



Permanency Hearings and Termination of Parental Rights

October 7, 2015

Permanency Hearings

Purpose. To compel a resolution of the case and thereby prevent children from languishing in the system.

Initial Permanency Hearing

- Critical stage in abuse/neglect proceedings
- Court must decide whether the parents have made sufficient progress to allow the child to return home or whether there will be another outcome to the case (usually involving termination of parental rights and adoption, but see other permanency plans below).
- At any permanency hearing, the Court must consult with the child in an age-appropriate manner regarding the child's proposed permanency or transition plan.¹ Best practice is for the decision-maker to talk directly to the child (however, federal guidance allows the child's GAL or attorney to express the child's wishes).²

Timing

- A pre-permanency meeting must be held before the Initial Permanency hearing so the parties can discuss the issues to be address at the permanency hearing and try to come to a resolution.³ This "pre-perm meeting" is frequently done as a mediation or as a family centered meeting. The judge does not participate in the "pre-perm meeting."
- **The Initial Permanency Hearing** must be commenced either within:
 - 30 days of a judicial determination that reasonable efforts toward reunification are not required;⁴ or
 - 6 months of the initial judicial review or 12 months after the child enters foster care, whichever comes first;⁵
 - For purposes of the Permanency Hearing, the child is considered to have entered foster care either on the date of the first judicial finding that the child has been abused or neglected or 60 days after the date on which the child was removed from the home, whichever is earlier.⁶

¹ 42 U.S.C. § 675(5)(C)(iii).

² Child Welfare Policy Manual §8.3C.2c (Oct. 17, 2007).

³ NMSA §32A-4-25.1(A).

⁴ NMSA §32A-4-25(K).

⁵ NMSA §32A-4-25.1(A).

⁶ NMSA §32A-4-25.1(F).

- **Reasonable Efforts Findings.** The court must make a finding about whether CYFD has made reasonable efforts to finalize the permanency plan within 12 months of the child’s entry into foster care. The reasonable efforts finding should be explicit and case specific.

Permanency Plans.

At the end of the permanency hearing, the Court *must* order one of the following permanency plans for the child:

- (1) reunification
- (2) adoption
- (3) permanent guardianship
- (4) placement in the legal custody of the department with the child in the home of a fit and willing relative
- (5) another planned permanent living arrangement.⁷

Another planned permanent living arrangement is available only if substantial evidence shows that none of the other options is appropriate for the particular child,⁸ and the child is not under 16.⁹

The permanency plan chosen should take into account the child’s living arrangements and relational permanency, as well as threats to the child’s safety, parental protective capacities, and whether the parents have remedied (or are making solid progress toward remedying) the causes and conditions of the abuse or neglect.

Evidence and Due Process

- The rules of evidence do not apply in Permanency hearings,¹⁰ but all parties must have the opportunity to present evidence and cross-examine witnesses.¹¹
- Even though the rules of evidence do not apply, the Court must ensure that basic due process protections are respected at permanency hearings due to the critical nature of a permanency hearing and the ability of the outcome of a permanency hearing to impact the rest of the abuse/neglect proceeding.¹²

Next Steps

- If the plan is reunification, the court must adopt a *plan for transitioning the child home* and schedule a *permanency review hearing* within 90 days to address the transition.¹³
- If the plan is not reunification, the court must make findings about whether the Department has made *reasonable efforts to identify and locate relative, and perform a home study on any appropriate relatives who are interested in providing permanency for the child*, and if the Department has not, the court may schedule a hearing in 60 days to address issues related to relatives.¹⁴

⁷ NMSA §32A-4-25.1(B).

⁸ NMSA §32A-4-25.1(B).

⁹ Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, Sec. 112.

¹⁰ NMSA §32A-4-25.1(I).

¹¹ NMSA §32A-4-25.1 (B).

¹² *Maria C.*, 2004-NMCA-083.

¹³ NMSA §32A-4-25.1 (C).

¹⁴ NMSA §32A-4-25.1 (D).

- If a child remains in custody, the Court shall hold a permanency hearing every twelve months.¹⁵ The court must also determine whether CYFD has made reasonable efforts to finalize a permanency plan at least once every 12 months that the child remains in care.¹⁶

Permanency Review Hearing

At a permanency review hearing, the Court must do one of three things:

- (1) change the plan from reunification to one of the other plans listed at NMSA §32A-4-25.1(B);
- (2) dismiss the case and return custody to the parent, guardian, or custodian; or
- (3) return custody to the parent, guardian, or custodian with limitations including protective supervision for up to six months.¹⁷

Special Considerations for Youth at Permanency Hearings

- Under the new Federal Preventing Sex Trafficking and Strengthening Families Act, youth who are 14 or older must participate in creating their case plans and must be given a list of their rights.¹⁸
- Although the Court should review the youth’s participation at every hearing, the Court should give special consideration to the youth’s participation at permanency hearings given the critical nature of the permanency hearing and the fact that for older youth whose parents’ rights have been terminated often only come before the Court for permanency hearings.
- Under this same law, the permanency plan of Planned Permanent Living Arrangement cannot be used for a youth who is under 16.¹⁹

Transition Planning. CYFD is responsible for developing a transition plan with the youth and individuals of the youth’s choosing prior to the youth reaching 17. CYFD must present this plan to the Court at the first hearing immediately following the youth’s 17th birthday.²⁰

Life Skills Planning. The life skills plan required for youth age 16 or older²¹ identifies the activities, tasks, and services needed for the youth to develop the life skills necessary to safely transition into independent living. Like the transition plan, the life skills plan is reviewed at every judicial review and permanency hearing.
8.10.9.11 NMAC.

Discharge Hearing. The final permanency or judicial review hearing before a youth’s eighteenth birthday must be treated as the discharge hearing and should be scheduled as close as possible to the youth’s 18th birthday.²² Some Courts will set a separate discharge hearing for the youth. At this hearing, the Court must ensure that CYFD has made reasonable efforts to provide the youth with the following:

¹⁵ NMSA §32A-4-25.1(G).

¹⁶ 45 CFR §135.21(b)(2).

¹⁷ NMSA §32A-4-25.1(E)

¹⁸ Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, Sec. 113.

¹⁹ Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183, Sec. 112.

²⁰ NMSA §32A-4-25.2.

²¹ NMSA §32A-4-21(B)(11).

²² NMSA §32A-4-25.3.

- 1) Written information about the child's family history, the whereabouts of any sibling if appropriate and education and health records;
- 2) The child's social security card, certified birth certificate, state-issued identification card, death certificate of a parent and proof of citizenship or residence;
- 3) assistance in obtaining Medicaid; and
- 4) a referral for guardianship or limited guardianship if the child is incapacitated.²³

Special Immigrant Juvenile Status: If a child or youth who is not a U.S. Citizen or permanent resident cannot be reunified with one parent, the child may be eligible for a type of immigration relief call Special Immigrant Juvenile Status. The Court should inquire whether CYFD has investigated this possibility and whether the Court should make findings in the abuse and neglect case to ensure the child's eligibility and to allow the court to retain jurisdiction beyond the youth's 18th birthday if needed to secure SIJS.²⁴

Termination of Parental Rights (TPR)

General.

- TPR is final and divests parents of their rights to the child.²⁵
- Court must weigh the serious nature of termination and the constitutional rights of the parent against the welfare of the child.²⁶
- Parents have a constitutionally protected liberty interest in caring for and raising their children.²⁷

Because of this, the Court must ensure that TPR proceedings are conducted with **scrupulous fairness** and that parents have a fair opportunity to be heard and present a defense.²⁸ This is particularly important for incarcerated parents, and the Court should ensure that incarcerated parents are able to be present in person and that the basis for the TPR is not solely based on incarceration.

Filing a Motion for TPR. A motion for TPR may be filed at any stage of the abuse or neglect proceeding by a party.²⁹

The "15 out of 22" Rule and Compelling Reasons

- Federal law requires states to file a motion for TPR if a child has been in foster care for 15 out of the previous 22 months unless there are compelling reasons not to file.³⁰

²³ *Id.*

²⁴ NMSA §32A-4-23.1.

²⁵ NMSA §32A-4-29(L).

²⁶ NMSA §32A-4-28(A) (in TPR proceedings, "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.")

²⁷ *Stanley v. Illinois*, 405 U.S. 645 (1972); *In re Ruth Anne E.*, 1999-NMCA-035; *State ex. rel. CYFD v. Mafin M.*, 2001-NMSC-015.

²⁸ *Ruth Anne E.*, 1999-NMCA-035; *Mafin M.*, 2001-NMSC-015.

²⁹ NMSA §32A-4-29(A).

³⁰ 45 C.F.R. §1356.21(i)(1)(i)(B) and (C); NMSA §32A-4-29(G).

- The New Mexico statute lists several examples of compelling reasons such as a parent has made substantial progress, the child has a close relationship with the parent, a parent is terminally ill or incarcerated, or the child is not capable of functioning in a family setting.³¹
 - This list is not exhaustive; given the serious nature of termination and the interests of children in maintaining their connections with their biological family, courts should carefully consider whether these or other compelling reasons exist.

Service and Timing of Hearings

- All parties must be served pursuant to Rule 10-104, except that attorneys of record are to be served by certified mail.³²
 - Rule 10-104 only requires service on the attorney, but permits the court to require service on the party. In cases where a parent is absent or the attorney is unable to contact the parent, service on the attorney may not provide adequate notice. Judges should consider whether in certain cases, due process considerations require the Department to attempt to make service directly on a parent.
- If ICWA applies the child's tribe must also be given notice of the Termination of Parental Rights Motion as must any Indian custodian.³³
- The TPR hearing must take place at least thirty days but no more than sixty days after service is effected.³⁴

Grounds for TPR

- The Court *must* terminate parental rights when the child has been:
 - abandoned by his or her parents or
 - determined to be an abused or neglected child and the causes and conditions of the abuse or neglect are unlikely to change in the foreseeable future despite reasonable efforts by the Department or other appropriate agency to assist the parent in adjusting the conditions that made the parent unable to properly care for the child; or
 - placed in the home of others and the child-parent relationship has disintegrated.³⁵
- The Court can base TPR on abandonment pursuant to §32A-4-28(B)(1) *only* when a parent is completely absent prior to the termination. If a parent has been present during the life of the case and expressed an interest in participating, the Court may rely on neglect due to abandonment pursuant to §32A-4-28(B)(2) as a basis of TPR.
 - The Department cannot file a motion for TPR when the sole basis for the TPR is that a parent is incarcerated.³⁶

³¹ NMSA §32A-4-29(G).

³² NMSA §32A-4-29(C).

³³ NMSA §32A-4-29(C); 25 U.S.C. §1912(a).

³⁴ NMSA §32A-4-29(D).

³⁵ NMSA §32A-4-28(B).

³⁶ NMSA §32A-4-28(D).

Burdens of Proof

- Grounds for termination of parental rights must be proven by **clear and convincing evidence**.
- If the child involved is an Indian child and ICWA applies, the **burden is beyond a reasonable doubt** and the court must find that:
 - **active efforts** were made to provide remedial and rehabilitative services and rehabilitative programs designed to prevent breakup of Indian family and such efforts proved unsuccessful, including testimony of qualified expert witness that continued custody by parent or Indian custodian likely to result in serious emotional or physical damage to child.³⁷

Denial of Motion to Terminate Parental Rights

When the Court denies a Motion for Termination of Parental Rights, the Court must immediately issue whatever orders the Court thinks appropriate. The Court must also direct the parties to file a Stipulated Order and Interim Plan or request a hearing within 30 days.³⁸

³⁷ 25 U.S.C. § 1912(f); NMSA §32A-4-29(K).

³⁸ NMSA §32A-4-29(M).