship Act, including an

evidentiary hearing in compliance with the Rules of Evidence, before being dismissed from an abuse and neglect proceeding. *Djamila B.* ¶ 2. The Court found that the revocation could occur in the abuse and neglect case as the children’s court has jurisdiction over the kinship guardian and the ability to make decisions in the best interests of the children. *Id.* ¶¶ 2, 35. Clarifying the Court of Appeals’ holding, the Supreme Court pointed out that kinship guardians are not necessary and indispensable parties to abuse and neglect proceedings because the necessary and indispensable party concept is derived from the Rules of Civil Procedure, not the Children’s Court Rules. *Id.* ¶¶ 39-40. (Handbook §§ 22.5.2, 25.1, 30A.2.4)

In the Matter of Grace H., State ex rel. CYFD v. Maurice H., 2014-NMSC-034 (No. 34,126, Sept. 18, 2014). In the course of denying rehearing, the Supreme Court withdrew its opinion filed on June 12, 2014, and substituted a new one with a number of corrections that do not alter the holding. The new opinion alters the paragraph citations to *Grace H.* in the Handbook; for example, ¶ 44 of the original *Grace H.* opinion is now ¶ 43, and ¶ 43 is now ¶ 41. (Handbook § 22.4.2)

State v. Antonio T., 2014-NMSC-____ (No. 33,997, Oct. 23, 2014). The Supreme Court clarified the procedural protections that § 32A-2-14 provides to alleged delinquent children. The Court held that a fifteen year old’s statements, which were elicited by a school official, could not be used against the child in a delinquency proceeding because the state failed to show that the child knowingly, intelligently, and voluntarily waived his right to remain silent under § 32A-2-14(D). *Antonio T.* ¶¶ 21, 23. The Court was careful to note that its holding only applies to delinquency proceedings and in no way affects school disciplinary proceedings. *Id.* ¶ 24. (Handbook § 33.5.4)

State v. Consaul, 2014-NMSC-030 (No. 33,483, Aug. 21, 2014). Overturning Defendant’s conviction for child abuse resulting in great bodily harm based on a theory of suffocation, the Supreme Court examined the reliability of expert medical opinion in criminal child abuse cases, particularly those in which medical opinion testimony often serves as the foundation of the prosecution’s theory, such as shaken baby syndrome. *Consaul* ¶ 73, n.4. The Court held that the expert medical testimony alone, which at best demonstrated that the infant in *Consaul* was “likely suffocated” with no additional non-opinion evidence in support, was insufficient to support a criminal verdict beyond a reasonable doubt. *Id.* ¶¶ 2, 57, 70-72. The Court specified that, if the prosecution is to rely only on medical opinion, it must go beyond the mere probable causation required for evidentiary admissibility and “establish ... why the expert opinions are sufficient in themselves to establish guilt beyond a reasonable doubt.” *Id.* ¶ 73. (Handbook §§ 34.3.3, 34.6.6)

In addition to that and other holdings, the Court clarified that recklessness is required for the crime of negligent child abuse. *Consaul* ¶¶ 37-38. It expressed concern that its prior cases and jury instructions have confused criminal and civil negligence. To avoid confusion, the Court believed that what has long been called “criminally negligent child abuse” should be called “reckless child abuse” in the jury instructions, without any reference to negligence. *Id.* ¶ 37. The Court was also doubtful that the phrase “knew or should have known” should be used, a subject the Court said it will address in the near future. *Id.* ¶ 40. (Handbook § 34.3.2) Revisions to the criminal child abuse jury instructions are pending. (Handbook §§ 34.3.1 through 34.3.3)

Federal Law

The Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, has as much to do with improving outcomes for children and youth in foster care as it does with preventing sex trafficking. It requires that states receiving federal foster care dollars ensure by the end of September 2015 that their state plan:

- Includes policies and procedures for determining appropriate services for children under state responsibility whom the state believes are victims or at risk of becoming sex trafficking victims. The law also requires the state to develop protocols for locating a child who is missing from foster care, determining why the child ran away or otherwise went missing, responding to those factors in placements, and screening to determine if the child is a possible sex trafficking victim. (Handbook § 38.3)
- In the interest of supporting normalcy for children in foster care, provides training to foster parents on a “reasonable and prudent parent standard” for the participation of the child in age or developmentally-appropriate activities. (Handbook §§ 11.3, 38.3)
- Limits another planned permanent living arrangement (APPLA) as a permanency goal for children under the age of 16 and includes certain case plan and case review requirements for all foster children with a permanency plan of APPLA. These include a number of requirements for permanency hearings: documenting intensive, ongoing, unsuccessful efforts for family placement, re-determining the appropriateness of the child’s placement (including ensuring that the court asks the child about the desired permanency outcome for the child and makes a judicial determination that APPLA is the best permanency plan for the child), and documenting the steps the state has taken to ensure that the child has regular, ongoing opportunities to engage in age or developmentally-appropriate activities. (Handbook §§ 18.5.1, 19.2, 19.8.2, 38.4)
- For foster youth age 14 or older, requires the case plan to be developed in consultation with the child and up to two members of the case planning team who are chosen by the child, and that it include a list-of-rights document. The age for transition planning is lowered from 16 to 14. (Handbook §§ 6A.5, 16.6, 17.9, 19.9, 38.9).
- Ensures that foster children aging out of the system have a birth certificate, social security card, health insurance information and medical records, and a driver’s license or equivalent ID. (Handbook §§ 38.3, 38.7, 38.8)
- Adds as an objective of the Chafee Foster Care Independence Program that children who are likely to remain in foster care until age 18 have regular, ongoing opportunities to engage in age or developmentally-appropriate activities. (Handbook § 38.5)
- Ensures that all parents of a child’s siblings who have legal custody of the siblings be identified and notified within 30 days after removal of a child from home. The term “siblings” includes individuals who would have been considered siblings if not for termination of parental rights or death of a parent. (Handbook §§ 12.9, 13.10, 38.9)