UPDATES TO THE 2014 NEW MEXICO CHILD WELFARE HANDBOOK

http://childlaw.unm.edu/resources

This is the **seventh** semi-annual update to the 2014 New Mexico Child Welfare Handbook, covering the period July 1, 2017 to December 31, 2017. **It is important to check all of the updates when using the Handbook. They are available at the website above.**

Part I of this Update includes new information pertaining to child welfare/foster care/abuse and neglect under the Abuse and Neglect Act, the primary focus of the Child Welfare Handbook. Part II includes information on "related proceedings" – in this Update, meaning delinquency and criminal child abuse and neglect. No new statutes, rules or cases were found in the areas of adoption, kinship guardianship, families in need of court-ordered services, or mental health and developmental disabilities.

Cites to affected sections of the Handbook appear in parentheses after each description.

PART I: ABUSE AND NEGLECT/FOSTER CARE

Supreme Court Rules and Forms

The Supreme Court has amended **Rule 10-161(C)** on automatic recusal when a judge or employee of the district is a party to the proceeding. The amendment eliminates the provision giving the parties 10 days to agree to a replacement judge. The rule now states that a judge from another district will be designated according to procedures ordered by the Chief Justice.

New **Rule 10-169** governs criminal contempt in Children's Court. Under the new rule, adults are subject to criminal contempt as provided in Rule 1-093, but children are not. The committee commentary discusses at length the reasons for not permitting criminal contempt against children. Among other things, when abuse or neglect is involved, holding a child in criminal contempt of court for misbehaving in the courtroom risks further traumatizing the child.

The committee commentary to **Rule 10-325**, governing notice of the child's advisement of the right to attend a hearing, has been amended. A statement has been added to make it clear that, once the written notice required by the rule has been filed, the youth attorney for a child may notify the court orally or in writing of any changes about whether the child will attend the hearing. (Handbook §§ 6A.4, 13.3, 15.4, 16.4, 17.4, 19.4, 20.4, 21.4, 22.5.7)

New **Rule 10-325.1** and **Form 10-570.1** require that the GAL, before each hearing in an abuse and neglect case, provide written notice to the court and the parties that the child has been advised of his or her right to attend the hearing. The required notice is similar, but not identical, to the notice required of a youth attorney. The GAL must inform the court and parties that the child has been advised of the right to attend the hearing, whether the child wishes to attend the hearing, and whether the GAL believes that attendance is in the child's best interest. If the child wishes to offer information related to the substantive allegations in the petition without

appearing in court, the child must file a motion for alternative testimony as provided by Rule 10-340. (Handbook §§ 6.4, 13.3, 15.4, 16.4, 17.4, 19.4, 20.4, 21.4, 22.5.7)

The Supreme Court has renumbered Forms 10-440 through 10-443 on court interpreters. The forms are now **Forms 10-611 through 10-614**. (Handbook §§ 5.2.3, 13.7.1, 15.3)

Rule 12-210 of the Rules of Appellate Procedure on calendaring assignments for direct appeals has been amended to clarify the screening function of the rule and to better describe the use of the calendaring system. **Rule 12-502** on petitions for writs of certiorari includes detailed provisions on briefing schedules depending on whether the case was heard on the Court of Appeals' general, summary or legal calendar, and includes an expedited process for briefing and oral argument in time-sensitive cases. (Handbook Chapter 24)

The Supreme Court has approved a number of changes to the Rules of Professional Conduct to provide guidance to lawyers regarding social media. The **Rule 16-101** committee commentary, for example, now provides that lawyers should counsel their clients on the use of social media and the consequences of posting and removing content. **Rule 16-106** specifically applies the client confidentiality rule to a lawyer's website or blog. (Handbook Chapter 4, 5, 6, and 6A)

Case Law

State ex rel. CYFD v. Michael H. and In the Matter of Jayda' Mae S., 2017-NMCA-__ (No. A-1-CA-35903, Oct. 11, 2017). Father had no contact with and did not provide financial support for his infant Child for over three months. The district court determined that Father had neglected Child by abandonment under §§ 32A-4-2(A)(2) and 32A-4-2(G)(1). Affirming the adjudication of neglect, the Court of Appeals found that Father's lack of knowledge that Mother was neglecting Child and lack of "certain knowledge" through DNA testing that he was Child's father were not justifiable cause for leaving Child in Mother's care without support or communication. The district court's finding that Father had notice that he was the father of the child was supported by substantial evidence. According to the Court, this finding was crucial to its determination that lack of "certain knowledge" of paternity is not justifiable cause for abandonment. Comparing cases on adoption and abandonment, the Court concluded that certainty of paternity is not a precondition for a man's obligation to care for a child to arise. Father had an affirmative obligation under § 32A-4-2(A)(2) to either take necessary steps to ensure that Child was receiving the necessary care and support or establish that he was not the father if he had doubts about his paternity. ¶¶ 27, 34, 35-41. Because Father failed to do so, he assumed the risk of an adjudication of neglect. ¶ 34. (Handbook §§ 15.5.3, 22.4.2, 30.3.3)

State ex rel. CYFD v. Donna E., in the Matter of Sarai E., 2017-NMCA-088 (No. A-1-CA-35064, July 26, 2017). The Court issued an opinion in this case on June 8, 2017, reversing a termination of parental rights and addressing the issue of custody after reversal. On July 26, the Court denied rehearing but issued a new opinion solely to correct a statement in paragraph 16 (now 17). Aside from the correction, a new paragraph denying the motion for rehearing, and renumbered paragraphs, the two opinions are the same. A summary can be found in the July 2017 Update. See http://childlaw.unm.edu/assets/docs/update-to-the-cwh-handout-2015-2017-combined.pdf. (Handbook § 22.4.4)

Other Resources

The National Council of Juvenile and Family Court Judges released its Indian Child Welfare Act Judicial Benchbook in October 2017. The publication is designed to provide guidance to judges who are handling ICWA cases and is available at: http://www.ncjfcj.org/ICWABenchbook. (Handbook Chapter 39)

Also published in October 2017 was a benchcard on ICWA developed specially for New Mexico by the Corinne Wolfe Center for Child and Family Justice for the New Mexico Tribal-State Judicial Consortium. The benchcard can be found at: http://childlaw.unm.edu/resources/publications/bulletins-guides-benchcards.html.

PART II: RELATED PROCEEDINGS

Delinquency

Due to the courts' differing interpretations of the **Rule 10-166** requirements for delinquency cases, the rule has been amended to "establish a uniform requirement to seal all court records in delinquency proceedings automatically without motion or order of the court." See Committee commentary to Rule 10-166. Rule 10-166(C)(6) makes limited exceptions for: (1) the persons and entities listed in § 32A-2-32(C), such as court personnel, the child's attorney, etc.; (2) a facility, organization or person providing care, treatment, or shelter to the child, including a detention facility; and (3) disclosure by CYFD as governed by § 32A-2-32. The committee commentary has been supplemented to explain the amendments. (Handbook §§ 33.7, 33.8)

The Supreme Court has adopted a new criminal form, **Form 9-809**, Order of Transfer to Children's Court, which implements the procedure set forth in § 32A-2-6 of the Delinquency Act requiring that metropolitan, magistrate, and municipal courts transfer juvenile delinquency cases to the district court. (Handbook §§ 33.5.1, 33.5.2)

Criminal Child Abuse

State v. Luna, 2017-NMCA-___ (No. A-1-CA-34709, Dec. 13, 2017). Defendant was convicted of criminal sexual contact of a minor (CSCM) in the third degree, intimidation of a witness, unlawful exhibition of motion pictures to a minor, and contributing to the delinquency of a minor (CDM) for forcing a minor to "engage in sexual acts and watch pornographic movies." ¶ 1.

The Court vacated the CDM conviction on double jeopardy grounds because the jury convicted Defendant of CDM based on the same evidence that was used to convict him of unlawful exhibition of motion pictures to a minor. ¶ 16. The Court also reversed the conviction for unlawful exhibition of motion pictures because the jury instructions omitted an essential element, namely that the motion picture is harmful to minors, and failed to define legal terms whose meaning differed from the commonly understood meaning. ¶¶ 20-21. Child's testimony about what the movie depicted, the only evidence supporting the conviction, did not indisputably establish the elements of the offense. ¶¶ 22-25.

The Court did not find fault with the jury instructions on CSCM and held that there was sufficient evidence supporting the intimidation of a witness conviction. ¶¶ 27-28, 34. Finally, the Court found no plain error in the admission of a forensic interviewer's testimony. The Child's testimony alone supported the jury's finding that Defendant was guilty of CSCM and intimidation of a witness. ¶ 39. (Handbook §§ 27.2.1, 27.3.1, 34.5.2, 34.6.4, 34.6.6)

State v. Simmons, 2017-NMCA-___ (No. A-1-CA-34773, Oct. 25, 2017), *cert denied*, Dec. 20, 2017. Defendant, who offered a 15 year old boy a ride home but instead took him to his apartment, gave him drugs and alcohol, and engaged in sexual activity with him, was convicted of two counts of CSP-II felony, one count of CSP-II force/coercion, and one count each of first degree kidnapping, second degree distribution of a controlled substance to a minor, and contributing to the delinquency of a minor. The Court of Appeals found the jury instructions deficient because they did not require the jury to find a "causal link" between the CSP II-felony charges and the associated felonies. However, the deficiency did not rise to the level of fundamental error because the link between the associated felonies and the CSP acts was "so readily apparent" that the convictions did not shock "the judicial conscience." ¶¶ 11-12.

The Court also found sufficient evidence for all of the convictions. ¶ 15. With regard to kidnapping, for example, the jury could have reasonably found that Victim's association with Defendant was based on deception and intimidation. ¶ 19. However, the Court vacated the CSP-II felony convictions on double jeopardy grounds. The kidnapping offense was subsumed within the CSP II-felony convictions. ¶¶ 24, 32. (Handbook § 34.5.1)

State v. Adamo, 2017-NMCA-__ (No. A-1-CA-34597, Oct. 12, 2017), *cert. denied*, Dec. 5, 2017. Police downloaded images of child pornography from a shared file on a computer located at Defendant's IP address and retrieved multiple images of child pornography from deleted files on Defendant's computer. However, police found no active or accessible child pornography on Defendant's computer and several other persons owned computers located at the same IP address. Defendant was found guilty of one count of possession of child pornography under § 30-6A-3(A) of the Sexual Exploitation of Children Act. Defendant appealed, arguing insufficiency of evidence, fundamental error in the jury instructions, and abuse of discretion.

The Court of Appeals found that "the evidence supports the jury's finding that sometime in the past Defendant knowingly possessed child pornography." ¶ 14. In addition to the above evidence, large amounts of child and adult pornography had been downloaded from the IP address associated with Defendant's home, "massive amounts" of non-child pornography were accessible on his hard drive, and he had sexually suggestive images of children displayed on his computer when the police searched his home. ¶¶ 14-20.

The Court found no fundamental error in the jury instructions, holding that § 30-6A-3(A)'s requirement that a person know or have reason to know that at least one of the persons depicted is under 18 is a constitutionally sufficient scienter requirement for a child pornography possession conviction. A showing of recklessness is not required by the First Amendment. ¶¶ 28-34. (Handbook §§ 34.5.5, 34.6.8)

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This is the **sixth** update to the 2014 New Mexico Child Welfare Handbook. The 2014 Handbook was published in mid-2014, with later developments reported semi-annually. This July 2017 update covers the period January 1, 2017 to June 30, 2017. **It is important to check all of the updates when using the Handbook. They are available at the website above.**

The Update is divided into two parts: Part I includes new information pertaining to child welfare/foster care/abuse and neglect under the Abuse and Neglect Act, the primary focus of the Child Welfare Handbook. Part II includes information on "related proceedings" – in this Update, meaning delinquency and criminal child abuse and neglect. No new statutes, rules or cases were found in the areas of adoption, kinship guardianship, families in need of court ordered services, or mental health and developmental disabilities.

Only developments since January 1, 2017 are reported here, with one exception: we have included the new Guidelines Implementing the Indian Child Welfare Act, which were published on December 30, 2016.

Cites to affected sections of the Handbook appear in parentheses after the description of each development.

PART I: ABUSE AND NEGLECT/FOSTER CARE

Legislation

2017 N.M. Laws, Ch.53/Ch. 85 (HB 301/SB 213 – identical bills). The new **Support for Transferring Students** law enacts a new section of the Public School Code to assist students whose education is disrupted as a result of adjudication as an abused or neglected child, placement in treatment foster care, homelessness, or certain other factors. When the student has to change schools, the law requires schools and districts to provide student records to the new school promptly upon transfer. The law also gives students whose education has been disrupted:

- priority placement in classes that meet state graduation requirements, and
- timely placement in elective classes comparable to those in the previous school.

For students who experience disruption during high school, the new public school or school district must ensure:

- acceptance of state graduation requirements for a diploma even if the new school or district has different standards,
- equal access to sports and other extracurricular activities, career and technical programs, and other special programs for which the student qualifies,
- timely advice from counselors to improve college or career readiness, and
- that the student receives all special education services to which the student is entitled.

(Handbook §§ 16.6, 16.12.6)

2017 N.M. Laws, Ch. 64 (HB 411). HB 411 enacts a new section of the Public School Code to require school districts and charter schools by the Public Education Department to designate an individual to serve as a **point of contact** for students in foster care and students involved in the juvenile justice system. The point of contact is responsible for facilitating enrollment in a new school; ensuring that the student is immediately enrolled with or without records from the student's last school; ensuring that the enrolling school (1) communicates with the last school to obtain the student records within two days of enrollment, and (2) timely transfers credits from the last school; and providing other assistance to minimize disruption to the student's education. The point of contact has a host of other responsibilities, including, with regard to students in foster care, responsibilities with regard to best interest determinations about whether the student will remain in the school of origin and related transportation policies, as well as for collaborating with the educational decision maker appointed by the children's court, and ensuring that the student has the opportunities accorded by HB301/SB213.

HB 411 also adds a definition of **educational decision maker** to § 32A-4-2 and adds a new section to the Abuse and Neglect Act to require the children's court to appoint an educational decision maker at the custody hearing and review the appointment at every stage of the proceeding. The educational decision maker is to be the respondent parent unless contrary to the child's best interests, in which case the court must appoint another qualified individual. This new law essentially codifies the Children's Court rules concerning educational decision makers (*see* Rule 10-316 and Forms 10-564, 10-520, 10-522A through 10-533. (Handbook §§ 13.11, 15.11, 16.12.6, 17.7, 19.12, 20.7, and 21.7)

2017 N.M. Laws, Ch. 33 (HB 75). The bill enacts a new section of the Public School Code to specify the conditions under which **restraint or seclusion techniques** may be used in schools. The bill requires schools to adopt policies and procedures for the use of restraint or seclusion techniques and notify parents/guardians when restraint or seclusion occurs, with a written report detailing the circumstances. Other measures include requiring that certain school personnel be trained in the use of restraint/seclusion and that the restraint technique be proportionate to the student's age or physical condition. (This law is noted because of the importance of educational advocacy for children in foster care.)

Supreme Court Rules and Forms

The only change that the Supreme Court has made to the Children's Court Rules and Forms since the first of the year is an amendment to **Rule 10-166**. Section D now specifies that any attorney or other person granted electronic access to court records containing **protected personal identifier information** shall be responsible for taking all reasonable precautions to ensure that the protected information is not unlawfully disclosed by the attorney or other person or by anyone under their supervision. Failure to comply may result in sanctions or the initiation of disciplinary proceedings. This same change was made to the Rules of Civil Procedure, the Rules of Appellate Procedure and others. (Handbook §§ 12.11, 13.4)

Case Law

***State ex rel. CYFD v. Raymond D., in the Matter of Adrian F.*, 2017-NMCA-___ (No. 35,616, June 15, 2017, on rehearing).** Father appealed the termination of his parental rights; Mother did not appeal. The Court of Appeals upheld the district court determination that termination of Father's rights was in Child's best interest, on the basis of substantial, admissible evidence. ¶ 2.

At all times during the case, the Child needed intensive mental health treatment, medication, and services. At one point, after Father was released from probation, the Child was temporarily placed with him and he had great difficulty meeting the Child's needs. Shortly after that, Father was arrested on new state charges and CYFD took the child back into custody; Father remained incarcerated and had no further contact with child. He was facing a ten year sentence and on that basis stipulated to a finding that reunification with Child was futile. ¶¶ 9.

Section 32A-4-28(A) provides that "[t]n proceedings to terminate parental rights, the court shall give primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated." ¶ 14. The termination in this case was based on § 32A-4-28(B)(2), where the elements to be proven are that (1) the child was neglected, (2) the conditions and causes of Child's neglect were unlikely to change in the foreseeable future, and (3) CYFD made reasonable efforts to assist Father in adjusting the conditions that rendered him unable to properly care for the child. Father's no contest plea satisfied the first element and, when he stipulated to a finding of futility, CYFD was not required to make reasonable efforts. ¶ 15.

In determining whether the second element was satisfied, the Court reviewed the factual findings, which did not rely on testimony Father had objected to, and concluded that they supported the district court's finding that termination was in Child's best interest. The case spanned three years of Mother's inconsistent participation, Father's incarceration and lack of communication with Child, and Child's continued residency in psychiatric and residential facilities. At the time of the hearing, Father had an anticipated parole date five months later. "It was not in the Child's best interest to make Child wait five more months for a placement that might be temporary given Father's recidivism and inability to attend to Child's special needs." Quoting *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, ¶ 24, the Court held that "the court is not required to place the [Child] indefinitely in a legal holding pattern." ¶ 19. (Handbook § 22.4.3. 24.7)

***State ex rel. CYFD v. Donna E., in the Matter of Sarai E.*, 2017-NMCA-___ (No. 35,064, June 8, 2017).** Two children had been removed, a boy age 6 and a girl age 2. Five years later, after numerous continuances, changes of plan, and other delays, the district court denied termination of parental rights as to Son but granted it as to Daughter on the basis of presumptive abandonment under § 32A-4-28(B)(3). The parents appealed. The Court of Appeals reversed because there were no findings as to the cause of the disintegration of Respondents' bond with Daughter and no evidence in the record to support a finding that they caused the disintegration. The Court quoted *In re Adoption of J.J.B.*, 1995-NMSC-026, ¶ 44, as holding that the presumption of abandonment is "completely rebutted by showing that a parent lacks responsibility for the destruction of the parent-child relationship." ¶ 29. It reviewed the facts

and concluded that there was not and could not be, under the facts of the case, a finding that Respondents caused the disintegration of their relationships with Daughter. ¶¶ 54-63.

Although the Court reversed the TPR, it still had to address the issue of Daughter's future. Quoting from *J.J.B.*, the Court noted that TPR and the determination of custody are different issues and must be addressed separately. Although there is a presumption that custody should be awarded to the natural parent, the presumption is not conclusive. Any such parental right is secondary to the best interest and welfare of the child. Here the Court was "faced with the prospect of completely disrupting the life of a young child who has lived with a family with whom she has bonded and by whom she wishes to be adopted." As in *J.J.B.*, this case "offers no acceptable choice. Instead, [the appellate court] must be resigned to a solution that causes the least amount of harm." ¶ 64, quoting *J.J.B.*, 1995-NMSC-026, ¶ 65. In deciding who will have custody, the court should consider whether there are extraordinary circumstances that warrant depriving the parent of custody, citing *State ex rel. CYFD v. Lance K.*, 2009-NMCA-054, ¶ 47. ¶ 66. The court discussed at length the facts and circumstances to be considered and remanded to the district court for the custody determination. ¶¶ 65-69. (Handbook §§ 22.4.4)

***State ex rel. CYFD v. Rosalia M., in the Matter of Monique L.*, 2017-NMCA-___ (No. 34,511, April 26, 2017).** Mother appealed the termination of her parental rights as a violation of due process. She argued that CYFD improperly coached a witness prior to the termination hearing by providing her with a document containing her anticipated testimony, the anticipated testimony of other witnesses for CYFD, and CYFD counsel's opening and closing arguments. ¶ 1. The Court of Appeals affirmed the order terminating her rights. ¶ 19.

Citing *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Court noted that whether Mother was afforded due process depends on whether CYFD's method of preparing witnesses increased the risk of an erroneous deprivation of Mother's parental rights, and whether additional procedural safeguards would eliminate or lower that risk. ¶ 9. "Here, the risk of an erroneous deprivation of parental rights was low.... First, the outline was created from court reports that are part of the record and that were available to Mother's attorney… Second, Mother does not argue that the information provided in the outline and taken from [the] treatment plan [prepared by the witness] and court reports was, in fact, inaccurate or incorrect and there is nothing in the record indicating the information was inaccurate or incorrect." ¶¶ 10-11. The district court also took several measures to prevent the risk of an erroneous deprivation, even after stating that it appeared that the witness was testifying from her memory. By taking the document under seal and allowing for voir dire in addition to cross-examination, the district court provided sufficient procedural safeguards. ¶ 13-14. Providing the outline to the witness, under the facts of the case, was not a violation of due process, nor was it structural error. (Handbook §§ 22.1.2, 22.5.7)

***State ex rel. CYFD v. William C., in the Matter of Skyla C.*, 2017-NMCA-___ (No. 35,472, April 21, 2017).** The district court denied CYFD's first motion to terminate Father's parental rights but granted the second one. At the hearing on the second motion, the court allowed evidence regarding events prior to first termination hearing. Father appealed, arguing that the court erred in allowing this evidence and that there was insufficient evidence to terminate his rights. The Court of Appeals disagreed and affirmed the lower court. ¶ 1.

Father argued that *State ex rel. CYFD v. Benjamin O. (Benjamin O. I)*, 2007-NMCA-070, limited CYFD to presenting evidence of abuse or neglect after the department's first motion to terminate was denied. The *Benjamin O*. case involved a situation in which the adjudication of abuse or neglect was reversed on appeal just as the lower court was hearing CYFD's motion to terminate the parents' rights in the case. The appellate court upheld the lower court's decision to terminate, but did so based on later evidence, stating that it agreed that the court could not rely in on an adjudication that had been reversed on substantive grounds. The Court of Appeals in the current case pointed out that the case is not dealing with a reversed adjudication, and to ignore all preceding evidence when there is no dispute as the adjudication of abuse or neglect, would be to limit the district court's access to information that is needed to appropriately assess whether a parent's parental rights should be terminated. ¶ 25.

The Court also reviewed the evidence extensively in holding that there was sufficient evidence for the district court to conclude that Father had not alleviated the causes and conditions that led to Child being taken into custody and that he would not do so in the foreseeable future, despite reasonable efforts by CYFD. ¶¶ 29-31. The Court noted that the standard of review requires it to view the evidence in the light most favorable to the prevailing party and determine whether the clear and convincing evidence standard was met, not whether the trial court could have reached a different conclusion. ¶ 32. (Handbook §§ 22.____)

ICWA Guidelines

New **Guidelines for Implementing the Indian Child Welfare Act** were announced in the Federal Register on December 30, 2016 (*see* 81 FR 96476) and made available at https://bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm. These guidelines are intended to complement the ICWA regulations (*see* 81 FR 38778) and replace the 1979 and 2015 versions of the guidelines. (Handbook Chapter 39 and §§ 12.10, 13.8, 15.5.6, 15.11.3, 16.9, 16.12.5, 19.8.4, 21.5.4, 22.3.2, 22.4.5, 22.5.7, 23.4, 30.4.2, 31.3.2)

Information Resources

The National Child Traumatic Stress Network, Justice Consortium Attorney Workgroup Subcommittee has produced a very useful guide entitled **Trauma: What Child Welfare Attorneys Should Know**. This document is intended to provide attorneys with information about the impact of trauma on children and families and practice tips for attorneys representing children and parents with histories of trauma. The appendix includes a number of links to other resources as well. http://www.nctsn.org/content/trauma-what-child-welfare-attorneys-should-know. (Handbook Chapters 4, 5, 6, and 6A)

PART II: RELATED PROCEEDINGS

Delinquency

***State v. Rivas*, 2017-NMSC- ___ (No. S-1-SC-34252, June 19, 2017).** The New Mexico Supreme Court examined when detectives may question a juvenile outside the presence of and without notifying a court-appointed attorney or guardian ad litem. Defendant, tried in district

court as a serious youthful offender, was convicted of first degree murder and other offenses. Defendant appealed, alleging ineffective assistance of counsel due to counsel's failure to timely move to suppress two statements made to detectives when he was fifteen years old. The first statement was made before the petition was filed, the second after filing and the appointment of a guardian and counsel. ¶ 1. The Court held that the juvenile defendant waived his right against self-incrimination during the first interview, but not the second. ¶ 35. Once the Sixth Amendment right to counsel has attached, a juvenile cannot validly waive Sixth Amendment rights outside of counsel's presence. Thus, the district court's refusal to suppress the juvenile's statements during the second interview was in error. ¶¶ 50-51. Nonetheless, the Court found the error to be harmless and upheld the conviction. ¶ 54. (Handbook § 33.5.4)

***State v. Linares*, 2017-NMSC-014 (No. S-1-SC-35407, March 9, 2017).** This case involved a juvenile who was accused of murdering her foster parent. She was charged as a serious youthful offender but deemed incompetent to stand trial under the statute on mental retardation and competency, § 31-9-1.6. Much of the opinion addresses the competency of a mentally retarded defendant under § 31-9.1.6, and the procedures to be followed in making the determination. ¶¶ _____.

The case is also mentioned here because it points out some of the confusion between prosecution as a serious youthful offender, in which case the young person is treated as an adult and must be sentenced as an adult, and prosecution as a youthful offender, where the adjudication is in children's court and an amenability hearing is required if the DA asks for an adult sentence. In this case, the parties wanted to enter into a plea agreement that included an amenability hearing, but such hearings are not available to serious youthful offenders. ¶¶ _____. (Handbook § 33.3)

Criminal Child Abuse

2017 N.M. Laws, Ch. 121 (SB 45) adds a new section to Chapter 40, Domestic Affairs, to permit a biological parent to petition the court for termination of parental rights of the other parent when the child was conceived as a result of **criminal sexual penetration (CSP)** in the 1st, 2nd, or 3rd degrees. The biological mother must establish by clear and convincing evidence that the child was conceived as a result of CSP for which the other biological parent was convicted. If the proceeding involves an Indian child, the requirements of ICWA must be met, including proof beyond a reasonable doubt. (Handbook § 34.5.1)

***State v. Santos*, 2017-NMCA- ___ (No. 35,175, June 21, 2017).** Defendant appealed his conviction of one count of possession of child pornography under § 30-6A-3(A). Defendant claimed there was insufficient evidence to show that he intentionally possessed child pornography, arguing that he deleted the computer files after watching them, showing an intent to get rid of them, not possess them. ¶ 12. The Court upheld his conviction. "By downloading, viewing, and deleting videos on his computer, Defendant possessed those videos," and there was plenty of evidence that Defendant knew child pornography was on his computer. ¶¶ 14, 20. The Court further held that the district court did not abuse its discretion by allowing the prosecution to show excerpts of the videos to the jury. The videos were relevant to the charges and probative to show Defendant's intent and refute his claim that he was viewing them for medical research. Their probative value outweighed any prejudicial impact under Rule 11-403. ¶¶ 25-28. (Handbook §§ 34.5.5, 34.6.8)

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For the first time, the Update is being divided into two parts: Part I includes information pertaining to child welfare/foster care/abuse and neglect under the Abuse and Neglect Act, the primary focus of the Child Welfare Handbook. Part II includes information on other topics covered in the Handbook. As our readers know, the Handbook includes several chapters on "related proceedings" -- adoption, kinship guardianship, families in need of court ordered services, mental health and developmental disabilities, delinquency, and criminal child abuse and neglect. These chapters were included in the Handbook because the planning committee felt that information in these areas helped to inform practice in cases under the Abuse and Neglect Act.

Developments since July 1, 2016 are described below. Cites to affected sections of the Handbook appear in parentheses after the description of each development.

PART I: ABUSE AND NEGLECT IN CHILDREN'S COURT

Supreme Court Rules and Forms

Probably the most significant developments have been in the area of the Children's Court Rules and Forms. The Supreme Court has amended a number of the rules on and forms for abuse or neglect proceedings, including the following:

New Rule 10-168 invites the local district courts to recommend to the Supreme Court, from time to time, local rules to govern practice in their children's court cases. Local rules and forms may not conflict with, duplicate, or paraphrase statewide rules or statutes.

Rule 10-315 on custody hearings has been amended to require that, at the commencement of the hearing, the court ask *each* party and participant, including the GAL and the agency representative, to state on the record under oath whether the party or participant knows or has reason to know that the child is an Indian child under the Indian Child Welfare Act (ICWA). The court must determine that the child is or is not an Indian child, or that there is reason to know that the child is an Indian child. Four subsections have been added to the rule to specify the practices and procedures required. The extensive Committee Commentary, which cites ICWA and the ICWA regulations, is also helpful. (Handbook §§ 13.8, 39.2.2)

Amended Form 10-521, the ICWA notice, is intended for use with Rules 10-312 and Rule 10-315. The Committee Commentary is again instructive. Among other things, "the committee views the new [ICWA] regulations, taken as a whole, as a directive to engage potentially

interested Tribes as early as possible in a child custody proceeding in which an Indian child may be affected." (Handbook §§ 12.10, 13.8, 39.2.2)

New Rule 10-318 requires that the court ensure that CYFD is following the placement preferences established by ICWA for Indian children. These preferences must be applied in any foster care, preadoptive, or adoptive placement in an ICWA case unless there is a determination on the record that good cause exists not to apply them. The new rule outlines at length the practices and procedures to be followed. (Handbook §§ 13.8, 16.9, 21.5.4, 39.3)

New Rule 10-325 and new Form 570 require youth attorneys to give notice to the court at least 15 days before each hearing that the attorney has notified the child of the hearing and has advised the child of the right to attend. Written notice is not required when an emergency hearing is scheduled without 15 days-notice to the parties. In this situation, the youth attorney must orally notify the court whether the child was advised of the child's right to attend the hearing. (Handbook §§ 6A.4, 13.3, 15.4, 16.4, 17.4, 19.4, 20.4, 21.4, 22.5.7)

New Rule 340 and new Form 10-571 govern the use of alternative methods of testimony by children. The rule and form set forth procedures and standards for determining whether the use of an alternative method may be appropriate and how to proceed. The form is a form of motion to permit testimony by an alternative method. (Handbook § 27.2.3)

Form 10-560, the form for subpoenas, clarifies that the form may be used for any abuse and neglect hearing and that payment of per diem and mileage for a subpoena issued by a children's court attorney or court-appointed attorney is made pursuant to regulations of the Administrative Office of the Court or CYFD policies and procedures. (Handbook Chapters 12-23)

Rule 12-206 on stays pending appeal in children's court has been amended in a few respects, particularly to clarify that the Court of Appeals may grant a stay pending disposition of the application at any time after the application is filed. (Handbook § 24.8)

Rule 12-321, the preservation rule, has been amended to clarify the basic standard for preserving issues for review and when issues can be raised for the first time on appeal. (Handbook § 24.10)

Case Law

CYFD v. Keon H., in the Matter of Anhayla H., 2016-NMCA-___ (No. 34,908, July 7, 2016), *cert. granted*, Sept. 19, 2016. The Court of Appeals decision in *Keon H.* was the only published opinion in an abuse and neglect case issued in the last six months of 2016. However, oral argument was heard recently in the Supreme Court so even this summary will be outdated soon.

Keon H. involves a termination of parental rights in which the appeal focused on the sufficiency of the evidence to support the lower court's conclusion that CYFD made reasonable efforts to assist Father with reunification. ¶ 1. The father in the case was incarcerated much of the time the child was in custody. Comparing the situation to cases involving incarceration in which the Court of Appeals upheld findings of reasonable efforts, the Court concluded that CYFD had not exercised reasonable efforts to assist the father and reversed the TPR. ¶¶ 8-11, 19. (Handbook §§ 3.3.1, 8.2.4, 16.5.3, 17.7, 21.5.1, 22.4.3)

Quevedo v. CYFD, 2016-NMCA-101 (No. 34,345, Aug. 31, 2016), *cert. denied*, Oct. 27, 2016. This opinion addresses the extent to which CYFD may or may not be immune under the Tort Claims Act from suit alleging that CYFD is liable with the Tierra Blanca Ranch (TBR) High Country Youth Program for abuse at TBR. *Quevedo* is not a case under the Abuse and Neglect Act, but the discussion may be of interest to Children's Court practitioners.

New Title IV-E Guardianship Assistance Program

The Fostering Connections Act of 2008 gave states the option to use federal Title IV-E funds (foster care funds) to finance guardianship assistance programs to help children in the care of relatives to exit foster care into permanent homes. CYFD has been working to develop a subsidized guardianship program, which was recently approved by the federal Children's Bureau. The program is important because it provides funding for a guardianship option in cases where adoption is not a viable permanency plan. This is sometimes the case with Indian children, for example, where termination of parental rights may not be culturally appropriate and keeping the child in the extended family is important.

To be eligible for Title IV-E guardianship assistance, the child must be eligible for federal Title IV-E foster care maintenance payments, must be in a licensed relative foster home, and must have lived with the licensed relative for at least six consecutive months. The term "relative" includes fictive kin as well as blood relatives. The situation must be such that reunification and adoption are not appropriate permanency options, the child has a strong attachment to the relative guardian, and the relative guardian has a strong commitment to caring permanently for the child. A child 14 or older must be consulted about the arrangement.

The court report included in the child's case plan is to document a number of things, including the steps taken by CYFD to determine that neither reunification nor adoption is appropriate, the reasons for any sibling separations during placement, and why a guardianship is in the child's best interest. A Title IV-E guardianship assistance agreement has to be completed with the relative guardian before the legal guardianship is established.

Further information about the guardianship assistance program can be obtained from Foster Care and Adoption Bureau Chief Isela Burciaga (505-476-1046) or Chief Children's Court Attorney Chuck Neelley (575-770-2146). The federal guidelines are described at: https://www.acf.hhs.gov/cb/resource/title-iv-e-guardianship-assistance. (Handbook Chapter 23)

Information Resources

The publication *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* has been published by the National Council of Juvenile and Family Court Judges. The *Guidelines* are not state-specific but provide an excellent overview of the child welfare legal system and extensive guidance for the children's court judge, as well as other stakeholders in the system. This resource is available on-line at: http://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%2005-2016.pdf.

On October 19, 2016, the Justice Department and the Department of Health and Human Services issued a joint guidance letter to state and local child welfare systems on the requirements of Title VI of the Civil Rights Act of 1964 and its implementing regulations. Title VI prohibits discrimination on the basis of race, color and national origin in programs and activities receiving federal financial assistance. The guidance aims to ensure that child welfare systems know about their responsibilities to protect the civil rights of children and families. The letter can be found at https://www.hhs.gov/sites/default/files/title-vi-child-welfare-guidance-10-19-16.pdf.

PART II: RELATED PROCEEDINGS

Adoption

In the Matter of the Adoption Petition of Darla D. v. Grace R., in the Matter of Tristan R, Child, 2016-NMCA-093 (No. 34,327, Aug. 31, 2016). This was an extensive opinion addressing a parent's rights under the Adoption Act when termination of parental rights is sought in a private adoption proceeding. The district court granted the TPR sought by the grandmother and her partner (the petitioners), as well as the adoption. The Court of Appeals reversed, finding numerous failures to comply with the Adoption Act. ¶¶ 14-15. The appellate court emphasized the importance of the parent's due process rights and concluded that the lower court's failure to inform Mother that she was entitled to court-appointed counsel if she was indigent constituted fundamental error. ¶ 25. The Court also held that the district court abused its discretion in requiring Mother to pay one-third of the cost of the guardian ad litem (GAL), despite her low income, and was in error when it determined that the GAL's role and duties were governed by Rule 1-053.3 for contested custody disputes rather than the Children's Code. ¶¶ 27-31.

The Court of Appeals also reviewed the three grounds for TPR under § 32A-5-15, abandonment, presumptive abandonment and abuse or neglect, and determined that there was insufficient evidence for any of these. ¶¶ 41, 52, 63-66, 71. It queried though whether private litigants can even terminate another's parental rights on grounds of abuse and neglect without CYFD involvement and the safeguards set forth in the Abuse and Neglect Act, such as reasonable efforts to reunify. See the discussion at ¶¶ 53-60. (Handbook Chapter 30)

Kinship Guardianship

Supreme Court Rules and Forms. Rule 1-120 has been amended to require that self-represented litigants use Supreme Court-approved forms in cases under the Kinship Guardianship Act. The forms themselves, which are included in the domestic relations forms, have been recompiled as Forms 4A-501 to 4A-513. Several new forms have been approved and others amended to conform to current practice. (Handbook Chapter 30A)

Mental Health and Developmental Disability

Supreme Court Rules and Forms. The amendments to Rule 10-166 that were provisionally approved earlier in 2016 and reported in the July 2016 Update have been withdrawn, as have the provisionally adopted Rule 10-171 and Form 10-604. These provisional rules and forms had

required that notice of the federal restriction on right to receive or possess a firearm or ammunition be attached to orders appointing treatment guardians and orders for placement in involuntary residential treatment. (Handbook Chapter 32)

Delinquency

*Supreme Court Rules and Forms***.** The Supreme Court has adopted amendments to a number of Children's Court rules affecting delinquency cases, including Rule 10-103 (relating to service of process at school) and Rule 10-163 (consent to special masters). The Court has also recompiled and amended the delinquency forms and placed them in a new Article 7 of the Children's Court Rules and Forms. (Handbook Chapter 33)

State v. Taylor E., 2016-NMCA-100 (No. 34,261, Aug. 29, 2016), *cert. denied*, Oct 27, 2016. A juvenile made incriminating statements to his probation officer (JPO) in response to routine questions after he was suspended from school for possessing a pipe. In his probation revocation proceeding, the district court suppressed the statements. The Court of Appeals reversed. As to whether *Miranda* warnings were required prior to the JPO's questioning, the Court found "no evidence that the meeting involved police presence, isolation, or confinement, let alone custodial interrogation initiated by law enforcement tantamount to a formal arrest or coercion by the JPO" during questioning. ¶¶ 12-24. The Court also held that warnings weren't required under § 32A-2-14 of the Delinquency Act. ¶ 43. Requiring a JPO to read warnings prior to questioning a child would transform the juvenile-JPO relationship into an adversarial one. ¶ 47. (Handbook §§ 33.5.4, 33.5.8)

Criminal Child Abuse

State v. Lucero, 2016-NMSC-___ (No. S-1-SC-34094, Dec. 22, 2016). Father was convicted of intentional child abuse under § 30-6-1(D) and (H), after his infant girl died as a result of "devastating brain injuries" caused by blunt force trauma. Father appealed his conviction, contending that the jury instruction improperly defined the intent element for intentional child abuse by endangerment. ¶ 21. He argued that the jury instructions should have required the jury to find, not only that he acted intentionally, but also *with a further intent to abuse or harm a child.* Without this additional intent requirement, he argued, the instructions permitted the jury to find a person guilty of intentional child abuse by endangerment resulting in death by finding that he committed any intentional act that eventually led to baby's death, even if the act was innocent or attenuated from her fatal injuries. ¶ 28.

The Supreme Court concluded that the instructions given were not incomplete or inconsistent with the law, nor where they confusing or misleading. ¶¶ 32, 39. The Court pointed out that the State's case was always based on the theory that Defendant intentionally, physically abused Baby, resulting in her death. ¶¶ 34, 37. Defendant also conceded at oral argument that the evidence was sufficient to support a conviction of abuse by torture, cruel confinement, or cruel punishment. Defendant's suggestion that the jury instructions may have permitted a conviction based on some other intentional conduct that led to Baby's death was too theoretical and speculative to support a claim of fundamental error. ¶ 38. (Handbook § 34.3)

State v. Bailey, 2016-NMSC-____ (No. S-1-SC-35395, Oct. 13, 2016). Defendant appealed his conviction for second-degree criminal sexual contact of a minor under § 30-9-13(B), arguing that admission of evidence of uncharged conduct was improper under Rules 11-404B)(1) and 11-403. At trial, Defendant admitted that he committed the charged acts but claimed that he lacked unlawful intent because the contact was merely parental conduct that victim was misinterpreting. The Supreme Court held that the evidence of a similar but uncharged act that could not be reasonably viewed as parental care was highly probative of Defendant's intent during the charged incident. ¶ 24. The Court concluded that other acts that "bear on a defendant's specific, unlawful intent to commit the charged offense are admissible under Rule 11-404(B)(2)." ¶ 22. It further concluded that, in this case, the inherently prejudicial nature of the uncharged incident was not enough to outweigh its probative value. ¶ 26. The Court upheld the district court's admission of the evidence and affirmed Defendant's conviction. (Handbook § 34.6.8)

State v. Stephenson, 2016-NMSC-___ (No. S-1-SC-35035, Sept. 26, 2016) (Nakamura and Maes, *concurring in part and dissenting in part*). Mother put her two year old child in his room at bedtime and locked the door for the night. The next morning the father found the child pinned between a dresser and a crossbar on his bed, which caused severe injury. A jury found Mother guilty of abandonment resulting in great bodily harm under § 30-6-1(B). The Court of Appeals reversed, finding insufficient evidence to prove that Mother left the child with intent not to return. In a 3-2 split decision, the Supreme Court upheld the reversal of Mother's conviction, but on different grounds. Rejecting the Court of Appeals' interpretation of the statute, the Supreme Court concluded that the crime of abandonment under § 30-6-1(B), which refers to "leaving or abandoning," criminalizes both intentionally *leaving* – even temporarily – and intentionally *abandoning* a child, but only under circumstances where doing so exposes the child to a risk of harm. ¶¶ 16. In this case, the Court decided that there was not sufficient evidence for a reasonable juror to find that, at the time Defendant left Isaiah in his room, the circumstances were such that Isaiah's well-being was at risk of harm. ¶ 26. The dissent disagreed that there was insufficient evidence to convict. ¶ 33. (Handbook § 34.4)

State v. Samora, 2016-NMSC-031 (No. S-1-SC-34733, Aug. 8, 2016) Defendant, who was accused of luring a sixteen year old boy into a truck by deception and forcibly penetrating him, was convicted of second degree criminal sexual penetration (CSP) in the commission of a felony under § 30-9-11(E)(5). On appeal, the Supreme Court found that the district court erred in omitting "without consent" from the jury instructions since the boy was 16 and could have legally consented to the sex. ¶ 26. When jury instructions omit an essential element of the crime and that element is at issue in the case, fundamental error may occur if the court cannot determine whether the jury found that element beyond a reasonable doubt. ¶ 28. Examining the jury instructions in the context of the entire record, including questions from the jury relating to the issue of consent, the Court ruled that the jury may have been "confused or misdirected" as to whether Defendant's conduct had to be without consent, and fundamental error occurred. ¶ 32. The Court reversed and remanded for a new trial. (Handbook § 34.5.1)

State v. Pitner, 2016-NMCA-102 (No. 33,807, Sept. 8, 2016), *cert. denied* Oct 2, 2016. Defendant appealed his conviction for criminal sexual contact of a minor in violation of § 30-9-13(A) based on insufficiency of the evidence, among other things. A nine-year old girl accused Defendant of putting his hand in her pajamas and rubbing the area "a little above" her private parts. ¶ 2. To convict Defendant, the state had to prove that Defendant "touched or applied

force to the unclothed [vagina, vulva and/or groin area]" of the victim. UJI 14-925. ¶ 7. The Court of Appeals held there was sufficient evidence for Defendant's conviction. Applying the common meaning of the term "groin" from case law, the Court concluded that a jury could have reasonably determined that Defendant touched or applied force to her groin area. ¶¶ 9-10. (Handbook § 34.5.2)

State v. Granillo, 2016-NMCA-094 (No. 33,637, Aug. 22, 2016), *cert. denied* Nov 15, 2016. This case addresses the *mens rea* required for intentional child abuse by endangerment under § 30-6-1(D)(1). Police arrested mother after witnesses observed her driving on the wrong side of the road and otherwise driving "poorly," and finding her in an intoxicated state unable to stand for a field sobriety test. ¶¶ 2-6. Defendant was convicted of child abuse by endangerment under a theory of intentional child abuse (not reckless or knowing child abuse), along with motor vehicle related offenses. The Court of Appeals rejected the State's argument that it only had to prove that Defendant intended to drive her car while intoxicated, with a child in the car. ¶ 14. The Court held that "the *mens rea* for intentional child abuse by endangerment requires a conscious objective to achieve a result -- endanger a child." ¶¶ 17, 21. In this case, the child was strapped to a car seat and Mother did not seem to be purposely courting danger while driving. The Court found no evidence that it was Mother's conscious objective to endanger the child, and reversed Defendant's conviction. ¶¶ 24. (Handbook §§ 34.3.2, 34.3.3)

Changes in Cert. Status Since July Update. Cert. has been denied in *State v. Ramirez*, 2016-NMCA- 072 (No. 34,303, May 25, 2016), and quashed in *State v. Sena*, 2016-NMCA-062 (No. 33,889, March 15, 2016). The Court of Appeals decisions in these cases were reported in the July 2016 update.

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

This is the fourth semi-annual update to the 2014 New Mexico Child Welfare Handbook. The 2014 Handbook was published in July 2014, with later developments reported in the January 2015, July 2015, and January 2016 updates. This July 2016 update covers the period January 1, 2016 to June 30, 2016. **It is important to check all of the updates when using the Handbook.**

In the last six months, New Mexico Supreme Court has decided a criminal child abuse case but no civil abuse or neglect or delinquency cases. The Court of Appeals has issued published opinions in one civil abuse case and several cases involving crimes against children.

The New Mexico Legislature has passed a few bills affecting Children's Court practice, adding to the Abuse and Neglect Act several provisions on relative placement. The Citizen Substitute Care Review Act was amended extensively to create a council to govern the citizen review boards and to specify the extent to which the boards review individual cases and the purpose of review. The Delinquency Act and the Criminal Procedure Act were amended to permit the courts to consider juvenile dispositions of youthful offenders when setting conditions of release in later cases. The Sexual Exploitation of Children Act was amended and sentences increased.

Like the Rules of Civil and Criminal Procedure, the Children's Court Rules have been amended to require the court to notify a child who has had a treatment guardian appointed or been placed in involuntary residential treatment that federal law prohibits the child from having a firearm or ammunition. The Children, Youth and Families Department (CYFD) repealed and replaced its regulations on the procedures in administrative appeals.

The Bureau of Indian Affairs has issued extensive regulations on the Indian Child Welfare Act; these are the first substantive regulations on ICWA since the law was passed. The federal Children's Bureau has issued non-regulatory guidance on educational stability.

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

Changes to New Mexico Statutes

2016 N.M. Laws, Ch. 51 (HB 28). Several sections of the **Abuse and Neglect Act** were amended to emphasize the importance of grandparents and other relatives and conform to the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. For example, definitions of fictive kin, relatives and siblings were added to § 32A-4-2; a new § 32A-4-17.1 was added to require due diligence to identify and provide notice to relatives within 30 days of the child's removal from home; a placement preference for relatives was added to § 32A-4-18 on custody hearings; and a requirement that CYFD include in its predisposition study a statement of its efforts to identify and locate grandparents and other relatives and to conduct home studies on appropriate relatives interested in caring for the child was added to § 32A-4-21. The provisions of § 32A-4-25.1 requiring the court to determine whether CYFD has made reasonable efforts to

identify and locate relatives, to conduct home studies, and to consider familial identity and connections have been moved to § 32A-4-22 on dispositions. (Handbook §§ 12.9, 13.7.2, 16.6, 16.12.1, 19.8.4)

House Bill 28 also added a time frame for transition home plans in § 32A-4-25.1. When the plan is reunification, the court must adopt a plan for transitioning the child home within a reasonable period depending on the facts and circumstances but not to exceed six months. In addition, HB 28 made revisions and additions to the list of individuals who may access abuse and neglect records under § 32A-4-33. (Handbook §§ 1.3.7, 19.8.3, 19.11.1, 20.2, 20.4.2)

Last but not least, the phrase "treatment plan" in § 32A-4-21 has been changed to "case plan." (Handbook Chapter 16 and §§ 14.5, 21.5.1)

2016 N.M. Laws, Ch. 60 (SB 49). The **Citizen Substitute Care Review Act**, §§ 32A-8-1 to -7, was amended extensively. Senate Bill 49 amends § 32A-8-2 to specify that the purpose of the Act is to provide a permanent system for independent and objective monitoring of children placed in the custody of CYFD "by examining the policies, and procedures and practices of the department and, *where appropriate*, specific cases to evaluate the extent to which the department is effectively discharging its child protection responsibilities." Section 32A-8-4 was amended to replace the statewide advisory committee with an advisory council, which will adopt rules and govern the citizen review boards. SB 49 also amends the **Abuse and Neglect Act** to conform to the changes to the Citizen Substitute Care Review Act, in particular § 32A-4-25 on judicial reviews. (Handbook Chapter 10 as well as §§ 19.3, 19.5, 21.3, 21.4, 25.4.2)

2016 N.M. Laws, Ch. 9 (HB 72). HB 72 added a new section to the **Criminal Procedure Act,** §§ 31-1-1 to 31-3-9, to permit consideration of the juvenile disposition of a youthful offender and any evidence given at a hearing for a youthful offender when, during a later case in which the person is charged with a felony, the court is considering the setting of bail or other conditions of release. The section of the **Delinquency Act** on sealing of records, § 32A-2-26, was also amended for this purpose. (Handbook §§ 33.7, 33.8)

2016 N.M. Laws, Ch. 2 (HB 65). The **Sexual Exploitation of Children Act**, §§ 30-6A-1 to -4, was amended and specific sentences for sexual exploitation of children added. Changing the sentences for persons convicted of sexual exploitation of children also required changes to the sentencing provisions of § 31-18-15. (Handbook § 34.5.5)

Changes to Children's Court Rules

Rule 10-166, the public inspection and sealing of court records rule, was provisionally amended and new **Rule 10-171 and Form 10-604, Notice of federal restriction on right to receive or possess a firearm or ammunition,** were provisionally approved and made effective for all cases pending or filed on or after May 18, 2016. These rules require the children's court to provide written notice to a child who is the subject of an order appointing a treatment guardian or placing the child in involuntary residential treatment that (1) the child is prohibited under federal law from receiving or possessing a firearm or ammunition and (2) the child's identification information will be transmitted to the FBI for entry into the National Instant Criminal Background Check System. The Supreme Court made similar changes to the Rules of Civil and

Criminal Procedure and will be considering comments and recommendations to determine whether any revisions need to be made. The rules changes were all intended to accommodate recent statutory changes; see 2016 N.M. Laws, Ch. 10 (HB 336). (Handbook Chapter 32)

Changes to CYFD Rules

CYFD has repealed and replaced its regulations on the procedures to be followed in **administrative appeals**, including appeals of substantiations of abuse and neglect. See 8.8.4 NMAC, as adopted March 15, 2016. (Handbook Chapters 5, 6 and 6A)

Case Law

Abuse and Neglect

State ex rel. CYFD v. Nathan H., In the Matter of Nyree H., 2016-NMCA-043 (No. 34,320, Jan. 6, 2016), *cert. denied*, May 3, 2016. The Court of Appeals affirmed the lower court's decision to terminate Father's parental rights. On appeal, Father argued that ICWA applied to the case, along with its substantive and procedural standards, because the children were eligible for enrollment or enrolled in an Indian tribe. However, eligibility depended on Mother's lineage and she was not cooperating with CYFD's efforts to track this down, and Navajo Children and Family Services determined that Children were not eligible based on its research. ¶¶ 18, 19. Father argued as well that the Children were eligible for enrollment in the Ute tribe but no evidence of this could be found. ¶ 22.

Father also argued that, as in *State ex rel. CYFD v. Marsalee*, 2013-NMCA-062, CYFD did not comply with § 32A-4-22(I) requiring CYFD to investigate whether a child is eligible for enrollment in an Indian tribe and, if so, to pursue enrollment. ¶ 24. The Court reviewed CYFD's efforts to investigate and pursue enrollment and concluded that they complied with §32A-4-22(I). "[T]he statute does not require CYFD to implement all possible methods in its investigation…. Each case must be determined on its own facts." ¶ 29.

Father also challenged the TPR for lack of clear and convincing evidence, arguing, among other things, that, as in *State ex rel. CYFD v. Hector C.*, 2008-NMCA-079, the evidence of past conduct was stale evidence and therefore insufficient. ¶ 40. The Court of Appeals reviewed the facts at length and disagreed. "[I]n this case, Father's past conduct is still relevant to his current parental abilities, and to foreseeable events…. While we recognize that incarceration is not a dispositive legal ground to terminate Father's parental rights, Father's significant substance abuse and criminal issues – for which he was repeatedly incarcerated, provided sufficient evidence that he was unable to care for his children now, and in the foreseeable future." ¶ 41. (Handbook §§ 16.12.5, 22.4.1, 22.5.7)

State ex rel. CYFD v. Scott C. in the Matter of Bryce H., 2016-NMCA-012 (No. 34,220, Sept. 3, 2015), summarized in the last update. Cert. was denied on January 5, 2016.

Criminal Child Abuse

State v. Thomas, 2016-NMSC-____ (No. 34,042, June 20, 2016). While not a child abuse case, this decision adds to the discussion of the Confrontation Clause in § 34.6.7 of the Handbook. In the lower court, the State had called a forensic analyst to testify by Skype. On appeal, Defendant argued that the admission of this testimony denied him his right to confront witnesses. The Supreme Court commented: "The United States Supreme Court has never adopted a specific standard for two-way video testimony, but we doubt it would find any virtual testimony an adequate substitute for face-to-face confrontation without at least the showing of necessity that [*Maryland v. Craig*, 497 U.S. 846 (1990)] requires." ¶ 27. The Court continued: "A criminal defendant may not be denied a physical-face-to-face confrontation with a witness who testifies at trial unless the court has made a factual finding of necessity to further an important public policy and has ensured the presence of other confrontation elements concerning the witness testimony including administration of the oath, the opportunity for cross-examination, and the allowance for observation of witness demeanor by the trier of fact." ¶ 29. Because the required findings were not made, the Court held that the admission of remote testimony violated Defendant's right to confrontation. ¶ 30. Also, an out-of-state witness is not generally considered unavailable for the purpose of the admission of out-of-court statements unless the proponent of that witness's testimony has complied with the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, §§ 31-8-1 to -6. ¶ 32. (Handbook § 34.6.7)

State v. Tufts, 2016-NMSC-020 (No. S-1-SC-35255, June 2, 2016). Defendant filmed himself masturbating, saved the image on a secure digital (SD) memory card, inserted the card into a cell phone, handed the phone to a 15 year old girl, and told her there was a surprise on the phone for her. He was convicted of criminal sexual communication of a child in violation of § 30-37-3.3(A), which requires "communicating directly with a specific child … by *sending* the child obscene images … by means of an electronic communication device …." Defendant argued that his conduct of placing an SD memory card in a cell phone and handing the phone to the child cannot constitute "sending" under this statute and the Court of Appeals agreed, holding that "to send" requires transmitting an object to another by means of a third-party carrier. The Supreme Court reversed the Court of Appeals, holding that the word "sending" may also occur by delivering the electronic communication device containing the obscene images directly to the child. ¶ 5. The Court reviewed the history and purpose of the statute in reaching this conclusion. ¶¶ 6 – 9. (Handbook § 34.5.6)

State v. Ramirez, 2016-NMCA-___ (No. 34,303, May 25, 2016), *petition for cert. filed* June 22, 2016. The Court of Appeals affirmed the convictions of a defendant who invaded a home in which a 15 year old child was alone, put a gun to the child's head, and forced the child to go with him room-by-room as he looked for someone who wasn't there. Among other things, the defendant argued that his conviction for aggravated assault was subsumed into the child endangerment conviction. ¶ 18. The Court disagreed: Although the act of pointing a gun at the victim is a shared element of both offenses as charged, it does not follow that one offense is subsumed within the other. ¶ 23. Children are often placed in danger by conduct that also happens to violate a separate criminal statute. ¶ 25. "We conclude that there is little overlap between the social policies addressed by the child abuse and assault statutes…. [W]here a defendant acts in a manner that infringes on both of those social interests, multiple punishments

for aggravated assault and child endangerment do not violate the right to be free from double jeopardy." ¶ 29. (Handbook § 34.3.1, 34.3.3)

State v. Carmona, 2016-NMCA-050 (No. 33,378, March 17, 2016), *cert. denied,* May 11, 2016. The Court of Appeals affirmed the district court's order suppressing the opinion of the State's expert that defendant's DNA was contained in samples taken from an alleged victim by a now-deceased Sexual Assault Nurse Examiner (SANE). Defendant was charged with criminal sexual contact of a minor. When the SANE nurse died, Defendant moved to suppress the DNA evidence collected by the nurse and the report prepared by the State's expert witness comparing the evidence collected by the nurse with that of Defendant's buccal swab. ¶¶3, 4. The Court reviewed the U.S. Supreme Court cases since *Crawford v. Washington*, 541 U.S. 36 (2004), together with the N.M. Supreme Court decision in *State v. Navarette*, 2013-NMSC-003. It concluded that the nurse's statements on the labels affixed to the rape kit identifying the swab as being taken from the child were testimonial hearsay because the nurse would have reasonably understood those statements' sole purpose to be for use in investigating and prosecuting criminal charges against Defendant. ¶ 40. Since the declarant was deceased and hence unavailable to testify, allowing the expert to offer her opinion to the jury in reliance on the labels violated Defendant's rights under the Confrontation Clause. ¶ 42. (Handbook § 34.6.7)

State v. Sena, Ct. App. No. 33,889, March 15, 2016, *cert. granted*, June 1, 2016. The Court of Appeals considered whether ten separate still images of child pornography located on a "shared" file on Defendant's computer amounted to ten counts of distribution of child pornography, or only one count. The Court concluded that § 30-6A-3(B) on distribution of child pornography was ambiguous and that the legislative history and purpose of the statute did not provide a clear legislative intent for defining the unit of prosecution. ¶ 15. Further, Defendant's actions were not shown to be distinct with regard to any images placed in the "shared" file. ¶ 18. The Court applied the rule of lenity to the multiple charges filed and held that Defendant may only be convicted of one count of distribution of child pornography. ¶ 19. (Handbook § 34.5.5)

State v. Vargas, 2016-NMCA-038 (No. 33,247, Jan. 12, 2016), *cert petitions withdrawn*. The Court of Appeals reversed the conviction of the child's foster father on 24 counts of intentional child abuse by torture, involving the alleged use of a stun gun. The case was remanded to the district court for retrial.

One of the State's witnesses was a police officer who testified both to his experience with stun guns and his opinion that the marks on the child's body were the type that would be caused by a stun gun. ¶ 21. The testimony was admitted as opinion testimony of a lay witness under Rule 11-701, which the Court of Appeals held was improper because it was expert opinion testimony. ¶ 23. The Court also concluded that the admission of the testimony did not constitute harmless error, requiring reversal of Defendant's convictions on all counts. ¶ 25.

For purposes of retrial, the Court of Appeals also addressed Defendant's argument that his due process rights were violated. The State had charged Defendant with 24 identical counts of child abuse based upon the child's allegations that Defendant and his sons assaulted him with a stun gun numerous times between August and October 2010. The indictment did not provide notice as to any specific instance in which Defendant was alleged to be the principal abuser or any specific instance in which he was alleged to be an accomplice to abuse inflicted by others. It was

impossible for the jury to conclude that he was guilty of some of the offenses and not others. This lack of specificity violated Defendant's due process rights. ¶¶ 44, 45. (Handbook §§ 34.3.1 34.3.2, 34.3.3, 34.6.6)

State v. Perez, 2016-NMCA-033 (No. 31,678, Jan. 20, 2016), *cert. denied,* March 15, 2016. The State appealed the district court's order excluding the testimony of an eight year old girl in a case alleging multiple counts of sexual abuse by Defendant. The Court of Appeals concluded that the district court applied an incorrect standard when deciding the child was incompetent to testify. ¶ 5. Dr. Sachs, who had conducted a psychological evaluation ordered by the court, testified that the child had the capacity to tell the difference between the truth and a lie and knew that there were consequences for lying, which meets the minimum standard for witness competency. ¶ 16. (Handbook § 27.1)

State v. Erwin, 2016-NMCA-032 (No. 33,561, Jan. 19, 2016), *cert. denied*, March 8, 2016. Defendant was convicted of criminal sexual contact of a minor under § 30-9-13(B)(2)(a) (the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit). Defendant argued that the district court did not properly instruct the jury because the court's elements instruction allowed the jury to convict because he was a household member, without finding that he was actually in a position of authority over the child. The issue on appeal was one of statutory interpretation and the Court of Appeals held that a household member is listed in the definition of "position of authority" in § 30-9-10(E) as a person in a position of authority able to exercise undue influence over a child. Additional proof is not necessary. ¶¶ 1, 6-9, 15. (Handbook § 34.5.2)

Federal Law

The new **ICWA regulations** were published in the Federal Register on June 14, 2016 and take effect 180 days from publication. These are the first substantive regulations issued to implement the Indian Child Welfare Act and, unlike the BIA Guidelines, are binding interpretations of the Act. The regulations focus on State court and are intended to provide consistent nationwide interpretation of the minimum requirements of ICWA for the courts. *See* 81 Fed. Reg. 38778 at https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf.
The National Indian Child Welfare Association (NICWA) and the Native American Rights Fund (NARF) have prepared a helpful summary of the new regulations: http://www.nicwa.org/government/documents/2016%20ICWA%20regs%20summary_rev24June.pdf. (Handbook Chapter 39 and §§ 12.10, 13.8, 15.5.6, 15.11.3, 16.9, 16.12.5, 19.8.4, 21.5.4, 22.3.2, 22.4.5, 22.5.7, 23.4, 30.4.2, 31.3.2)

On June 23, 2016, the U.S. Department of Education and U.S. Department of Health and Human Services issued guidance on the Every Student Succeeds Act of 2015 called **"*Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care*."** The two agencies joined forces on this guidance to assist in the implementation of the 2015 law, which complements the Fostering Connections Act passed in 2008 and was summarized in the January 2016 update. The guidance document can be found at http://www.acf.hhs.gov/programs/cb/resource/ed-hhs-foster-care-non-regulatory-guidance. (Handbook §§ 16.12.6, 38.9)

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

This is the third semi-annual update to the 2014 New Mexico Child Welfare Handbook. The 2014 Handbook was published in July 2014, with later developments reported in the January 2015 and July 2015 updates. This January 2016 update covers the period July 1, 2015 to December 31, 2015. **It is important to check the updates when using the Handbook.**

The New Mexico Supreme Court has decided a delinquency case and a criminal child abuse case but no civil abuse or neglect cases. The Court of Appeals has issued opinions in a few civil abuse or neglect cases and a delinquency case.

There were few changes to the Children's Court rules, while the Children, Youth and Families Department (CYFD) amended or replaced a number of its regulations. The CYFD rules were changed in part to reflect the requirements of the federal Preventing Sex Trafficking and Strengthening Families Act, described in the January 2015 update.

The Every Student Succeeds Act, passed by Congress and signed into law in December 2015, contains a number of provisions specific to foster children. The Health and Human Services Department and the Department of Justice have issued guidance on compliance by child welfare agencies and courts with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

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

Changes to Supreme Court Rules

Children's Court Rules

Rule 10-162, the preemptory challenge rule, was amended to add a subsection on the misuse of **preemptory excusal** procedures. (Handbook Chapters 4, 5, 6, 6A)

Rule 10-316 was adopted to 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. These forms were amended in 2015 to correct the name of the Family Educational Rights and Privacy Act.) (Handbook § 13.11, 16.12.6, 17.10, 19.12, 21.10)

A new **Rule 10-323** on the **conduct of hearings** in abuse and neglect cases was also adopted. The rule focuses on the persons who may or should be present at a hearing and identifies several categories of individuals who may have a "proper interest in the case" or a "proper interest in the work of the court." (Handbook § 13.4)

Rules of Criminal Procedure and UJIs

The Supreme Court adopted a new jury instruction, **UJI 14-6019A,** for use in **criminal sexual penetration (CSP) cases** in which the **victim's age** is not an essential element of the offense but an essential sentencing fact. Under § 30-9-11(E)(2)-(6) , when a victim is age 13 – 18, CSP in the second degree triggers a statutory increase to a second degree felony and a mandatory minimum sentence. The Use Note to **UJI 14-954** was amended in part to explain that the victim's age in these cases is an essential sentencing fact that must be determined by the jury beyond a reasonable doubt. (Handbook § 34.5.1)

The Supreme Court also amended the **UJI Criminal General Use Note** to clarify that the court may alter an **elements instruction** when supported by binding precedent or unique circumstances, and when necessary to accurately convey the law to the jury. The Committee commentary explains that, even where a UJI exists, if it is inadequate to convey the legal questions of the case or has been rendered obsolete by a change in the law, modification may be necessary to avoid fundamental error. (Handbook Chapter 34)

Rules 5-501 and **5-502** requires the parties to a criminal case, when listing their witnesses, to identify any witnesses who will be providing expert testimony and the subject matter of their testimony. (Handbook § 34.6.6)

Changes to CYFD Rules

CYFD has amended or replaced a number of rules in the New Mexico Administrative Code (NMAC), some of which affect practice in abuse or neglect cases in Children's Court. Parts 8.10.2 (Intake), 8.10.9 (Youth Services), and 8.26.2 (Placement Services) were amended extensively, while 8.10.3 (Investigations) and 8.10.8 (Permanency Planning) were repealed and replaced. The changes were effective September 29, 2015.

The permanency planning rules, 8.10.8 NMAC, have been updated in part to reflect changes in state and federal law since 2005. For example, they devote more attention to relative notification and placement and to sibling continuity (8.10.8.10). New provisions on education, including educational continuity, IEPs, next step plans and educational decision makers, have also been added (8.10.8.10(F) and 8.10.8.18). (Handbook §§ 16.8, 16.12.6, 19.8.4)

A number of the changes to CYFD rules conform state practice to the Preventing Sex Trafficking and Strengthening Families Act passed by Congress in 2014. For example:

- The permanency planning and youth services rules require that PSD take certain steps in preventing, identifying, and reporting sex and human trafficking and in reporting runaways. PSD is to make reasonable efforts to locate children or youth missing from foster care, determine the factors that led to the child or youth being absent, and assess the child's or youth's experience, including whether the child or youth is a victim of sex or human trafficking (8.10.8.24 and 8.10.9.22).
- A permanency plan of planned permanent living arrangement (PPLA) may be used only for youth who are age 16 or older (8.10.9.7(L)). (Another rule, 8.10.8.12(E), states that

PPLA may only be used for youth over 16, which appears to mean 17 year olds, but the federal law allows PPLAs for children who have "attained 16 years of age.").

- The case plan for a child age 14 or older must be developed in consultation with the child, who may choose two other members of the team as well (8.10.8.13D).
- Life skills plans, which are part of the case plan, must now be developed with and for children at age 14, not 16. PSD will develop a life skills plan with the youth regardless of the youth's permanency plan and will present the plan to the court prior to the first hearing after the youth's 14th birthday and every subsequent hearing (8.10.9.11).
- PSD must provide children age 14 or older with copies of certain documents about their rights and responsibilities and obtain a signed acknowledgment that the child has received and understands them (8.10.8.13E).
- The rules on placement now require that PSD make efforts to normalize the lives of children in PSD's custody and empower caregivers to approve a child's participation in activities based on the caregiver's own assessment using a reasonable and prudent parent standard, without prior approval of PSD. When a child age 14 or older disagrees with a decision made under this standard, the child may request a review of the decision in writing (8.26.2.13). (Handbook §§ 16.6, 17.9, 18.5.1, 19.8.1, 19.9, 38.4)

Case Law

Abuse and Neglect

State ex rel. CYFD v. Yodell B., in the Matter of Tyrell B., 2015-NMCA-___ (No. 33,990, Dec. 21, 2015). Holding that clear and convincing evidence is the proper standard of proof for proving active efforts under ICWA § 1912(d), the Court of Appeals concluded that the evidence was insufficient to show that CYFD made active efforts to prevent the breakup of the Indian family before terminating Father's parental rights. ¶¶ 16, 29. Concluding that the active efforts requirement is a " 'more involved and less passive standard' " than reasonable efforts, the court found that CYFD took only a passive role by making Father locate and obtain service providers on his own and making him ensure that service providers were communicating with CYFD about his progress. ¶¶ 20, 26. (Handbook §§ 1.3.4, 3.3.4, 15.5.6, 15.11.3, 22.4.5, 39.2.8, 39.2.9)

State ex rel. CYFD v. Alfonso M.E., in the Matter of Uriah F.-M., 2015-NMCA-___ (No. 33,896, Dec. 14, 2015). At the time Child was taken into custody, Father was incarcerated due to an arrest for DWI and subject to an immigration hold. ¶ 4. After Father was deported, the Mexican consulate arranged for a home study and a psychological evaluation and Father obtained employment and attended therapy sessions. A month after deportation, CYFD filed a motion to terminate parental rights. ¶ 34. The Court of Appeals reversed the district court's decision terminating parental rights and remanded the case back to the lower court. ¶ 64.

The appeals court held that abandonment under § 32A-4-28(B)(1) is inapplicable. Under *Grace H.*, § 32A-4-28(B)(1) applies only when the parent is absent prior to termination. Here, Father was present in the case and expressed a legitimate desire to take responsibility for Child. ¶ 23.

Regarding § 32A-4-28(B)(2), the Court emphasized that the Abuse and Neglect Act places the burden on CYFD, not the parent, to prove by clear and convincing evidence that the parent is unlikely to alleviate the cause and conditions of neglect in the foreseeable future and that the

agency made reasonable efforts to assist the parent in adjusting the conditions that rendered him unable to properly care for the child. The Court concluded that CYFD had not met its burden of proof and that the district court had essentially relied on the lack of evidence, rather than evidence, to terminate parental rights. For example, in finding that Father had not alleviated the causes and conditions of neglect, the district court noted that Father had an alcohol problem and that there was no evidence whether he was still drinking. The Court of Appeals held that this lack of evidence does not constitute clear and convincing evidence. ¶ 37. Similarly, the district court's findings pointed to the lack of certain information in the home study as a basis for termination; however, it was CYFD's statutory responsibility to present evidence that established that Father's home was unsafe or unstable, which CYFD failed to do. ¶¶ 49-50.

The Court of Appeals did not reach best interest, but commented on the district court's concern that Father did not speak English and Child at 18 months did not speak Spanish. The appeals court said that it was "unconvinced that, as a general rule, native language disparities between a natural parent and his or her infant child are insurmountable obstacles to reunification" and had serious reservations about the district court's reliance on this theory in light of the lack of evidence before the court. ¶¶ 61-62. (Handbook §§ 22.1.2, 22.4.2, 22.4.3, 22.5.10)

State ex rel. CYFD v. Scott C. in the Matter of Bryce H., 2015-NMCA-___ (No. 34,220, Sept. 3, 2015). The Court of Appeals held that the doctrine of claim preclusion did not bar CYFD from substantiating allegations of abuse or neglect in its own administrative proceedings when the court case had been dismissed with prejudice per agreement. "By expressly identifying different decision-makers, different purposes, and different standards of proof, the statues and regulations appear to contemplate inclusion of substantiated reports in CYFD's child abuse database, even where abuse cannot be proven by clear and convincing evidence in children's court." ¶ 18. The Court also held that, once CYFD dismisses a case against a defendant by notice under Rule 10-145(A)(1)(a), the district court loses jurisdiction to reopen. ¶ 20. Scott C. filed a petition for certiorari, which was pending as of December 31, 2015. (Handbook Chapters 8, 12)

State ex rel. CYFD v. Christina L., 2015-NMCA-115 (No. 34,061, Aug. 20, 2015). The Court of Appeals reversed the district court's adjudication of neglect under § 32A-4-2(E)(4), finding that evidence of Mother's defiant attitude toward CYFD does not constitute a mental disorder or incapacity. ¶ 21. The court noted that § 32A-4-2(E)(4) requires CYFD to establish both the existence of a mental disorder or incapacity *and* that such condition makes the parent unable to perform his or her parental responsibilities. ¶ 17. Under (E)(4), CYFD does not have to prove culpable behavior on the parent's part but also cannot rely on evidence of the parent's intentional or negligent disregard of the child's need, as it can under § 32A-4-2(E)(2), which pertains to neglect as a result of "the faults or habits of the child's parent." *Id*.

The Court added that, to the extent the lower court relied on the expert witness's opinion that Mother functioned at a lower cognitive ability, which was based on the results of a non-diagnostic therapeutic tool used to assess Mother's developmental history, the opinion was not properly supported. In addition, expert testimony in the form of a diagnosis is likely required to show neglect due to mental disorder or incapacity. ¶¶ 4, 22. (Handbook § 15.5.3)

State ex rel. CYFD Concerning the Mercer-Smiths, 2015-NMCA-093 (Nos. 31,941 and 28,294, June 18, 2015), summarized in the July 2015 update. Cert. was granted on August 26, 2015. (Handbook § 28.5)

Delinquency

State v. DeAngelo M., 2015-NMSC-033 (No. S-1-SC-34995, Oct. 15, 2015). The Supreme Court held that, to overcome §32A-2-14(F)'s presumption that statements of a 13- or 14-year-old to a person in a position of authority are inadmissible, expert testimony is not required and the prosecution need not prove that the child had the maturity and intellectual capacity of an average 15-year-old. Rather, the recording of the child's custodial interrogation must clearly and convincingly show that "the child's answer to open-ended questions demonstrated that the … child has the maturity to understand each of his or her constitutional and statutory rights and the force of will to insist on exercising those rights." ¶¶ 3, 17-19. In this case, the Court concluded that the State failed to meet the burden of proof needed to overcome the statutory presumption. The district court erred in denying the child's motion to suppress. ¶ 30. (Handbook § 33.5.4)

State v. Acosta, 2015-NMCA-___ (No. 33,573, Sept. 2, 2015). In a case addressing the adequacy of the state's notice of its intent to introduce prior bad acts evidence under Rule 11-404(B), the Court of Appeals held that the state's failure to specifically invoke the rule or identify the consequential fact to which the prior bad acts evidence might have been directed was prejudicial enough to justify the grant of a new trial. ¶¶ 19, 25. (Handbook § 34.6.8)

State v. Wyatt B., 2015-NMCA-110 (No. 33,297, Aug. 13, 2015), *cert. denied*, Oct. 13, 2015. Among other holdings, the Court of Appeals upheld the district court's denial of a 16-year-old's motion to suppress incriminating statements made to police officers while subject to an investigatory detention and DWI arrest. ¶ 3. Applying the totality of the circumstances analysis set forth in § 32A-2-14(E), the court found that such factors as the child's impaired physical and mental condition due to intoxication and the police officer's denial of child's request to have his parents present did not override other evidence showing a valid waiver of rights. ¶¶ 21-25. (Handbook § 33.5.4)

Criminal Child Abuse

State v. Nichols, 2015-NMSC-___ (No. S-1-SC-34549, Nov. 19, 2015). Rejecting the state's theory that defendant inflicted a fatal liver injury on his infant child, the jury convicted defendant of one count of child abuse resulting in death or great bodily harm based on the state's theory that defendant negligently permitted medical neglect. The Supreme Court held that the state failed to provide substantial evidence that the medical neglect caused the child's death or that the child's symptoms were so obvious that defendant was criminally reckless in not seeking immediate medical attention. ¶¶ 37, 44, 49. The Court also noted that "causing" and "permitting" child abuse lose their distinction when the charge is based on a theory of endangerment by medical neglect. The jury had found defendant *not guilty* of *causing* medical neglect but *guilty* of *permitting* medical neglect but the difference between the two is not clear and the verdicts made it impossible to determine what culpable act was the actual basis for the jury's conviction. ¶¶ 34-36. (Handbook § 34.3.3)

Cert has been granted in the following cases, which were summarized in past updates:

- *State v. Bailey*, 2015-NMCA-102 (No. 32,521, June 9, 2015), *cert. granted*, Sept. 25, 2015. (Handbook §§ 34.5.1, 34.6.8)
- *State v. Tufts*, 2015-NMCA-075 (No. 33,419, April 7, 2015), *cert. granted*, June 19, 2015. (Handbook § 34.5.6).

- *State v. Tapia*, 2015-NMCA-048 (No. 32,934, Feb. 17, 2015), *cert. granted*, May 11, 2015. (Handbook §§ 34.5.1, 34.5.2)

Federal Law

The **Every Student Succeeds Act**, P.L. 114-95, enacted on December 10, 2015, reauthorizes the Elementary and Secondary Education Act (ESEA) of 1965, the main Federal education law, largely replacing No Child Left Behind. The new law contains a number of provisions aimed at helping to improve educational outcomes for foster children. The new law, for example:

- amends 20 U.S.C. § 6311 of the ESEA to require that state educational plans set forth the steps the state educational agency will take to ensure collaboration with the state child welfare agency to ensure the educational stability of children in foster care, including assurances that:
    - foster children may remain in their school of origin unless a determination is made that this is not in their best interest, in which case they will be immediately enrolled in a new school, even without records, and the new school will immediately contact the last school attended to obtain relevant academic and other records; and
    - the state education agency will designate an employee to serve as a point of contact for the child welfare agency;
- amends 20 U.S.C § 6311 of the ESEA to require that the annual state report card include disaggregated achievement information on foster children; and
- amends 20 U.S.C. § 6312 of the ESEA to require local education agencies (LEAs) to collaborate with child welfare agencies and develop a plan governing how transportation to maintain foster children in their original school will be provided and funded. (Handbook §§ 16.12.6, 16.6, 38.1, 38.3)

In August 2015, the HHS Administration on Children and Families, the HHS Office for Civil Rights, and the Department of Justice, issued joint guidance entitled "**Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act**." This document includes an overview of the law, answers to specific questions and examples for child welfare agencies and courts, and resources to consult for additional information. See http://www.acf.hhs.gov/programs/cb/laws-policies/whats-new or http://www.ada.gov/doj_hhs_ta/child_welfare_ta.html. (Handbook §§ 5.2.4, 6.4.2, 6A.5, and 8.2.4, and Chapter 38)

Other Resources

The ABA has published **Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders**. Information on ordering the book can be found at: http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=224751148. (Handbook Chapter 5)

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 an 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)

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

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)