



## EX PARTE CUSTODY ORDERS and CUSTODY HEARINGS

February 4, 2015

### EX PARTE CUSTODY ORDERS

- In most cases, when CYFD files an abuse and neglect petition, it will also ask for custody of the children involved via ex parte order.
- Pursuant to § 32A-4-16 (A) the Court may issue an ex parte custody order based on a *sworn written statement* of facts showing *probable cause* to believe that
  - the child is abused and neglected *and*
  - the criteria in § 32A-4-18(C) have been met (see below).
- Typically the affidavit supporting the request for ex parte custody order is signed by the CYFD worker investigating the case.
- The affidavit should provide sufficient facts about the abuse or neglect and should also document the efforts made to avoid removal. If no efforts were made, the affidavit should indicate that not making efforts was reasonable (this should only occur in very rare situations).
- **Required Findings:** Pursuant to federal law, in order for the agency to receive federal Title IV-E foster care funds for the child, the ex parte custody order **must** contain a finding that **continuation in the home is contrary to the welfare of the child**. This finding cannot be made later in the case.

### CUSTODY HEARINGS

- **Timing:** A hearing must be held within 10 working days of the issuance of an ex parte custody order. § 32A-4-18(C); see also NMRA 10-107.
- **Purpose:** to determine whether the child should stay in CYFD's custody pending the adjudication on the abuse and neglect petition. § 32A-4-18(A). *This hearing is not about determining whether the allegations in the petition are true.*
- The hearing must occur whether or not respondents have been located and served.
- The rules of evidence do not apply to the custody hearing. § 32A-4-18 (H).

- **Criteria Under § 32A-4-18(C):** The Court must determine whether there is probable cause to believe that:
  - 1) the child is suffering from an illness or injury and the parent, guardian, or custodian is not providing adequate care for the child;
  - 2) the child is in immediate danger from the child's surroundings and removal from those surroundings is necessary for the child's safety or well-being;
  - 3) the child will be subject to injury by others if not placed in the custody of the department;
  - 4) there has been an abandonment of the child by the child's parent, guardian, or custodian; or
  - 5) the parent, guardian, or custodian is not able or willing to provide adequate supervision and care for the child.
- **If the Court finds probable cause** to establish one of the factors above, the Court may grant CYFD legal custody of the child or return custody to the parent, guardian, or custodian on conditions that will reasonably ensure the safety and well-being of the child.
- **If the Court finds no probable cause**, the Court must:
  - 1) retain jurisdiction and, unless the court permits otherwise, order that the respondent and child remain in the jurisdiction of the court pending the adjudication;
  - 2) return legal custody of the child to the child's parent, guardian or custodian with conditions to provide for the safety and well-being of the child; and
  - 3) order that the child's parent, guardian or custodian allow the child necessary contact with the child's guardian ad litem or attorney.
- **Required Findings:** the court must determine whether CYFD has made reasonable efforts to prevent removal of the child from the home. § 32A-4-18(E).
- **Advisement of Rights:** If the respondents are present at a custody hearing, the Court must ensure that they have been advised of their rights under NMRA 10-314.
- The court may also order initial assessments at this time. Typically this will be a psychological or psychosocial evaluation for the respondents or some type of substance abuse assessment. The court may also order assessments for the children depending on their needs and development.<sup>1</sup> Any assessments ordered should be linked to the allegations in the petition.

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<sup>1</sup> Note that the child must consent to any mental health treatment if he or she is fourteen or older. § 32A-6A-15. The Court should also consider carefully what information respondents should be required to release.

- The Court should inquire about:
  - whether ICWA applies,
  - visitation,
  - whether siblings have been placed together and if not, about sibling contact,
  - whether the child has changed schools,
  - the child's educational decision-maker,
  - the identity of absent parents,
  - possible relative caregivers,

## **APPOINTMENTS**

- At the outset of the case, the Court must appoint attorneys for all respondents and a guardian *ad litem* for the child if the child is under 14 or an attorney for the child if the child is 14 or over.
- It is critical to ensure that all parties have representation at the custody hearing and that the attorneys have had time to meet with their clients before the hearing.

## **APPEALS**

- **Right to Appeal:** The parties may appeal the Court's custody order granting or withholding custody of the child. § 32A-4-18(I).
- **Jurisdiction:** While the appeal is pending, the District Court retains jurisdiction to take further action in the case. § 32A-1-17(B).
  - Appeals from a custody order do not toll or extend the time limits for adjudicatory hearings. NMRA 10-343(D).

For more details, see Chapters 12 and 13 of the New Mexico Child Welfare Handbook:  
<http://childlaw.unm.edu/resources/common/docs/2014-child-welfare-handbook.pdf>

## CUSTODY HEARING CHECKLIST

(from the New Mexico Child Welfare Handbook)

- Preliminary matters
  - Appearances
  - Manner and date of service
  - Notice of hearing
  - Appointment of counsel; opportunity to consult
  - Language or cognitive challenges
- Inquiry regarding
  - Absent parents
  - Tribal affiliation
- Indian child
  - Notice to tribe
  - Domicile/residence of child
- Advisement of rights
  - Allegations of petition
  - Right to hearing on merits of petition
  - Right to an attorney
  - Possible consequences if allegations are found to be true, including termination of parental rights
- Continuing counsel's appointment
  - Indigency determination
  - Interest of justice
- Use immunity, if requested
- Stipulations of parties, if any
- Probable cause determination
  - Rules of Evidence do not apply
- Reasonable efforts to prevent removal
- Custody pending adjudicatory hearing
  - Any conditions, if child is with respondent
- Assessments and evaluations
- Scheduling of further proceedings
  - Pre-adjudicatory meeting/mediation
  - Pretrial conference
  - Adjudicatory hearing