2014

NEW MEXICO CHILD WELFARE HANDBOOK

A LEGAL MANUAL ON CHILD ABUSE AND NEGLECT

CORINNE WOLFE CHILDREN'S LAW CENTER
NEW MEXICO JUDICIAL EDUCATION CENTER
INSTITUTE OF PUBLIC LAW, UNM SCHOOL OF LAW

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INTRODUCTION TO THE HANDBOOK

Acknowledgements

The staff of the Corinne Wolfe Children's Law Center and the New Mexico Judicial Education Center at the University of New Mexico School, of Law, Institute of Public Law, gratefully acknowledge the remarkably generous assistance provided by the many volunteers throughout the state who helped in developing this Handbook.

The Handbook, when originally published in 2000, was ably guided by an exceptionally talented and hard-working planning committee made up of the following members, who also served as writers and reviewers:

- Angela Adams, Chief Children's Court Attorney, Children, Youth & Families Dept.
- Hon. Christina Armijo, New Mexico Court of Appeals
- Patricia Briggs, Project Director, Citizen Review Board
- Hon. Ralph Gallini, Fifth Judicial District
- Toby Grossman, Attorney, American Indian Law Center, Inc.
- Jennifer Davis Hall, Attorney, Albuquerque
- Julie Fallin, Training Director, New Mexico CASA Network
- Edward Schissel, Children's Court Attorney, Children, Youth & Families Dept.
- Hon. Patricio M. Serna, New Mexico Supreme Court
- Susan Simmons, Attorney, Albuquerque

Numerous other individuals have contributed their expertise and time in researching and writing portions of the Handbook or its 2003, 2007, 2011, and 2014 updates, reviewing and editing drafts, and providing help, support, and good cheer along the way. The list is getting long:

- Laura Bassein
- Maryellen Bearzi
- Leigh Brunner
- Hon. Gary Clingman
- Cristen Conley
- Ann Desiderio
- Dr. Elizabeth Dinsmore
- Deborah Dungan
- Tara Ford
- Ellen Genné
- Ann Halter
- Michael Hart
- Hon. Alvin Jones
- Dr. Ken Kenney
- Peter Klages
- Oneida L'Esperance
- Rebecca Liggett
- Gina Maestas
- Don Miller
- Chuck Neelley
- Susan Page
- Mary Ann Shaening
- Roy Stephenson
- Lisa Trabaudo
- Kelly Waterfall

Reviewers, some of whom spent countless hours reviewing text for one or more editions:

- Iris Augusten
- Richard Bustamante
- Jean Conner
- Kari Converse
- Sara Seymour Crecca
- Hon. Cynthia Fry
- Deborah Gray
- Todd Heisey
- Jessica Martin
- Elizabeth McGrath
- Dr. Brian Meyer
- Hon. Peggy Nelson
- Brian O'Connell
- Lisa Olewine
- Dan Pearlman
- Andrea Poole
- Hon. Jerry Ritter
- Hon. John Romero
- Carolyn Waters
- Linda Yen

Cindy Camarata, Diane Garrity, Mark Katzman, Jeff Kauffman, Christine Montano, Nancy Simmons, and Jane Printz, among others, provided their generous assistance during work on the original edition.

Purpose of the Handbook

The purpose of the Handbook is to provide the judiciary and other members of the child welfare community with a comprehensive resource guide to New Mexico's child abuse and neglect process. While designed and written primarily for judges, the Handbook should be helpful to other participants in the legal system.

The Handbook incorporates the applicable requirements of the Children's Code, the Children's Court Rules, court cases, and federal laws. It summarizes the child abuse and neglect process, describes the roles and responsibilities of certain key participants, explains the hearings that may take place in a case, and addresses other relevant topics, such as related proceedings, evidence, psychological considerations, and special provisions for Indian children.

The Handbook is intended to serve as a current, convenient secondary source of law, policy, and practice for child abuse and neglect cases. Do not rely on the Handbook as legal authority; instead, consult primary sources for specific legal language and requirements.

Organization

The Handbook is organized into seven general parts, each divided into chapters addressing the following topics:

Part A: Overview

- Overview of the abuse and neglect process.
- Substantive and procedural rights of parents and children.
- Key concepts involved in the process.

Part B: Roles and Responsibilities

- Roles and responsibilities of such participants as CYFD, attorneys for parents, the child's guardian ad litem, the youth's attorney, child advocates, and foster parents.
- Note that judges, parents, and children are addressed throughout the Handbook and are not the subject of individual chapters in this part.

Part C: Child Abuse and Neglect Proceedings

- Proceedings in order of their occurrence generally, from commencement of a case through appeal.
- Issues such as notification, timelines, standard of proof, required findings, and other substantive and procedural matters.

Part D: Evidentiary and Procedural Issues

- Intervention, discovery and evidence.
- Court orders during a case, case management techniques, and mediation.

Part E: Related Proceedings

- Adoption, kinship guardianship, families in need of court-ordered services, and procedures under mental health and developmental disabilities law.
- Juvenile delinquency and criminal child abuse and neglect.

Part F: Medical, Psychological and Social Issues

- Physical, mental, and emotional condition of parents and children.
- Types and uses of psychological assessments.

Part G: Federal and Tribal Considerations

- Federal laws affecting state proceedings, including the Adoption and Safe Families Act and the Fostering Connections to Success and Increasing Adoptions Act.
- Indian children and the requirements of the Indian Child Welfare Act.

In addition, the Handbook contains appendices which include common acronyms, a glossary of terms used in the Children's Code, and lists of statutes and cases cited in the text.

Style and Format

The Handbook is written in a narrative form, with every effort being made to achieve a balance between readability and accuracy in areas that are complex and governed by detailed statutes, rules, and case law. Abbreviations are kept to a minimum and should be readily recognizable when encountered.

Citations to statutes, rules, and cases use the most concise style possible while still providing adequate reference information. Full citations can be found in the statute and case lists in the appendices. In general, citations in the text use the following style:

- Statutes: New Mexico statutes are cited as §__-__-__, such as §32A-4-1, without "NMSA 1978." Federal laws are cited as __ U.S.C. §___, such as 25 U.S.C. §1901.
- Rules: New Mexico judicial rules are cited as Rule __-___, such as Rule 10-301, without the addition of "NMRA." Administrative rules are cited as __.__.__.__ NMAC, such as 8.10.7.29 NMAC.
- Cases: New Mexico cases since 1997 are cited using the vender neutral citation from the New Mexico Appellate Reports, as well as a citation to the New Mexico Reports, if available. If the New Mexico Reports cite is not available, the Pacific Reporter cite is used. Hence, a case may be cited as 2008-NMSC-002, 143 N.M. 246, or, if the case is older, 119 N.M. 638 (1995). Complete citations can be found in the Table of Cases in Appendix D. The Table of Cases also indicates where the case is cited in the Handbook.

It is important for attorneys to note that the form of citation in this Handbook is for the sake of brevity and formatting and is not necessarily appropriate for formal citations in briefs. Refer to the Supreme Court General Rules, specifically Rule 23-112 NMRA as amended in 2013, for the proper form of citation for pleadings and papers filed with the court.

Availability of Laws and Cases

While the Handbook contains citations to numerous state and federal statutes, rules, and cases, it does not provide their full text. You can find these legal materials in law libraries and through the Internet. Some examples of no-cost electronic sources are listed below.

Statutes and Court Rules and Forms

- New Mexico statutes/court rules/forms: http://www.nmcompcomm.us
- Federal statutes: http://www.gpo.gov/fdsys/search/home.action

Agency Rules

- New Mexico Administrative Code: http://www.nmcpr.state.nm.us/nmac
- Federal regulations: http://www.gpo.gov/fdsys/search/home.action

Cases

- New Mexico appellate cases: http://www.nmcompcomm.us
- Federal cases: http://www.findlaw.com/casecode

Effective Date

The Handbook, originally published in November 2000 and updated in 2003, 2007, 2011, and 2014, is generally current through June 2014. Chapters 35, 36, and 37 are the only chapters that have not been updated in recent years.

As funds and staffing allow, the Handbook will continue to be updated periodically, with the most current version available on the web at http://childlaw.unm.edu/resources/index.php.

Production

The Handbook was produced under the direction of attorneys Judy Flynn-O'Brien and Pam Lambert in 2000 and 2003 and Ms. Flynn-O'Brien and Beth Gillia in 2007, 2011, and 2014, with extensive assistance from attorney Leigh Brunner in 2014. Funding has been provided by the following sources over time:

- State Justice Institute
- Children, Youth and Families Department
- New Mexico Judicial Education Center
- Corinne Wolfe Children's Law Center
- Institute of Public Law
- University of New Mexico School of Law
- New Mexico Administrative Office of the Courts
- Several private foundations.

The New Mexico CASA Network provided the artwork for the cover from its collection of art drawn by children in New Mexico.

Access to the Handbook

The 2014 Handbook is available free of charge on the Children's Law Center website, http://childlaw.unm.edu. Users are also welcome to print out the Handbook for their convenience. For information on the possibility of purchasing hard copies, please contact the Children's Law Center at the address below.

Permission to Reproduce

For information on the permission and acknowledgements necessary for reproducing portions of the Handbook, please contact the Children's Law Center at the address in the next section.

Contact

For further information on the Handbook, or to report errors or suggestions for future updates, please contact:

Beth Gillia, Director
Ph: 505-277-0710
Email: bgillia@unm.edu

Tracey Kincaid, Program Coordinator
Ph: 505-277-9170
Email: tkincaid@unm.edu

Corinne Wolfe Children's Law Center
School of Law, Institute of Public Law
MSC11 6060, 1 University of New Mexico
Albuquerque, NM 87131-0001

HIGHLIGHTS OF THE 2014 UPDATE

While the Legislature has made few changes to the Children's Code since the New Mexico Child Welfare Handbook was last updated in August 2011, the New Mexico Supreme Court has approved a number of changes to the Children's Court rules for abuse and neglect cases. The Court has also amended the Rules of Appellate Procedure in certain respects and revised the Rules of Evidence to conform to the restyled federal rules. The U.S. Supreme Court has issued its first decision on the Indian Child Welfare Act (ICWA) in over 20 years, while the New Mexico Supreme Court has issued opinions relating to children under various state laws. The Court of Appeals has published several opinions on appeals from adjudications and terminations of parental rights as well as other matters relating to child welfare.

Statutory Changes

The 2012 Legislature amended the Adoption Act to prohibit unauthorized adoption services and limit the advertising of adoption services. The law also requires prospective adoptive parents to file a full and specific accounting of their costs and expenses before the court will approve a consent to adoption or relinquishment. However, this only applies to adoptions under the Abuse and Neglect Act when ordered by the court. *See* S.B. 27, 50th Leg., 2nd Sess. (N.M. 2012).

The 2013 Legislature amended the Safe Haven for Infants Act to expand the facilities that can provide a safe haven. Besides hospitals, law enforcement agencies and fire stations that have staff on site when the infant arrives are considered safe haven sites. *See* H.B. 674, 51th Leg., 1st Sess. (N.M. 2013).

The 2014 Legislature amended the Abuse and Neglect Act to allow for immediate appeals from orders granting legal custody to or withholding legal custody from one or more of the parties in an abuse or neglect case under §32A-4-18. *See* S.B. 183, 51th Leg., 2nd Sess. (N.M. 2014).

The 2014 Legislature passed a bill that waives tuition and fees for former foster youth attending state post-secondary educational institutions. Youth up to age 25 who have been in the custody of CYFD or tribal social services because of abuse or neglect are eligible for this waiver. *See* S.B. 206, 51st Leg., 2nd Sess. (N.M. 2014).

Rule Changes

Rule 10-111 of the Children's Court Rules was amended to require that opposed **motions** be accompanied by a request for hearing and that all pre-adjudicatory motions be filed 25 days before the adjudicatory hearing, except by leave of court.

Rule 10-162 on **peremptory challenges** now requires that the children's court attorney file a peremptory election to excuse the judge within two days of filing the petition. Other parties continue to have more time to file an election.

Rule 10-167 on **interpreters** was added. The new rule, which is similar but not identical to rules adopted for other types of cases, outlines the standards and procedures for the use of interpreters in the courtroom.

Rule 10-315 was amended and Rule 12-206A was promulgated to implement the amendments to §32A-4-18 permitting immediate appeals of orders granting or withholding custody at the custody hearing. The new rules set forth expedited procedures for **appealing custody orders**.

Rule 10-341 on **witness immunity** was amended to allow any party to an abuse or neglect case, not just the state, to request use immunity for a person who may be called to testify or produce records, documents, or objects.

Rule 10-342 on admissions in an abuse or neglect proceeding was amended to make it clear that a **no contest plea** is treated as an admission for purposes of the case (but not for any other civil or criminal case). Where there is a no contest plea, the court must satisfy itself that there is a factual basis for the plea without questioning the respondent.

Rule 10-352 was amended to require that **appeals** be signed by the respondent parent taking the appeal as well as by counsel, unless counsel certifies that the appeal is not frivolous or that the respondent contested the proceedings and expressed an intention to appeal but that counsel has not been able to locate the respondent for signature.

The **Rules of Evidence** have been rewritten to be consistent with the federal rules, which were revised as a matter of style in late 2011. Most of the changes, like the changes to the federal rules, are intended to be stylistic only.

Rule 12-303 was amended to require **trial counsel** to seek an order from the Court of Appeals appointing appellate counsel unless trial counsel intends to continue representation or appellate counsel has already been retained.

Changes to a number of other Children's Court Rules are under consideration. For example, amendments to Rule 10-104 on service and filing of pleadings have been proposed that would make special provisions for the filing and service of documents by an inmate.

The Supreme Court is also considering a proposal to update a number of the **abuse and neglect forms**, add a number of new forms, and move them all into a Part 5 of the Rules and Forms. New proposed forms include a form of notice to be used in ICWA cases. Decisions on these proposals are expected at the end of 2014.

Case Law

Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013). This case involves a child who is 1.2% Cherokee and whose unmarried parents broke up before she was born. The father, who is a member of the Cherokee Nation, sought custody as soon as he received notice that the mother was putting the child up for adoption. Under South Carolina law, the father's consent

would not have been required but the state Supreme Court held that ICWA applied and that the adoptive parents had not met the standards set forth in §1912(d) and §1912(f) of the Act.

The U.S. Supreme Court, in a sharply divided 5-4 decision, held that 25 U.S.C. §1912(f) – which bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child – does not apply when the Indian parent never had custody of the child. Similarly, §1912(d) – which conditions involuntary termination on a showing that active efforts have been made to provide remedial services to prevent the breakup of the Indian family – does not apply when the child has never been in the Indian parent's legal or physical custody. "[T]he 'breakup of the Indian family' has long since occurred." The Court also held that the placement preferences in §1915(a) did not apply because no one besides the Adoptive Couple sought to adopt the child. The Indian father was not covered by this section of ICWA because he was not seeking to adopt the child. Rather, he was seeking custody as the biological father of the child.

Chatterjee v. King, 2012-NMSC-019. This case regards the standing of a same sex partner to pursue joint custody. The New Mexico Supreme Court used the rules of statutory construction to decide that a lesbian partner who was not the biological mother could be a "natural mother" under the Uniform Parentage Act. The Court then stated:

> In our view, it is against public policy to deny parental rights and responsibilities based solely on the sex of either or both of the parents. The better view is to recognize that the child's best interests are served when intending parents physically, emotionally, and financially support the child from the time the child comes into their lives. This is especially true when both parents are able and willing to care for the child.

¶37. The Court concluded that Chatterjee had standing to bring an action to establish a parent and child relationship under the UPA because she had alleged sufficient facts to establish that she is a presumed natural parent. Assuming her allegations are true, she would then have standing to seek joint custody as a natural parent.

Diamond v. Diamond, 2012-NMSC-022. In *Diamond*, the New Mexico Supreme Court held that the Emancipation of Minors Act authorizes the court to declare a minor emancipated for some but not all of the enumerated purposes in §32A-21-5 of the Act. The Court stated that the Act's directive that emancipation may be declared for "one or more purposes" expressly authorizes partial emancipation. In this case, the district court had ruled that emancipation does not necessarily cut off a minor's right to child support. The Supreme Court upheld the district court's order that Daughter was "an emancipated minor in all respects except that she shall retain the right to support" from her mother.

Freedom C. v. Brian D., In the Matter of Patrick D., 2012-NMSC-017. The Supreme Court addressed certain issues under the Kinship Guardianship Act, in particular the extent to which both parents must meet the prerequisites of §40-10B-8(B) before guardianship can be granted, in this case to the grandparents. The Court looked first to the policies and purpose

of the Act and interpreted the Act "to require courts to protect and facilitate relationships between a child and kinship caregivers when neither of the child's parents are able and/or willing to care for the child." ¶15. The Court held that both parents must meet at least one of the three conditions of §40-10B-8(B) but they do not have to meet the same condition. For example, if an award of guardianship were based on §40-10B-8(B)(1) (parental consent), the consent of both parents would not be required so long as each parent met one of the conditions in the statute.

In this case, the Court concluded that §40-10B-8(B)(3) was satisfied. The child had not resided with Father for 90 days or more, which satisfied the first part of (B)(3). As for Father's argument that (B)(3) could not be satisfied because neither parent had legal custody (custody having been given to the grandparents in a custody case), the Court wrote that "Father's rigid textual interpretation improperly ignores the 'extraordinary circumstances' language also found in Section 40-10B-8(B)(3), which we read as a fail safe to allow courts to ensure that the Act is applied in a manner that adheres to the spirit of the Act." ¶29. The Court also held that the fact that the mother continues to live in the same house as the kinship guardians does not preclude application of the KGA.

In the Matter of Grace H., State ex rel. CYFD v. Maurice H., 2014-NMSC-___ (No. 34,126, June 12, 2014). The Supreme Court, in a 4-1 decision, reversed a termination of parental rights that was based on abandonment under §32A-4-28(B)(1), which does not require that CYFD work with the parent on a treatment plan. If the grounds for termination had been neglect due to abandonment under §32A-4-28(B)(2), CYFD would have been required to show that it had engaged in reasonable efforts to assist the parent in adjusting the conditions which render the parent unable to properly care for the child. However, both grounds for termination rely on the same definition of abandonment and the Supreme Court agreed that there is some ambiguity in the statute: The Court concluded that §32A-4-28(B)(1) should be used when the parent is completely absent prior to termination, that is, where there is no parent with whom the department can work toward reunification. Section 32A-4-28(B)(2) should be used when a parent is present and willing to participate prior to termination. In this case, where the father was present prior to termination and expressed the desire and ability to take responsibility for the child, any termination proceeding should have been under §32A-4-28(B)(2), which would have given him the opportunity for assessment and treatment.

Kimbrell v. Kimbrell, 2014-NMSC-___ (No. 34,150, June 23, 2014). This case involves a guardian ad litem (GAL) who had been appointed under §40-4-8 and Rule 1-053.3 to represent the children in a custody dispute and who was later sued by the father. The Court held that GALs appointed under Rule 1-053.3, which provides that a GAL "serves as an arm of the court and assists the court in discharging its duty to adjudicate the child's best interests," are entitled to absolute quasi-judicial immunity from suit arising out of performance of their duties. The only exception is where the alleged tortious conduct is completely outside the scope of the GAL's appointment, a determination to be made by the appointing court. The Court further held that a parent does not have standing to sue a GAL for tortious conduct on behalf of a child. If the custody court determines that the alleged tortious conduct is completely outside the scope of the GAL's appointment, then under Rule

1-017(C) the court should appoint a GAL other than a parent to represent the child in any necessary litigation.

Whether the outcome would be the same in an abuse and neglect case under the Children's Code is not certain, as the role of a GAL in such a case is dictated by different statutes, rules, and orders than those cited in *Kimbrell*.

Aeda v. Aeda, 2013-NMCA-095. The Court of Appeals was asked to decide whether termination of parental rights ended a parent's obligation to make child support payments imposed in a divorce decree. The Court held that "the fundamental and terrible act of severing the parent-child relationship cuts off all connection between them except as specifically excepted by the Legislature." ¶38. It concluded that the termination of parental rights statute in effect at the time the mother filed the termination of parental rights (TPR) action against the father, which was in March 1993, severed the parent-child relationship completely, including the support obligation.

State ex rel. CYFD v. Carl C., 2012-NMCA-065. In this appeal from an adjudication of abuse or neglect, the Court of Appeals held that evidence that either the mother *or* the father perpetrated the abuse was sufficient for a court to conclude that action or inaction of the child's parent, guardian, or custodian caused the abuse. Before entering its findings, the district court had noted that it had "no problem" finding by clear and convincing evidence that Mother or Father caused the injuries but it could not determine which parent specifically was the perpetrator. After reviewing the history of §32A-4-3(B)(1) and associated case law, the court concluded that it was not necessary to specifically find which parent caused the abuse in order to adjudicate the children as abused.

Chris L. v. Vanessa O., In the Matter of Natalia O., 2013-NMCA-107. In this adoption case, the Court of Appeals ruled that the district court's failure to advise Mother of the right to counsel before terminating parental rights and entering a final adoption decree in favor of Petitioners was fundamental error. Even though under the Adoption Act counsel is appointed for indigent parents "upon request," the court must first advise the parent that he or she is entitled to counsel if indigency can be established.

State ex rel. CYFD v. Christopher B., 2014-NMCA-016 (filed 2013). In a case with issues somewhat similar to those in *Grace H.*, Father argued that a judgment terminating his parental rights to his two children on the grounds of abandonment violated his due process rights, as the court failed to give him notice and an opportunity to participate in two permanency hearings that preceded the TPR hearing. The Court of Appeals held that Father suffered no due process violation because his participation in the permanency hearings could not have reasonably changed the court's unchallenged findings of abandonment. The case was not discussed by the Supreme Court in *Grace H*.

State ex rel. CYFD v. Djamila, 2014-NMCA-045, *cert. granted*, 2014-NMCERT-004. In a 2-1 decision, the Court of Appeals held that a guardian appointed under the Kinship Guardianship Act who was a party to the abuse and neglect proceeding could not be dismissed involuntarily before a hearing on termination of parental rights, even though the

guardian was not a parent. The appellate court held that the guardian was a necessary party until the guardianship was revoked under the Act.

State ex rel. CYFD v. Laura J., 2013-NMCA-057 (filed 2012). While affirming termination of Mother's parental rights, the Court of Appeals held that the child's cousin, who had intervened in the children's court, had standing to appeal. This cousin had sought to be considered for placement purposes. The Court of Appeals held that CYFD did not make reasonable efforts to locate relatives for placement, as required by §32A-4-25.1(D), and remanded so that CYFD could consider whether the cousin might serve as an appropriate placement for the child.

State ex rel. CYFD v. Marsalee P., 2013-NMCA-062. Mother appealed a termination of parental rights on the grounds that the district court failed to apply the protections of ICWA. The Court of Appeals held that ICWA did not apply because the mother and children were not enrolled in the Navajo Nation, although they were eligible to be enrolled. The court pointed out that there is a difference between being a member of an Indian tribe and being eligible for membership. ICWA only applies if the child is a member of a tribe or the child of a member of a tribe.

The Court of Appeals was concerned, however, that CYFD had not met its obligation under §32A-4-22(I) of the New Mexico Children's Code to pursue enrollment on behalf of the children in the case. The court reversed the judgment terminating the mother's parental rights because the department had not fulfilled its obligation under the statute. "We hold that the district court erred by terminating Mother's parental rights before it ensured that the Department fully complied with Section 32A-4-22(I). The district court has an affirmative obligation to make sure that the requirements of the Abuse and Neglect Act are followed prior to the termination of something as fundamental as the parental rights to a child." ¶25.

State ex rel. CYFD v. Raquel M., 2013-NMCA-061. Mother appealed the termination of her parental rights, arguing that the district court's finding of aggravated circumstances, which relieved CYFD of its obligation to make further reasonable efforts, violated her right to due process. The finding of aggravated circumstances was based on the fact that Mother's parental rights to Child's sibling had been terminated, even though an appeal was pending on the termination. The Court of Appeals, in a 2-1 decision, upheld the termination.

The Court of Appeals first held that Mother was not denied due process, noting that she was free, on her own behalf, to engage in efforts toward reunification, yet she failed to do so. The court's view that the risk of an erroneous deprivation was minimal was "fortified by the fact that this Court affirmed the termination of Mother's parental rights to [the sibling] four months after the termination of Mother's parental rights to Child." ¶25. The Court of Appeals also disagreed with Mother's argument that the aggravated circumstances finding was contrary to legislative intent. The primary consideration of the Children's Code is the best interest of the child and children's interests are served by timely and permanent placement. The court was not persuaded that the Legislature would choose to limit the district court's discretion with a mandate requiring the court to delay a finding of aggravated circumstances until an appeal was resolved.

State ex rel. CYFD v. Steve C., 2012-NMCA-045. The petition filed by CYFD under the Abuse and Neglect Act had alleged neglect. At the close of the adjudicatory hearing, CYFD asserted that there was sufficient evidence presented to support a finding of abuse. The court considered this to be a motion to conform to the evidence, granted the motion and, without further hearing, found that Father had neglected and abused the children. The Court of Appeals concluded that the court erred in not following §32A-1-18(A), which requires the court to hear the additional issues, and that it was a violation of due process for Father to be denied the opportunity to present a defense on the new charge.

Other Developments

The New Mexico Tribal-State Judicial Consortium has developed a judicial bench card for use in ICWA cases. The bench card, together with other information on ICWA, including the Act, the regulations, and the guidelines, can be found at: https://tribalstate.nmcourts.gov/index.php/indian-child-welfare-act/laws-and-rules.html.

The Joint Education Task Force, established by the New Supreme Court and co-chaired by Justice Petra Jimenez Maes and Governor Susana Martinez, has approved a bench card on education for children in state custody. This bench card can be found at pages 57 and 58 of the Task Force Report and Recommendations, approved by the Supreme Court on April 2, 2014: http://www.nmcourts.gov/CourtImprovement/files/JETFfinal.pdf.

The Association of Family and Conciliation Courts (AFCC) has adopted and approved the Child Protection Mediation Guidelines, which have since been endorsed by the National Council of Juvenile and Family Court Judges. These Guidelines can be found at: http://www.afccnet.org/ResourceCenter/PracticeGuidelinesandStandards.

The New Mexico Child Protection Best Practice Bulletins have been updated and are available on-line at http://www.nmcourts.gov/CourtImprovement/best/index.php. These bulletins identify issues critical to the safety, permanency, and well-being of children in the child welfare system and describe the roles of the court, attorneys, agency workers, and volunteer advocates in addressing them.

Three chapters of the Handbook have not been reviewed or considered for revision in the course of the 2014 update. Chapters 35, 36, and 37 on the physical, mental, and emotional condition of children and parents and on psychological assessments are slated for review in 2015.

The BIA Guidelines for ICWA cases are no longer included in full since they are readily available in the ICWA section of the website for the Tribal-State Judicial Consortium, https://tribalstate.nmcourts.gov.

The New Mexico Child Protection Best Practice Bulletins, which were included in the 2007 Handbook, are no longer included because they too are available on-line, as noted above.

We regret if we have missed any developments that should be reported in the Handbook, and we urge our readers to bring these matters to our attention. As always, of course, we welcome any comments, suggestions, or corrections that will improve the book as a resource for judges and participants in abuse and neglect cases. Contact information is provided in the Introduction to the Handbook.

The Editors

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CHAPTER 1

OVERVIEW OF THE ABUSE AND NEGLECT LEGAL SYSTEM

This chapter provides an overview of:

- The Children's Code.
- Children's Court.
- Stages and proceedings in an abuse or neglect case.
- Required timeline in an abuse or neglect case.

1.1 The Children's Code

The state, in its role as *parens patriae* (protector of vulnerable individuals), has a compelling interest in the welfare of children, particularly when their health and safety may be in jeopardy. This interest is of such significance that it can justify government intrusion into the constitutionally protected autonomy of the family.

The Children's Code is the result of the Legislature's effort to balance the interests of the state and families. The primary purpose of the Code is the protection of the safety and welfare of children. The law creates a range of possible state actions when abuse or neglect is suspected or confirmed, from emergency intervention to permanent placement of the child outside the home.

As part of the Children's Code, the Abuse and Neglect Act authorizes the state to act in these cases through the Children, Youth and Families Department (CYFD). CYFD's decision-making is based on a consensus model involving case workers and children's court attorneys, all of whom are trained and practice exclusively in the area of child protective services. The children's court also plays an essential role, making critical decisions at important junctures in the case. It is the court, for example, that determines whether CYFD will have custody of the child, whether the child is an abused or neglected child, and what the permanency plan for the child will be.

Representing the parties before the court are the attorneys: the children's court attorney for CYFD, the youth attorney for children age 14 and older, the guardian ad litem for children under age 14, and the respondent's attorney for parents. The Children's Code also provides for oversight by citizen review boards (CRB) and the assistance of volunteers through the

Court Appointed Special Advocate (CASA) program. Extended family members and substitute caregivers also may contribute both in and out of the courtroom.

The first goal of every proceeding under the Act is to protect the child's health and safety, then to preserve the unity of the family. This involves a comprehensive assessment of family strengths and needs, not in the abstract or according to a prescriptive set of values, but in light of the individual requirements and relationships of the particular child. If temporary removal from the home is necessary, CYFD attempts to place the child in the most familiar setting possible, in physical proximity to relatives and respectful of the child's cultural connections. Siblings should stay together whenever possible, unless there are clinical indications to the contrary. For an Indian child, special procedures require consultation with the child's tribe and the application of placement preferences under the federal Indian Child Welfare Act (ICWA).

Visitation between children and their parents helps to encourage positive participation and maintain healthy relationships, while providing vital information on the child's attachment to the parents and their parenting skills. When family reunification fails, or is not expected to safely succeed, immediate measures must be taken to secure an alternative, permanent placement for the child. This is followed by legal action to modify or replace the parent-child relationship.

1.2 Children's Court

The Children's Code establishes the children's court as a division of the district court, with subject-matter jurisdiction over proceedings arising under the Code in which a child is alleged to be abused or neglected. Jurisdiction over the parent, guardian or custodian of the child is based on the child's presence in the state or an allegation that the abuse or neglect occurred here.

The children's court has broad discretion under the Code, the applicable court rules, and its inherent equitable power to receive information and fashion remedies consistent with the best interest of the child. From beginning to end, every decision of the children's court judge is attended with the due process protections of notice and the opportunity to be heard.

1.3 Anatomy of an Abuse or Neglect Case

1.3.1 Reports and Investigation

Every person is required by law to report suspected abuse or neglect, but only some of these reports reveal circumstances serious enough to result in a court proceeding. In an emergency situation, law enforcement personnel can take a child into custody, while medical personnel can hold a child until law enforcement can take custody. These are the only two professions

with authority to take emergency action.

CYFD's Statewide Central Intake (SCI) evaluates reports and assigns a priority for investigation, while also contacting law enforcement if that has not already been done. Specially trained case workers investigate every report, following established criteria to determine which situations are the most urgent and what needs to be done to assess the risk to the child.

If the report is substantiated or if the child has already been taken into protective custody by law enforcement, the next question is whether there is a way to lower the risk without having to remove the child from the caretaker. State and federal law and best practices require that reasonable efforts be made to prevent removal of the child from the home. CYFD identifies what reasonable efforts could be made to prevent the removal of the child from the home, giving consideration to the health and safety of the child. These efforts could involve the offer of services such as available community services or in home services to assist the parent to care for the child within the home or family unit. Noncustodial parents or other extended family members might be able to provide temporary care while the dangerous or neglectful condition is corrected.

Legal intervention begins only when less intrusive alternatives have been exhausted or when the risk of serious harm is unacceptably great. When the child's situation indicates that informal measures are insufficient to assure safety, or that the parent is unable or unwilling to provide an appropriate level of care, CYFD will request appropriate relief from the court to assure the child's safety and health.

1.3.2 Petition

A case begins with the filing of a petition by CYFD alleging abuse or neglect. If the case worker and supervisor responsible for the investigation of a report decide that CYFD should seek legal custody of the child, they turn to the children's court attorney. The children's court attorney must endorse upon the petition that the filing of the petition is in the best interest of the child. If the child is already in CYFD's emergency custody, the petition and a motion for an *ex parte* custody order must be filed within two working days. CYFD also may file a motion for an *ex parte* custody order if it believes the child's welfare demands it, even if the child is not already in custody.

The district court clerk assigns a docket number and a judge to hear the case. CYFD, the petitioner, must serve the summons personally upon the respondent, along with notice of the hearing and other pertinent papers. In every case, the children's court appoints counsel to represent the respondent and either counsel or an attorney-guardian ad litem (GAL) to represent the child, depending on the child's age. If the court issues an *ex parte* custody order, it will schedule a custody hearing within 10 days, although the timeline is somewhat different in the case of an Indian child.

Once a petition has been filed, the following themes underlie all subsequent actions:

- Timeliness. As the Children's Code has evolved and the federal Adoption and Safe Families Act (ASFA) has been implemented, the timeframes within which important decisions must be made have consistently shortened. This sense of urgency reflects the reality that time is not static to a child. A child separated from his or her family deserves the speediest of resolutions. Foster care is a stopgap measure, never a solution.
- Continuity. An abuse or neglect case is a single entity, from the custody hearing to the adjudication to the permanency hearings and final placement. Although these proceedings are separated into discrete events, each relates to and builds upon its predecessors. The Code recommends that, to maintain continuity, a single judge should hear all of the proceedings involving the child or family whenever possible.
- Remediation. The purpose of the legal action is not punitive but remedial. These cases are unique in that the focus is not on awarding damages or other compensatory relief. Nor is it on conviction and sentencing, even though many of the due process protections from the criminal law arena have been extended by analogy. Rather, although there must be a determination that the child has been abused or neglected at some point, the goal is to arrive at a plan that will provide permanent protection for the child. The emphasis is on cooperation and rehabilitation instead of conflict.
- Permanency. Every child has a right to a family and every effort towards permanency should have this fundamental proposition as its basis. This includes the child's relationships with siblings, relatives, and other significant adults as well as tribal or other cultural connections. Throughout the case, the primary emphasis should always remain on meeting the needs of the child. At every stage in the proceedings the court addresses the reasonableness of efforts made either to reunite the family or to implement a permanent alternative placement for the child.

By the time the petition is filed, CYFD also knows or is working to determine whether the child is an Indian child. If the child is an Indian child, notice is being given to the child's tribe to inform the tribe of the proceeding and its right to intervene. ICWA and the Children's Code together set the framework for cases involving Indian children, a framework that respects tribal sovereignty and the importance of preserving cultural connections.

1.3.3 Custody Hearing

At the custody hearing, the respondents are advised of their legal rights. At this stage the child's need for protection predominates, but no binding determination or remedy can be ordered other than removal of the child from the dangerous condition. Formal rules of evidence do not apply.

Upon the conclusion of the hearing, the court must return the child to the respondent unless it finds probable cause to believe that the child would not receive safe or adequate care. If the court finds such probable cause, it may award legal custody to CYFD or it may return legal custody to the respondent on such conditions as will reasonably ensure the child's safety, including protective supervision by CYFD. If custody is vested in CYFD, it has discretion to

decide whether the child needs to be in substitute care outside the home or whether he or she can remain in the home and if so, under what conditions. Often the court orders additional evaluation or assessment of the respondent, the child, or both.

Most often, the ultimate objective is for the child to return home safely. The CYFD permanency planning worker conducts a psychosocial assessment of family functioning, then develops a treatment plan to address the reasons the child came into custody and the changes the parent, guardian, or custodian needs to make to correct the condition.

1.3.4 Adjudicatory Hearing

The court must commence the adjudicatory hearing within 60 days of service of the petition. This is a trial on the merits at which CYFD must prove by clear and convincing evidence that the child is abused or neglected, as defined by statute. Allegations of aggravated circumstances, if any, should be proved similarly at this time. In practice, many trials are avoided as a result of the mandatory pre-adjudicatory meeting, where the respondent may decide to enter admissions either directly or in the form of a plea of no contest.

It is important that the adjudicatory hearing be timely commenced. While extensions of the time limit to commence may be sought when necessary, every effort is made to commence the hearing within the 60 days.

If the court does not find that the evidence at trial is clear and convincing, the child must be returned to the custody of the respondent and the case dismissed. Otherwise, a finding of abuse or neglect results in a final, appealable order and establishes the factual basis for everything that follows. The court's specific findings as to the causes and conditions of the abuse or neglect become the law of the case. If new factual allegations arise, CYFD must file an amended petition to bring them to the attention of the parties and the court.

If the child is an Indian child, CYFD will have to demonstrate at adjudication that *active* efforts have been made to provide services designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful. The agency must also prove that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Under ICWA, this must be proven by clear and convincing evidence that includes the testimony of qualified expert witnesses.

1.3.5 Dispositional Hearing

If the adjudication results in a finding of abuse or neglect, the court retains jurisdiction to award custody of the child and to order the implementation of a treatment plan to mitigate and correct the conditions and causes of the abuse or neglect. These matters are addressed at the dispositional hearing, which may be held in conjunction with the adjudicatory hearing or within 30 days thereafter.

At the dispositional hearing the formal rules of evidence are suspended, primarily to allow the court to consider the results and reports of previous evaluations and assessments. The permanency planning worker will have conducted a detailed study of family needs and strengths, including the impact of the case on the child. Based on this analysis, the CYFD team will propose a treatment plan, often with input from the other parties and designed first to meet the needs of the child, second to assist the family, and finally to facilitate the child's return to a safe environment as expeditiously as possible. The court may order that plan or modify it.

Among the possible dispositions the court may make at this hearing are to:

- return the child to the parent, with or without protective supervision by CYFD;
- transfer custody of the child to the non-custodial parent; or
- place or continue the child's placement in the legal custody of CYFD.

If the child is an Indian child, the disposition should comply with the placement preferences set forth in ICWA and maintain the child's cultural ties. If the child would be an Indian child if enrolled in the tribe, CYFD should be working to pursue enrollment on the child's behalf.

When the child is placed outside the home, the court may order the respondent to contribute to the child's financial support.

If the court decides that reasonable efforts to reunify the family are not required because of aggravated circumstances or because reunification efforts would be futile, it must schedule a permanency hearing within 30 days. Otherwise, an initial judicial review hearing will be held within 60 days.

1.3.6 Judicial Reviews

The initial judicial review hearing must be held within 60 days of the disposition. When the goal is family reunification, this hearing is held to oversee the treatment plan. The court and the parties can examine the implementation of the treatment plan, identify any impediments, and adjust the plan as necessary. The hearing also serves as an important reminder that the goals of the treatment plan must be achieved within six months or else the permanency plan may change. Finally, the hearing provides an opportunity for the court, the parties, the CASA volunteer, and the citizen review board to address the child's adjustment to placement along with any other matters that have arisen since the inception of the case. It is important to remember that the child's voice needs to be heard here, whether in person or through the child's GAL or attorney. The formal rules of evidence do not apply at this hearing.

In the vast majority of cases, the treatment plan is congruent with a permanency plan of maintaining the child at home or returning the child to the home. In the most severe or intractable situations, however, the court may find that aggravated circumstances exist and may order that no further efforts toward reunification need to be attempted. In those instances, the court must set a permanency hearing within 30 day of that determination.

Otherwise, the permanency hearing must be held within six months of the initial judicial review or within 12 months of the child entering foster care, whichever occurs earlier.

Judicial reviews will continue to be held every six months during the life of the case. These periodic reviews are often combined with permanency hearings. For older youth close to aging out, these reviews are also opportunities for the court to adopt a transition plan for the youth and to ensure that CYFD is taking certain steps to prepare the young person to leave foster care.

1.3.7 Permanency Hearings

Returning the child home is the plan in most cases. This means that within six months from the judicial review hearing, or within 12 months of the child entering foster care, whichever date comes first, the court must hold a permanency hearing to determine whether reunification remains viable. Prior to the permanency hearing, the parties are required to attend a pre-permanency hearing conference. If the plan for returning the child to the home does not appear to be viable, the parties may explore alternative placement arrangements that could provide for the long term needs of the child while preserving family relationships.

At the permanency hearing, all of the parties have the opportunity to present evidence and to cross-examine witnesses, although the formal rules of evidence do not apply. Again, it is important that the court hear the child's view. At the end of the hearing, the court will order one of the following permanency plans for the child:

- reunification;
- placement for adoption after relinquishment or termination of the parent's rights;
- placement with a person who will be the child's permanent guardian;
- placement in CYFD's legal custody with the child placed in the home of a fit and willing relative; or
- if none of these options are appropriate, placement of the child in CYFD's legal custody under a planned permanent living arrangement.

If the court adopts a plan of reunification, it will also adopt a plan for transitioning the child home and schedule a permanency review hearing within three months. If the child is returned home before the hearing, the hearing will be vacated. If the child has not returned home yet, then the court will take evidence and decide whether it should change the child's plan, return the child to the custody of the parent, guardian, or custodian and dismiss the case, or return the child subject to conditions imposed by the court, including protective supervision and continuation of the treatment plan.

Important: The court must conduct a permanency hearing and adopt a permanency plan within 12 months of the child entering foster care. A child is considered to have entered foster care on either 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. Hearings will be held to approve a permanency plan for the child at

least once every 12 months while the child is in CYFD's legal custody.

If the court adopts a permanency plan other than reunification, the court will also determine whether CYFD has made reasonable efforts to identify and locate all relatives and to conduct home studies on any appropriate relative who has expressed interest in providing permanency for the child. If reasonable efforts have not been made, the court will schedule a permanency review within 60 days to revisit the matter.

1.3.8 Permanent Guardianship

There are a number of cases where the respondent is unable to provide for the child's safety and welfare, even after the offer of services and efforts to assist. Yet the parent-child or other family relationships may still have value and adoption may be unlikely or undesirable under the circumstances. In these cases the special status of permanent guardianship is a possibility for children who have been adjudicated as abused or neglected.

A judgment of permanent guardianship transfers legal responsibility and legal authority for the child to a third party who has offered to become the child's guardian. This person is almost always a relative and ideally one with whom the child is already familiar. Something of a misnomer, this form of guardianship is not necessarily perpetual. It assures that the child will have a consistent adult decisionmaker, but it does not sever the parent's interests irrevocably. The court retains jurisdiction to dissolve or modify the guardianship upon a showing of changed circumstances by the parent, the guardian, or CYFD.

1.3.9 Termination of Parental Rights; Adoption

For many children in the state's custody, adoption represents the best hope for a permanent family. To free these children for adoption, the state first must terminate the legal rights of any and all persons who have a constitutionally or statutorily protected interest in the custody of the child, even those who may never have been present as parents. Situations also exist in which termination of parental rights is warranted and necessary even if adoption is not going to occur.

Because of the fundamental nature of parental rights, the court must be careful to accord due process to the parties whose rights may be terminated. Notice and meaningful opportunity to be heard are guaranteed, as are the rights to counsel and to appeal.

Each of the elements of one of the three statutory grounds for termination of parental rights must be supported by clear and convincing evidence. The grounds for termination are:

- abandonment;
- abuse or neglect that cannot be cured in the foreseeable future despite the reasonable efforts of CYFD or other agencies (especially where the parent has inflicted serious harm on the child, another child, or a family member); or

- certain situations in which the parent-child relationship has disintegrated and a psychological parent-child relationship with a substitute caregiver has developed.

When the child is an Indian child, ICWA requires evidence beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and expert testimony is required.

In many instances, especially where there is a possibility of an "open adoption," the parent may consent to a voluntary relinquishment of parental rights, although a relinquishment to CYFD cannot be conditioned upon an open adoption. Relinquishment requires counseling and judicial verification that the relinquishment is knowing and voluntary. In cases involving Indian children, ICWA imposes additional requirements.

Timeliness is always important, even when the child is already in a home identified as "pre-adoptive." Until the adoption decree is final, the child and its new family lack security. All legal proceedings to this end should be handled as promptly as possible, consistent with the due process interests of all the parties.

1.3.10 Appellate Proceedings

Under the Children's Code, any party may appeal a judgment of the court. This includes an appeal of a judgment adjudicating a child to be abused or neglected, as well as a judgment terminating parental rights. Under an amendment to the Code in 2014, a party may also appeal an order entered at the custody hearing. An appeal does not stay the judgment or order appealed from, although the court may order a stay under certain conditions. While an appeal is pending, the children's court has jurisdiction to take further action in the case.

The Code specifies that an appeal be heard at the earliest practicable time. The Supreme Court and the Court of Appeals have developed procedures to expedite these appeals to the maximum extent possible consistent with the due process rights of the parties.

1.4 Timeline

In 1997, 2001, 2003, and 2005, the Legislature enacted significant changes to the Children's Code that accelerated the schedule of events in abuse and neglect cases. This acceleration was intended to reduce the time that children are subject to the uncertainties of the legal system and the instability of substitute care.

In 1997, the time for commencing the adjudicatory hearing was shortened from 90 to 60 days. For children who return home at this stage, the benefit of the shortened time period is obvious. In many other cases, implementation of a treatment plan cannot be ordered until after adjudication, especially if the respondent contests the petition. While some lapse of time is inevitable, the sooner treatment begins, the sooner it can succeed. Another reason for prompt action is that respondents often are most motivated to regain custody of their children immediately, but delay may dull or divert that desire.

The Legislature also accelerated the permanency planning process so that children would not "stay in the system" indefinitely with no true plan of permanency. The timeline for permanency planning was shortened first in 1997 and again in 2005. Now the court must conduct a permanency hearing and adopt a permanency plan for the child within 12 months after the child entered foster care. If the permanency plan is reunification, the court must also adopt a plan for transitioning the child back to home and schedule a review hearing within three months.

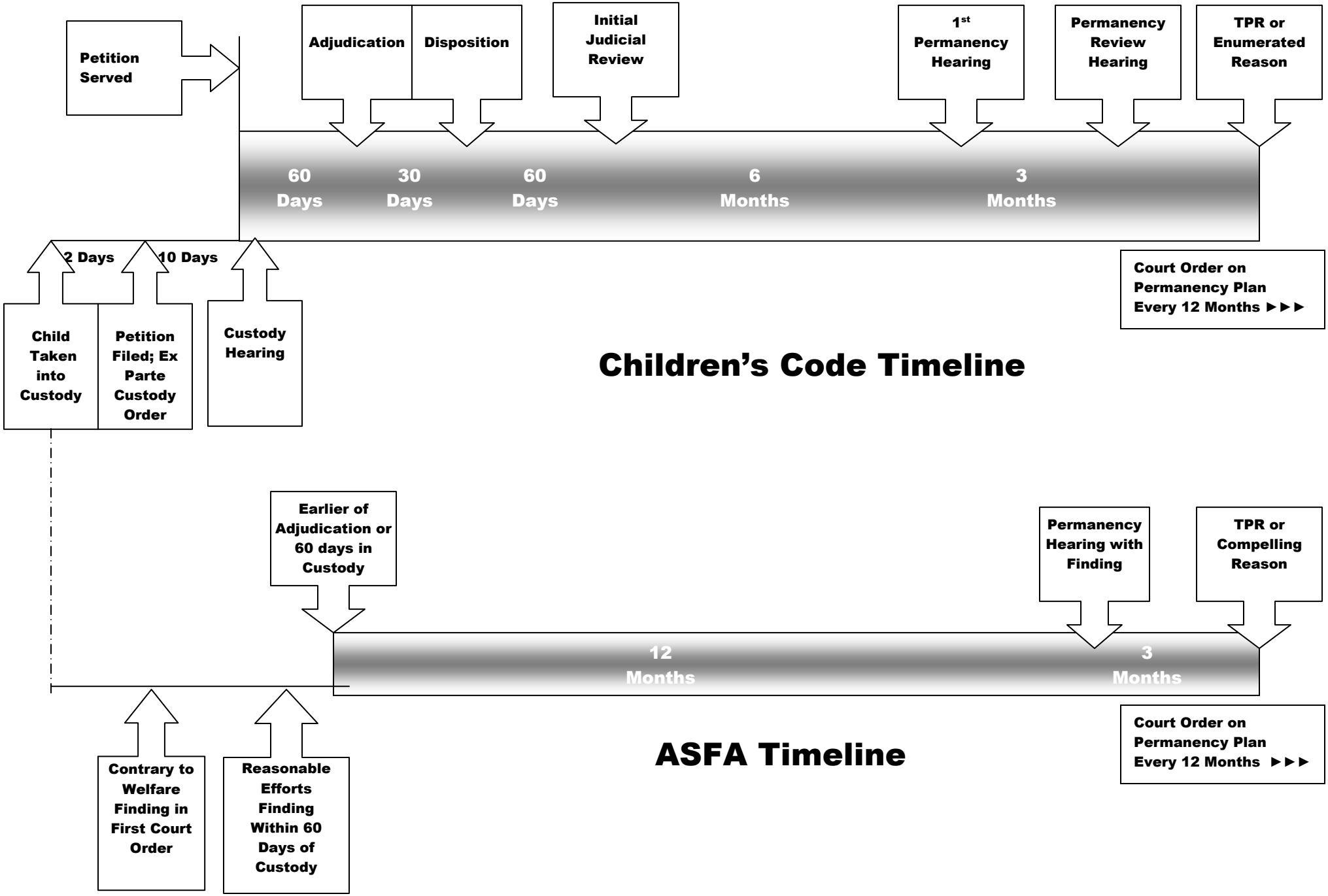
Changes to the Children's Code in 2001 and 2003 also accelerated the permanency planning process for children who cannot return home by setting a deadline for the filing of a motion to terminate parental rights. CYFD must now file a motion to terminate parental rights if the child has been in foster care for 15 of the previous 22 months. The 15 months actually begin at the adjudicatory hearing, or 60 days after the child was taken into custody, and exceptions to the requirement that a motion for TPR be filed exist. Nonetheless, the importance of moving toward permanency is clear.

1.5 Adoption and Safe Families Act

While the changes to the timelines described in §1.4 are driven by the needs of children, the enactment of the Adoption and Safe Families Act (ASFA) by Congress in 1997 and the issuance of implementing regulations in 2000 also provided a major impetus to efforts to accelerate the timelines. ASFA does not impose mandates directly on the state or its court system, but it does make the receipt of federal funds for foster care conditional upon compliance with ASFA requirements. This is a significant concern in a state in which the majority of the funds used to make foster care payments for children are federal dollars.

While most of the changes in the timelines and approaches to permanency outlined in ASFA are mirrored already in the New Mexico Children's Code, some require special attention. The ASFA regulations provide, for example, that the first court order in the case, which would typically be the *ex parte* custody order, must contain certain factual findings and that the absence of such findings will result in the loss to the child of federal foster care payments for the duration of the child's stay in foster care.

The timelines on the next page illustrate some of the basic requirements of the Adoption and Safe Families Act and compare them to the Children's Code.


Petition Served
Adjudication
Disposition
Initial Judicial Review
1st Permanency Hearing
Permanency Review Hearing
TPR or Enumerated Reason
60 Days
30 Days
60 Days
6 Months
3 Months
2 Days
10 Days
Child Taken into Custody
Petition Filed; Ex Parte Custody Order
Custody Hearing
Court Order on Permanency Plan Every 12 Months ►►►
Children's Code Timeline
Earlier of Adjudication or 60 days in Custody
Permanency Hearing with Finding
TPR or Compelling Reason
12 Months
3 Months
Court Order on Permanency Plan Every 12 Months ►►►
ASFA Timeline
Contrary to Welfare Finding in First Court Order
Reasonable Efforts Finding Within 60 Days of Custody

CHAPTER 2

RIGHTS OF PARENTS AND CHILD

This chapter describes:

- The rights of parents in the care, custody and control of their children.
- Procedural due process rights.
- The rights of children.

2.1 Substantive Rights

Long-standing precedent of the United States Supreme Court holds that the Due Process Clause of the Fourteenth Amendment protects the fundamental liberty interest of parents in the care, custody and control of their children. *See Meyer* v. *Nebraska,* 262 U.S. 390, 399-401 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535 (1925).

In *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), the Court again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents." 321 U.S. at 166. Subsequent cases have explained that this constitutional liberty derives from the presumption that "natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J. R.*, 442 U.S. 584, 602 (1979).

In 2000, the U.S. Supreme Court reiterated the importance of this interest in the case of *Troxel v. Granville,* 530 U.S. 57 (2000), ruling that a Washington state statute allowing "any person" to petition for visitation was unconstitutional because it impermissibly infringed on the rights of parents.

In the seminal case of *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court upheld the principle that an unwed father could not be presumed to be an unfit parent, but was entitled to a hearing pursuant to the Equal Protection Clause of the Fourteenth Amendment. This case thus marks the connection between the substantive rights of parents and the procedural requirements necessary to protect those rights.

Not only are parents entitled to an evidentiary hearing before a determination can be made as to their "fitness" (*i.e.,* whether their parental rights should be terminated permanently), but the Due Process Clause also dictates that the standard of proof in such cases must be clear

and convincing evidence, rather than a mere preponderance. *Santosky v. Kramer*, 455 U.S. 745 (1982).
The New Mexico Supreme Court reviewed and endorsed these doctrines in the case of *In the Matter of the Adoption of J.J.B.*, 119 N.M. 638 (1995), which clarified the standards for termination of parental rights on the grounds of presumptive abandonment. ***See*** §22.4 of this Handbook. That case, however, like the precedents to which it adheres, reiterates that the rights of parents are not absolute. Rather, those rights must be balanced against the interests of the child and the state's compelling interest as *parens patriae. Id.* at 652. *See also Santosky v. Kramer*, cited above.

Similarly, in *Williams v. Williams*, 2002-NMCA-074, 132 N.M. 445, the Court of Appeals distinguished *Troxel v. Granville* in upholding a district court order granting visitation rights to grandparents over the parents' objection. "*Troxel* may have altered, but it did not eradicate, the kind of balancing process that normally occurs in visitation decisions." The Court concluded that the district court had given appropriate weight to the wishes of parents in determining the child's best interests. *Williams*, ¶¶23-24.

Although the courts have not explicitly articulated the contours of the corresponding rights of children, the truth is self-evident that children also have certain inalienable needs: to be free from physical and emotional harm at the hands of their caretakers and to be provided with the essentials of food, shelter, education and medical care. If the parent cannot ensure that those needs are met, then the state may intervene legally.

The legislature has defined in detail the duty and the discretion of parents, guardians and custodians. Under §32A-1-4, a parent has all of the duties and authority of guardianship and legal custody of the child, unless limited by court order. The duties and authority of guardians and custodians are also described. These establish the foundation for all child welfare proceedings.

In the short term, the state can act upon a showing of actual harm or imminent risk to the child, acquiring a greater degree of control in proportion to the proof of parental incapacity. During the pendency of any legal proceeding, the parent retains a statutory right to visitation with the child, unless the court finds that the best interests of the child preclude any visitation. §32A-4-22(D). Likewise, the child has a corresponding interest in maintaining contact with parents, siblings, extended family members, and others with whom the child has a significant, caring relationship, unless such contact is shown to be contrary to the child's best interest. §32A-4-22(E).

Where the state can prove that the parent is unable to care for the child, it may move to terminate, rather than merely suspend, all parental authority. ***See*** Chapter 22. Moreover, if the state does intervene to deprive the parent of all rights regarding the child, then the state must also assume another function implicit in parenting, namely to provide a permanent and stable set of relationships and sense of family identity for the child.

2.2 Meaning of "Parent"

The word "parent" in the New Mexico Children's Code "includes a biological or adoptive parent *if the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child*." §32A-1-4(O). This definition reflects the holdings of a line of cases from the U.S. Supreme Court that declare that the right to parent is not a mere incident of biology, but requires some sort of familial relationship.

In *Caban v. Mohammed*, 441 U.S. 380 (1979), the U.S. Supreme Court struck down a state law that treated unwed fathers differently than unwed mothers when the spouse of one of the parents petitioned to adopt the child. Referring to the case of *Quilloin v. Walcott*, 434 U.S. 246 (1978), the Court suggested that the strength of an unwed father's claim to his child is directly proportional to his efforts to fulfill his parental responsibility. *See* 441 U.S. at 389, 393.

Conversely, in the case of *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court upheld New York's putative father registry, ruling that an unwed father has no guarantee of notice of the adoption of his child, unless he undertakes some affirmative actions to establish a custodial, personal, or financial relationship with her. A biological connection creates the opportunity to become a parent; if a parent does not avail himself of that opportunity, the Constitution will not afford him the right automatically. *Id*. at 249, 262.

Even a father who has both a biological and an established relationship with his child may be denied parental rights by a state statutory presumption that the husband of the mother is the child's legal parent. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The question regarding who has a constitutionally protected liberty interest is answered to some extent in the Adoption Act, which defines the terms "acknowledged father," "presumed father," and "alleged father," and requires that the first two men, but not the last one, consent before an adoption can take place. ***See*** Appendix B for the definitions. These provisions make it clear that biology alone does not confer a constitutionally protected parental status. A father must act affirmatively to acknowledge his paternity before it will be recognized by the courts or protected under the Children's Code. *See In the Matter of the Adoption Petition of Bobby Antonio R.*, 2008-NMSC-002, 143 N.M. 246.

A woman who acts as the child's parent in a same-sex relationship may well be able to establish that she is a presumed natural mother. When addressing the applicability of the term "natural mother" in the Uniform Parentage Act to a lesbian partner, the New Mexico Supreme Court stated:

> In our view, it is against public policy to deny parental rights and responsibilities based solely on the sex of either or both of the parents. The better view is to recognize that the child's best interests are served when intending parents physically, emotionally, and financially support the child from the time the child comes into their lives. This is especially true when both parents are able and willing to care for the child.

Chatterjee v. King, 2012-NMSC-019, ¶37, 280 P.3d 283. The Court concluded that Chatterjee had standing to bring an action to establish a parent and child relationship under the UPA because she had alleged sufficient facts to establish that she is a presumed natural parent. Assuming her allegations are true, she would then have standing to seek joint custody as a natural parent. *Id.* ¶50.

A very different question is the extent to which a foster parent might have a constitutionally protected liberty interest. A foster care arrangement generally does not create a protected interest. *Elwell v. Byers*, 699 F.3d 1208, 1217 (10th Cir. 2012). However, in *Elwell*, a case out of Kansas, the Tenth Circuit Court of Appeals held that the foster parents, given all the facts of that particular case, had a constitutionally protected interest. There were a number of factors but they included the fact that the Elwells had cared for the child nearly his entire life and were on the verge of adopting him.

2.3 Procedural Rights

Persons who have a constitutionally protected liberty interest in their children cannot be deprived of their rights without due process of law. At a minimum, due process requires notice and the opportunity to be heard. While the Children's Code and the Children's Court Rules establish the mechanism to meet these requirements, it is incumbent upon all of the parties to verify that they are met in fact. In the first instance, this may mean something as mundane as establishing the correctness of addresses and telephone numbers; or it may entail a sophisticated search to identify and locate absent parents. Throughout the proceedings, participants should endeavor to remember and respect the dignity and humanity of all the family members.

To protect these rights in particular, both the Code and the Rules provide for the appointment of counsel to represent respondents who are indigent. Case law has clarified that the right to counsel includes the right to effective assistance of counsel. *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶48, 136 N.M. 53; *State ex rel. CYFD v. Tammy S.*, 1999-NMCA-009, ¶20, 126 N.M. 664. It also affirms the parent-respondent's right to an appeal. *State ex rel. CYFD v. Alicia P.*, 1999-NMCA-098, 127 N.M. 664.

A series of appellate decisions has delineated the dimensions of the opportunity to be heard when respondent is not physically present at trial, whether as a result of incapacity, incarceration or deportation. In such situations, alternative measures must be implemented to preserve the opportunity to testify on one's own behalf, to cross-examine witnesses, and to confer with counsel. *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, 133 N.M. 827; *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, 136 N.M. 053; I*n the Matter of Ruth Anne E. (State ex rel. CYFD v. Lorena R.)*, 1999-NMCA-035, 126 N.M. 670; *State ex rel. CYFD v. Stella P.*, 1999-NMCA-100, 127 N.M. 699; *State ex rel. CYFD v. Rosa R.*, 1999-NMCA-141, 128 N.M. 304.

Due process also requires providing parents with an opportunity to present a defense on all of the allegations in the petition. In *State ex rel. CYFD v. Steve C.*, 2012-NMCA-045, 277 P.3d 484, the Court of Appeals held that father's procedural due process rights were violated when the trial court authorized the children's court attorney to amend the petition at the end of the adjudicatory hearing to include a charge of abuse in addition to the neglect charges and made its ruling immediately, without hearing the additional issues. According to the court, the procedure denied father the opportunity to present a defense on the added charge. 2012-NMCA-045, ¶16.

Just as the due process rights of parents are protected, along with their substantive interests, by the presence of counsel, so the rights of children to fair treatment and decent outcomes are protected by their court-appointed guardian ad litem (GAL) or "youth attorney," described in §2.4 below. Case law has also clarified the importance of the GAL role, and its scope in investigating and informing the court, as well as representing to the court the stated position of the child. *State ex rel. CYFD in the Matter of Esperanza M.*, 1998-NMCA-039, 124 N.M. 735; *State ex rel. CYFD in the Matter of George F.*, 1998-NMCA-119, 125 N.M. 597.

2.4 Statutory Rights

Because of the significance of the interests involved, both the Children's Code and the Children's Court Rules set forth requirements for advisement of parental rights.

At the commencement of the investigation, parents are to be advised of the rights they have during an investigation. These rights include the freedom from being compelled to appear or to produce any papers. §32A-4-4(B). They do not include the freedom to control access to the child or to obstruct or interfere with the investigation. §30-6-4. A child may be interviewed at school or elsewhere without the permission of the parent. §32A-4-5(C). If no petition is filed, a parent has the right to the results of the investigation, may inspect foundational reports in the possession of CYFD, and may petition the court for further disclosure of records and information, provided that identification of individuals be withheld. §32A-4-33(C). At their first appearance before the court, parents are to be advised of their rights under the Children's Code. §32A-4-10(G); Rule 10-314. These include the right to a trial on the allegations of the petition and the right to counsel.

According to the Children's Code, children are afforded the same basic rights as adults except as otherwise provided in the Code. §32A-4-10(A). A child under age 14 is entitled to a guardian ad litem appointed by the court at the inception of the proceeding; the guardian ad litem is an attorney appointed to represent and protect the child's best interest. A child who is 14 or older is entitled to court-appointed counsel (commonly referred to in New Mexico as a youth attorney). The youth attorney provides client-directed representation, with all of the duties and responsibilities of any attorney under the Code of Professional Conduct. §32A-4-10(C), §32A-1-7.1(A).

CHAPTER 3

KEY CONCEPTS

This chapter describes the following key concepts inherent in child abuse and neglect cases:

- Best interests of the child.
- Safety, permanency, and well-being.
- Reasonable efforts.
- Concurrent planning.
- Legal custody and placement.

The Key Principles for Permanency Planning for Children adopted by the National Council on Juvenile and Family Court Judges are reprinted at the end of the chapter.

3.1 Best Interests of the Child

At every stage in the proceedings, the court must make and record findings that the proposed treatment or permanency plan is in the best interest of the child. While everyone agrees that the child's best interest is the overarching concern in every proceeding, it is a term that is neither defined in the statutes nor easily susceptible of definition. Rather than a goal to be achieved or a treasure to be discovered, it might be more accurate to think of it as a lens through which the entire proceeding should be viewed, or a touchstone against which to test every decision as to placement and permanency.

It should be mentioned that the court may not be in a position to choose, in some ultimate sense, what is "best" for the child, but rather to determine whether what is proposed would tend more to further, rather than to hinder, the best interest of the child. *See In the Matter of the Adoption of J.J.B.*, 119 N.M. 638 (1995). Every case commences with a family in crisis, a child in need or even in peril. Some damage is inevitable. Almost invariably, alternatives must be selected and decisions driven on the basis of inflicting the least additional trauma.

Finally, the discretion of the children's court to act in the best interest of the child, although broadly equitable in nature, is not boundless. *See, e.g., In the Matter of the Adoption of Francisco A.*, 116 N.M. 708 (Ct. App. 1993) (Hartz, J., dissenting). While the best interest standard provides an additional safeguard for the child, it is not a substitute for the substantive requirements set forth in the Children's Code. In terms of procedure, the child's best interest is protected through the appointment of and zealous representation by the GAL

or youth attorney, whose duties and responsibilities are described more fully in Chapter 6. In general, the best interest of the child becomes the common denominator for all of the participants, who may differ in their views of the details or the best way to arrive at the desired result.

3.2 Safety, Permanency, and Well-Being

Core to the federal Adoption and Safe Families Act (ASFA) and the state Children's Code are the three principles of safety, permanency, and well-being. The federal Children's Bureau has used these three principles effectively in measuring the success of the states' child welfare programs and the National Council of Juvenile and Family Court Judges has incorporated them into its Key Principles for Permanency Planning for Children, found at the end of this chapter.

- **Safety:** Children are, first and foremost, protected from abuse and neglect. At the same time, children are safely maintained in their homes whenever possible and appropriate.

- **Permanency:** Children have permanency and stability in their living situations and the continuity of family relationships and connections is preserved for families.

- **Well-Being:** Families have enhanced capacity to provide for their children's needs. Children receive appropriate services to meet their educational needs and adequate services to meet their physical and mental health needs.

While safety is always paramount and efforts have been made to accelerate permanency, increasing attention is being paid to the child's well-being as a way to improve outcomes for children impacted by maltreatment.

3.3 Reasonable Efforts

3.3.1 Preventing Removal; Reunification

The Children's Code states that "[t]he child's health and safety shall be the paramount concern" but also mandates that CYFD attempt "to preserve the unity of the family whenever possible." §32A-1-3(A). Even where CYFD makes a decision to seek legal custody of the child, "*reasonable efforts* shall be made to prevent or eliminate the need for removing the child from the child's home, with the paramount concern being the child's health and safety." §32A-4-7(D).

The requirement that CYFD make reasonable efforts remains operative throughout much of the life of a case. The court needs to make a finding early in the proceedings regarding what efforts were made, either to prevent removal or to make it possible for the child safely to return to the home. These efforts must be explicitly documented and reflected in the court order. If reasonable efforts are not made, CYFD may, under ASFA, forfeit its federal funding for foster care for the child. In addition, one of the three grounds for terminating

parental rights would not be met if the department has not made "*reasonable efforts* … to assist the parent in adjusting the conditions that render the parent unable to properly care for the child." §32A-4-28(B).

In *State ex rel. CYFD v. Patricia H.*, the Court of Appeals affirmed a termination of parental rights, finding sufficient evidence of reasonable efforts despite some concern about the extent and duration of efforts made by CYFD.

> ASFA has had a significant impact upon the State's responsibility to provide services to children and families, which consequently informs our contemporary understanding of what constitutes a reasonable effort to assist a parent before the State may resort to termination. The fifteen-month period described in ASFA for "time-limited reunification services" provides us some guidance in how we assess the duration of reasonable efforts under state law.

2002-NMCA-61, ¶26, 132 N.M. 299.

3.3.2 Finalizing a Permanency Plan for the Child

As the case progresses, the department's efforts broaden into efforts to finalize a permanency plan for the child. The point is always to establish permanency for the child, whether through the goal of return home or through some other feasible permanency goal, or both in the alternative. Within 12 months of the time the child is considered to have entered foster care, the court must determine a permanency plan for the child. CYFD must also be able to demonstrate to the court that it has been making *reasonable efforts* to finalize the permanency plan in effect. The court must make a determination of reasonable efforts at least once every 12 months that the child is in foster care. This ties in very closely with the discussion of permanency planning and concurrent planning later in this chapter.

3.3.3 Aggravated Circumstances

In ASFA, Congress codified a principle that had been operative in child protection and reflected in judgments for some time, namely, that in some instances it may never be safe for a child to return to the family. Severe or chronic injury to the child, or to another family member, may give rise to an unacceptably high risk of recurrence. The Children's Code sets out specific instances of conduct which, if proven, may eliminate the need to attempt reunification. A finding by the court that aggravated circumstances exist can lead to an order that no further efforts be attempted to return the child to the home and that another plan be identified to provide the child a stable future.

In the first challenge to the state's aggravated circumstances provisions adopted in 1999, the Court of Appeals upheld their constitutionality. The court, citing the legislative history of ASFA and cases from other states, found that the statute does not create a presumption of unfitness at the TPR trial but rather gives the trial court discretion not to require reunification efforts, if warranted by all the relevant facts. "[ASFA], in eliminating the requirement of reasonable efforts under certain circumstances, and in requiring the states to follow suit …,

was responding to the perceived excesses in the application of the reasonable efforts requirement." *State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶7, 133 N.M. 136.

3.3.4 Active Efforts in ICWA Cases

If the child is an Indian child, CYFD must demonstrate that *active* efforts have been made to provide services designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful. Under the federal Indian Child Welfare Act (ICWA), this demonstration must take place both before the state can effect a foster care placement and before there can be a termination of parental rights. 45 U.S.C. §1912(d). The New Mexico Supreme Court has held that the "active efforts" finding that must be made to support foster care placement should be made at the adjudicatory hearing. *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, ¶36, 149 N.M. 315.

"Active efforts" is considered a more stringent standard than "reasonable efforts." According to the BIA guidelines on ICWA, these efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They should also involve and use the available resources of the extended family, the tribe, Indian social service agencies, and individual Indian caregivers.

Neither ASFA nor the Children's Code alters ICWA's active efforts requirement. Even where the Children's Code would relieve the state of engaging in reasonable efforts (as when there are aggravated circumstances), active efforts must still be proved.

3.4 Permanency Planning; Concurrent Planning

Permanency planning is not a new idea in child welfare, but it has been made increasingly important in view of the accelerated timetables established by statute. Historically the emphasis was on protection, and children lingered indefinitely in foster care. Now, every child must have a plan, not just an ideal destination, but a clearly delineated direction and measurable means to get there.

Under the Children's Code, the state implements a permanency plan for the child that has been approved by the court. The hearing at which the permanency plan is brought to the court for review is held within 12 months of the date the child is considered to have entered foster care and at least once every 12 months while the child is in foster care. If the permanency plan is reunification, the court will schedule a permanency review hearing within three months to be sure that real progress is being made.

The state also engages in concurrent planning to effectuate permanency. Concurrent planning is the process of working toward a primary permanency goal of reunification while at the same time working on an alternative goal in the event that the birth parents are unable to do what is necessary to bring the child home. This approach is intended to move the child more quickly to a safe and more stable permanent family.

In the past, little attention was given to these secondary scenarios, and then only after too much time had elapsed. For example, in the past the adoptive placement process could not commence until the child was legally "freed" for adoption and, even after parental rights had been terminated, a case could continue for months on appeal, postponing any efforts to find the child a permanent home.

The Children's Code now requires concurrent planning by the time a motion to terminate parental rights is filed, although in practice concurrent planning may begin much earlier. Among other things, CYFD works to promptly identify those cases at greatest risk, and to seek placements for those children in homes that could become permanent, whether through adoption or otherwise.

3.5 Legal Custody and Placement

The term "legal custody" is defined in the Children's Code. It should be read in harmony with the definitions of "guardian" and "parent." Whoever has legal custody of a child is empowered to make decisions regarding, among other things, where and with whom the child shall live, that is, the physical placement of that child. If legal custody is given to CYFD, placement is in the discretion of CYFD and not the court; CYFD's placement decisions are reviewable by the courts under the abuse of discretion standard. The term "physical custody" can confuse the two concepts and is no longer used.

The significance of the concept of "legal custody" as distinct from "placement" is that it clarifies the distinction between the caretaker and the decision-maker for the child. In certain situations, a parent may be able to provide one or the other of these functions, but not both. For permanency planning purposes, the participants need to evaluate the two functions separately. For example, a parent who is incarcerated and unable to provide physically for the child may yet be able to remain legally authorized to care for the child. Conversely, a parent could suffer from substance abuse or mental illness rendering him or her incapable of exercising appropriate judgment, but might still have a viable, loving relationship with the child and be able to meet some of that child's needs.

3.6 Key Principles for Permanency Planning for Children

In July of 1999, the National Council of Juvenile and Family Court Judges (NCJFCJ) approved a statement of principles called the Key Principles for Permanency Planning for Children. Broader than a discussion of permanency plans, the statement is a vision intended to help guide the courts and other members of the child welfare community as they strive to serve the best interests of abused and neglected children. The Key Principles were revised and reissued in July of 2011. These Key Principles are set forth on the following pages.

For more information, contact the NCJFCJ at the University of Nevada in Reno (775-784-6012 or staff@ncjfcj.org) or consult its website at http://www.ncjfcj.org.

NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES
est. 1937

Key Principles for Permanency Planning for Children

Judging in juvenile court is specialized and complex, going beyond the traditional role of the judge. Juvenile court judges, as the gatekeepers to the foster care system and guardians of the original problem-solving court, must engage families, professionals, organizations and communities to effectively support child safety, permanency, and well-being. Judges must encourage the court system to respond to children and their families with both a sense of urgency and dignity. These key principles provide a foundation for courts to exercise the critical duties entrusted to them by the people and the laws of the land.

Keep Families Together
Families are the cornerstone of our society, and children have a right to grow up with their families as long as they can be safe. Each child and family deserves to be treated fairly and holistically, regardless of how and why they enter the court system. Judges must ensure that all children and each parent are afforded their constitutional rights to due process. Judicial determinations to remove children from a parent should only be made based on legally sufficient evidence that a child cannot be safe at home. Children and families must be an integral part of the planning and problem solving process.

Ensure Access to Justice
Judges must ensure that the courtroom is a place where all who appear are treated with respect, patience, dignity, courtesy and as part of the problem-solving process. Juvenile courts must be child and family-centered and presumptively open to the public. Children and parents must have the opportunity to be present in court and meaningfully participate in their case planning and in the court process. It is the responsibility of Judges to see that all children and each parent are afforded their constitutional rights to due process.

Cultivate Cultural Responsiveness
Courts must be welcoming and respectful to people of all races, legal, ethnic, and socio-economic statuses, honoring family in all its forms. All members of the court system must recognize, respect, and seek to preserve the ethnic and cultural traditions, mores and strengths of those who appear before the court. Judges must become aware of, and remediate to the extent possible, their own implicit biases that may adversely affect decision making.

Engage Families Through Alternative Dispute Resolution Techniques
Judges should encourage and support the development of family-centered, culturally responsive forms of dispute resolution to allow families to craft effective court-sanctioned solutions to the issues that brought them before the court. Courts should support the development and use of appropriate dispute resolution techniques including mediation, family group conferencing, differential response, and encourage all to utilize the form that will be most beneficial to the children and parents in a particular case.

Ensure Child Safety, Permanency, and Well Being
Children should remain at home as long as they can be safe. Removal of a child from the home should occur only as a last resort. Judges are responsible for proactively monitoring the safety of children and ensuring services are provided to maintain their safety no matter where they are placed. Judges are responsible for ensuring the physical, mental, emotional, reproductive health, and educational success of all children under the supervision of the court. If a parent is a victim of violence from the other parent/spouse/friend, the Judge should sanction plans that keep that victim safe as the best way to keep a child safe. When return to a parent is inappropriate, placement with kin or a responsible person with a significant relationship with the child is the first priority. No child should exit foster care without a life-long connection to a caring and responsible adult.

Ensure Adequate and Appropriate Family Time
Consistent with child safety, relationships between and among children, parents and siblings are vital to child well-being. Judges must ensure that quality family time is an integral part of every case plan. Family time should be liberal and presumed unsupervised unless there is a demonstrated safety risk to the child. Sibling family time apart from parental family time should be considered. Family time should not be used as a case compliance reward or consequence.

Provide Judicial Oversight
Judges must provide fair, equal, effective, and timely justice for children and their families throughout the life of the case, continually measuring the progress toward permanency for children. The same judge should oversee all cases impacting the care, placement, and custody of a child. Through frequent and thorough review, without needless delay, judges must regularly exercise their authority to set and monitor the timelines, quantity, quality, and cultural responsiveness of the services for children and families. Judges should ensure that there is communication, collaboration and cooperation among all courts handling cases involving any given family.

Ensure Competent & Adequately Compensated Representation
Judges are responsible for ensuring that parties, including each parent, are vigorously represented by well-trained, culturally responsive, and adequately compensated attorneys who are committed to these key principles. Children should be parties to their cases. Children are entitled to representation by attorneys and guardians *ad litem* and Judges must ensure the child's wishes are presented to and considered by the court.

Advance the Development of Adequate Resources
Juvenile and family courts must be appropriately supported. Courts must maintain a sufficient number of specially trained and permanently assigned judicial officers, staff, attorneys and guardians *ad litem* to thoroughly and effectively conduct the business of the court. Judges should continually assess the availability and advocate for the development of effective and culturally responsive resources and services that families need.

Demonstrate Judicial Leadership & Foster Collaboration
Judges must convene and engage the community in meaningful partnerships to promote the safety, permanency, and well-being of children and to improve system responses. The juvenile court must model and promote collaboration, mutual respect, and accountability among all participants in the child welfare system and the community at large. To demonstrate the effectiveness of the system and to improve its ability to serve children and families, courts should strive to maintain data on every aspect of the process and use that data to identify and achieve system improvements. Judges must encourage regular and productive review of system-wide processes to foster the continual goal of improvement.

Technical Assistance Brief

NCJFCJ Permanency Planning for Children Department, University of Nevada, Reno,
P.O. Box 8970, Reno, NV 89507, (775) 327-5300

Adopted by the NCJFCJ Board of Trustees – July 23, 2011

CHAPTER 4

CHILDREN'S COURT ATTORNEY

This chapter covers the following with regard to the children's court attorney:

- Overall role.
- Administrative alignment within CYFD.
- Consultation and decision-making responsibilities.
- Specific responsibilities during a case.

4.1 Introduction

The children's court attorney in a civil abuse or neglect case is an attorney selected by and representing the Children, Youth and Families Department. §32A-1-6(C). The children's court attorney:

- Represents CYFD in every phase of an abuse or neglect proceeding, from the initial determination regarding whether to file a petition through dismissal.
- Provides Protective Services' case and social workers with information about state and federal law related to children's court and interpretation of federal and state law and regulations.
- Provides general assistance to CYFD in the provision of child protective services.

A number of appellate cases have emphasized the role of the children's court attorney in ensuring the fundamental fairness of the proceedings with respect to all parties. *In the Matter of Pamela A. G.*, 2006-NMSC-019, ¶19, 139 N.M. 459; *In the Matter of the Termination of Parental Rights of Ronald A.*, 110 N.M. 454 (1990); *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶51, 136 N.M. 53. The Supreme Court in *Ronald A.* concluded that when pursuing termination of parental rights, the children's court attorney "must seek not only to protect the children involved; they must see to it also that the parents are dealt with in scrupulous fairness." 110 N.M. at 456. In *Pamela A. G.* the Supreme Court extended that analysis to the adjudicatory hearing and other early stages of an abuse or neglect case. The Court of Appeals further emphasized this aspect of the children's court attorney's role in *Maria C.*, where it explained that CYFD has "a constitutional duty to ensure that a parent's due process rights are protected …." *Maria C.*, ¶50.

4.2 Structure

The children's court attorneys are employees of CYFD. The Director of Protective Services is the immediate supervisor of the Chief Children's Court Attorney, who serves as lead children's court attorney and supervises the managing attorneys in the department's five regions – Northwest, Northeast, Southwest, Southeast, and Metro. Children's court attorneys are housed in most CYFD county offices.

CYFD also has a general counsel's office, which handles general legal issues and represents the department in other types of matters. The general counsel's office does not supervise or direct the activities of the children's court attorneys.

4.3 Filing an Abuse or Neglect Petition

When CYFD is contemplating filing an abuse or neglect petition, the case worker must consult with the children's court attorney. Consultation generally occurs at an internal meeting that includes the investigative case worker and may include the permanency planning worker who would be assigned to the case if filed, the investigative and permanency planning workers' supervisors, the county office manager, and the children's court attorney. If the children's court attorney is not present at the meeting, the case worker will consult with the attorney after the meeting.

The children's court attorney must sign each abuse or neglect petition and determine and endorse on the petition that filing it is in the best interests of the child. §32A-1-10 and §32A-4-15. In order to make the threshold best interest determination, the children's court attorney will consider the case worker's personal observations, the worker's interviews of the parents, the children and other collateral sources (e.g., witnesses, extended family), the history regarding the family, and the safety and risk assessment tools completed by the worker.

Working with the case worker, the children's court attorney ensures that all appropriate persons are named as respondents in the petition. Appropriate persons include those persons with a legal right to the child, who generally will be the child's mother and father but can include a legal guardian if there is one. In addition, CYFD may name as a respondent a custodian of the child. A custodian is defined in CYFD policy as any household member whose participation in treatment is required for the protection of the child. 8.10.7.7 NMAC.

Reflecting a determination that the CCA should move promptly after a judge is assigned to the case, and certainly before the custody hearing, Rule 10-162 requires children's court attorneys to file any peremptory election to excuse a judge within two days of filing the petition. Other parties have a longer period in which to file a preemptory election.

4.4 Representation at Hearings

The children's court attorney represents CYFD at every hearing in a child protective services case. Working closely with the permanency planning worker, the children's court attorney is

guided by the safety and best interest of the child and the applicable professional standards for attorneys. In the event that the children's court attorney and the permanency planning worker cannot agree on the most appropriate course of action in a particular case, CYFD has an internal process for resolving the dispute.

4.5 Termination of Parental Rights and Permanent Guardianships

When it appears that a child's permanency plan should be changed from reunification to adoption or permanent guardianship, a meeting is held which includes the permanency planning worker, the supervisor, and the children's court attorney. If CYFD proposes to change the child's permanency plan to adoption, the children's court attorney files and represents CYFD on a motion for termination of parental rights. If the child's permanency plan is being changed to permanent guardianship, the children's court attorney files and represents CYFD on a motion for permanent guardianship once there is a prospective guardian.

The case worker and the children's court attorney work together to identify any person who has not been named in the abuse or neglect case yet but who has a substantial liberty interest to the child. If CYFD determines that a previously unnamed person has a substantial liberty interest in a relationship with the child, the children's court attorney will add that person to the motion as a respondent.

4.6 Legal Risk Placement

A legal risk placement occurs when a child who is not legally free for adoption is placed for potential adoption with an approved adoptive family. If the case worker and the prospective adoptive parents want to proceed with a legal risk placement, the children's court attorney prepares a legal risk agreement to be entered into between CYFD and the prospective adoptive parents. This agreement sets out the legal barriers that could interfere with the adoption, as in the situation where the termination of parental rights motion has not been heard by the court or a judgment terminating parental rights is on appeal.

4.7 Use Immunity and Protective Orders

The Abuse and Neglect Act authorizes the children's court attorney to apply for use immunity for a respondent during an abuse or neglect proceeding. Use immunity under the statute may be sought for in-court testimony, records, documents or other physical objects produced by the immunized respondent, or for statements that the respondent makes in the course of a court-ordered psychological evaluation or treatment program. §32A-4-11. The children's court attorney may also apply for a protective order to restrict release of immunized statements or things. §32-4-12.

Effective January 7, 2013, the Supreme Court amended its rule on use immunity, Rule 10-341, to allow the court, on application of *any party* or on its own motion, to grant use

immunity for *any person* who has been or may be called to testify or produce records, documents or other objects. Under the rule as amended, not only the children's court attorney, but also any party, may make such an application. Moreover, the application may be made to immunize *any person,* not just the respondent as set out in immunity section of the Abuse and Neglect Act. At this point, the rule and the statute are in conflict when it comes to immunization of respondents - the statute allowing it only on application of the children's court attorney, and the rule allowing the application from any party. However, the Supreme Court's decision in *State v. Belanger,* 2009-NMSC-025, ¶17, although a criminal case, gives strong support to the argument in the children's court context that the rule would control under the court's "rule making power ... within the realm of pleading, practice and procedure."

4.8 Disclosure of Information under Rule 10-331

Children's Court Rule 10-331 requires that CYFD disclose certain information to the parties at least 15 days before an adjudicatory hearing or a termination of parental rights hearing. The children's court attorney must file a certificate stating that the required information has been produced and acknowledging a continuing duty to disclose. ***See*** Handbook §26.3.2 for more detail. Failure to comply with disclosure subjects CYFD to possible sanctions. *See* Rules 10-165(D) and 10-137(B).

4.9 Involuntary Placement for Mental Health or Developmental Disabilities Services

When involuntary mental health or developmental disabilities residential services are appropriate for a child in CYFD's custody, the case worker will ask the children's court attorney to file a petition for involuntary placement under the Children's Mental Health and Developmental Disabilities Act, §§32A-6A-1 to 32A-6-30. The Abuse and Neglect Act provides that, when an abuse or neglect case is pending, the hearing on the involuntary placement petition may be held as part of the abuse or neglect case or may be heard in a separate proceeding. §32A-4-23(D). ***See*** Handbook §32.9 for more detail.

CHAPTER 5

RESPONDENT'S ATTORNEY

This chapter covers the following with regard to the respondent's attorney:

- Respondent's right to counsel.
- Effective assistance of counsel:
  - appointed counsel
  - conflicts of interest
  - working with non-English speaking clients
  - Americans with Disabilities Act
  - standard of review
  - the court's role.
- Responsibilities of the respondent's attorney.
- Performance standards and other resources.

5.1 Respondent's Right to Counsel

The interest of natural parents in the care and custody of their children is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). A parent's right to custody is constitutionally protected. *In the Matter of the Termination of Parental Rights of Ronald A.*, 110 N.M. 454, 455 (1990).

The Children's Code requires that the court appoint counsel for the parent or parents "[a]t the inception of an abuse or neglect proceeding," which means as soon as the petition alleging abuse or neglect is filed. Appointed counsel serves until the custody hearing, at which time the court makes an indigency determination and appoints counsel for parents in financial need. *See* Rule 10-456A for the Supreme Court-approved form for indigency determinations. The Code also provides for appointment of counsel if, in the court's discretion, appointment of counsel is required in the interest of justice. §32A-4-10(B).

5.2 Effective Assistance of Counsel

5.2.1 Right to Effective Assistance

As a matter of due process, parents have a right to effective assistance of counsel in abuse and neglect cases. *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶48, 136 N.M. 53; *State ex*

rel. CYFD v. Tammy S., 1999-NMCA-009, ¶20, 126 N.M. 664. This includes the right to effective assistance when counsel is appointed by the court. *State ex rel. HSD in the Matter of the Termination of Parental Rights of James W. H.*, 115 N.M. 256, 257-258 (Ct. App. 1993). A claim that trial counsel was ineffective may be raised on direct appeal. *Id.*

Maria C., a case in which the Court of Appeals expressed "grave concerns over the conduct of counsel in the proceedings below," may shed some light on the responsibilities of respondents' counsel and the meaning of effective assistance. 2004-NMCA-083, ¶48. In *Maria C.*, both parents were incarcerated as federal prisoners throughout the proceedings. After the dispositional hearing, the court appointed new counsel for mother. Counsel did not speak to mother for almost a year after being appointed, failed a number of times to obtain a writ of habeas corpus to allow mother to attend the judicial review and permanency hearings, allowed father's counsel to make representations on her behalf to the court, and in certain proceedings did not speak on mother's behalf at all. Father's counsel also failed to secure his client's presence at the hearings.

The Court in *Maria C.* wrote: "It cannot be over emphasized that counsel must be a zealous advocate for his client, including making reasonable efforts to locate and facilitate their attendance at neglect and abuse proceedings, 'despite opposition, obstruction or personal inconvenience.' " *Id.* ¶48 (citations omitted). "Parties are not required to 'move heaven and earth' to notify parents…, but they must make reasonable efforts to do so…." *Id.* ¶52, citing *State ex rel. CYFD v. Rosa R.*, 1999-NMCA-141, ¶17, 128 N.M. 304.

5.2.2 Possible Conflicts of Interest

As a general matter, the court must appoint separate counsel for each respondent. Rule 10-314(B) provides that "[i]n any proceeding or case that may result in the termination of parental rights, an attorney may not be appointed to represent more than one respondent." "It is well established in New Mexico that counsel has a duty to avoid a conflict of interest." *Tammy S.*, 1999-NMCA-009, ¶21.

Tammy S. was an appeal based on ineffective assistance of counsel in a joint counsel situation. The court looked to see whether there was an actual conflict, not just a possibility of conflict. The test was whether counsel actively represented conflicting interests that adversely affected his or her performance. "Differently stated, a conflict of interest exists if some plausible defense might have been pursued were it not damaging to another's interest." *Id.* ¶ 22.

Rule 16-107(A) of the Rules of Professional Conduct, as amended in 2008, provides that:

> Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Notwithstanding the existence of a concurrent conflict of interest, a lawyer may, under Rule 16-107(B), represent a client if:

- the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- the representation is not prohibited by law;
- the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- each affected client gives informed consent, confirmed in writing.

Because of the relatively few attorneys who are court-appointed in this field, an attorney may also find him or herself being appointed in a case in which the attorney previously represented another party. According to Rule 16-109, a lawyer who formerly represented a client in a matter may not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

5.2.3 Non-English Speaking or Hearing Impaired Clients

A respondent's attorney should attempt to independently determine the ability of a client to understand and respond in English. A client may have some understanding of English but important, subtle points can be lost without careful interpretation. New Rule 10-167 and Rules 10-440 through 10-443 of the Children's Court forms, effective for cases filed or pending on or after January 1, 2013, set forth detailed procedures for the use of interpreters in court proceedings. Under the rules, the parties are generally responsible for notifying the court if they or their witnesses will need a court interpreter. ***See*** Rule 10-167 (Committee commentary).

Rule 10-167 essentially provides that a "need for a court interpreter exists whenever a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding," and a court interpreter must be appointed if requested. Rule 10-167(B)(1). The Committee commentary to Rule 10-167 offers specific advice for instances when court interpretation services are required for deaf or hard-of-hearing individuals.

While the rule sets forth procedures and priorities for the appointment of court interpreters and procedures for the use of court interpreters in the courtroom, a respondent parent does not have an absolute right to translated documents or representation in his or her language in an abuse or neglect case, and there is no constitutional right requiring the assistance of a court-appointed interpreter to supplement the right to counsel. *State ex rel. CYFD v. William M.*, 2007-NMCA-055, ¶¶40-43, 141 N.M. 765. However, due process does require that the parent receive notice and a meaningful opportunity to participate in the proceedings. It is also reasonably clear that courts will consider a claim of ineffective assistance of counsel based on inadequate communication between a non-English speaking client and his or her attorney, although such a claim was unsuccessful in *William M.*, where the attorney spoke Spanish, translated portions of

the documents for the client, and made sure that certified interpreters assisted the client in proceedings. *Id.* ¶¶52-57.

A respondent's attorney should ensure that an interpreter is present for court proceedings and meetings involving a client who does not speak or understand English well enough to participate in the proceedings. The court will pay for interpreters for hearings and statutorily-required meetings, such as pre-permanency meetings, but the attorney should make sure that the interpreter is present. The court generally will not pay for confidential attorney-client communications during a court proceeding or for witness interviews or pre-trial transcriptions or translations that the party intends to use for a court proceeding. Rule 10-167 (Committee commentary). If the respondent is represented by court-appointed counsel, the Indigent Defense Act may provide for payment of the costs of court interpretation services for attorney-client communications. *See* Rule 10-167(E)(6).

The respondent's attorney should also clarify with the case worker what steps have been taken to ensure that the parent is able to fully communicate with CYFD and the service providers in the case. The agency should make efforts to accommodate the parent's language needs so that the parent can participate meaningfully in the treatment plan. *See William M.,* ¶¶50-51.

5.2.4 Americans with Disabilities Act (ADA)

The responsibility for raising and proving applicability of the ADA in termination of parental rights cases rests with respondents and their counsel. *State ex rel. CYFD v. Johnny S.,* 2009-NMCA-032, ¶10, 145 N.M. 754. In *Johnny S.* the Court of Appeals stated:

> We decline to place on district judges the obligation to initiate inquiry into the applicability of the ADA in particular cases. District judges are simply not in a good position to recognize the potential application of the ADA, in particular in the early stages of termination proceedings when the inquiry would be best raised. Counsel, who should be most aware of their clients' situation, are best equipped to determine whether the ADA might apply and whether it would be of value to pursue it.
>
> To preserve issues concerning violations of the ADA, the parent bears the initial burden of asserting that the parent is a qualified individual with a disability under 42 U.S.C. Section 12131(2). Thereafter, the parent must create a factual and legal record sufficient to allow meaningful appellate review of the district court decision on the issue. What constitutes a sufficient record is, of course, different for each case. At a minimum, however, there must be a request for relief citing the ADA backed by facts developed in the record.
>
> Determining what accommodation may be reasonable once the ADA is found to apply will call for a more collaborative effort between the parents, CYFD, and the district court. But the initial burden to raise and argue the issues--as early in the case as possible--lies with the parents and their counsel.

Id. ¶¶7-9.

5.2.5 Standard of Review

In reviewing a claim of ineffective assistance of counsel, the Court of Appeals looks at the proceedings as a whole. *William M.*, 2007-NMCA-055, ¶53, citing *State ex rel. CYFD v. David F. Sr.*, 121 N.M. 341, 348 (Ct. App. 1995). " 'Litigants alleging ineffective assistance of counsel have the burden of establishing the claim and are required to show not only that trial counsel was ineffective, but that trial counsel's inadequacies prejudiced them.' " *Id.*

5.2.6 Court's Role in Protecting Respondents' Due Process Rights and Assuring Effective Assistance of Counsel

The duty to protect respondents' due process rights and to assure effective assistance of counsel does not lie solely with respondents' counsel. Rather, the court and CYFD also have obligations to parents in abuse or neglect cases. In *Maria C.*, the Court of Appeals emphasized that, "[i]n the final analysis … it is the district court that is charged with protecting a parent's due process rights." The district court has "an affirmative duty to ensure the parent's due process rights are protected from the initiation of abuse and neglect proceedings, not just at the end." 2004-NMCA-083, ¶52. In *State ex rel. CYFD v. Steve C.*, 2012-NMCA-045, ¶11, 277 P.3d 484, the Court of Appeals found that father's due process rights were violated when the judge allowed the children's court attorney to amend the petition at the end of the adjudicatory hearing to include a claim of abuse in addition to neglect and immediately made its ruling without proceeding to hear the additional issues as required by §32A-1-18(A).

Due process requires:

> timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.

In the Matter of Ruth Anne E. (State ex rel. CYFD v. Lorena R.), 1999-NMCA-035, ¶26, 126 N.M. 670 (quoting *In re Interest of L.V.*, 482 N.W.2d 250, 257 (Neb. 1992)). In particular, the district court must "inquire explicitly and on the record the reasons for a parent's absence from [the review, permanency, and TPR] hearings. At a minimum, the district court must assess what reasonable efforts were made to arrange for the parents to be present and what corrective measures counsel intends to employ to facilitate their presence in the future." *Maria C.*, 2004-NMCA-083, ¶52 (citation omitted). The appellate court criticized the district court's delay in addressing counsel's failure to secure the presence of their clients and reminded the district court that it could use its contempt power when the efforts of respondents' counsel are not reasonable. *Id.*

Similarly, at the conclusion of a TPR hearing, the court should routinely question respondents about their satisfaction with counsel. Because an important party – the child – may be harmed if

the case has to be reopened,

> we encourage the trial judge to inquire of a parent, who has been represented by appointed counsel, immediately after terminating parental rights whether that parent has any concerns about the representation provided by counsel…. [W]e conclude that the trial judge has an obligation to facilitate the resolution of the issue of whether that parent has received effective assistance of counsel by holding an evidentiary hearing if he or she expresses concerns that merit such a hearing.

James W.H., 115 N.M. at 258.

5.3 Duties of Respondent's Attorney

An attorney has a duty to zealously advocate his or her client's express or implied wishes. *State ex rel. CYFD v. Stella P.*, 1999-NMCA-100, ¶28, 127 N.M. 699. In the case of a client with a mental impairment, an attorney must maintain a normal lawyer-client relationship so far as is reasonably possible, even in light of the client's impaired capacity. Rule 16-114.

Attorneys have a unique role with the client. A different level of communication is available when there is a guarantee of confidentiality, which is not available to the respondent in other contexts in an abuse/neglect case. A client may take advice offered in such a confidential setting by his or her counsel more seriously.

In the *Tammy S*. case, the Court of Appeals emphasized the counseling role that the respondent's attorney plays:

> Mother testified that someone had explained her options to her. However, there is no evidence that her attorney counseled her on the ramifications of her continued relationship with Father. Contrary to the Department's suggestion on appeal, the counseling role is not properly left solely to a social worker. Rather, it is the practical reality in certain types of poverty law cases, particularly cases similar to those involved here. In such instances, an attorney's advice regarding the law and how it impacts upon a client's life choices may be at least as important as the attorney's performance in the litigation.

Tammy S., 1999-NMCA-009, ¶24.

Practice Note: One way that a respondent's attorney can help his or her client is to emphasize to the client the shortness of the timeline and the importance of becoming involved with the treatment plan early on. Although often an uncomfortable task, it is the job of the respondent's attorney to be honest and straightforward with the client and not just tell the client what the client wants to hear.

The duties of a respondent's attorney may include, for example:

- Ensuring that the client has an opportunity to confer privately with the attorney.

- Counseling the respondent on the law and how it impacts his or her life choices.
- Making active efforts to locate the client and facilitate attendance at hearings.
- Arranging for meaningful participation by the client at the different hearings when the client is incarcerated.
- Arranging for the appearance of witnesses on behalf of the client at any hearing, including any necessary expert witness (*see State ex rel. CYFD v. Kathleen D.C., In the Matter of Damion M.C.*, 2007-NMSC-018, ¶¶16-18, 141 N.M. 535, and the guidelines of the Administrative Office of the Courts with regard to situations in which the state will pay for an expert).
- Presenting evidence or testimony describing or expressing the client's wishes throughout the proceedings.
- Requiring CYFD to meet its statutory obligation to provide reports and treatment plans five days ahead of all hearings, in order to afford counsel an opportunity to review these reports with the client and to prepare for the hearing.
- Making timely objections to the admission of evidence, as appropriate (*see, e.g. State ex rel. CYFD v. Brandy S.*, 2007-NMCA-135, ¶21, 142 N.M. 705).
- Demanding at a hearing to terminate parental rights that CYFD prove by clear and convincing evidence that the client's parental rights should be terminated, even when the client is absent from the hearing, if appropriate.
- Filing requested findings of fact or conclusions of law, even in cases where the client does not appear to contest the termination proceedings.
- Filing an appeal at the request of the respondent following an adjudication or after TPR, even if the attorney does not feel an appeal is justified. *See State ex rel. CYFD v. Alicia P.*, 1999-NMCA-098, ¶9, 127 N.M. 664. However, it is important for counsel and the client to stay in touch because Rule 10-352 now requires that the client sign the appeal. See the note below for the exceptions to this rule.

2013 Amendments to Rule 10-352. The Supreme Court amended Rule 10-352 on judgments and appeals, effective December 31, 2013. Under the rule as amended, a notice of appeal may not be filed without the appellant's signature unless counsel certifies either that the appeal is not frivolous or that (a) the appellant contested the proceedings and expressed an intention to appeal and (b) the appellant has failed to maintain contact with counsel, and despite diligent efforts counsel has been unable to locate the appellant to sign the notice of appeal. Counsel must specify the last date on which the appellant contacted counsel and the efforts counsel made to locate the appellant.

In *Mafin M.*, which involved a mother with severe mental illness and acute substance abuse, the Supreme Court commented favorably that mother was represented by a competent attorney who vigorously litigated her case. The Court noted that he confronted and cross-examined the department's witnesses, challenged the department's evidence, and was allowed to present witnesses and evidence on mother's behalf, including a statement from mother. *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, ¶25, 133 N.M. 827.

It has been observed that the responsibilities of a respondent's attorney seem to be moving toward those of an attorney representing a person accused of a criminal act. The court needs to ascertain whether a purported decision on the part of the respondent was voluntarily,

intelligently and knowingly made. *Stella P.*, ¶¶22-24. In counseling the client, a respondent's attorney should attempt to communicate effectively with the client about the possible ramifications of a given decision.

Practice Note: Respondents' counsel should consider the extent to which they need to be aware of their client's immigration status and whether and how that status might affect or be affected by the case, or related criminal proceedings.

Children's Court Rule 10-332 requires that the respondent disclose certain information to the other parties at least 15 days before an adjudicatory hearing or a termination of parental rights hearing. CYFD and the child's guardian ad litem or attorney must make similar disclosures under Rule 10-331 and Rule 10-333 respectively. ***See*** Handbook §26.3.

5.4 Performance Standards

The Supreme Court has adopted performance standards for court-appointed attorneys in child abuse and neglect cases. The standards for respondents' attorneys begin on the next page.

5.5 Recommended Reading

The ABA Center for Children and the Law has founded a National Project to Improve Representation for Parents Involved in the Child Welfare System which aims to strengthen parent representation. The ABA makes a number of excellent resources available at:
http://www.americanbar.org/groups/child_law/what_we_do/projects/parentrepresentation.html.

These standards are not intended to substitute for, or impede the exercise of, an attorney's professional judgment or discretion. However, if an attorney elects not to perform a particular task specified in the standards, that decision should be the result of purposeful consideration in the context of the facts of a specific case rather than a random or blanket decision by the attorney.

Performance Standards
Respondent Attorney (RA)

1. PRACTICE STANDARDS

- The RA zealously represents the expressed interests of the respondent;
- The RA represents and protects the respondent's expressed cultural needs;
- The RA represents the respondent in accordance with the Code of Professional Responsibility, S.C.R.A. 16-101 et seq. NMSA 1978, and all other applicable laws;
- The RA represents the respondent in accordance with the confidentiality requirements of the New Mexico Children's Code (Section 32A-4-33).

2. TRAINING STANDARDS

- The RA participates in at least ten (10) hours of relevant annual training. *(See attachment).*

3. CONTACT AND CONTINUITY OF COUNSEL STANDARDS

After consultation with the respondent/client:

- The RA meets with the respondent in advance of custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, and other court proceedings to ascertain the need for witnesses or other evidence to be presented; the RA also meets with the respondent prior to mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The RA counsels the respondents, in a manner understandable to the client, on the subject matter of the litigation, the rights of the custodial and non-custodial parent, the court system, the proceedings, the RA's role, and what to expect in the legal process;
- The RA explains court orders and their consequences to the respondent;
- The RA is accessible to the respondent through office hours, telephone/voice mail, fax, or email;
- The RA attends treatment team meetings, administrative hearings, Citizen Review Board meetings, and other conferences and staffings concerning the respondent or the respondent's child, whenever possible;

- The RA informs the client of the right to appeal and discusses the nature of an appeal; if the client chooses to appeal, the RA continues representation through the filing of the docketing statement and requests the appointment of an appellate attorney;
- If there is no appeal, the RA continues representation through dismissal, unless removed or relieved by the court; and
- In the event of a change of venue, the originating RA remains on the case until a new RA is appointed by the court in the new venue and the new RA has communicated with the former RA.

After consultation with the respondent/client:

- The RA is responsible for gathering and reviewing information, including:
    - Interviews with the parents, caseworkers, and service providers; and interviews as appropriate with foster parents and other caretakers, school personnel, neighbors, relatives, clergy, law enforcement, and others;
    - Contact with lawyers for other parties and the CASA;
    - Review of the respondent's, child's, and family's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case, as available;
    - Review of the court files of the respondent, child, and family, and case-related records of the social service agency and other service providers;
    - Review of photographs, videos, or audiotapes and other evidence; and
- The RA obtains the necessary authority for the release of information.
- The RA personally observes the child's interaction with parents, or with whomever the child may be reunited, when reunification is anticipated, as needed.

4. CASE PLANNING STANDARDS

After consultation with the respondent/client:

- The RA consults with the social worker, and health care, mental health care, and other professionals involved with the respondent's service plan;
- The RA requests services (by court order if necessary) to meet the respondent's needs, to protect the respondent's interests, and to ensure a comprehensive service plan. These services may include but are not limited to:
    - Screening and diagnostic services;
    - Family preservation or reunification services;
    - Family visitation;
    - Medical and mental health care;
    - Drug and alcohol treatment;
    - Domestic violence prevention, intervention, or treatment;
    - Home-based services;
    - Parenting education;

  - Inclusion of the respondent in IEP and other special education services as the responsible signatory, if appropriate;
  - Education and training;
  - Social security income (SSI) to help support needed services;
  - Recreational or social services; and
  - Housing.
- The RA determines the appropriateness of the respondent and/or the RA attending local Citizen Review Board hearings concerning the respondent; if neither the respondent nor RA attend, the RA forwards to the board a letter stating the respondent's status during the period since the last review and an assessment of CYFD's permanency and treatment plans;
- The RA monitors implementation of the case plan;
- The RA communicates with the Court-Appointed Special Advocate (CASA); and
- The RA communicates to the Court the respondent's position on the service plans for the respondent and child, issues about the child's placement, and the respondent's goals.

5. COURT PERFORMANCE STANDARDS

After consultation with the respondent/client:

- The RA participates in custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, other court proceedings, and mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The RA reports to the court on the respondent's compliance with prior court orders and treatment plans;
- The RA presents evidence of the reasonableness or unreasonableness of the Department's efforts and on alternative efforts that could have been made;
- The RA participates in mediation;
- The RA stays informed of the child and family's involvement with family group decision making, family drug court, and other court sanctioned programs;
- The RA files petitions, motions, and responses and makes objections as necessary to represent the respondent. If appropriate, the RA files briefs in support of evidentiary issues. During all hearings, the RA preserves legal issues for appeal, as appropriate. Relief requested may include but is not limited to:
  - Obtaining necessary services;
  - A mental or physical examination of a party;
  - A parenting, custody or visitation evaluation;
  - An increase or decrease of contact or visitation;
  - Contempt for non-compliance with a court order;
  - Dismissal of petitions or motions.

- The RA presents and cross examines witnesses, offers exhibits, and provides independent evidence as necessary;
- The RA prepares the respondent to testify; the RA familiarizes the respondent with court procedures, and what to expect during direct and cross-examination;
- The RA requests orders that are clear, specific, and, where appropriate, include a time line for assessment, services, and evaluation;
- The RA reviews all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices;
- The RA monitors the implementation of the court's orders and reports any noncompliance;
- If appropriate, the RA makes a closing argument and provides proposed findings of fact and conclusions of law. The RA ensures that a written order is entered;
- The RA works diligently to avoid continuances and reduce delays in court proceedings.

Attachment

RECOMMENDED TRAINING CONTENT

At a minimum, the requisite training programs, including mentoring, should address:

- Relevant federal and state laws and agency regulations;
- Relevant court decisions and court rules;
- Court process and key personnel in child and family related litigation;
- Applicable guidelines and standards for representation;
- Child development needs and abilities;
- Family dynamics and dysfunction including substance abuse and the use of kinship care;
- Accessing services such as family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services, the structure of the agencies providing services, as well as provision and constraints related to agency payment for services; and
- Policy and procedure re: the multidisciplinary input required, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of effort made to safely maintain the child in his or her home.

CHAPTER 6

GUARDIAN AD LITEM FOR CHILD UNDER 14 (GAL)

This chapter covers the following with regard to the guardian ad litem for a child under the age of 14:

- Role of the GAL.
- Appointment.
- Duties and responsibilities.
- Relationship to others in the case, including the child, other parties, and the court.
- Performance standards and other resources.

6.1 Introduction

The child who is the subject of an abuse or neglect proceeding is a party to the case. Rule 10-121(B). Under the Children's Code, this child is entitled to representation by a guardian ad litem (GAL) or youth attorney, depending on the age of the child.

Children under the age of 14 are represented in the case by a GAL appointed by the court. The GAL is a licensed attorney who represents the "best interests" of the child. The GAL also informs the court of the child's expressed wishes, which may or may not be the same as the child's best interests. §§32A-1-7 and 32A-4-10.

Until 2005, all children were appointed GALs regardless of age. In 2005, the Children's Code was amended to require that attorneys be appointed to represent youth age 14 and older as attorneys, not as GALs. In other words, the attorney for the older child is client-directed under the traditional model of client representation. The term "youth attorney" is used informally to refer to this role, which is described in more detail in Chapter 6A.

In 2009, the Legislature made it clear that similar requirements for a GAL and a youth attorney apply in proceedings to revoke permanent guardianship, §32A-4-33, as well as in proceedings under the Family in Need of Court-Ordered Services Act, §32A-3B-8 (C) and (D). In addition, the Adoption Act was amended to acknowledge the youth attorney in the abuse and neglect case and provide for this attorney to represent the youth in certain proceedings under the Act. *See* §32A-5-16 (termination), §32A-5-24 (relinquishment) and §32A-5-33 (adoption).

6.2 Role of the GAL

A GAL is an attorney appointed by the children's court to represent and protect the best interests of the child in the court proceeding. §32A-1-4(J). Indeed, the GAL "zealously represents" the child's best interests. §32A-4-10(F). The GAL must also inform the court of the child's declared position at every hearing. §32A-1-7.

The Supreme Court has adopted performance standards that describe the responsibilities of the GAL in some detail. This chapter highlights certain aspects of the GAL's role but it is important for attorneys to review the standards carefully when they are appointed in a case. The standards can be found at the end of the chapter, beginning on page 6-9.

6.3 Appointment

The court appoints a GAL for a child under the age of 14 at the inception of the proceeding, as soon as the petition alleging abuse or neglect of the child is filed. §32A-4-10(C); *see also* Rule 10-312(D). Only an attorney with appropriate experience may be appointed as a GAL. §32A-4-10(C). When reasonable and appropriate, the court must appoint a GAL who is knowledgeable about the child's particular cultural background. §32A-4-10(D).

An officer or employee of an agency that has legal custody of the child may not serve as the child's GAL. §32A-4-10(C). In addition, no party to the proceeding, or employee or representative of a party, is permitted to serve as a child's GAL. §32A-1-4(J).

Once the child turns 14, the child is entitled to an attorney who represents the child as an attorney rather than a GAL. As the child approaches the age of 14, the GAL should discuss with the child the change in the form of representation that will take place at age 14. The GAL must file either a notice of continued representation as attorney for the child or a motion to request the appointment of a different attorney for the child. Rule 10-313(A).

The law contemplates that the GAL will continue as the child's attorney, or "youth attorney." §32A-4-10(E). When the concept was being developed, there was concern that younger children not lose the continuity of their relationship with their GAL. Hence, the law was drafted to allow the same attorney to continue representing the child after age 14, albeit as counsel rather than GAL. However, the law also recognizes that this is not suitable in all cases. Hence, §32A-4-10(E) requires that the court appoint a different attorney to serve as the youth attorney if:

- the child requests different counsel;
- the GAL requests removal; or
- the court determines that appointment of a different attorney is appropriate.

A new appointment is mandatory, not discretionary, if any one of these three conditions is met. *State ex rel. CYFD v. John R. (In the Matter of Sabrina R.)*, 2009-NMCA-025 ¶¶19-23, 145 N.M. 636.

The GAL needs to be alert to possible conflicts of interest when appointed to represent multiple siblings, whether in his or her role as GAL for all of the siblings or as a GAL for the younger children and attorney for the older children in the sibling group. Rule 10-313.1 was adopted in 2010 to provide guidance to judges and attorneys in these situations.

When there is a sibling group, Rule 10-313.1 permits the court to appoint the same lawyer to serve as GAL for the children under 14 and youth attorney for the children aged 14 or over. In this situation, the lawyer would be representing the best interests of the children under age 14 while representing the older youth directly as their attorney. Rule 10-313.1 makes it clear that serving in different roles does not by itself constitute a conflict of interest. The rule also provides a list of circumstances which do not, standing alone, demonstrate a conflict. For example, the fact that the children have different permanency plans or that they express conflicting desires on issues that are not material to the case does not, standing alone, demonstrate a conflict. *See* Rule 10-313.1(C).

With some exceptions, the attorney must decline to represent one or more siblings if, at the outset, a concurrent conflict of interest exists. A concurrent conflict exists "if the representation of one child will be directly adverse to another child or there is a significant risk that the representation of one or more of the children will be materially limited by the attorney's responsibilities to another client, a former client, or a third person, or by a personal interest of the attorney." Rule 10-313.1(A)(2); *see also* Rule 16-107 of the Rules of Professional Conduct.

An attorney representing siblings has an ongoing duty to evaluate the interests of each sibling and assess and act on any conflicts of interest that develop. *See* Rule 10-313.1(B).

6.4 Primary Responsibilities

6.4.1 Statutory Duties

The GAL's powers and duties are outlined in §32A-1-7. The GAL is required to "zealously represent the child's best interests in the proceeding for which the guardian ad litem has been appointed and in any subsequent appeals." §32A-1-7(A). The court must assure that the child receives zealous representation by the GAL in accordance with these statutory provisions. §32A-4-10(F).

After consultation with the child, the GAL must convey the child's declared position to the court at every hearing. §32A-1-7(D).

Unless "the child's circumstances render these duties and responsibilities unreasonable," the GAL is required by §32A-1-7(E) to:

- meet with and interview the child prior to custody, adjudicatory, and dispositional hearings, judicial reviews, and any other hearings scheduled under the Children's Code;

- communicate with health care, mental health care, and other professionals involved in the child's case;
- review medical and psychological reports relating to the child and the respondents;
- contact the child before and after any changes in placement, s*ee also* §32A-4-14;
- attend citizen review board (CRB) meetings concerning the child and, if unable to attend, provide a letter informing the board of the child's status and including an assessment of the permanency and treatment plans;
- report to the court on the child's adjustment to placement, CYFD's and the respondent's compliance with court orders and treatment plans, and the child's degree of participation during visitation; and
- represent and protect the child's cultural needs. (Among other things, the GAL will need to be familiar with the Indian Child Welfare Act in the case of an Indian child. ***See*** Handbook Chapter 39. In the case of immigrant children, the GAL should be aware of §32A-4-23.1, passed in 2009. ***See*** Handbook §17.8.)

Additionally, the GAL may request that CYFD file a termination of parental rights motion and if CYFD refuses, the GAL may bring the motion, litigate it, and request attorneys fees if successful. §32A-4-30.

The GAL is prohibited from serving simultaneously as the child's GAL in an abuse or neglect case and as the child's attorney in a delinquency case. §32A-1-7(I).

6.4.2 Related Advocacy

Although not specifically enumerated in the Children's Code, other activities may be reasonable and appropriate in the context of the case, for example:

- Advocacy in other forums, such as attending treatment team meetings if the child is in a residential mental health placement or in treatment foster care, participating in Individualized Education Plan meetings for special education services at school, or working through administrative channels to secure other health or social services.

  The GAL should be familiar with the federal laws that may affect the child's rights in these areas. Examples include the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the Families Educational Rights and Privacy Act (FERPA). (*Compare State ex rel. CYFD v. Johnny S.,* 2009-NMCA-032, 145 N.M. 754, which discusses the ADA in the context of an abuse or neglect case. ***See*** Handbook §5.2.4.)

- Participating in discharge planning for the child, such as from one level of care to another, and in permanency planning, from foster care to a permanent placement. The GAL's knowledge of therapeutic intervention models, pharmacological interventions, child development, and state and federal adoption subsidies can be an important resource for the child in those discussions.

As a practical matter, the GAL should cooperate and share expertise with the court appointed

special advocate (CASA) in the case, with each benefiting from the other's knowledge of the case.

6.4.3 The GAL in Court

It is important to remember that the child is a party in the case. Rule 10-121(B)(3). The GAL should actively participate in all court proceedings. This participation includes:

- making pretrial motions;
- making opening and closing statements;
- calling and adequately examining witnesses;
- preparing and offering evidence and exhibits;
- making proper objections or responding to objections raised by opposing counsel;
- preserving issues for appeal;
- filing briefs; and
- providing proposed findings of fact and conclusions of law.

"Passive representation" that does not include these activities may be materially deficient and fail to meet the standards prescribed by §32A-1-7. *State ex rel. CYFD in the Matter of Esperanza M.*, 1998-NMCA-039, ¶41, 124 N.M. 735. Any party may petition the court for an order to remove a GAL who has a conflict of interest or is unwilling or unable to zealously represent the child's best interests. §32A-1-7(C).

Under Children's Court Rule 10-333(A), the GAL has an obligation to disclose certain information at least 15 days before any adjudicatory hearing or termination of parental rights hearing. *See* Rule 10-333, summarized at Handbook §26.3.4. The information to be disclosed includes both the child's declared position and the GAL's position.

6.5 Additional Responsibilities

6.5.1 Mental Health and Developmental Disabilities Residential Placement Decisions

Under §32A-4-23(E), the GAL in an abuse or neglect case serves as GAL for the child for the purposes of the Children's Mental Health and Developmental Disabilities Act until the child turns 14. This Act was extensively revised in 2007 and it is important that GALs become familiar with its provisions. ***See*** Handbook Chapter 32 for a summary of the Act as amended.

When a child in CYFD's custody is admitted to a residential facility for mental health treatment or developmental disabilities habilitation, the GAL, representing the child's best interests, has the duty of certifying to the court whether admission to the facility is appropriate. §32A-6A-20(G) and (H). The admission will be considered appropriate if the GAL certifies that:

- The parent, guardian, or custodian understands and consents to the admission.
- The admission is in the child's best interests.
- The admission is appropriate for the child and consistent with the least restrictive means principle.

If the GAL makes this certification to the court, there is no involuntary placement hearing even if the child disagrees with the placement. The placement is reviewed every 60 days. §32A-6A-20(K).

If the GAL does not certify that the admission is appropriate, the child must be released or involuntary placement procedures under §32A-6A-22 must be initiated. §32A-6A-20(L). The child's rights at the involuntary placement hearing are set out in §32A-6A-22(H).

6.5.2 Representation on Appeal

The GAL in an abuse or neglect case is obligated to represent the child during any appellate proceedings unless excused by the court. §32A-1-7(B). This includes initiating an appeal on the child's behalf or filing an answer brief. On appeal, the GAL continues to represent the child's best interest but must present the child's declared position as well. *Esperanza M.*, 1998-NMCA-039, ¶40.

6.5.3 Retaining Separate Counsel

The GAL may retain separate counsel to represent the child in a tort action or any other action outside the jurisdiction of the Children's Court. The GAL must provide written notice to the court within 10 days of retaining separate counsel. The GAL is prohibited from having any pecuniary interest in the separate action. §§32A-1-7(F).

6.6 Relationship to Others in the Case

6.6.1 Relationship to the Child

The Children's Code sets forth a dual role for GALs in relation to the child, who is a party to the case. Rule 10-121(B). The GAL must "zealously represent the child's best interests," §32A-1-7(A), and must "convey the child's declared position to the court at every hearing." §32A-1-7(D). The GAL therefore could be in a position of presenting contrary positions to the court. The court in *Esperanza M.* recognized these dual responsibilities and stated: "The guardian ad litem is required to advocate the child's expressed position only to the extent that the child's desires are, in the guardian ad litem's professional opinion, in the child's best interests. The guardian ad litem may properly present the child's wishes to the court, and at

the same time advise the court of those facts and matters which the guardian believes bear upon and affect the child's best interests." *Esperanza M.*, 1998-NMCA-039, ¶37.

In most cases, a GAL is expected to represent both the child's best interest and the child's position: "Unless the guardian ad litem's perception of the child's best interests is so incongruous with the child's position that the guardian ad litem absolutely refuses to present the child's position, we see no need for the guardian ad litem to withdraw as counsel." *Id.* ¶40.

6.6.2 Relationship to Other Parties

The child's GAL may contact the CYFD social worker outside the presence of CYFD's attorneys to discover factual information relevant to the representation of the child. *State ex rel. CYFD in the Matter of George F.*, 1998-NMCA-119, ¶16, 125 N.M. 597. When investigating the facts affecting the child in order to report to the court as required by §32A-1-7, the GAL "is acting to 'assist the court in carrying out its duty' and is not functioning solely as an attorney advocating the child's wishes, nor in the traditional manner of an attorney who represents a client with a single-minded duty solely to that client." *Id.* ¶¶15-16. Accordingly, "the Rules of Professional Conduct that are designed strictly for the traditional role of attorneys do not fit this circumstance" and "the GAL is not prohibited by Rule 16-402 from contacting social workers outside the presence of the Department attorneys." *Id.* ¶16.

6.6.3 Relationship to the Court

The children's court judge "has an affirmative duty to assure that the best interests of a child are legally represented" as part of "the court's traditional role of protecting the child's best interests." *Esperanza M.*, 1998-NMCA-039, ¶42. This includes "a duty to elicit the guardian ad litem's position on substantive issues throughout the course of the abuse and neglect proceeding." *Id.* ¶43. If a GAL is not adequately representing the child's best interests, the court may want to consider replacing the GAL with a different attorney. §32A-1-7(C).

The GAL's role in assisting the court in carrying out its duties, discussed in *George F.* (***see*** §6.6.3 above), was revisited briefly by the Court of Appeals in *State ex rel. CYFD v. Laura J.*, 2013-NMCA-057 (decided 2012), 301 P.3d 860. In *Laura J.*, the court held that CYFD had not complied with its mandate under §32A-4-25.1(D) to identify, locate, and consider relatives who may serve as an appropriate placement for the child. As a "final note," the court proceeded to "emphasize that the statute imposes a duty on the district court to make a serious inquiry into whether the Department has complied with its mandate." It continued:

> Nor will the court's *or the child's guardian ad litem's* duty of inquiry be satisfied by leaving the full burden of locating and identifying relatives to the parents of children in departmental custody who may, for any number of reasons, be unable or unwilling to provide information about relatives.

2013-NMCA-057, ¶61 (emphasis added).

For a discussion of the role of a GAL as an arm of the court, see the Supreme Court's recent opinion in *Kimbrell v. Kimbrell*, 2014-NMSC-___ (No. 34,150, June 23, 2014). *Kimbrell* involved a GAL who was appointed under Rule 1-053.3 to serve in a custody dispute. The GAL was sued by the father in tort, alleging that the GAL's conduct had injured the child. The Court held, among other things, that a Rule 1-053.3 GAL is protected by absolute quasi-judicial immunity from suit arising from the performance of his or her duties, unless the GAL's alleged tortious conduct is clearly and completely outside the scope of the appointment. *Id*. ¶2. In deciding that a Rule 1-053.3 GAL is generally entitled to immunity, the Court explained that a Rule 1-053.3 GAL "serves as an arm of the court and assists the court in discharging its duty to adjudicate the child's best interests." Rule 1-053.3(A).

The Court in *Kimbrell* quoted at length from Rule 1-053.3, which describes in detail the role, duties, and responsibilities of a GAL appointed as an arm of the court under it. Both the rule and the discussion in *Kimbrell*, while not directly applicable to abuse and neglect cases, may be helpful in considering the GAL's role or roles under the Children's Code.

6.7 Performance Standards

As noted earlier, the New Mexico Supreme Court has adopted performance standards for attorneys representing children as GALs in abuse and neglect cases in children's court. The standards are reprinted here, beginning on the next page.

6.8 Recommended Reading

- Peters, Jean Koh, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions, International Third Edition. Matthew Bender & Company, Inc., a member of the LexisNexis Group, 2007.
- Renne, Jennifer L., Legal Ethics in Child Welfare Cases. American Bar Association, 2004.

These standards are not intended to substitute for, or impede the exercise of, an attorney's professional judgment or discretion. However, if an attorney elects not to perform a particular task specified in the standards, that decision should be the result of purposeful consideration in the context of the facts of a specific case rather than a random or blanket decision by the attorney.

Performance Standards
Guardian ad Litem (GAL)

1. PRACTICE STANDARDS

- The GAL zealously represents the child's best interests with respect to matters arising pursuant to the provisions of Section 32-1-6[32A 1-7] NMSA 1978;
- The GAL determines the best interests of the child through an objective evaluation that takes into account such factors as age, sense of time, level of maturity, culture and ethnicity, degree of attachment to family members including siblings, as well as continuity, consistency, and sense of belonging and identity;
- The GAL represents and protects the child's cultural needs;
- In the event that the child's best interests are different than the child's expressed wishes, the GAL informs the court of these differences;
- The GAL represents the child's best interests in accordance with the Code of Professional Responsibility, S.C.R.A. 16-101 et seq. NMSA 1978, and all other applicable laws; and
- The GAL represents the child's best interests in accordance with the confidentiality requirements of the New Mexico Children's Code (Section 32A-4-33).

2. TRAINING STANDARDS

- The GAL participates in at least ten (10) hours of relevant annual training. **(*See attachment*.)**

3. CONTACT AND CONTINUITY OF COUNSEL STANDARDS

- The GAL meets with the child and the child's caregiver in advance of custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, and other court proceedings to ascertain the need for witnesses or other evidence to be presented; the GAL also meets with the child and the child's caregiver prior to mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The GAL counsels the child, in a developmentally appropriate manner, concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the GAL's role, and what to expect in the legal process;

- The GAL facilitates the child's participation in court hearings, especially if the child is 12 or older, unless it is determined to not be in the child's best interest;
- The GAL explains court orders and their consequences to the child;
- The GAL contacts the child prior to and after any change in the child's placement whenever possible;
- The GAL contacts the child in the event of an emergency or significant event impacting the child;
- The GAL is accessible to the child through office hours, telephone/voice mail, fax, or email;
- The GAL attends treatment team meetings, administrative hearings, citizen review board meetings, school case conferences and staffings concerning the child whenever possible;
- As appropriate, the GAL pursues issues on behalf of the child, administratively or judicially, even if those issue do not specifically arise from the court appointment; for example: school/education issues, especially a child with disabilities; and mental health proceedings;
- In the event of a change of venue, the originating GAL remains on the case until a new GAL is appointed by the court in the new venue and the new GAL has communicated with the former GAL;
- The GAL discusses with the child, as developmentally appropriate, the nature of an appeal. If the appeal has merit, the GAL takes all necessary steps to perfect the appeal and seeks appropriate temporary orders or extraordinary writs to protect the interests of the child during the pendency of appeal;
- Whenever an appeal is taken, the GAL enters an appearance and GAL representation continues through any appellate proceedings unless representation is otherwise arranged;
- If there is no appeal, GAL representation continues through dismissal unless removed or relieved by the court;
- At cessation of representation, the GAL discusses the end of the legal representation and determines what contacts, if any, he/she and the child will continue to have.

4. <u>STANDARDS FOR GATHERING AND REVIEWING INFORMATION</u>

- The GAL is responsible for gathering and reviewing information, including:
    - Interviews with the child, foster parents and other caretakers, caseworkers, and service providers; and interviews as appropriate with the parents, school personnel, neighbors, relatives, clergy, law enforcement, and others;
    - Contact with lawyers for other parties and the CASA;
    - Review of the child's, respondent's, and family's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case, as available;
    - Review of the court files of the child, respondent, and family, and case-related records of the social service agency and other service providers; and

  - Review of photographs, videos, or audiotapes and other evidence;
- The GAL obtains the necessary authority for the release of information;
- The GAL personally observes the child's interaction with parents, or with whomever the child may be reunited, when reunification is anticipated; and
- The GAL personally observes every residence at which the child is placed promptly after the child is placed at the residence to determine and facilitate the safety and well being of the child.

5. CASE PLANNING STANDARDS

- The GAL consults with the social worker, and health care, mental health care, and other professionals involved with the child's care;
- The GAL requests services (by court order if necessary) to meet the child's needs, to protect the child's interests, and to ensure a comprehensive service plan. These services may include but are not limited to:
  - Screening and diagnostic services
  - Family preservation or reunification services;
  - Home-based services;
  - Sibling and family visitation;
  - Child Support;
  - Domestic violence prevention, intervention and treatment;
  - Medical and mental health care;
  - Drug and alcohol treatment;
  - Parenting education;
  - Semi-independent and independent living services;
  - Long-term foster care;
  - Termination of parental rights action;
  - Adoption related services;
  - Education;
  - Recreational or social services;
  - Housing.
  - Special education and related services; and
  - Supplemental security income (SSI) to help support needed services.
- The GAL attends local Citizen Review Board hearings concerning the child and, if unable to attend the hearings, forwards to the board a letter stating the child's status during the period since the last review and an assessment of CYFD's permanency and treatment plans;
- The GAL communicates with the Court-Appointed Special Advocate (CASA); and
- The GAL monitors implementation of the case plan.

6. COURT PERFORMANCE STANDARDS

- The GAL participates in custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, other court proceedings, and mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The GAL reports to the court on the child's adjustment to placement, the Department's and the respondents' compliance with prior court orders and treatment plans, and the child/parent interaction during visitation;
- The GAL participates in mediation;
- The GAL stays informed of the child and family's involvement with family group decision making, family drug court, and other court sanctioned programs;
- The GAL files petitions, motions, and responses and make objections as necessary to represent the child's best interests. If appropriate, the GAL files briefs in support of evidentiary issues. During all hearings, the GAL preserves legal issues for appeal, as appropriate. Relief requested may include but is not limited to:
    - Obtaining necessary services;
    - A mental or physical examination of a party or the child;
    - A parenting, custody, or visitation evaluation;
    - An increase, decrease, or termination of contact or visitation;
    - Requesting, restraining, or enjoining a change of placement;
    - Contempt for non-compliance with a court order;
    - Termination of the parent-child relationship;
    - Child support;
    - A protective order concerning the child's privileged communication or tangible property; and
    - Dismissal of petitions or motions.
- The GAL presents and cross examines witnesses, offers exhibits, and provides independent evidence as necessary;
- The GAL prepares the child to testify, when appropriate. The GAL familiarizes the child with the courtroom, court procedures, and what to expect during direct and cross-examination. The GAL makes an effort to ensure (including making objections) that testifying will cause minimum harm to the child;
- The GAL requests orders that are clear, specific, and, where appropriate, include a time line for assessment, evaluation, services, placement, treatment, and evaluation of the child and family;
- The GAL reviews all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices;
- The GAL monitors the implementation of the court's orders and reports any noncompliance;
- If appropriate, the GAL makes a closing argument and provides proposed findings of fact and conclusions of law. The GAL ensures that a written order is entered; and

- The GAL works diligently to avoid continuances and reduce delays in court proceedings.

RECOMMENDED TRAINING CONTENT

At a minimum, the requisite training programs, including mentoring, should address:

- Relevant federal and state laws and agency regulations;
- Relevant court decisions and court rules;
- Court process and key personnel in child and family related litigation;
- Applicable guidelines and standards for representation;
- Child development needs and abilities;
- Family dynamics and dysfunction including substance abuse and the use of kinship care;
- Accessing services such as family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services, the structure of the agencies providing services, as well as provision and constraints related to agency payment for services; and
- Policy and procedure re: the multidisciplinary input required, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of effort made to safely maintain the child in his or her home.

CHAPTER 6A

ATTORNEY FOR CHILD AGE 14 OR OLDER (YOUTH ATTORNEY)

This chapter covers the following with regard to the "youth attorney" for the child age 14 or older:

- Overview of statutory changes.
- Role of the youth attorney.
- Appointment.
- Duties and responsibilities.
- Relationship to others in the case.
- Performance standards and other resources.

6A.1 Introduction

In 2005, the Legislature changed the representation of children in abuse and neglect cases. Previously, each child, regardless of age, was appointed a guardian ad litem (GAL), who was an attorney by profession but who was charged with representing the child's best interest. Under the law as amended, children under the age of 14 continue to have attorney GALs representing their best interests to the court, but older children are represented by attorneys under the traditional client-directed model of representation. The attorney advocates for the young person's position after counseling the young person on his or her choices.

The Handbook uses the term "youth attorney" to describe the attorney appointed for a child 14 or older in abuse or neglect cases. Although this term is not found in the statute, it is the term commonly used by judges and practitioners throughout New Mexico. It distinguishes between the attorney GAL for the younger child and the attorney serving as attorney for the older child.

6A.2 Role

Section 32A-4-10 provides that the court shall appoint an attorney for children 14 and older and that the attorney must zealously represent the child. Section 32A-1-7.1(A) explains that this attorney "shall provide the same manner of legal representation and be bound by the

same duties to the child as is due an adult client, in accordance with the rules of professional conduct." Such representation extends through any subsequent appeals. §32A-1-7.1(B).

While the Rules of Professional Conduct serve as the primary guidance for attorneys appearing on behalf of older children in abuse and neglect cases, the Supreme Court has also adopted performance standards for these attorneys. Among other things, these standards require the youth attorney to consult with the child before hearings, to zealously represent the expressed interests and expressed cultural needs of the child, and to comply with the Children's Code confidentiality requirements. The standards can be found at the end of this chapter.

6A.3 Appointment

When a petition alleging abuse or neglect of a child age 14 or older is filed, the court will appoint an attorney to represent the child. §32A-4-10(C); *see also* Rule 10-312(D).

When a child with a GAL reaches age 14, the child's GAL must file either a notice of continued representation as attorney for the child or a motion to request the appointment of a different attorney for the child. Rule 10-313(A). At the child's first appearance in court after turning 14, the court must inquire as to whether the child is represented by an attorney and appoint one if not. Rule 10-313(B).

Although the law contemplates that the GAL will continue as the child's attorney, the court must appoint a different attorney if:

- the child requests different counsel,
- the GAL requests removal, or
- the court determines that appointment of a different attorney is appropriate. §32A-4-10(E).

The requirement to appoint counsel is mandatory rather than discretionary and the court must appoint a different attorney for the child if any one of the three statutory conditions is satisfied. *State ex rel. CYFD v. John R., In the Matter of Sabrina R.*, 2009-NMCA-025 ¶22, 145 N.M. 636. Once "[a]lerted to the potential that Child's interests were not fully protected, the district court's obligation was to remedy the deficiency by appointing separate counsel for Child. Absent separate counsel, Child's position was not fully developed, and Child was therefore prejudiced by not being afforded her full right to representation." *Id.* ¶24. Additionally, references to age are to actual age, not mental age. A child's mental age should not be a factor in determining whether or not to appoint a separate attorney. *Id.* ¶25.

Only an attorney with appropriate experience may be appointed as a youth attorney. §32A-4-10(C). When reasonable and appropriate, the court must appoint an attorney who is also knowledgeable about the child's particular cultural background. §32A-4-10(D). An officer or employee of an agency that has legal custody of the child may not serve as the child's attorney. §32A-4-10(C).

Historical Note: When the concept of a youth attorney was being developed, there was concern that younger children not lose the continuity of their relationship with their GAL. Hence, the law was drafted to allow the same attorney to continue representing the child after age 14, albeit as counsel rather than GAL. It was thought that the interests and desires of the younger and older siblings would not conflict in many cases and that the attorney would be able to continue serving as GAL for the younger children and attorney for the older children.

Rule 10-313.1 was adopted by the Supreme Court in 2010 to provide guidance to courts and attorneys when siblings are involved. The rule permits the court to appoint the same attorney to serve as GAL for the younger children and attorney for the older children. The difference in role is not itself a conflict of interest. The rule also provides a list of circumstances which do not, standing alone, demonstrate a conflict. For example, the fact that the children have different permanency plans or that they express conflicting desires or give different accounts regarding issues that are not material to the case does not, standing alone, demonstrate a conflict. *See* Rule 10-313.1(C).

With some exceptions, the attorney must decline to represent one or more siblings if, at the outset, a concurrent conflict of interest exists. A concurrent conflict exists "if the representation of one child will be directly adverse to another child or there is a significant risk that the representation of one or more of the children will be materially limited by the attorney's responsibilities to another client, a former client or a third person, or by a personal interest of the attorney." Rule 10-313.1(A)(2); *see also* Rule 16-107 of the Rules of Professional Conduct.

An attorney representing siblings has an ongoing duty to evaluate the interests of each sibling and assess and act on any conflicts of interest that develop. *See* Rule 10-313.1(B).

6A.4 Specific Powers and Duties

6A.4.1 Representation on Appeal

The youth attorney in an abuse or neglect case is obligated to represent the child during any appellate proceedings unless excused by the court. §32A-1-7.1(B). This includes initiating an appeal on the child's behalf or filing an answer brief. The youth attorney should continue to advocate the child's position consistent with the attorney's duties under the Rules of Professional Conduct.

6A.4.2 Filing TPR Motion

The attorney representing an older child in the abuse or neglect proceeding may request in writing that CYFD move for the termination of parental rights and notify the department that, if it does not move for termination, the child will do so and seek an award of attorney fees. The court may order CYFD to pay attorney fees if the child, through the attorney, moves successfully for TPR and the department refuses to litigate the motion or fails to act in a timely manner. §32A-4-30.

6A.4.3 Retaining Separate Counsel

The youth attorney may retain separate counsel to represent the child in a tort action or any other action outside the jurisdiction of the children's court. The youth attorney must provide written notice to the court within ten days of retaining separate counsel and is prohibited from having any pecuniary interest in the separate action. §32A-1-7.1(C).

6A.4.4 Mental Health and Developmental Disabilities Residential Placement Decisions

Under the Children's Mental Health and Developmental Disabilities (MHDD) Act, as amended in 2007, a child 14 years of age or older may voluntarily admit him or herself to a residential treatment or habilitation program, with the informed consent of the child's legal custodian. §32A-6A-21(B). The law also entitles the child to an attorney. §32A-6A-21(D). In the case of a child subject to the Abuse and Neglect Act, the child's attorney in the abuse or neglect proceeding continues to serve in the MHDD Act proceeding. However, the child may, after consultation with this attorney, elect to be represented by counsel appointed under the MHDD Act instead. §32A-4-23(E).

Because children 14 years of age or older have the independent right to consent to residential placement, the child's attorney must meet with the child and determine, within seven days after admission, whether or not the child consents to the placement. At the meeting, the attorney must first explain to the child:

- the child's right to an attorney;
- the child's right to terminate his voluntary admission and the procedures to effect termination;
- the effect of terminating the child's voluntary admission and the options of the physician and other interested parties to the petition for involuntary admission; and
- the child's rights under the MHDD Act, including the right to:
    - legal representation;
    - a presumption of competence;
    - receive daily visitors of the child's choice;
    - receive and send uncensored mail;
    - have access to telephones;
    - follow or abstain from the practice of religion;
    - a humane and safe environment;
    - physical exercise and outdoor exercise;
    - a nourishing, well-balanced, varied, and appetizing diet;
    - medical treatment;
    - educational services;
    - freedom from unnecessary or excessive medication;
    - individualized treatment and habilitation; and
    - participation in the development of the individualized treatment plan and access to that plan on request. §32A-6A-21(I) and §32A-6A-12.

If the attorney determines that the child understands his or her rights and voluntarily and knowingly desires to remain as a patient in the residential program, the attorney will so certify on a form designated by the Supreme Court within seven days of the child's admission. §32A-6A-21(J); Form 10-494. A child voluntarily admitted has the right to immediate discharge upon his or her request, except in those situations in which involuntary placement proceedings are commenced. §32A-6A-21(L). If involuntary proceedings are commenced, the child shall at all times be represented by counsel. §32A-6A-22(H).

6A.5 Other Responsibilities

The youth attorney will want to consult with the youth's case worker as well as the health care, mental health care, and other professionals involved with the youth's treatment plan. This will permit the attorney to request services to meet the youth's needs, to protect the youth's interests, and to ensure a comprehensive plan.

It may also be reasonable and appropriate, for example, to:

- Engage in advocacy in other forums, such as attending treatment team meetings if the child is in a residential mental health placement or in treatment foster care; participating in Individualized Education Plan meetings for special education services at school; or working through administrative channels to secure other health or social services. The youth attorney should be familiar with federal statutes that may affect the child's rights, such as the Americans with Disabilities Act, Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Family Education Rights and Privacy Act.

- Participate in discharge planning for the child, such as from one level of care to another, from foster care to a permanent placement, or at the time of emancipation. The youth attorney's knowledge of therapeutic intervention models, pharmacological interventions, child development, and state and federal adoption subsidies can be an important resource for the child in those discussions.

It will be especially important to advocate for the child as he or she prepares for adulthood. Section 32A-4-21(B)(11), for example, requires that the predisposition study for children 16 years of age and older contain a plan for developing specific skills the child requires for successful transition into independent living as an adult, regardless of whether the child is returned to the parent's home. In 2009, the legislature further required the predisposition study to include "a treatment plan that sets forth steps to ensure that the child's educational needs are met and, for a child fourteen years of age or older, a treatment plan that specifically sets forth the child's educational and post-secondary goals." §32A-4-21(B)(12).

Also added in 2009 were the provisions for transition planning set forth in §32A-4-25.2 and §32A-4-25.3. The transition plan in this context is somewhat different from the plans described above. As defined in §32A-4-2:

> "transition plan" means an individualized written plan for a child, based on the unique needs of the child, that outlines all appropriate services to be provided to the child to increase independent living skills. The plan must also include responsibilities of the child, and any other party as appropriate, to enable the child to be self-sufficient upon emancipation.

Before the child turns 17, the department will meet with the child, the child's attorney and others of the child's choosing to develop this transition plan and will present the plan to the court at the first hearing after the child's 17th birthday. §32A-4-25.2(C). Then, at the last hearing before the child turns 18, the court will both review the plan and determine whether the department made reasonable efforts to provide certain information and documentation to the youth as he or she ages out of the system. §32A-4-25.3. The youth attorney will want to ensure that the court considers all appropriate issues and hears the views of the youth before ordering a transition plan, reviewing the transition plan, or determining whether the department has made reasonable efforts.

Immigration issues are also important for the attorney to address. Section 32A-4-23.1, passed in 2009, requires the department to determine the child's immigration status. If the child is an undocumented immigrant, CYFD must consider whether it is in the child's best interest to be returned to the child's country of origin. If the permanency plan is not reunification, the department must also consider whether the child may be eligible for special immigrant juvenile status (SIJS) and, if so, to move the court for an SIJS status order. After consulting with the child and his or her attorney, the department will then determine whether the child's best interests would be served by filing a petition with the federal immigration agency to secure SIJS for the child. ***See*** Handbook §17.8 for more details.

In the case of both transition planning and petitioning for SIJS, the Children's Code now permits the children's court to retain jurisdiction of the case beyond the child's 18th birthday under certain circumstances. It will be critical for the child's attorney to pay close attention to timelines as the child approaches 18. *See* §32A-4-25.3(C) and §32A-4-23.1(E).

The attorney should also be attentive to any need the youth may have to seek emancipation from his or her parents, for one or more of the purposes set forth in the Emancipation of Minors Act, §§32A-21-1 through 32A-21-7, discussed at length in *Diamond v. Diamond*, 2012-NMSC-022, 283 P.3d 260. In *Diamond* the New Mexico Supreme Court held that the Emancipation of Minors Act authorizes the court to declare a minor emancipated "for some rather than all of" the enumerated purposes in §32A-21-5 of the Act. 2012-NMSC-022, ¶1. The Court ruled that the district court could, under the Act, order the minor in that case to be "an emancipated minor in all respects, except that she shall retain the right to support from [Mother]." *Id*. ¶¶13, 50.

6A.6 Youth Attorney in Court

The child who is the subject of an abuse or neglect petition is a party to the case. Rule 10-121(B)(3). The youth attorney should actively participate in all court proceedings. This participation includes:

- making pretrial motions;
- making opening and closing statements;
- calling and adequately examining witnesses;
- preparing and offering evidence and exhibits;
- making proper objections or responding to objections raised by opposing counsel;
- preserving issues for appeal;
- filing briefs; and
- submitting proposed findings of fact and conclusions of law.

To do otherwise would amount to the passive representation that the Court of Appeals in *Esperanza M*. described as "materially deficient." The Court in that case pointed out that the attorney (serving as a GAL) did not make any pretrial motions, make an opening statement, call witnesses, adequately examine witnesses called, make proper objections, or take a position on a majority of the objections made by opposing counsel. *State ex rel. CYFD in the Matter of Esperanza M.*, 1998-NMCA-039, ¶40, 124 N.M. 735.

6A.7 Relationship to Others in the Case

The relationships between the participants in abuse or neglect cases -- clients, children's court attorneys, social workers, CASAs, respondents' counsel, GALs, and now youth attorneys -- are evolving. Some of these relationships are defined by requirements of the Children's Code, court rules, and case law, and change accordingly. Because older children have only recently had attorneys representing them under the client-directed model of representation, the legal community is still exploring the extent to which this model of representing children is or is not changing relationships.

6A.7.1 Relationship to the Child

The youth attorney's relationship to the child client is that of any lawyer to his or her client. §32A-1-7.1(A). As such, the youth attorney is required to perform a number of roles, including advisor, counselor, and advocate. Rule 16-201; Preamble to the Rules of Professional Conduct. Depending on the child's age, maturity, and sophistication, the youth attorney's role as advisor and counselor may be especially significant. The youth attorney must candidly advise the child about his or her rights, the strengths and weaknesses of the child's expressed positions, and the possible outcomes of the case, and must do so in a manner that is meaningful to the child. In counseling the child, the youth attorney may -- and probably should -- discuss more than just the legal aspects of the case, such as the child's future family relationships and social and economic factors that may be relevant to the child's situation. Rule 16-201. Once the child has been fully advised and counseled, the youth attorney must abide by the child's "decisions concerning the objectives of representation" and be a zealous advocate for the child. Rule 16-102.

6A.7.2 Relationship to Other Parties

Whether the youth attorney may communicate directly with CYFD workers without the children's court attorney being present or consenting is unclear. Whereas the GAL plays a unique role not typical of traditional attorneys in abuse and neglect cases, the youth attorney is explicitly required to "provide the same manner of legal representation and be bound by the same duties to the child as is due an adult client, *in accordance with the rules of professional conduct*." §32A-1-7.1(A) (emphasis added). Presumably this includes Rule 16-402, which provides that a lawyer may not "communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." In *State ex rel. CYFD in the Matter of George F*., 1998-NMCA-119, ¶5, 125 N.M. 597, the court declined to decide whether an attorney-client relationship exists between the children's court attorney and the social workers. However, CYFD regulations provide that the primary decision-maker on the case is the CYFD worker for the purpose of the attorney-client relationship. 8.10.7.12(A) NMAC.

The youth attorney should not make direct contact with the respondents when they are represented by counsel, outside of the presence of such counsel, unless the respondents and their counsel agree to the contact.

6A.7.3 Relationship to the Court

While the court must assure that the GAL zealously represents the child's best interest, it must assure that the youth attorney represents the child. §32A-4-10(F). The court does not have the same relationship with the youth attorney that it does with the GAL who, at least in part, is acting to assist the court in carrying out *its* duty to determine the child's best interest. ***See*** Handbook §6.6.3.

6A.8 Performance Standards

The performance standards adopted by the New Mexico Supreme Court for attorneys who represent older youth in abuse or neglect proceedings in children's court are reprinted here, beginning on the next page.

6A.9 Recommended Reading

- Peters, Jean Koh, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions, Third Edition. Matthew Bender & Company, Inc., a member of the LexisNexis Group, 2007.
- Renne, Jennifer L., Legal Ethics in Child Welfare Cases. American Bar Association, 2004.

These standards are not intended to substitute for, or impede the exercise of, an attorney's professional judgment or discretion. However, if an attorney elects not to perform a particular task specified in the standards, that decision should be the result of purposeful consideration in the context of the facts of a specific case rather than a random or blanket decision by the attorney.

Performance Standards
Youth Attorney (YA)

1. PRACTICE STANDARDS

- The YA zealously represents the expressed interests of the youth;
- The YA represents and protects the youth's expressed cultural needs;
- The YA represents the youth in accordance with the Code of Professional Responsibility, S.C.R.A. 16-101 et. seq. NMSA 1978, and all other applicable laws;
- The YA represents the youth in accordance with the confidentiality requirements of the New Mexico Children's Code (Section 32A-4-33).

2. TRAINING STANDARDS

- The YA participates in at least ten (10) hours of relevant annual training. ***(See attachment).***

3. CONTACT AND CONTINUITY OF COUNSEL STANDARDS

After consultation with the youth/client:

- The YA contacts the youth in advance of custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, and other court proceedings to ascertain the need for witnesses or other evidence to be presented; the YA contacts the youth prior to mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The YA counsels the youth, in a manner understandable to the client, on the subject matter of the litigation, the rights of the custodial and non-custodial parent, the court system, the proceedings, the YA's role, and what to expect in the legal process;
- The YA explains court orders and their consequences to the youth;
- The YA is accessible to the youth through office hours, telephone/voice mail, fax, or email;
- The YA attends treatment team meetings, administrative hearings, Citizen Review Board meetings, and other conferences and staffings concerning the youth, whenever appropriate;
- The YA discusses with the youth the nature of an appeal. If the appeal has merit, the YA takes all necessary steps to perfect the appeal and seeks appropriate temporary

orders or extraordinary writs to protect the interests of the child during the pendency of appeal;

- Whenever an appeal is taken, the YA enters an appearance and YA representation continues through any appellate proceedings unless representation is otherwise arranged;
- If there is no appeal, YA representation continues through dismissal unless removed or relieved by the court;
- At cessation of representation, the YA discusses the end of the legal representation and determines what contacts, if any, he/she and the youth will continue to have.

4. STANDARDS FOR GATHERING AND REVIEWING INFORMATION

After consultation with the youth/client:

- The YA is responsible for gathering and reviewing information, including:
    - Interviews with the youth, foster parents and other caretakers, caseworkers, and service providers; and interviews as appropriate with the parents, school personnel, neighbors, relatives, clergy, law enforcement, and others;
    - Contact with lawyers for other parties and the CASA;
    - Review of the youth's, respondent's, and family's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case, including placement records, as available;
    - Review of the court files of the youth, respondent, and family; and case-related records of the social service agency and other service providers; and
    - Review of photographs, videos, or audiotapes and other evidence.
- The YA obtains the necessary authority for the release of information; and
- The YA personally observes the youth's interaction with parents, or with whomever the youth may be reunited, when reunification is anticipated, as needed.

5. CASE PLANNING STANDARDS

After consultation with the youth/client:

- The YA consults with the social worker, and health care, mental health care, and other professionals involved with the youth's service plan;
- The YA requests services (by court order if necessary) to meet the youth's needs, to protect the youth's interests, and to ensure a comprehensive service plan. These services may include but are not limited to:
    - Screening and diagnostic services
    - Family preservation or reunification services;
    - Home-based services;
    - Sibling and family visitation;
    - Child Support;
    - Domestic violence prevention, intervention and treatment;

- Medical and mental health care;
- Drug and alcohol treatment;
- Parenting education;
- Semi-independent and independent living services;
- Long-term foster care;
- Termination of parental rights action;
- Adoption related services;
- Education;
- Recreational or social services;
- Housing;
- Special education and related services; and
- Supplemental security income (SSI) to help support needed services.

- The YA determines the appropriateness of the youth and/or the YA attending local Citizen Review Board hearings concerning the youth; if neither the youth nor YA attend, the YA forwards to the board a letter stating the youth's status during the period since the last review and an assessment of CYFD's permanency and treatment plans;
- The YA monitors implementation of the case plan;
- The YA communicates with the Court-Appointed Special Advocate (CASA); and
- The YA communicates to the Court the youth's position on the service plans for the youth and respondent; issues about the youth's placement; and the youth's goals.

6. COURT PERFORMANCE STANDARDS

After consultation with the youth/client:

- The YA participates in custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews, permanency hearings, other court proceedings, and mandatory pre-adjudicatory and pre-permanency meetings scheduled in accordance with the provisions of the Children's Code;
- The YA reports to the court on the youth's compliance with prior court orders and treatment plans;
- The YA presents evidence of the reasonableness or unreasonableness of the Department's efforts and on alternative efforts that could have been made;
- The YA participates in mediation;
- The YA stays informed of the youth and family's involvement with family group decision making, family drug court, and other court sanctioned programs;
- The YA files petitions, motions, and responses and makes objections as necessary to represent the youth. If appropriate, the YA files briefs in support of evidentiary issues. During all hearings, the YA preserves legal issues for appeal, as appropriate. Relief requested may include but is not limited to:
    - Obtaining necessary services;

- A mental or physical examination of a party or the youth;
- A parenting, custody, or visitation evaluation;
- An increase, decrease, or termination of contact or visitation;
- Requesting, restraining, or enjoining a change of placement;
- Contempt for non-compliance with a court order;
- Termination of the parent-child relationship;
- Child support;
- A protective order concerning the youth's privileged communication or tangible property; and
- Dismissal of petitions or motions.

- The YA presents and cross examines witnesses, offers exhibits, and provides independent evidence as necessary;
- The YA prepares the youth to testify; the YA familiarizes the youth with court procedures, and what to expect during direct and cross-examination;
- The YA requests orders that are clear, specific, and, where appropriate, include a time line for assessment, services, and evaluation;
- The YA reviews all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices;
- The YA monitors the implementation of the court's orders and reports any noncompliance;
- If appropriate, the YA makes a closing argument and provides proposed findings of fact and conclusions of law. The YA ensures that a written order is entered;
- The YA works diligently to avoid continuances and reduce delays in court proceedings.

Attachment

RECOMMENDED TRAINING CONTENT

At a minimum, the requisite training programs, including mentoring, should address:

- Relevant federal and state laws and agency regulations;
- Relevant court decisions and court rules;
- Court process and key personnel in child and family related litigation;
- Applicable guidelines and standards for representation;
- Child development needs and abilities;
- Family dynamics and dysfunction including substance abuse and the use of kinship care;

- Accessing services such as family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services; the structure of the agencies providing services, as well as provision and constraints related to agency payment for services; and
- Policy and procedure re: the multidisciplinary input required, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of effort made to safely maintain the child in his or her home.

CHAPTER 7

GUARDIAN AD LITEM FOR RESPONDENT WITH DIMINISHED CAPACITY

This chapter covers the following with regard to the guardian ad litem for a respondent with diminished capacity:

- Appointment, including appropriate circumstances and court authority.
- Responsibilities, including Americans with Disabilities Act.

7.1 Appointment

7.1.1 Rules

Both the Children's Code and the Children's Court Rules are silent on the appointment of a guardian ad litem for a respondent whose capacity to make decisions in connection with his or her representation is diminished. Nevertheless, guardians ad litem are occasionally appointed for respondents with diminished capacity in child welfare cases.

Guidance on when a guardian ad litem may be appointed can be found in the Rules of Civil Procedure, the Rules of Professional Conduct, and the statutes on trials. For example, Rule 1-017(C) of the Rules of Civil Procedure provides in part:

> The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 16-114 of the Rules of Professional Conduct addresses situations in which an attorney is representing a respondent whose capacity is diminished:

A. Client-lawyer relationship. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

B. Protective action. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or

> entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

The Committee Commentary suggests that, in determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision. It further suggests that, in appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician. Rule 16-114 Committee Commentary, ¶6.

The statutory law on trials authorizes the appointment of a guardian ad litem for an "incapacitated" person who is sued. § 38-4-15. The definition of "incapacitated person" in §38-4-14 offers further guidance to courts and practitioners considering the possible need for assistance for a respondent. The definition is broad in the sense that it covers a wide range of causes for the incapacity, but narrow in the sense that the extent of the inability required is great. An "incapacitated person" is defined in the statute as:

> any person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he is unable to manage his personal care or he is unable to manage his property and financial affairs.

§38-4-14.

7.1.2 Case Law

In *State ex rel. CYFD v. Lilli L*., 1996-NMCA-014, 121 N.M. 376, a mother appealed the termination of her parental rights and argued that, because she was a minor, the children's court should have appointed both a guardian ad litem and an attorney to represent her. The court stated:

> As a general rule, the court, upon being apprised that a minor is unrepresented by counsel, has a duty to appoint a guardian ad litem *or* an attorney to protect the interests of such child….
>
> [W]hile it is a general practice under SCRA 1-017(C) for a guardian ad litem to be appointed to represent a minor who is a defendant in a civil case, it is clear the court is not required to appoint a guardian ad litem where the child is represented by counsel in such action.

121 N.M. at 378-379.

In *In the Matter of Jason Y*., 106 N.M. 406, 409 (Ct. App. 1987), a mother appealed the termination of her parental rights and argued that, because there were issues of her mental incompetence, she was denied equal protection in relation to the protections provided to

criminal defendants. The Court of Appeals rejected her argument, citing the different considerations to be balanced in a civil case, in particular the needs of the child, as opposed to those in a criminal case. The court stated:

> While criminal proceedings may be suspended where a defendant is not competent, different rules apply in civil cases. An infant or an incompetent person may sue or be sued. SCRA 1986, 1-017(C) provides in part: '[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.' Mother was at all times material to the proceeding represented by counsel. No claim is advanced that the court erred either by failing to enter an order for the protection of respondent or by failing to appoint a separate guardian ad litem.

106 N.M. at 409.

A review of these authorities makes it clear that representation by counsel is generally sufficient for most clients. Indeed, counsel must, as far as reasonably possible, maintain a normal attorney-client relationship with the impaired client. However, counsel may request protective action if counsel reasonably believes that the client cannot adequately act in the client's own interest. Rule 16-114.

Appointment of a guardian ad litem rests in the equitable discretion of the court. If a guardian ad litem is appointed, it should be clear that both the GAL and counsel remain in the case, but with different roles.

Practice Note. Counsel might consider requesting the appointment of a guardian ad litem when the respondent client appears unable to participate meaningfully in the process due to developmental disability or mental illness. When deciding whether to request appointment of a GAL, however, counsel should consider the question it might raise in the court's mind about the client's ability to parent. For just this reason, some respondents' attorneys will not, as a general rule, consider asking for a guardian ad litem.

As noted in the Committee Commentary to Rule 16-114, ¶8, there are cases in which raising the question of diminished capacity can adversely affect the client's interests. The lawyer's position in such cases is "an unavoidably difficult one."

7.2 Responsibilities

7.2.1 General Responsibilities

The role of the guardian ad litem for a respondent with diminished capacity is not defined in New Mexico law and undoubtedly depends on the nature and extent of the diminished capacity and what assistance the respondent needs in order to participate effectively in the case. Since the respondent will already be represented by counsel, it will be a different situation than that of the GAL appointed to represent a child's best interest under the

Children's Code. The order of appointment will have to guide the GAL and set forth the GAL's roles and responsibilities.

Case law provides some guidance on the possible roles and responsibilities of a GAL appointed for a client who is incapacitated or of diminished capacity. For example, the role of the guardian ad litem for a mentally ill parent in a TPR proceeding is discussed briefly but forcefully in *State ex rel. CYFD v. Stella P.*, 1999-NMCA-100, 127 N.M. 699. The attorney for the respondent mother had requested that the children's court appoint a guardian ad litem for the mother, who was mentally ill, "in order to address the issue of her best interests herein." The children's court appointed the GAL but did not define his role in the order appointing him. *Id.* ¶4.

The Court of Appeals was critical of the fact that the respondent's attorney and her GAL "only passively participated" in the TPR trial, did not present to the children's court any evidence or testimony or express Mother's wishes regarding the proceedings, and did not require CYFD to prove by clear and convincing evidence that her rights should be terminated. *Id.* ¶¶.30-31. Quoting from different cases, the Court of Appeals wrote:

> Mother's GAL is "not a mere figurehead, but is required to take all steps reasonably necessary to protect and promote the interests of his ward in litigation."
>
> "Appointment as guardian ad litem of a minor is a position of the highest trust and no attorney should ever blindly enter an appearance as guardian ad litem and allow a matter to proceed without a full and complete investigation into the facts and law so that his clients will be fairly and competently represented and their rights fully and adequately protected and preserved."
>
> [A]ppointment of [a] GAL "for an incompetent is not a bare technicality,... [T]he office involves more than perfunctory and shadowy duties."
>
> "A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof."

Id. ¶¶29-30 (citations omitted).

Two Supreme Court cases have addressed the question of immunity for court-appointed guardians ad litem and in the course of their analysis discussed various roles of a GAL at some length. Unfortunately, both cases involve GALs appointed to help the court determine the best interest of children in situations involving a financial settlement in a tort case and a custody dispute, respectively. Neither involved a GAL appointed in a situation where the individual is represented by counsel already. Nevertheless, both cases offer some guidance in articulating the role of a GAL in a case.

In *Collins ex rel. Collins v. Tabet*, 111 N.M. 391 (1991), the court discussed the dual role of a GAL as an advocate for the client and as an arm of the court.

> [I]t is clear that in New Mexico, and probably elsewhere, a guardian ad litem *does* represent the interests of his or her ward, but the guardian may at the same time assist the court in carrying out its duty of protecting the interests of the child…. The guardian ad litem thus may fulfill the dual role of providing information to the court to enable it to pass on the reasonableness of a settlement, while at the same time protecting the ward's interests by zealous advocacy and thorough, competent representation.

Id. at 400. The court determined that, when deciding whether a GAL is functioning as an arm of the court and therefore cloaked with quasi-judicial immunity, "a limited factual inquiry is necessary to determine the nature of Tabet's appointment and the extent to which he functioned within the scope of that appointment," suggesting that the role of a GAL could vary from case to case. *Id*. at 393, 403. As in *Stella P.*, the trial court had not defined the role of the GAL in the proceeding when it made the appointment. *Id*. at 394.

In Kimbrell v. Kimbrell, 2014-NMSC-___, ¶¶2, 17 (No. 34,150, June 23, 2014), the Court held that a guardian ad litem appointed under Rule 1-053.3 in a custody dispute was protected by quasi-judicial immunity when acting as an arm of the court. The Court distinguished *Collins* because in *Collins* the record did not show clearly whether the guardian was appointed as an arm of the court or as a "conflict/guardian ad litem" in a settlement involving a minor. Rule 1-053.3, on the other hand, spells out in great detail what it means to be an arm of the court in a particular context.

Practice Note. When and if the court appoints a GAL for a respondent with diminished capacity, whether at counsel's request or otherwise, it is important that the court define the role of the GAL in the order. This will allow for more effective assistance to the respondent, respondent's counsel, and the court in the proceeding.

7.2.2 Americans with Disabilities Act

Both the GAL and counsel would have the responsibility for raising and proving applicability of the Americans with Disabilities Act (ADA) in termination of parental rights cases. *State ex rel. CYFD v. Johnny S.*, 2009-NMCA-032, ¶10, 145 N.M. 754. The *Johnny S.* court stated:

> We decline to place on district judges the obligation to initiate inquiry into the applicability of the ADA in particular cases. District judges are simply not in a good position to recognize the potential application of the ADA, in particular in the early stages of termination proceedings when the inquiry would be best raised. Counsel, who should be most aware of their clients' situation, are best equipped to determine whether the ADA might apply and whether it would be of value to pursue it.
>
> To preserve issues concerning violations of the ADA, the parent bears the initial burden of asserting that the parent is a qualified individual with a disability under 42 U.S.C. Section 12131(2). Thereafter, the parent must create a factual and legal record sufficient to allow meaningful appellate review of the district court decision on the issue. What constitutes a sufficient record is, of course, different for each case. At a

> minimum, however, there must be a request for relief citing the ADA backed by facts developed in the record.
>
> Determining what accommodation may be reasonable once the ADA is found to apply will call for a more collaborative effort between the parents, CYFD, and the district court. But the initial burden to raise and argue the issues--as early in the case as possible--lies with the parents and their counsel.

Johnny S., ¶¶7-9.

CHAPTER 8

CHILDREN, YOUTH AND FAMILIES DEPARTMENT (CYFD)

This chapter covers the following with regard to the Children, Youth and Families Department:

- Structure and funding.
- Responsibilities, including:
  - receiving and investigating reports of child abuse and neglect
  - making reasonable efforts to prevent the child's removal from the home
  - serving as the child's legal custodian
  - working with the child and family
  - undertaking permanency planning.

8.1 Introduction

The Children, Youth and Families Department (CYFD) is the child welfare agency responsible for child protective services in New Mexico. CYFD receives a combination of state and federal funds. Most of the federal funds are allocated to CYFD under Title IV of the Social Security Act and require the submission of state plans. The U.S. Department of Health and Human Services, through its regional office in Dallas, Texas, monitors and audits New Mexico's use of the funds. The regional office is responsible for approving CYFD state plans and for conducting compliance reviews in relation to national outcome standards.

CYFD includes the following program divisions: Protective Services, Juvenile Justice Services, and Early Childhood Services. Protective Services is directly responsible for fulfilling the responsibilities delegated to CYFD under Article 4 of the Children's Code, the Abuse and Neglect Act.

CYFD has authority to promulgate administrative rules. The rules that relate to protective services are located in Title 8 of the New Mexico Administrative Code. In addition, Protective Services has developed procedures that provide guidance to case and social workers and children's court attorneys on issues that arise in their daily practice.

8.2 Responsibilities

CYFD's responsibilities under the abuse and neglect article of the Children's Code include:

- Accepting and investigating reports of child abuse and neglect. §§32A-4-3, 32A-4-4.

- Making reasonable efforts to prevent the need to remove the child from the home. §32A-4-7.
- Making reasonable efforts to preserve and reunify the family. §§32A-4-22, 32A-4-25, 32A-4-28.
- Serving as the legal custodian for children. §§32A-4-7, 32A-4-18, 32A-4-22, 32A-4-25.
- Determining whether a child who is the subject of investigation is eligible for enrollment as a member of an Indian tribe and if so, pursuing enrollment on the child's behalf. §32A-4-22(I).
- Identifying, locating, and considering relatives who may serve as an appropriate placement for the child. §32A-4-25.1(D).
- Providing protective supervision when the court returns a child to the parent's legal custody, under certain circumstances. §§32A-1-4, 32A-4-25.1.
- Developing and facilitating treatment plans for parents and children. §§32A-4-21, 32A-4-22, 32A-4-25.
- Developing plans to teach independent living skills to children 16 and older and to help them transition to adulthood. §32A-4-21(B)(11); 32A-4-25.2.
- Establishing permanency plans for children. §§32A-4-22(J), 32A-4-25.1.
- Making reasonable efforts to implement the child's permanency plan. §§32A-4-22 and 32A-4-25.1.

CYFD's permanency planning workers are primarily responsible for implementing service plans for families involved in the child protective services system. In larger geographic areas, staff for Protective Services work in specialized areas such as intake, investigation, treatment, placement, or in-home services.

CYFD's legal responsibilities include filing abuse or neglect petitions, filing motions to terminate parental rights, filing motions for permanent guardianship, and prosecution of cases. These duties are handled by children's court attorneys. ***See*** Handbook Chapter 4.

8.2.1 Receiving and Investigating Reports of Abuse or Neglect

All reports of child abuse and neglect are received by Statewide Central Intake (SCI), which is staffed by intake case workers 24 hours a day, 7 days a week. The telephone number for SCI is 1-855-333-SAFE (7233) or #SAFE from any cell phone.

The intake case worker assesses the report to determine whether the report falls within the agency's authority to investigate, collects ancillary information, and cross reports to law enforcement. An intake supervisor reviews the information and determines the time frame for response, which can range from immediate to a period of days.

The reports that require investigations are transferred to the local Protective Services office for this purpose. Investigative case workers conduct interviews, review records, and collect information to determine whether the reported abuse or neglect allegations can be substantiated and to assess for safety threats, the child's vulnerability to those threats, and the protective capacities that may mitigate existing safety threats. If a decision is made to file an

abuse or neglect petition and seek emergency custody, the investigative case worker is generally the person who prepares the affidavit in support of an *ex parte* custody order.

8.2.2 Efforts to Prevent Removal

The efforts made to prevent a child's removal from the home depend on the case worker's assessment of the child's safety. Reasonable efforts must be made to prevent removal in every case, with the paramount concern being the child's safety. The investigating case worker may be able to facilitate the parent's placement of the child with a relative, refer the parent to a child care provider, or work with the parent in other ways to prevent the child from being removed from the home.

In cases where the child can be safely maintained at home with more intensive services, CYFD offers in-home services. These services are provided by clinicians who are trained in intensive crisis intervention and family preservation services. These clinicians work with the family in their home by providing counseling, parenting training, practical assistance with the family's needs, and referrals to community-based services. In-home services may be provided for up to 12 months. CYFD also contracts with agencies for mid-level in-home services. This is a less intensive service.

8.2.3 Legal Custodian

CYFD can become the legal custodian of a child by court order or by operation of statute. §§32A-4-7, 32A-4-16 and 32A-4-18. Accordingly, when law enforcement places children in CYFD's care in emergency situations and the agency does not release the child to the child's parent, guardian, or custodian under §32A-4-7(B) and (C), CYFD has obtained legal custody by operation of statute. If CYFD wants to retain custody, it must file a petition in district court within two business days of the date that the child came into its custody. §32A-4-7(D). The status of legal custodian carries with it a number of statutory duties and responsibilities, including the right to determine where and with whom a child will live. §32A-1-4(O). This right is limited by the court's ability to review a placement decision for abuse of discretion. §32A-4-25(H)(6).

CYFD places children in its custody in licensed foster homes, approved adoptive homes, certified treatment facilities, or shelters. §32A-4-8. Children can be placed with relatives, who become licensed foster homes. Protective Services is responsible for licensing foster homes and approving adoptive homes under the Child Placement Agency Licensing Act, §§40-7A-1 to 40-7A-8. Placement workers carry out these responsibilities by recruiting families, providing training, conducting home studies, and working with foster and adoptive families. Placement workers also provide post-placement adoptive services.

In 2013, the Legislature passed SB 41, which adds a new section to the Children's Code on emergency placement. "Emergency placement" is defined as "instances when CYFD is placing a child in the home of private individuals, including neighbors, friends or relatives as a result of sudden unavailability of the child's primary caretaker." The law requires CYFD to request a Federal name-based criminal history record check of each adult residing in a

home where a child will be placed in an emergency due to the absence of the child's parents or custodians. SB 41, which is now codified at §32A-3A-11, is designed to provide more timely access to Federal criminal records histories in an emergency placement situation than was previously available and to ensure the safety of children.

8.2.4 Working with Parents and the Child

Child protective services cases are transferred to the permanency planning worker at the initial assessment planning conference, which occurs within 10 days of filing the abuse or neglect petition in children's court. The permanency planning worker's primary responsibilities are to:

- provide ongoing assessment of the child's safety;
- manage the treatment services needed to correct the causes and conditions of the abuse or neglect and enhance parental protective capacities;
- work directly with the child and family;
- facilitate the permanency plan goal identified for the child; and
- address the well-being needs of the child.

Treatment plans focus on the causes and conditions of the abuse or neglect and the problems with parental capacity that resulted in the removal of the child. Even though parental compliance with the treatment plan is critical, it is not determinative of whether the child can be returned to the parent. *State ex rel. CYFD v. Athena H.*, 2006-NMCA-113, 140 N.M. 390. Circumstances may change in such a way that allows the child to return home safely, even though the parent has not fully complied with the plan. For example, the safety threat may have been eliminated (e.g., the perpetrator of the abuse may have left the home), the child may no longer be vulnerable to the safety threat or the parent has developed protective capacities that mitigate the safety threat.

Permanency planning workers make critical decisions that may forever affect the family, but these decisions are not made alone. Most decisions are made at internal "staffings," some of which are attended by the family, guardian ad litem/youth attorney and the CASA. The permanency planning worker supervisor and county office manager are also involved in important decisions. The county office manager is the supervisor of all of the protective services staff in the county office and responsible for the case decisions made there. The county office manager often attends important meetings, such as change of plan meetings.

8.2.5 Permanency Planning

Permanency planning is the process of identifying a permanency goal for a child and then developing and implementing plans to accomplish that goal. CYFD establishes a permanency planning goal at the time the child is placed in its custody and it works to implement that goal unless and until the court has an opportunity to determine the goal for the child at a permanency hearing. §32A-4-25.1.

CYFD often engages in concurrent planning, which allows it to make reasonable efforts to reunify a family while simultaneously planning for other permanency options should reunification become impossible. CYFD must engage in concurrent planning when a motion for termination of parental rights is filed, if it had not begun doing so earlier. §32A-4-29(F).

8.2.6 Protective Supervision

After hearing evidence in the permanency review hearing, the court may, among other things, place the child in CYFD's protective supervision for up to six months and return the child to the parents' legal custody. §32A-4-25.1(E). Protective supervision allows CYFD to visit the child in the home, inspect the home, transport the child to court-ordered diagnostic examinations and evaluations, and obtain information and records concerning the child.

During the period of protective supervision, CYFD may file a motion to remove a child from the home or may seek emergency removal by a police officer under §32A-4-6 if necessary to protect the child's best interests. When a child is removed in this situation, a permanency hearing must be scheduled within 30 days of the child coming back into the department's legal custody. §32A-4-25.1(E).

8.3 Termination of CYFD's Responsibilities

CYFD's custody ends when the case is dismissed, the child is adopted, the court enters an order appointing a permanent guardian, the child reaches the age of majority, or in the event of the child's death. §32A-4-24. However, in some cases, CYFD may continue to provide services on behalf of the child after custody has ended. §32A-4-24(F). For example, CYFD provides services and support for children who emancipate from its custody at age 18. *See* 8.10.9 NMAC. Transition plans are developed to address the emancipating child's strengths and needs and to plan with the youth in order to maximize the child's ability to successfully transition into adulthood. The child may continue to receive independent living services until age 21 and may receive some educational services up to the age of 23. ***See*** Handbook §38.5.

Foster Youth and Post-Secondary Education. In 2014, the Legislature passed and the Governor signed a bill that waives tuition and fees for former foster youth attending state post-secondary educational institutions. Young people are eligible up to age 25. 2014 N.M. Laws, Ch. 62 (Senate Bill 206).

In the case of an adoption, a special needs child may receive an adoption subsidy, which is negotiated between CYFD and the adoptive parents and re-negotiated annually. §§32A-5-44, 32A-5-45. Most of the funding for adoption subsidies is federal and therefore must meet federal Title IV-E eligibility requirements. ***See*** Chapter 38 on federal laws. There are also state-funded subsidies available for children who do not meet the federal criteria.

CHAPTER 9

COURT APPOINTED SPECIAL ADVOCATE (CASA)

This chapter covers the following with regard to Court Appointed Special Advocates:

- Role and purpose.
- Duties and responsibilities.
- Qualifications and training.
- Availability of CASA programs in New Mexico.

9.1 Purpose

A Court Appointed Special Advocate is "a person appointed as a CASA, pursuant to the provisions of the Children's Court Rules who assists the court in determining the best interests of the child by investigating the case and submitting a report to the court." §32A-1-4(D). Children's Court Rule 10-164 governs the appointment, qualifications, powers, duties, reports and procedures for CASAs.

CASAs are trained, community volunteers appointed by a judge to represent the best interest of the child in abuse and neglect cases. The CASA volunteer has an official role in the judicial proceeding, working alongside professionals within the scope of Rule 10-164. The mission of the CASA program is to provide effective volunteer advocacy for the best interests of abused and neglected and dependent children involved in the court system, with the goal of ensuring that every child has a safe, supportive, and permanent home.

9.2 Duties and Responsibilities

Under Rule 10-164(C), the CASA may assist the court:

- in determining the best interests of the child by investigating the facts of the situation when directed by the court and submitting reports to the parties; and
- by monitoring compliance with the treatment plan and submitting reports to the court and the parties after adjudication.

Rule 10-164(D) provides that a CASA "shall be assigned duties consistent with the best interest of the child." These include:

- Reviewing records to the extent permitted by §32A-4-33. The CASA must maintain the confidentiality of the information.
- Interviewing appropriate parties.
- Monitoring case progress.
- Preparing reports based on the CASA's investigation, including recommendations to the court.

The CASA must receive notice prior to certain events in the case, including a change in the child's placement, judicial review hearings, and permanency hearings. §32A-4-14; §32A-4-25; §32A-4-25.1. CASA volunteers are expressly prohibited from engaging in *ex parte* (one-sided, without all the parties being present) communications with the judge in any of the CASA's assigned cases. Rule 10-164(E).

As a practical matter, CASAs must undertake the following tasks to fulfill their responsibilities in a case:

- Investigate the facts of the situation by acting as an independent gatherer of information. This includes:
    - Reviewing all relevant records.
    - Interviewing all appropriate parties, including the child, respondents, foster parents, relatives, teachers, medical personnel, therapists, and anyone who might have information concerning the circumstances of the case and/or the child's needs.
- Meet with the child in person on a regular basis.
- Seek cooperative solutions to the child's situation.
- Monitor the implementation of the treatment plan to determine if services are being provided in a timely manner and are accomplishing their stated objectives.
- Monitor the progress in the case.
- Provide written reports of findings and recommendations to the court at each hearing after adjudication, except for a termination of parental rights hearing.
- Attend all hearings, mandatory meetings, and any other meetings where the child's welfare is addressed.
- Maintain communication with the child's GAL or youth attorney.
- Remain actively involved with the case until formally dismissed by the presiding judge and/or permanency for the child is achieved.

9.3 Qualifications and Training

CASA volunteers are recruited by local CASA programs from the local community. To be eligible to serve as a CASA, an individual must meet the qualifications outlined in Rule 10-164(B) and the standards set by the National CASA Association (NCASA). A CASA must:

- be at least 21 years of age;
- pass screening requirements, including a written application, personal interview, reference checks and national, state, and local criminal background checks; and

- successfully complete an initial minimum 30-hour pre-service training and be under the supervision of the local CASA director.

The initial (or pre-service) CASA training includes information on:

- roles and responsibilities of a CASA volunteer;
- children's court process;
- dynamics of abuse and neglect, attachment, and separation;
- state and federal laws regarding child abuse, reasonable efforts, and permanency planning;
- confidentiality;
- child development;
- state and community agencies and resources;
- communication, information gathering, and report writing;
- court observation; and
- cultural awareness. CASAs are required to receive periodic training on cultural recognition issues, including the impact of ethnicity on a child's needs, cross-cultural dynamics and sensitivity, culturally appropriate treatment plans, and alternative health practices. §32A-18-1.

After screening and completion of training, each CASA volunteer signs confidentiality and commitment statements. The volunteers are sworn in as officers of the court by the local district judge. To remain active, a CASA volunteer must complete a minimum of 12 hours of in-service training each year, in accordance with NCASA standards.

9.4 Availability of CASA Programs

Since its inception in New Mexico in 1985, CASA has grown to 16 local CASA programs operating 21 offices in 12 of the 13 judicial districts around the state. The programs operate independently and have their own governing bodies and staff.

In 1990 the CASA programs existing at the time decided that they needed a state-level organization to promote program development and provide ongoing training and networking opportunities.. They formed the New Mexico CASA Network to work alongside all of New Mexico's local CASA programs.

Over the course of a year, more than 700 individuals statewide serve as CASA volunteers, working to ensure safe, supportive, permanent homes in nearly 900 foster care cases for over 1,500 children.

To locate a local CASA program, visit the "Who We Are" page of the New Mexico CASA Network website at http://www.nmcasa.org. Use the map of New Mexico to locate the county in question and find the contact information for the local CASA program in that area.

CHAPTER 10

CITIZEN REVIEW BOARD (CRB)

This chapter covers the following with regard to Citizen Review Boards:

- Purposes of the CRB system statewide.
- Role of local CRBs.
- Role of the State Advisory Committee.

10.1 Introduction

Citizen Review Boards (CRBs) are established under the New Mexico Citizen Substitute Care Review Act (the Act), which was first enacted in 1983. The purpose of the Act is to "provide a permanent system for independent and objective monitoring of children placed in the custody of the [Children, Youth and Families Department]." §32A-8-2.

The CRB system, which includes local volunteer citizen review boards, a state advisory committee, a contractor with demonstrated expertise in substitute care, and the Department of Finance and Administration (DFA), conducts monitoring in two ways under the Act:

- Local Citizen Review Boards conduct regular meetings to review the status of children placed in the custody of CYFD. Boards meet before judicial reviews and permanency hearings, review the records in the case, hear from the parties, and submit reports to the court.
- Representatives of the local CRBs serve on a State Advisory Committee (SAC), along with three members appointed by the Secretary of Finance and Administration. SAC makes annual recommendations to CYFD, the courts, and the Legislature on statutes, policies, and procedures relating to substitute care.

The CRB system also serves as the citizen review panels required by the federal Child Abuse Prevention and Treatment Act (CAPTA), as amended in 1996. For more information on CAPTA and other federal laws, ***see*** Handbook Chapter 38.

10.2 Local Citizen Review Boards

10.2.1 ROLE OF A CRB

The Act requires that the contractor selected by DFA (***see*** §10.4 below) establish and maintain local substitute care review boards, which are known as Citizen Review Boards, or

CRBs. The Act directs each local board to elect a chairperson, a vice chairperson, and other officers as it deems necessary. §32A-8-5.

Section 32A-8-6 provides that the local CRB will, prior to judicial review in an abuse or neglect case:

- review any dispositional order or continuation of an order, as well as CYFD's progress report on the child; and
- submit a report to the court, which becomes part of the child's permanent court record.

Under the Children's Code, CRBs review the case before permanency hearings as well as judicial reviews. Section 32A-4-25.1 requires CYFD to submit a progress report to the local CRB before the permanency hearing and invites the CRB to report its findings and recommendations to the court. *See also* §§32A-4-25(A)-(B) regarding the CRB role in a judicial review. Ideally, the CRB reviews a case one month prior to the judicial review or permanency hearing.

All of the parties to the children's court proceeding are given prior notice of the CRB meeting and afforded an opportunity to participate fully in the meeting. §32A-8-6(A). If attendance at the review is not possible in-person, by phone, or by polycom or Skype, parties may communicate in writing prior to the meeting

CRB members are often given information that is highly confidential. The Children's Code requires that they keep the information confidential. §32A-4-33.

After the CRB hears from all of the interested parties, the board members deliberate, make assessments, identify strengths and barriers in the case, and formulate recommendations for submittal to the judge. The board chair leads the meeting, which is facilitated by the contractor, who then submits the report to the court.

10.2.2 CRB MEMBERSHIP

The members of local CRBs are volunteers who may receive per diem and mileage as nonsalaried public officers under the Per Diem and Mileage Act but no other compensation, perquisite, or allowance for their work. §32A-8-5. Important characteristics for CRB members are:

- a commitment to children and permanency planning;
- interest, experience, or training in issues concerning child placement and child development;
- a willingness to accept the full responsibility of the position; and
- an ability to recognize the importance of the team effort involved in the review process.

State and federal mandates require that each CRB represent, to the maximum extent feasible, the various socioeconomic, racial, and ethnic groups of the community that it serves. *See* §32A-8-5(A) and 42 U.S.C. §5106a(c) (which refers to citizen review panels as being broadly representative of the community).

Individuals interested in serving on a local board may apply by submitting the application and materials as instructed on the CRB website, http://www.nmcrb.org. Accepted applicants must attend CRB training before being appointed to a board and avail themselves of further training on an ongoing basis. They must have a secure computer on which to receive case information, sign a confidentiality agreement, and pass a background check.

10.3 State Advisory Committee

The Act requires the establishment of a State Advisory Committee (SAC), composed of three persons with expertise in the area of substitute care appointed by the Secretary of Finance and Administration, and one representative of each local board. The Act directs the SAC to select a chairperson, a vice chairperson, an executive committee, and other officers as it deems necessary. The committee is expected to meet at least twice a year and more frequently upon the call of the chairperson or as the executive committee may determine. §32A-8-4. Like CRB members, SAC members may receive per diem and mileage as nonsalaried public officers under the Per Diem and Mileage Act, but may not receive other compensation, perquisite, or allowance. §32A-8-4(E).

The SAC is authorized to adopt reasonable rules relating to the function and procedures of the local boards and the SAC. These rules should include guidelines for the determination of the appropriate type of review and the information needed for all cases to be monitored by the local boards. §32A-8-4(D). SAC, in consultation with the contractor and DFA, determines the membership and tenure of local CRBs. §32A-8-5(B).

Under the Act, the SAC reviews and coordinates the activities of the local boards and makes recommendations to CYFD, the courts, and the Legislature on statutes, policies and procedures relating to substitute care. §32A-8-4(D). SAC makes its recommendations in an annual report that is distributed widely throughout the state, using information from the reviews of the local CRBs and other local, state, and national information regarding substitute care and permanency for children.

10.4 CRB Contractor

The Act directs DFA to contract with a nonprofit organization with demonstrated knowledge of the problem of children in substitute care and issues in permanency planning to operate the statewide CRB system. §32A-8-3. In 2013, DFA began contracting with the Southwest Region National Child Protection Training Center at the New Mexico State University for this purpose.

CHAPTER 11

FOSTER PARENTS

This chapter covers the following with regard to foster parents:

- Role of foster parents.
- Qualifications, licensure, and training.
- Responsibilities.
- Participation in the case, including:
  - collaboration with the case management team; and
  - involvement with the legal proceedings.

11.1 Introduction

Simply stated, foster parents provide care for children who are removed from their homes and placed in the custody of the state because of suspected abuse or neglect. While accurate, such a factual statement does not convey the breadth of what foster parents provide to children in the state's custody. By taking children who have experienced neglect or abuse into their homes, foster parents provide far more than food, clothing, and shelter; they also offer stability, compassion, patience, safety, love, and many other forms of support. They help with homework and advocate for their foster children at school, make sure that their foster children receive proper dental and medical care, understand that their foster children love their parents despite the problems that brought them into foster care, and encourage their foster children to maintain family, community, and cultural connections. Foster parents also provide a critical link between CYFD and the child, keeping the agency informed about the child's needs and well-being, and participating in case planning. In sum, foster parents are central to the success of the child welfare system.

11.2 Qualifications and Licensure

Foster parents are licensed and regulated by CYFD or a child placement agency. §32A-1-4(H). CYFD issues three types of foster care licenses: the family foster home license, the provisional license for relative foster care, and the specialized foster home license for care of special needs foster children. A child placement agency may issue a treatment foster care license to a family foster home. CYFD does not license treatment foster care homes. 8.26.4.17 NMAC.

11.2.1 Family Foster Home License

Any adult who is a legal resident of the country and who resides in New Mexico can apply to be a foster parent. People wanting to become foster parents are subject to screening which includes criminal record checks with the FBI and state and local police and a CYFD abuse and neglect check. Foster parents also must undergo a rigorous home study and complete a detailed autobiographical application that provides the licensing body with information about the potential ability of an adult to be a substitute caregiver. In addition, CYFD interviews in person all adult members of the foster parent applicant's household. 8.26.4.12 NMAC.

Foster parent applicants attend required pre-service training. 8.26.4.14 NMAC. At a minimum, this training generally includes:

- communication techniques;
- parenting techniques for children in crisis;
- working with biological parents;
- understanding child development;
- techniques for de-escalating crisis situations;
- adult, child, and infant CPR and first aid;
- understanding grief and loss; and
- child trauma and attachment issues.

Once licensed, the foster parent must complete at least 12 hours of training each year. For foster parents licensed by CYFD, six of the 12 hours are mandated by CYFD; the remaining 6 hours are chosen by the foster family and approved by CYFD. 8.26.4.14 NMAC. The content of the mandatory training varies from year to year and has addressed placement stability, concurrent planning, attachment, and trauma, among other things.

11.2.2 Provisional Licenses for Relative Foster Care

Relatives who provide foster care for children in the state's custody must be licensed. Unlike other foster parent applicants, however, relatives may begin fostering their relative child with a provisional license before completing the "full" family foster home license. A provisional license may be issued for 60 days once CYFD completes the initial relative assessment and a supervisor approves the provisional license. The initial relative assessment involves collecting and assessing the following information:

- the child's attitude toward the prospective caregiver;
- the prospective caregiver's attitude toward the child and parents, motivation to foster the child, and ability to safely parent the child;
- local and state criminal records;
- CYFD abuse and neglect referral history; and
- the physical standards checklist.

The provisional license is valid for 60 days, with the possibility of one 30-day extension.

During that period, the relative must complete all of the requirements for family foster home licensing. If the relative does not complete these licensing requirements, the foster child must be removed from the relative's home. 8.26.4.16 NMAC.

11.2.3 Specialized Foster Home Licenses

A specialized foster home license is a license issued to a licensed foster parent who has the additional training, education, or experience needed to care for a special needs certified child. 8.26.4.7 NMAC. Specialized foster homes may care for no more than 3 special needs certified foster children at a time. 8.26.4.17 NMAC.

11.2.4 Treatment Foster Care

Treatment foster care is designed to "provide intensive therapeutic support, intervention and treatment" for foster children "who would otherwise require a more restrictive placement." 8.26.4.7 NMAC. More specifically, treatment foster care services are provided in a foster family setting for "children or adolescents who are psychologically or emotionally disturbed, or behaviorally disordered[.]" 7.20.11.7 NMAC. Foster children and adolescents are eligible for treatment foster care if they:

- are at risk for failure or have failed in regular foster homes;
- are unable to live with their own families; or
- are transitioning from residential care as part of the process of returning to their family and community. 7.20.11.29 NMAC.

As noted earlier, CYFD does not license treatment foster care homes. Rather, treatment foster homes are licensed by child placement agencies that have met the treatment foster care standards in 7.20.11.29 NMAC. 8.26.4.17 NMAC. Treatment foster parents must complete 30 hours of training before a child is placed in the foster home, and an additional 10 hours within two months of the first placement. 7.20.11.29 NMAC. This training must include:

- first aid and CPR;
- child and adolescent development;
- behavioral management;
- prevention and de-escalation of aggressive behavior and the use of therapeutic holds;
- crisis management/intervention;
- grief and loss issues for foster children;
- cultural competence and culturally responsive services;
- specific agency policies and procedures, including documentation;
- recognizing the signs of abuse and neglect and understanding reporting requirements;
- side-effects of psychotropic medications; and
- the role of the treatment foster parent in treatment planning.

Twenty-four hours of in-service training are required each year after a child is placed in the home. *Id.*

11.3 Responsibilities of Foster Parents

11.3.1 Family Foster Parents

Although it is difficult to capture the essence and importance of the foster parent in a list of responsibilities, CYFD regulations describe the roles and responsibilities of the foster parent as follows:

- The foster parent is responsible for the daily care and supervision of a child placed in the foster parent's home.
- The foster parent helps preserve the child's connections with family and community, including the child's connection with the foster parent once the child leaves foster care.
- The foster parent agrees to abide by all federal, state, and local laws and CYFD's licensing standards for foster care.
- The foster parent is a member of the child's case management team and as a team member participates in the development and implementation of team plans and may participate in conferences, Citizen Review Board meetings, judicial reviews, Individual Education Plan meetings, etc. Foster parents do not make independent plans for children in their care.
- The foster parent may serve as a surrogate parent to protect the foster child's educational rights and acts as the student's advocate in the educational decision-making process.
- The foster parent may serve as a surrogate parent for early intervention, evaluation, assessment, and treatment, when appointed by the Department of Health's Director of the Family Infant Toddler program.
- The foster parent keeps copies of the foster child's medical and educational documents in a file that remains with the child if the child is moved.
- Foster parents, in cooperation with CYFD, create or maintain a life book for each foster child, which will remain with the child if the child is moved.
- Foster parents maintain and return all of a child's belongings when he or she moves to another placement, including return home.
- Foster parents may refuse placements they believe are not appropriate to their home.
- With the exception of law enforcement, foster parents do not release the foster child to anyone, including the child's parents or other relatives, without CYFD's approval.
- Foster parents document their observations of the child's attitudes and behaviors and provide the information to CYFD.
- Foster parents honor the confidentiality provisions of the Children's Code.
- Foster parents agree to never inflict corporal punishment on a child in foster care, including shaking, spanking, whipping, hitting, hair or ear pulling, or to use isolation, forced exercise, threats of exclusion from the foster home, or denial of food, sleep, or approved visits with the child's parent as discipline. Foster parents are prohibited

from using any actions intended to produce fear, shame, or other emotional and/or physical trauma.
- Foster parents do not belittle or disparage the foster child's parents, family, or cultural heritage, and encourage recognition and acceptance of the family's strengths and achievements.
- Foster parents cooperate with and carry out CYFD's plans for the child, including returning the child to his or her parents, placing with relatives, transferring to other substitute care settings, or adoption planning and placement. 8.26.2.12 NMAC.

> Foster parents provide transportation to medical, educational, and recreational activities, as well as food, clothing, and activities that are age appropriate and promote healthy development. They are expected to provide a structured and nurturing home which provides appropriate discipline and expectations of the child as a member of the family.
> -- *As described by a foster parent*.

11.3.2 Treatment Foster Parents

Treatment foster parents have many of the same core roles and responsibilities as other foster parents, but have additional responsibilities because of the unique behavioral and psychological needs of their foster children. They work with the treatment team and with agency supervision to develop and implement the treatment plan. They also provide front-line treatment interventions. The family living experience is the basic service to which individualized treatment interventions are added. 7.20.11.29(B)(11) NMAC.

In addition, treatment foster parents are responsible for:

- maximizing the likelihood that services are provided in a culturally competent and culturally proficient manner;
- helping the foster child maintain contact with his or her family (unless contraindicated by the treatment plan);
- working to meet the foster child's permanency goals;
- keeping records of the foster child's behaviors, activities, and significant events related to the treatment plan;
- keeping the agency informed of significant events and reporting serious incidents;
- maintaining confidentiality;
- being available at all times; and
- working with and securing all resources and services available in the community. *Id.*

11.4 Foster Parents as Members of the Case Management Team

The foster parent is a member of the child's case management team together with the parents, the child (if age appropriate), the CYFD worker, the CYFD supervisor, service providers, and any significant others in the child's and/or family's life. 8.26.2.12 NMAC. Foster parents play an essential role in contributing vital information about the child to the team. As the foster parent is the primary caregiver and observes behaviors that indicate the progress or

needs of the child, it is important that he or she be involved in team meetings or staffings.

While foster parents provide daily care, they also serve as advocates for permanence for the child. Foster parents collaborate with the other team members to ensure the child's best interest.

11.5 Involvement in the Abuse and Neglect Proceeding

Unless they have intervened in the case, foster parents are not parties to the judicial abuse or neglect proceeding in a formal sense. They are, however, given notice of judicial reviews and permanency hearings and have a right to be heard at those reviews and hearings. Rule 10-104.1 ensures that foster parents are informed of this right:

> In abuse and neglect proceedings, the department shall give notice of permanency hearings and periodic judicial review hearings to the child's foster parents, pre-adoptive parents and relative care givers. The notice given shall expressly inform foster parents, pre-adoptive parents and relative care givers of their right to be heard at the permanency hearing or judicial review. Notice shall be served in the manner provided by Rule 10-104 NMRA, and a certificate of service shall be filed with the court.

Several sections of the Children's Code also refer to the foster parent's right to notice of the proceedings. For example, §32A-4-27(F) provides:

> The foster parent, preadoptive parent or relative providing care for the child shall be given notice of, and an opportunity to be heard in, any review or hearing with respect to the child, except that this subsection shall not be construed to require that any foster parent, preadoptive parent or relative providing care for the child be made a party to such a review or hearing solely on the basis of the notice and opportunity to be heard.

Other provisions of the law include:

- §32A-4-20(C): Foster parents shall be given notice and an opportunity to be heard at the dispositional phase.
- §32A-4-25(C), (D): The children's court attorney shall give notice to all parties, including the child by and through the child's guardian ad litem or attorney, the child's CASA, the local CRB, and the child's foster parent or substitute care provider of the time, place, and purpose of any judicial review hearing. Anyone required to receive notice of judicial review hearings is entitled to present evidence and cross-examine witnesses.

Foster parents can ask to intervene to become a formal party in certain situations:

- §32A-4-27(A), (B): The court may permit intervention when the child has lived with the foster parents for at least six months and they file a motion for affirmative relief.

The court will consider their rationale for intervening and whether intervention is in the best interests of the child.

- §32A-4-27(E): The court must permit intervention if:
  - the foster parent desires to adopt the child;
  - the child has resided with the foster parent for at least six months within the year prior to the termination of parental rights;
  - a motion for termination of parental rights has been filed by a person other than the foster parent; and
  - bonding between the child and the foster parent is alleged as a reason for terminating parental rights in the motion for termination.

A Foster Parent's View:

Foster parents advocate for the best interest of the child in all settings, from CRB meetings to medical evaluations. While a foster parent does not independently determine the most appropriate treatment for a child, the information they can contribute about the child provides valuable insight into the child's needs.

As foster parents, individuals must serve as advocates for a swift and timely move towards permanence for the child. In many cases, this involves working closely with biological families. Foster parents serve as a model for biological parents with respect to parenting skills, disciplining techniques, establishing a nurturing environment, and approaches to problem-solving. They need to collaborate in a non-judgmental manner with these families to improve their skills and facilitate a safe return of the child. The child's treatment team members and CYFD staff are urged to support this collaborative relationship.

CHAPTER 12

COMMENCEMENT OF CASE

The filing of a petition in children's court commences the abuse or neglect case. This chapter covers:

- Filing the abuse or neglect petition.
- Filing a motion for an *ex parte* custody order and accompanying affidavit.
- The *ex parte* custody order.
- Confidentiality of records in the proceeding.

12.1 Filing of Petition

The filing of the petition with the district court clerk initiates an abuse or neglect proceeding under the Abuse and Neglect Act, which is part of the Children's Code. The children's court attorney is the sole person empowered by statute to file, and then only after determining and endorsing upon the petition that filing it is in the best interest of the child. §32A-4-15. If the child was taken into emergency custody, the petition must be filed within two working days of the child being taken into custody. §32A-4-7(D); Rule 10-312. The children's court attorney must file any peremptory elections to excuse a judge within two days of filing the petition. Rule 10-162.

Pending Rules and Forms. When the 2014 Handbook went to press, the New Mexico Supreme Court was considering proposed revisions to a number of Children's Court rules and forms and the adoption of several new forms. Please be sure to check the rules and forms in effect at the time of the proceeding.

12.2 Jurisdiction and Venue

12.2.1 Jurisdiction

The Children's Code establishes a division in the district court for each county known as the "children's court," which has exclusive original jurisdiction over abuse or neglect proceedings. §§32A-1-5, 32A-1-8(A). During abuse and neglect proceedings in which New Mexico is the home state under the Uniform Child Custody Jurisdiction and Enforcement Act, §§40-10A-101 to 40-10A-403, the court has jurisdiction over both parents to determine

the best interest of the child and to decide matters incident to the court proceedings. §32A-1-8(C).
In cases involving Indian children, the court must inquire into the domicile and residence of the child early in the case. Under the Indian Child Welfare Act (ICWA), the child's tribe has exclusive jurisdiction of the matter if the child resides or is domiciled on the reservation, and the children's court has only emergency jurisdiction to protect the child until the tribe can assume jurisdiction and the child is transferred to that jurisdiction. 25 U.S.C. §1911(a) and 25 U.S.C. §1922; ***see*** Handbook §39.2.4 on ICWA's provisions on jurisdiction. In cases involving other Indian children, the children's court must transfer the proceeding to the jurisdiction of the Indian child's tribe upon the petition of the child's parent, guardian, or tribe, unless there is good cause to the contrary. The transfer is barred if there is an objection to the transfer by a parent of the child or the child's tribe, and the tribe can decline jurisdiction. §32A-1-9(D), 25 U.S.C. §1911(b); ***see*** Handbook §39.2.4.

12.2.2 Venue

Abuse or neglect proceedings may be brought in the county where the child resides or in the county where the child is present at the time the petition is filed. §32A-1-9(A).

If the case is begun in a court for a county other than the one in which the child resides, the court, on its own motion or on motion of a party made at any time prior to disposition of the case, may transfer it to the court for the county of residence. A transfer may also be made if the child's residence changes during or after the proceeding. Certified copies of all legal and social records pertaining to the proceeding must accompany the case on transfer. §32A-1-9(C).

If there is a change of venue, the original guardian ad litem is to remain on the case until a new guardian ad litem is appointed by the new court, and the new guardian ad litem has communicated with the original one. §32A-1-7(G). The same rule applies to youth attorneys, as reflected in the model contract generally used for attorneys contracting to take youth attorney appointments in the different judicial districts.

12.3 Form and Content of Petition

The petition sets forth the factual basis necessary to confer jurisdiction on the children's court, as well as other pertinent facts concerning the child. It should include information, if known, as to the child's relationship with family members, Indian tribes and other court proceedings. Section 32A-1-11 should be consulted for specific requirements.

The petition is to be in a form approved by the Supreme Court. Rule 10-312. Allegations of abuse or neglect should be stated with specificity, in language that allows respondents to understand the nature of the allegations against them.

Facts which could give rise to a finding of aggravated circumstances should be pleaded separately from the allegations of abuse and neglect. §32A-4-20(G).

Definitions: "Abused child," "neglected child," and "aggravated circumstances" are defined in the Abuse and Neglect Act. ***See*** Handbook §15.5 for these definitions.

If a motion for an *ex parte* custody order is filed, the petition may incorporate by reference factual representations contained in the affidavit submitted with the motion. It is preferred, however, that the petition be able to stand alone, providing sufficient detail to apprise the parties and the courts of the allegations. There should be enough specificity both in terms of the Children's Code definitions invoked (*e.g.*, abused child, neglected child, sexual abuse) and supporting facts to make any later admission or no contest plea clear.

If the child has been placed in emergency custody, the petition must be filed within two working days of the date the child is taken into custody. §32A-4-7(D). Otherwise, a petition may be filed at any time. New allegations or the joinder of additional parties require the filing of an amended petition. CYFD may amend the petition "once as a matter of course at any time within twenty (20) days after it is served" or with the court's permission. Rule 10-312(F).

Calculating Deadlines: If any period of time prescribed or allowed by the Children's Code, the Children's Court Rules or an order of the court is less than eleven days, intermediate Saturdays, Sundays and legal holidays are excluded from the calculation. Rule 10-107(A). Hence, if a child is taken into custody on a Friday or Saturday, Tuesday would be the last day for filing the petition. This Handbook will sometimes describe days fewer than eleven as "working days."

12.4 Persons Named as Parties in the Petition

The parties to an abuse or neglect action are:

- the state (that is, CYFD);
- the parent, guardian or custodian who has allegedly neglected or abused the child; and
- the child alleged to be neglected or abused. Rule 10-121(B).

The state may also join as parties the non-custodial parent or parents, the guardian or custodian of the child, or any other person permitted by law to intervene. Rule 10-121(C).

Practice Note: Especially in light of the shortened timelines for abuse or neglect cases, it is usually desirable to join all parents in the case at the earliest opportunity.

CYFD considers naming as a respondent any parent who has a constitutionally protected liberty interest in the care and custody of the child if there is any viable allegation of abuse or neglect at all. A presumed father who is not the biological father should also be considered since a presumed father may withhold consent to an adoption, if adoption were to become an option in the future. See §32A-5-17.

If a parent is not named as a respondent, the court may be making a decision in a vacuum, and a parent not named is generally considered available to take custody of the child. ***See*** cases discussed below.

Where the parent is not alleged to have abused or neglected the child, CYFD may bring the parent into the case under Rule 10-121(C). Some fathers are not brought into the case until a motion for termination of parental rights is made, and it is better to involve them earlier.

In *In the Matter of Mary L.*, 108 N.M. 702, 705-706 (Ct. App. 1989), the court held that, when the noncustodial parent indicated a desire to have custody of the children, the department was required to either turn custody over to that parent or file a legal action to establish its right to custody as against her. At the time the mother requested custody, she had not been joined in the abuse or neglect case. *Id*. at 704. *See also State ex rel. CYFD v. Lisa A.*, 2008-NMCA-087, 144 N.M. 324. On the other hand, in *State ex rel. CYFD v. C.H. in the Matter of A.H.*, 1997-NMCA-118, 124 N.M. 244, CYFD requested, and was denied, a finding that it was required to release the children to a father who had been dismissed from the case. The Court of Appeals agreed that the department should retain custody of the children. *Id*. ¶5. "Given the condition of these children and the extent of their need for services, the Department has a responsibility to investigate even a natural parent when allegations of such abuse have been made." *Id*. ¶8. The court distinguished *Mary L.* on the basis that there was no factual predicate giving rise to any suspicion of neglect or abuse in that case. Id. ¶6.

12.5 Motion for *Ex Parte* Custody Order

Usually, but not always, a motion for an *ex parte* custody order accompanies the petition. If a motion is filed, it must be supported by a sworn statement of facts, or affidavit, showing that probable cause exists to believe that:

- the child is a neglected or abused child (***see*** definitions of neglected child and abused child in Handbook §15.5.3); and
- it is necessary for CYFD to take, or keep, custody because the child is at risk under one or more of the criteria set forth in §32A-4-18(C) (***see*** the list in Handbook §13.7.2). §32A-4-16(A).

The affidavit may be signed by any person who has knowledge of the facts alleged or is informed of them and believes that they are true. §32A-1-10(B). The case worker or supervisor responsible for investigating the allegations customarily signs the affidavit.

The affidavit should provide sufficient factual details about the abuse or neglect found during investigation, and should also document the efforts, if any, made to prevent or avoid removal of the child, or to make it possible for the child to return home. If no efforts were made, the facts should indicate that, under the circumstances, not making efforts was reasonable. In light of the regulations under the Adoption and Safe Families Act, it is very important that the affidavit contain the facts to support detailed findings that continuation in the home is

contrary to the welfare of the child. ***See*** §12.6 below, as well as Handbook §38.4 on ASFA.

The motion and affidavit must be substantially in the form approved by the Supreme Court. Rule 10-311(A).

Word of Caution: The official Children's Court forms were not amended when the rules were recompiled and amended effective January 15, 2009. A proposal to recompile and amend the abuse and neglect forms was pending in the Supreme Court as of June 2014. Until updated forms are approved by the Court, the forms in the Children's Court Rules may need to be modified to conform to existing law.

12.6 *Ex Parte* Custody Order

The Rules of Evidence do not apply to the issuance of an *ex parte* custody order. Evidence Rule 11-1101(D)(3); §32A-4-16(C).

If the court is convinced that probable cause exists, it may grant the motion and issue an order directing that the child be placed, or remain, in the legal custody of the department. If not, the child must remain in, or be returned to, the custody of the parent.

ASFA Note: If an order is issued, it is very important that the order contain a finding to the effect that **continuation in the home is contrary to the welfare of the child**. The consequences of omitting such a finding are serious and cannot be remedied. Under the ASFA regulations, the child will be ineligible for federal Title IV-E foster care funds if such a finding is not made in the first order in the case that sanctions, even temporarily, the removal of the child from the home.

The exact phrase "contrary to the welfare of the child" is not required. Comparable language is acceptable. However, the findings must be detailed and must be found in the court order or hearing transcript; the order may not simply incorporate by reference the facts asserted in the affidavit. ***See*** Handbook §38.4 and the federal regulations cited therein.

The ASFA regulations also require that the court determine whether **reasonable efforts were made by CYFD to prevent removal from the home**. This determination could be made in the *ex parte* order, with the underlying facts stated, based upon sworn affidavits. If the subject of reasonable efforts is not addressed within 60 days of the date the child is removed from the home, the child becomes ineligible for federal foster care payments for the duration of his or her stay in foster care. ***See*** Handbook §38.4.

If an *ex parte* custody order is issued, the court must schedule the initial custody hearing within ten working days of the date the petition was filed. §32A-4-18(A); ***see*** the box in §12.3 above on calculating deadlines. In a case involving an Indian child, the custody hearing may not be held until at least ten days after the parents or Indian custodian and child's tribe receive notice. Under the Indian Child Welfare Act, an additional 20 days may be granted. 25 U.S.C. §1912(a).

The initial custody hearing will determine whether the child will remain in or be placed in CYFD's custody pending adjudication. ***See*** Handbook Chapter 13.

Signing or declining to sign an order for *ex parte* custody is not considered a discretionary act that would prevent a party from disqualifying a judge under Rule 10-162(A).

12.7 Appointments

At the inception of the proceeding, the court must appoint:

- a guardian ad litem (GAL) or, for a child 14 years of age or older, an attorney ("youth attorney") for the child; and
- counsel for the parent, guardian, or custodian of the child. §32A-4-10.

"Youth Attorney": Under the 2005 amendments to the Children's Code, a child under the age of 14 receives a GAL while a child 14 years of age or older receives an attorney. §32A-4-10. However, the GAL is also a licensed attorney. The difference is that the GAL represents the best interests of the child while the older child receives client-directed representation, just as an adult does. To distinguish between the two attorneys (the GAL for the younger child and the traditional attorney for the youth), it has become common parlance to refer to the latter as a "youth attorney."

These appointments are generally made as soon as the petition is filed. In the case of the parent, guardian, or custodian, appointed counsel serves until the initial custody hearing, at which time the court makes an indigency determination. ***See*** Handbook §13.5.

12.8 Service

12.8.1 Petition

The petitioner (CYFD) is responsible for effecting service of the summons, petition and related orders and notices by personal service upon the respondent and upon the child's GAL or youth attorney. The summons must clearly state that the proceeding could result in termination of parental rights. §§32A-1-12, 32A-1-13, 32A-4-17; Rule 10-103.

If a parent has not been named as a party in the petition, a copy of the petition must be served on that parent with a notice that the parent may intervene and request custody of the child. Rule 10-312(C).

CYFD must also deliver a copy of the petition to the district attorney. §32A-1-6(C).

12.8.2 *Ex Parte* Custody Order

For a child not already in CYFD's custody, the e*x parte c*ustody order is to be served on the respondent by a person authorized to serve arrest warrants. §32A-4-16(B).

12.9 Notice to Relatives

In an effort to encourage relative caregivers, Section 103 of the federal Fostering Connections to Success and Increasing Adoptions Act, P.L. 110-351, establishes notice requirements for relatives of children removed from their parent's custody. Section 103 requires CYFD to exercise due diligence to identify and provide notice to all adult grandparents and all adult relatives of a child within 30 days of the child's removal from parental custody, except in cases involving domestic or family violence. The notice to relatives must:

- specify that the child has been removed from the custody of the parent;
- explain the options the relative has under federal, state, and local law to participate in the care and placement of the child;
- explain the options that may be lost by failing to respond to the notice;
- describe the requirements to become a foster family home; and
- describe the services and supports available for children in a foster family home.

Fostering Connections does not specify whether the notice needs to be written and is understood to permit either written or oral notice.

To meet the spirit and intent of the federal law, the CYFD case worker asks the parents and child to identify relatives during the investigation. When a child comes into custody, the case worker further encourages the parents to identify relatives and invite them to the family centered meeting (FCM) to discuss issues of safety, custody, and relative placement. If a parent refuses to identify relatives, the children's court attorney may place the parent on the stand and ask them to provide the names of relatives or include the requirement in the order from the court. 8.10.7.17 NMAC. CYFD may also use parent locator services to locate relatives.

FCM: A family centered meeting is a facilitated meeting where Protective Services workers and supervisors meet with parents or caregivers and others for the purpose of case planning and decision making.

If at the permanency hearing a change of plan from reunification is recommended and the child is not placed with a relative, CYFD must show that relatives were notified and considered for placement. *Id.* ***See*** Handbook Chapter 19.

12.10 Indian Children

The state's Abuse and Neglect Act requires that CYFD make reasonable efforts to determine whether a child taken into custody is an Indian child. §32A-4-6(C). An "Indian child" is defined in the Indian Child Welfare Act as an unmarried person who is under age 18 and is either:

- a member of an Indian tribe, or
- eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.

25 U.S.C. §1903(4). (This definition is somewhat different than the definition in §32A-1-4(K), which seems to require that a child who is a member of an Indian tribe also be a child of a member. While this would tend to be the case for a child who is a tribal member, it is not required by federal law, and the federal definition governs.) If the child is an Indian child, CYFD must notify the child's tribe when the abuse or neglect petition is filed, using a form of notice that complies with the Indian Child Welfare Act. §§32A-1-14(B), 32A-4-6(D); Rule 10-312(E); ***see also*** Handbook Chapter 39 on ICWA. If the child is a member of or eligible for membership in more than one tribe, the tribe with which the child has more significant contacts is considered the child's tribe for purposes of the Children's Code. §32A-1-4(L).

ICWA Notice Form. In April 2014, the New Mexico Supreme Court published a proposed form of notice to be used in ICWA cases. Counsel should check the status of this form if it appears that a case might involve an Indian child: https://nmsupremecourt.nmcourts.gov.

12.11 Confidentiality of Records

All records concerning a party to an abuse or neglect proceeding incident to or obtained as a result of an abuse or neglect proceeding or that were produced or obtained during an investigation in anticipation of or incident to such a proceeding are confidential and closed to the public. Social records, diagnostic evaluations, psychiatric or psychological reports, videotapes, transcripts and audio recordings of a child's statement of abuse, and medical records are examples of records that are confidential. §32A-4-33(A).

These confidential records may be disclosed only to the parties and the following categories of people:

- court personnel;
- court appointed special advocates (CASAs);
- the child's GAL;
- the attorney representing the child in an abuse or neglect action, a delinquency action, or any other action under the Children's Code;
- CYFD personnel;

- the local citizen review board (CRB);
- law enforcement officials, except when use immunity is granted under §32A-4-11 (***see*** Handbook §27.4);
- district attorneys, except when use immunity is granted as above;
- any state government social services agency in any state or when, in CYFD's opinion, it is in the best interest of the child, a governmental social service agency of another country;
- persons or entities of an Indian tribe authorized to inspect records under ICWA;
- the current or prospective foster parent for the child, if the records concern the social, medical, psychological, or educational needs of the child;
- school personnel, if the records concern the child's social or educational needs;
- health care or mental health care professionals involved in the evaluation or treatment of the child, the child's parents, guardian, custodian, or other family members;
- protection and advocacy representatives pursuant to certain federal laws;
- children's safehouse organizations conducting investigatory interviews of children on behalf of law enforcement or CYFD; and
- any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court. §32A-4-33(B).

Anyone who intentionally and unlawfully releases any information or records closed to the public is guilty of a petty misdemeanor and subject to imprisonment in the county jail for up to six months, to the payment of a fine of up to $500, or both. §32A-4-33(D); §31-19-1.

Section 32A-4-33 requires CYFD to promulgate rules that would implement the statute's disclosure provisions.

CHAPTER 13

CUSTODY HEARING

The custody hearing is held within 10 days of the date the petition is filed. This chapter covers:

- Purpose of the hearing.
- Nature of abuse and neglect hearings as closed hearings.
- Advising respondents of rights.
- Findings of probable cause and reasonable efforts.
- Order providing for temporary custody.
- Requirements for Indian children.

13.1 Purpose of Hearing

As the first court hearing in an abuse or neglect proceeding and the first appearance of the parties before the court, the custody hearing sets the standard and the tone for a process involving the child, the family, CYFD and the court system. Giving utmost attention to the immediate health and safety of the child, the court must decide who will have legal custody of the child pending the adjudicatory hearing.

Sometimes called the "ten day hearing," this hearing follows closely upon the filing of the petition. Consequently, a sense of crisis predominates: emotions run high and information is often incomplete. Thus, the first priority is to establish that the respondents understand the nature of the proceedings and their rights. Second, it is important to inquire into the factual circumstances surrounding the family, in particular to ascertain any relationship of the child to an absent parent, other relatives, or an Indian tribe.

Under the statute, this hearing is a "custody hearing." Its primary purpose is "to determine if the child should remain in or be placed in the department's custody pending adjudication." §32A-4-18(A). The court must return legal custody to the parent, guardian or custodian unless there is "probable cause" as provided in §32A-4-18(C). ***See*** §13.7.2 below.

The hearing is not to determine whether there is probable cause to proceed with an adjudication. Rather, the hearing is to determine whether there is probable cause for the child to remain in

custody pending the adjudication. This distinction has been a source of confusion. In 2009, §32A-2-18 was amended to address the cases in which probable cause is not found.

13.2 Timeline

The custody hearing must be held within ten working days of the date the petition is filed. Upon written request of the respondent, the hearing may be held earlier, but in no event less than two days after the date the petition is filed. §32A-4-18(A), Rule 10-315(A), Rule 10-107(A) (Saturdays, Sundays, and holidays not included). CYFD, as the petitioner, is responsible for requesting a setting when filing the petition and the motion for an *ex parte* custody order.

Sometimes scheduling restrictions permit little latitude in this area. The earlier the hearing, the sooner the child's needs can be addressed, but the less likely that the parties will be prepared, or in some cases even served or notified of the hearing.

In the case of an Indian child, the custody hearing may not be held until at least ten days after the parents or Indian custodian and the child's tribe receive notice; an additional 20 days may be granted. 25 U.S.C. §1912(a); ***see*** Handbook §39.2.5.

Children's Court Forms. When the 2014 Handbook went to press, the Supreme Court was considering revisions to a number of Children's Court rules and forms as well as the adoption of several new forms, including an ICWA notice form.

13.3 Participants

CYFD is responsible for notifying the parties of the hearing. The department is specifically required to give reasonable notice of the time and place of the custody hearing to the child's parents, guardian, or custodian. §32A-4-18(B) and Rule 10-315(B). When the case involves an Indian child, the department must also give notice to the Indian child's tribe. 25 U.S.C. §1912(a); ***see*** Handbook §39.2.5.

Practice Note: At a minimum, the hearing should include the children's court attorney, a CYFD case worker, the child's GAL or youth attorney, and any other appointed attorneys. The respondent or respondents should appear, but the hearing may proceed in their absence.

In some instances, the respondent is officially served just prior to or at the hearing itself. At other times, the respondent, despite CYFD's efforts, is not served until after the custody hearing. In that case, the respondent may want to request that the hearing be reopened.

There are also cases in which a parent appears who is not a party to the petition and is not alleged to have neglected or abused the child. When that happens, the court may consider awarding custody of the child to that parent. ***See*** Handbook §12.4 for case law on this subject.

A child under the age of 14 may be excluded from the hearing if the court finds it is in the child's best interest. A child who is 14 or older may be excluded only if the court finds there is a

compelling reason to do so and states a factual basis for that finding. §32A-4-20(E). The decision as to whether the child should attend may be a complex one. Having the child present in the courtroom could be meaningful but difficult for the child. On the other hand, the hearing is an opportunity for the judge to meet the child for whom very serious decisions are being made.

If the respondent is incarcerated, a transportation order should be obtained to give the respondent an opportunity to be heard. If an order cannot be enforced, as where the respondent is in a prison out-of-state, other means of participation should be developed, such as participation by telephone. If the parent is in federal prison, habeas corpus may be a means of bringing the parent to state court for the hearing, although it is unlikely that there will be enough time before this particular hearing. *See State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶49, 136 N.M. 53; *see also In the Matter of Ruth Anne E.*, 1999-NMCA-035, 126 N.M. 670, on alternatives to in-person participation and Handbook Chapter 22 regarding the due process rights of incarcerated parents in the context of termination of parental rights proceedings.

13.4 Hearings Closed to Public; Records and Information Confidential

All abuse and neglect hearings are closed to the general public. Only the parties, their counsel, witnesses and other persons approved by the court may be present. Persons the court finds to have a proper interest in the case or in the work of the court may be present on the condition that they refrain from divulging any information that would identify the child or the family. §32A-4-20(B).

The media may be admitted to the hearing so long as they also refrain from divulging identifying information, and so long as they comply with any regulations the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Children's Code. §32A-4-20(C)-(D). Where confidentiality cannot be maintained, the media enjoys no statutory right of access. In the absence of a statutory right of access, the children's court has the discretion under §32A-4-20(D) to decide whether to allow the media to attend the proceedings. *Albuquerque Journal v. Jewell*, 2001-NMSC-5, ¶5, 130 N.M. 64. Furthermore, if the child who is the subject of the proceeding is present at the hearing, the child may object to the presence of the media. If the child does object, the court may exclude the media if it finds that the presence of the media is contrary to the best interests of the child. §32A-4-20(D).

All records and information concerning a party to an abuse or neglect case are confidential and closed to the public, including information disclosed during a closed hearing. §§32A-4-20, 32A-4-33(A). Anyone admitted to a closed hearing who intentionally divulges confidential information from the hearing, or who intentionally and unlawfully releases information that is confidential under the Abuse and Neglect Act, is guilty of a petty misdemeanor. §§32A-4-20(F), 32A-4-33(D).

Practice Note: As a practical matter, family members, substitute caregivers, and advocates may attend the hearing if there is no objection. Any responsible adult or appropriate relative whom the child knows and trusts can be a potential resource and should be encouraged to come forward. The court may need to balance its interest in an orderly proceeding and the

need for confidentiality with the desirability of keeping the extended family part of the solution at this stage of the proceedings.

13.5 Appointment of Counsel

The automatic appointment of counsel to represent the parent, guardian, or custodian at the inception of the proceeding is valid only until an indigency determination is made at the time of the custody hearing. A form for the indigency determination can be found in the Children's Court Rules and Forms. If the respondent is indigent, the appointment continues. Counsel may also be appointed if the court, in its discretion, considers appointment "required in the interests of justice." §32A-4-10.

Rule 10-314(B) on appointment of counsel prohibits an attorney from being appointed to represent more than one parent in "any proceeding or case that may result in the termination of parental rights." An attorney retained by multiple respondents should also be alert to the possibility of a conflict. *See State ex rel. CYFD v. Tammy S.*, 1999-NMCA-009, 126 N.M. 664 (decided before this rule was adopted), on conflicts of interest. ***See*** Handbook §5.2.2.

Practice Note: Courts that contract with particular attorneys to serve as respondent's counsel should have contracts with at least two different attorneys.

13.6 Advising Respondents of Rights

Respondents must be advised of their rights at their first appearance. §32A-4-10(G). Their first appearance is usually the custody hearing.

The court must inform the respondent of:

- the allegations of the petition;
- the right to an adjudicatory hearing on the allegations of the petition;
- the right to an attorney and, if the respondent cannot afford one, the right to have one appointed to represent him or her free of charge; and
- the possible consequences, including termination of parental rights, if the allegations of the petition are found to be true. Rule 10-314.

Practice Note. Not only is this the first time the respondent has appeared in the case, it may well be the first occasion for this individual to come before the court in any capacity. The judge or special master can anticipate some level of confusion or hostility, or both, on the part of respondent. This can be addressed by clarifying the temporary, provisional nature of the hearing, and by focusing on information gathering and problem solving to address the immediate needs of the child.

In describing the possible consequences, it is crucial for the court to emphasize the child's need for permanence and resolution, and the time frames within which change must occur.

The respondent in a civil abuse or neglect proceeding can be compelled to testify, subject to the privilege against self-incrimination, and the testimony given can be used against the respondent in a later criminal prosecution. If testifying or producing documents is going to be a concern, the respondent may want to consider invoking his or her Fifth Amendment privilege against self-incrimination and offering to testify only if granted use immunity. While §32A-4-11 provides that only the children's court attorney can apply for use immunity, recent amendments to Rule 10-341 authorize any party or the court to request immunity. Since use immunity orders cannot be issued *nunc pro tunc*, it is very important that such immunity, if desired, be sought before testimony is to be given or documents produced. ***See*** Handbook §27.4 for an explanation of use immunity.

13.7 Conduct of the Hearing

13.7.1 General; Court Interpreters

By the time the custody hearing takes place, the child is usually in the temporary custody of CYFD pursuant to an *ex parte* custody order. Before that, the child may have been taken into emergency custody by a police officer. §32A-4-6(A). Because of the traumatic or exigent circumstances surrounding a child being taken into custody, an early concern is the need for calm and clarity. The court should also consider the need for courtroom security.

Under Rule 10-315 as amended in 2014, the court must make an audio recording of the hearing. The court must be able to give a copy of the recording immediately to any party who wishes to file an appeal from the order entered after the hearing. *See* Rule 10-315(C).

A party or party's attorney must notify the court at the party's first appearance if a party needs a court interpreter. Rule 10-167(B). If a party fails to timely notify the court of a need for an interpreter, the court may assess costs against that party for any delay caused by the need to obtain an interpreter. Rule 10-167(B)(4). Before appointing a court interpreter, the court must qualify the interpreter in accordance with Rule 11-604 of the Rules of Evidence, and may use the questions in Rule 10-440 to assess the qualifications of the proposed court interpreter.

13.7.2 Temporary Custody

After the respondents are advised of their rights, the court will consider whether probable cause exists for CYFD to retain custody pending adjudication. The determination of probable cause is directed to custody, not the underlying petition.

The standard set forth in the statute is whether probable exists to believe that:

- the child is suffering from an illness or injury, and the parent, guardian, or custodian is not providing adequate care; or
- the child is in immediate danger from his or her surroundings and removal is necessary for the child's safety or well-being; or
- the child will be subject to injury by others if not placed in the custody of the department; or

- there has been an abandonment of the child by his or her parent, guardian, or custodian; or
- the parent, guardian or custodian is not able or willing to provide adequate supervision and care. §32A-4-18(C).

If the court finds probable cause, it then needs to determine the custody of the child pending the adjudicatory hearing on the petition. Section 32A-4-18(D) provides two options.

- One possibility is to return legal custody of the child to his or her parent, guardian, or custodian upon such conditions as will reasonably assure the safety and well-being of the child, including protective supervision by CYFD. Protective supervision, as defined in §32A-1-4, allows CYFD to visit the home where the child resides, to inspect the home, to transport the child to court-ordered diagnostic examinations and evaluations, and to obtain information and records about the child.
- The second approach is to award legal custody of the child to CYFD, while making reasonable efforts to preserve the family unity, with the paramount concern being the child's health and safety. ***See*** §13.7.3 below.

Practice Note on Placement: When custody is awarded to CYFD, the agency has the discretion to place the child with the most appropriate caretaker. In some situations, this will result in the child remaining in or returning to physical placement in the home, with CYFD able to remove the child without additional legal action if the child becomes endangered. In most cases, however, CYFD places children in substitute care.

Practice Note on Visitation: When CYFD is awarded legal custody and the child is not going to reside with the respondent, the preferred practice is for the parties to arrive at a reasonable arrangement for visitation. Visitation can be monitored both to ensure the safety of the child and to provide additional information as to the nature and quality of parent-child interactions.

If the court finds that probable cause does not exist, then it must return legal custody of the child to the parent, guardian, or custodian pending adjudication. A provision was added to §32A-4-18 in 2009 to make this clear. If the court determines that probable cause does not exist, the court must:

- retain jurisdiction;
- unless the court permits otherwise, order that the respondent and child remain in the court's jurisdiction pending the adjudication;
- 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
- order that the child's parent, guardian, or custodian allow the child necessary contact with the child's guardian ad litem or attorney. §32A-4-18(F).

The issue of abuse or neglect remains to be adjudicated.

13.7.3 Reasonable Efforts

The section of the Abuse and Neglect Act on custody hearings requires that reasonable efforts be made to preserve and reunify the family, with the paramount concern being the child's health and safety. §32A-4-18(E). The Adoption and Safe Families Act (ASFA) regulations also require that the court determine whether reasonable efforts were made by CYFD to prevent removal from the home, and this determination should be made at the custody hearing. It is incumbent upon the parties to introduce evidence at the custody hearing sufficient to allow detailed findings regarding whether reasonable efforts were made by CYFD (or were not required to be made) to prevent removal from the home.

ASFA Note. Regulations under ASFA provide for this reasonable efforts finding to be made within 60 days of the date the child is removed from the home. At first, the adjudicatory hearing would appear to be the appropriate deadline in New Mexico. However, that hearing is *commenced* (not necessarily concluded) within 60 days of *service* of the petition, not removal of the child. The reasonable efforts finding should be made earlier for the child to remain eligible for Title IV-E payments. In fact, the finding could be made even before the custody hearing, in the *ex parte* custody order, so long as it is explicitly documented.

13.7.4 Examinations and Evaluations

The custody hearing provides the most timely occasion for the court to order the respondent or the child, or both, to undergo appropriate diagnostic examinations or evaluations. Copies of the reports must be provided to the parties at least five days before the adjudicatory hearing, which does not allow much time for any necessary exams or evaluations to take place. §32A-4-18(G); Rule 10-335.

Practice Note: The ordering of exams and evaluations should not be tacked onto the custody order without a discussion in open court. The court should address the proposed assessment plan and the parties should have an opportunity to comment on it.

Even if the court determines that probable cause does not exist, the court may order respondent or child or both to undergo appropriate diagnostic examinations or evaluations as necessary to protect the child's best interests, based upon the allegations in the petition and the evidence presented at the custody hearing. §32A-4-18(G) (added in 2009).

Questions of immunity for the respondent undergoing an examination or evaluation should be considered and addressed, if appropriate, before the examination or evaluation begins. ***See*** Handbook §27.4.

13.8 Indian Children

At the custody hearing, there should be an inquiry into whether the child is an Indian child and whether the required placement preferences have been met. ***See*** Handbook §§16.9 and 39.3. A child is an Indian child if he or she is unmarried, under 18 years of age, and a member of an

Indian tribe or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. §1903(4); §32A-1-4(K).

If the child is an Indian child, the parties should offer evidence on the domicile or residence of the child. The child's tribe has exclusive jurisdiction if the child resides or is domiciled on the reservation. 25 U.S.C. §1911(a); *State ex rel. CYFD in the Matter of Andrea Lynn M*., 2000-NMCA-079, ¶6, 129 N.M. 512; ***see*** Handbook §39.2.4.

If it is unclear whether the child is an Indian child, the court may enter a finding that the child may be subject to the Indian Child Welfare Act and order CYFD to continue its inquiries. If the child would be an Indian child if the child or parent were enrolled as a member of an Indian tribe, and the child is eligible for enrollment, CYFD will have an obligation to pursue enrollment for the child if the child remains in the custody of the department at disposition. §32A-4-22(I); *State ex rel. CYFD v. Marsalee P*., 2013-NMCA-062, ¶¶25-26, 302 P.3d 761. Since enrollment can be a lengthy process, the children's court and CYFD should pay close attention early on to situations in which the parent or child may be eligible for membership in an Indian tribe.

Case Note: In *Marsalee P*., the Court of Appeals found that being a member of an Indian tribe and being eligible for membership are two different things. The Court wrote that it was undisputed in that case that children and mother were eligible to enroll in the Navajo Nation but that neither one was formally enrolled. It also appeared that, at least in the context of the Navajo Nation, enrollment was synonymous with membership. Since neither mother nor the children were as yet enrolled, ICWA did not apply. *State ex rel. CYFD v. Marsalee P*., 2013-NMCA-062, ¶¶19-21, 302 P.3d 761.

However, the Court of Appeals went on to discuss CYFD's duty under §32A-4-22(I) to pursue enrollment on behalf of the children and reversed a judgment terminating mother's parental rights because CYFD had not fulfilled its obligation. *Marsalee P*., ¶¶25-27. The Court emphasized that "*the district court has an affirmative obligation* to ensure that the Department complies with Section 32A-2-22(I) before terminating a parent's parental rights." *Id*. ¶27 (emphasis added).

See Handbook Chapter 39 for more information on Indian children and ICWA.

13.9 Stipulations

Frequently respondents will waive the probable cause hearing and stipulate to interim custody, but enter a denial as to the petition. Similarly, the respondent might stipulate to certain findings, such as probable cause, but not others. In any event, it is important to keep in mind the need to make a record as described in §§13.10 and 13.11 below.

13.10 Evidence

The Rules of Evidence do not apply to custody hearings. §32A-4-18(H); Rule 11-1101(D)(3).

The fact that the Rules of Evidence do not apply does not mean testimony is not given, and often sworn testimony is given. In fact, there may be occasions requiring sworn testimony.

- Sworn testimony may be desirable when CYFD has not submitted a written report and must establish probable cause through witnesses, such as the case worker, police officer, or medical or school personnel.

- Sworn testimony may also be necessary to elicit information about the identity and location of absent parents. A mother's declaration under penalty of perjury that an alleged father has not assumed sufficient responsibility for the child to be treated as an acknowledged father should be sufficient for a *prima facie* showing as to the status of that father, assuming the individual has failed to file with the putative father registry. *See* §32A-5-19 and §32A-5-3(F) and (G) regarding alleged and acknowledged fathers; ***see also*** Handbook Appendix B for definitions of the two terms.

- As explained in Handbook §12.9, the Fostering Connections to Success and Increasing Adoptions Act of 2008 requires that the department try to identify and provide notice to grandparents and other adult relatives of a child early in the proceeding. The case worker will ask the parents about other relatives during the investigation but if they are not forthcoming, the custody hearing gives the children's court attorney an opportunity to ask the parents under oath.

- A fourth area in which sworn testimony may be advisable is on the subject of reasonable efforts since ASFA regulations require the court's findings on this subject to be "explicitly documented." ***See*** §13.11 below, as well as Handbook §38.4 on ASFA. At the very least, any stipulations should include facts specific enough to meet the ASFA standards on documentation.

13.11 Findings and Order

The court must make and record findings about whether there is probable cause to believe that one or more of the statutory bases exists for giving legal custody to CYFD or returning legal custody to the parent, guardian, or custodian with conditions. ***See*** §13.7.2 above.

The court must also make a finding as to the efforts made to prevent removal of the child, or to make it possible for the child to return to the home, and whether those efforts were reasonable. ***See*** §13.7.3 above. According to the ASFA regulations, the judicial determination must be explicitly documented, made on a case-by-case basis, and stated in the court order. ***See*** Handbook §38.4 on ASFA. (Note: This determination could conceivably be made earlier, in the *ex parte* custody order.)

Finally, a finding that granting custody to CYFD is in the best interest of the child should support any order placing or continuing the child in CYFD's custody.

The order should reflect the child's custodial status, including any conditions or limitations concerning visitation or protective supervision. ***See*** §13.7.2 above.

Because subsequent hearings are subject to a tight timeline, the court should set the date and time for the pre-adjudicatory meeting, any pretrial conference, and the adjudicatory hearing in open court at the custody hearing. This ensures that the matters are scheduled within the correct timeframe and that the parties are aware of the dates early on.

The court's decision must be made by a written order filed with the clerk of the court at the earliest practicable time. Rule 10-315(D), as amended in 2014.

Appeals Under §32A-4-18. Section 32A-4-18 was amended in 2014 to provide that a party aggrieved by an order entered pursuant to the section may file an immediate appeal as a matter of right. If the order grants legal custody to or withholds it from one or more of the parties, the appeal must be expedited and heard at the earliest possible time. Procedures for these appeals are set forth in Rule 10-206A, adopted by the Supreme Court in June 2014. ***See*** Handbook Chapter 24, Appeals.

The 2014 amendments to §32A-4-18 provide that the children's court has jurisdiction to take further action in the case pending the appeal, although a stay is possible under §32A-4-17(B). The Supreme Court has amended Rule 10-343 to make it clear that the deadline for the adjudicatory hearing is not affected by an appeal under §32A-4-18.

13.12 Checklist

CUSTODY HEARING CHECKLIST

- ☐ 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

CHAPTER 14

PRE-ADJUDICATORY HEARING MEETING

The pre-adjudicatory hearing meeting is held to try to settle issues and develop a treatment plan. This chapter covers:

- Purpose and timing of the meeting.
- Conduct of the meeting.
- The treatment plan.

14.1 Purpose of the Meeting

The pre-adjudicatory hearing meeting is intended to expedite settlement, develop a treatment plan, and identify placement alternatives. The meeting requirement in §32A-4-19 consists of one subsection:

> B. Prior to the adjudicatory hearing, all parties to the hearing shall attend a mandatory meeting and attempt to settle issues attendant to the adjudicatory hearing and develop a proposed treatment plan that serves the child's best interest.

There are two aspects to these meetings, which are sometimes referred to as treatment planning conferences:

- resolving the abuse or neglect allegations; and
- addressing the treatment plan.

Even if the parties are not able to agree on one of these, they may be able to agree on the other. Similarly, it may be possible to narrow the issues to be tried.

14.2 Timing and Initiation

The meeting is held some days before the adjudicatory hearing. It is best to set the dates for both the meeting and the adjudicatory hearing at the initial custody hearing, while the parties are present, especially in view of the accelerated timeframes.

As a practical matter, CYFD takes responsibility for notifying the parties and conducting the meeting. While the children's court attorney arranges the meeting, the judge orders everyone to appear.

Practice Note: Some jurisdictions have experimented with scheduling the meeting at the courthouse with a judge available, so that, if a plea or other agreement is reached, it can be put on the record, the adjudicatory hearing vacated and a dispositional hearing scheduled. Alternately, the adjudicatory hearing can be used to present admissions or a proposed consent decree, if reached.

14.3 Participants

Section 32A-4-19(B) requires that all parties to the adjudicatory hearing attend the meeting. Hence, at a minimum, the meeting should include the children's court attorney and the permanency planning worker for CYFD, the respondent and respondent's counsel, and the child (if age and developmentally appropriate) and the child's GAL or youth attorney. Any other persons the state has joined as parties or who have been permitted to intervene should also participate.

14.4 Conduct of the Meeting

While the court does not participate in the pre-adjudicatory hearing meeting, it can play a role by encouraging and admonishing the parties to take advantage of this confidential and non-coercive opportunity to air their concerns. Mediation is used for this meeting in a number of jurisdictions. Over half of the children's court mediations statewide occur at the pre-adjudication stage. Mediation is not mandatory and many courts have elected an "opt in" approach. However, some judicial districts, often those with more experience with the Children's Court Mediation Program, have adopted an "opt out" approach and routinely order pre-adjudication cases for mediation. ***See*** Handbook §29.4.

- The meeting offers an excellent and important opportunity to try to settle the case. The prospects for settlement are greatest before positions become entrenched and personalities traumatized by litigation. Early settlement is particularly important when the lives of children are in the balance.

- Parents who are motivated to regain custody of their children may be more disposed to participate in a treatment plan developed in a confidential, non-adversarial setting.

The focus of the meeting should be on the needs of the children. Focusing on the needs of the children rather than the parents may help everyone minimize confrontation at the meeting.

A parent may be reluctant to disclose information that could be construed as an admission, especially when there is the possibility of criminal prosecution. CYFD has prepared a form that meeting participants sign concerning the non-disclosure of statements made at the meeting, but the agreement is not binding on the district attorney. As a result, some

respondents' attorneys may advise their clients to remain silent as to the allegations of abuse or neglect. Parents and their attorneys may feel somewhat more comfortable participating in mediation at this stage, with the additional confidentiality protections afforded by mediation. Nevertheless, in either the meeting or a mediation:

- productive talks can still take place regarding aspects of the treatment plan;
- in many cases, questions of custody and visitation can be negotiated, even when there is disagreement as to some of the allegations of the petition; and
- the attorneys can use the discussion to narrow the issues that need to be tried.

If no agreement is forthcoming, the parties are at least in a better position because of the pre-adjudicatory meeting or mediation to advise the court regarding the anticipated length and extent of the trial and to address any pre-trial issues.

Practice Note. Attorneys concerned about confidentiality and disclosure may want to consult Rule 11-408 of the Rules of Evidence on compromise offers and negotiations, Rule 10-342(G) of the Children's Court Rules on admissions, Children's Court Form 10-471, (Report on Mediation), and the Mediation Procedures Act enacted in 2007, §§44-7B-1 through 44-7B-6.

14.5 Proposed Treatment Plan

If the child is adjudicated an abused or neglected child during the adjudicatory hearing or if the parties settle the abuse or neglect issues in such a way that the case proceeds directly to the dispositional hearing, then the court will consider the treatment plan proposed by the parties at the dispositional hearing. The pre-adjudicatory hearing meeting is an opportunity for the parties to try to come to agreement on what the proposed plan should look like.

Ideally, the permanency planning worker and the parties will have discussed items for the proposed treatment plan prior to the meeting and the worker will come to the meeting with a proposed plan, with all necessary assessments and evaluations having been completed. If time allows, the pre-disposition study required by §32A-4-21 will be circulated to the parties in advance of the meeting.

Section 32A-4-21(B) calls for a treatment plan that sets forth steps to ensure that the child's physical, medical, psychological, and educational needs are met and that sets forth services to be provided to the child and the parents to facilitate permanent placement of the child in the parent's home. The treatment plan should address:

- the safety threats and the parental behavior, including lack of protective capacity, that led to removal of the child from the home and that have to be changed as conditions of return; and
- the child's needs.

Meeting participants should examine the plan:

- Are the desired outcomes/goals of the plan clear?
- Is there a logical connection between identified safety threats, the plan requirements, and the changes needed in behavior or circumstances?
- Who is responsible for carrying out which portions of the plan?
- What obstacles to implementation of the plan can be identified and how can they be overcome?
- Who can help?
- How can the parent demonstrate that protective capacity has been developed or that the problematic behaviors/circumstances are changing or have changed?
- Most importantly, does the parent understand the requirements and consequences that have been proposed?
- Are the child's needs being addressed, e.g., special education needs, psychological problems, physical problems, etc.?

Examining the treatment plan with these issues in mind and working to ensure that the parents understand the goals and requirements of the plan are particularly important. Mere compliance with the terms of a treatment plan, without changes in behavior or circumstances that would eliminate or mitigate safety threats and reduce the risk of harm to the children, does not guarantee return of the children to the parents. *See State ex rel. CYFD v. Athena H.*, 2006-NMCA-113, ¶1, 140 N.M. 390.

With regard to placement and visitation:

- What provisions have been made for visitation or otherwise maintaining the relationship between the child and the respondent?
- What provisions have been made for siblings to be placed together or, if such placement is contrary to the safety and well-being of one of the siblings, what provisions have been made for visitation or otherwise maintaining the relationship between the siblings?
- If the child must be in substitute care, can the respondent help identify another adult who is known to the child and who could serve as the substitute care provider, keeping in mind state licensing requirements for substitute care providers? This concern can be especially significant when the respondent is or will be incarcerated or enrolled in residential treatment, as for substance abuse.

Ordinarily, the plan will concentrate on those steps necessary for the child to return to the home. However, if aggravated circumstances are alleged (***see*** Handbook §15.5.4) or if the child's permanency plan has already changed, then CYFD will emphasize permanency as the child's primary requirement and identify an alternative placement as the primary objective of the plan. In such cases, candor and creativity can combine to focus the meeting on finding a suitable permanent placement for the child, and may include some form of post adoption contact agreement. ***See*** Handbook §§22.3.3, 29.4, 30.4.2.

Important Considerations: There can be a tendency to attempt to "fix" other conditions within the home or family structure, or affecting the parent's lifestyle, without a demonstrable connection to those immediate safety threats and welfare factors that prevent

the parent from properly caring for the child. The parties should remember to focus on the behavior of the parent that led to the removal of the child from the home and the changes in behavior that would allow the child to return home.

Once the treatment plan is in place, the parties should not lose sight of the fact that the various services and programs being offered to or required of the parent are only a means to an end, the end being the change in behavior needed to allow the parent to properly care for the child. If a parent complies with program requirements but does not change his or her behavior, the child will not be able to return home. Likewise, failure to complete all aspects of a treatment plan should not prevent reunification if the respondent has otherwise demonstrated the ability to properly care for the child.

CHAPTER 15

ADJUDICATORY HEARING

The adjudicatory hearing is the trial in the case. This chapter covers:

- The 60-day deadline for holding the hearing.
- Definitions of the terms "abused child" and "neglected child."
- Definition of the term "aggravated circumstances."
- The need for the court to make findings on these matters.
- For Indian children, ICWA-required findings.
- Admissions and no contest pleas.
- Motion for a new hearing.

15.1 Purpose

The adjudicatory hearing is the trial in the abuse or neglect case. It entails a full evidentiary hearing complete with all of the protections of due process. The findings made at this hearing determine whether the state continues to intervene in the life of the family.

15.2 Timeline

15.2.1 60-Day Deadline

Rule 10-343(A) provides that the adjudicatory hearing must be commenced within 60 days after the latest of the following: 1) the date that the petition is served on the respondent; 2) the date of the termination of any diversion agreement; 3) if a mistrial is declared or a new trial is ordered by the trial court, the date that such order is filed; or 4) in the event of an appeal from a judgment or disposition on a petition alleging abuse or neglect, the date that the mandate or order is filed in the children's court disposing of the appeal. Section 32A-4-19 of the Children's Code, as amended in 2009, provides for the adjudicatory hearing to be commenced within 60 days after the date of service on the respondent. Timelines of this nature are procedural and the rule would govern in case of conflict. *See State ex rel. CYFD*

v. Arthur C. 2011-NMCA-022, ¶21, 149 N.M. 472. As a practical matter, the date the petition is served on the respondent will be the applicable date in most cases.

Rule 10-343 was amended in June of 2014 to provide that appeals from orders entered at the custody hearing "shall not" affect the time limits set forth in the rule.

15.2.2 Extensions of Time

Extensions may be granted under Rule 10-343(C):

- by the children's court judge for good cause shown, provided the aggregate of all extensions granted by the judge does not exceed 30 days; or
- by the Supreme Court, a justice of the Supreme Court or a judge designated by the Supreme Court, for good cause shown. The 30 day aggregate limit does not apply.

For an extension by the children's court judge:

- the petition for an extension must be verified and state concisely the facts that the petitioner deems to constitute good cause; and
- the petition must be filed within the 60 day period described in §15.2.1 except that a petition can be filed within 10 days of the expiration of that period if based on exceptional circumstances beyond the control of the state or children's court.

For an extension by the Supreme Court, a justice or a designated judge:

- the two rules just listed apply;
- within five days of the filing of the petition for an extension, opposing counsel may file an objection to the extension, setting forth the reasons for the objection;
- no hearing is held except upon order of the Supreme Court; and
- if the Supreme Court finds that there is good cause for an extension, it will fix the time limit within which the adjudicatory hearing must commence.

At the time the 2014 Handbook went to press, a proposal was pending in the Supreme Court to eliminate extensions by the Supreme Court. If Rule 10-343 is changed in this manner, extensions could only be considered by the children's court judge and would be limited to 60 days. See the proposed change at https://nmsupremecourt.nmcourts.gov.

15.2.3 Failure to Timely Commence

Before 2009, both the Children's Court Rules and the Children's Code provided that the neglect and abuse petition must be dismissed with prejudice if the hearing is not begun within the 60-day period or within the period of any extension granted. Rule 10-343, formerly Rule 10-320; §32A-4-19(D). Rule 10-343 was amended in 2009 to eliminate mandatory dismissal and to provide that the court may dismiss the petition with prejudice or consider other sanctions as appropriate. The statute was not similarly amended. In *State ex*

rel. CYFD v. Arthur C., the Court of Appeals confirmed that these provisions are procedural and that procedural rules promulgated by the Supreme Court prevail over conflicting statutes enacted by the Legislature. 2011-NMCA-022, ¶21, 149 N.M. 472.

Rules Applicable to Pending Cases. The Court of Appeals in *Arthur C*. also held that Rule 10-343 as amended applied to the proceeding even though the case was pending when the rule was changed. Prior to 2009, new rules did not apply to pending cases, based on a broad reading of the New Mexico Constitution, Art. IV, §34. In 2009, in *State v. Pieri*, 2009-NMSC-019, ¶¶34-35, 146 N.M. 155, the Supreme Court held that "[t]he plain language of Section 34 applies to legislative acts only" and recognized the Court's authority to make rule changes applicable to pending cases. *See also State v. Savedra*, 2010-NMSC-025, ¶9, 148 N.M. 301, regarding withdrawal of the six month rule for commencing criminal cases in district court and its application to pending cases.

Another question is what it means for a hearing to commence but not be completed within the 60 days. The Rules of Criminal Procedure formerly required that a defendant's trial commence within a prescribed period of time but was silent on completion, much like current Rule 10-343. Observing that there was no requirement in the rule that all subsequent stages of the trial be contiguous, the Court of Appeals held that the rule did not require that the trial be completed within the prescribed period. *State v. Rackley*, 2000-NMCA-027, ¶4, 128 N.M. 761, citing *State v. Higgins*, 107 N.M. 617 (Ct. App. 1988). However, the Court also stated that it would scrutinize closely any prolonged, unjustified delay or conduct suggestive of an attempt to circumvent the rule. *Id.* ¶7.

Because of the shortened time frames under the Adoption and Safe Families Act (ASFA) and the need of children for permanency, adjudications should be commenced and concluded as expeditiously as possible. It is urgent that the adjudicatory hearing be concluded early enough to give parents even a minimal amount of time to try to follow the treatment plan.

Practice Note: It is suggested that courts set aside at least one half day within the 60-day window for the adjudicatory hearing.

15.3 Initiation and Notice; Court Interpreters

As a matter of practice, the children's court attorney is responsible for notifying the parties of the hearing and assuring that it is timely held. Similarly, any party who has requested an extension of time is responsible for ensuring that any new date for the hearing falls within the time allowed and that all parties are notified of the change.

Practice Note: It is preferable that, whenever possible, the adjudicatory hearing be set and announced in open court while the parties are present at the initial custody hearing. This ensures that the parties are aware of the date early on and should minimize the need for extensions of time. Due to the short time frame, the court, the attorneys, and their support staffs also need to communicate and cooperate on scheduling matters, especially if hearings need to be vacated and/or re-set.

If a party's witness needs a court interpreter, the party must notify the court in writing upon service of the notice of hearing. The party should use the notification form found in Rule 10-441 and indicate whether the party anticipates that the proceeding will last more than two hours. Rule 10-167(B). (If a *party* needs a court interpreter, the party or party's attorney is responsible for notifying the court at the party's first appearance before the court. ***See*** Handbook §13.7.1.) Under the rule, a "need for a court interpreter exists whenever a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding." Rule 10-167(B)(1). If a party fails to timely notify the court of a need for a court interpreter, the court may assess costs against that party for any delay caused by the need to obtain a court interpreter. Rule 10-167(B)(4).

Before appointing a court interpreter, the court must qualify the interpreter in accordance with Rule 11-604 of the Rules of Evidence and may use the questions in Rule 10-440 to assess the qualifications of the proposed court interpreter. At the beginning of the hearing, the judge will also instruct the parties and others present in the courtroom regarding the role of the court interpreter. Rule 10-167(E)(2).

If the need for a court interpreter is identified in accordance with Rule 10-167(B), then a case participant may only waive court interpretation services if the waiver is in writing and the requirements of Rule 10-167(D) are otherwise met. Neither the judge nor a party's attorney may act as a court interpreter for the proceeding, except that a party and his or her attorney may engage in confidential attorney-client communications in a language other than English. ***See*** Rule 10-167(C)(3).

15.4 Participants

The participants in the adjudicatory hearing include the parties, their attorneys and the witnesses. Even though the child is a party, the court may exclude a child under 14 from the hearing if it finds that this is in the child's best interest. The court may also exclude a child who is 14 or older, but only after making a finding that there is a compelling reason to exclude the child and stating the factual basis on the record. §32A-4-20(E).

A transport order may be needed if the respondent is incarcerated; ensuring that parents who are incarcerated can participate meaningfully in the hearing is important. ***See*** Handbook §22.5.8; *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, 136 N.M. 53 (discussing the importance of respondent's presence at permanency hearings). If the person is in federal prison, habeas corpus may be a means of bringing the parent into state court for the hearing. If for any reason, through no fault of their own, a parent is unable to attend court, alternative methods of participation in the proceedings should be considered. *See State ex rel. CYFD v. Ruth Anne E.*, 1999-NMCA-035, 126 N.M. 670.

Although there is no right for foster parents who are not parties to be heard at the adjudicatory hearing, foster parents and CASA volunteers may be present as observers,

subject to court approval and the confidentiality provisions of §32A-4-20(C). Foster parents could be called as witnesses by one of the parties as well.

Abuse and neglect hearings are closed to the general public. Persons the court finds have "a proper interest in the case or in the work of the court" may be allowed to attend on the condition that they refrain from divulging information that would identify the child or family. Similar rules apply to the news media. However, the 2009 legislature added to §32A-4-20(D) the following language: "A child who is the subject of an abuse and neglect proceeding and is present at a hearing may object to the presence of the media. The court may exclude the media if it finds that the presence of the media is contrary to the best interests of the child." Persons granted admission who intentionally divulge protected information are guilty of a petty misdemeanor. §32A-4-20(F). ***See*** Handbook §13.4.

A common predicament occurs when the respondent does not show up for the hearing. This is **not** a situation for a default judgment, which has no place in an abuse or neglect case. *State ex rel. CYFD v. Stella P.*, 1999-NMCA-100, ¶23, 127 N.M. 699.

An inquiry on the record should go to the questions of actual notice, whether attempts to provide notice were reasonable under the circumstances of the case, communication with counsel, and the like. *Maria C.*, 2004-NMCA-083, ¶52. One approach may then be to postpone the hearing in hopes that the respondent will attend, but this is only an option if time permits. Another approach, suggested obliquely in *Stella P.*, would be to proceed with the trial but to require that the state prove abuse or neglect by clear and convincing evidence, as if the respondent were present and contesting the allegations. 1999-NMCA-100, ¶¶30, 36.

If a respondent who has not yet testified appears, the court should receive the testimony of that respondent concerning the identity and whereabouts of any other person who may have a custodial or protected interest in the child and the nature of that relationship.

If not previously resolved, the court should determine whether the child is an Indian child. Hopefully, this was determined earlier because, if the child is an Indian child and the case is governed by the Indian Child Welfare Act (ICWA), there are very important findings that will need to be made at the adjudication, with notice to the tribe. ***See*** Handbook §15.11.3 below.

15.5 Conduct of the Hearing

15.5.1 No Right to Jury Trial

The parties do **not** have a right to a jury trial in an abuse or neglect case. *State ex rel. CYFD in the Matter of T.J.*, 1997-NMCA-021, 123 N.M. 99; *see* Committee Commentary to Rule 10-314.

15.5.2 Making a Record

The court's decision at the adjudicatory hearing is an appealable one. *State ex rel. CYFD v. Frank G.*, 2005-NMCA-026, 137 N.M. 137, affirmed on other grounds in *Pamela A.G.* Also, basic due process considerations apply to the hearing. *In the Matter of Pamela A.G.*, 2006-NMSC-019, 139 N.M. 459; *State ex rel. CYFD v. Kathleen D.C.*, 2007-NMSC-018, 141 N.M. 535.

It is very important that the practitioners before the court make a good record, offer the evidence that should be offered, and state objections clearly on the record. Because of the press of business and the general preference for informality in other aspects of an abuse or neglect case, both the court and the attorneys may be inclined to be less formal than in other types of trials. However, since the record made will be critical to any appeal taken, counsel and the court should fully develop the record, as fundamental liberty interests are implicated. *See State ex rel. CYFD v. Amanda M.*, 2006-NMCA-133, ¶¶20-22, 140 N.M. 578, and §32A-4-17 (initial summons in abuse/neglect proceeding must indicate that the proceedings could result in a termination of parental rights).

Under Rule 10-167(E)(5), the court may make and maintain a record of a court interpretation at the request of any party. Unless the parties agree otherwise, the requesting party pays the costs for making the record of court interpretation.

In a number of Court of Appeals' decisions, the court has declined to address an issue because it was not preserved below. In *In the Matter of Candice Y.*, 2000-NMCA-035, 128 N.M. 813, appellants criticized the children's court for not ordering a predisposition report to obtain certain information about the child. The Court of Appeals declined to address the issue, finding no indication that the issue was preserved below, there being no record showing whether a disposition report was ordered or not. *Id.* ¶11. *See also Pamela A.G.*, cited above.

15.5.3 Definitions of Abuse and Neglect

The court must determine whether the allegations of the petition are true, by admission or proof. If the allegations are denied, the court must proceed to hear the evidence and make and record its findings on whether the child is an abused child, a neglected child, or both.

The definitions of "abused child" and "neglected child" are critical in determining what must be proven and found. Given their importance, the current definitions are set forth in full:

"**Abused child**" means a child:

(1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian;
(2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian or custodian;
(3) who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian;
(4) whose parent, guardian or custodian has knowingly, intentionally or negligently

	placed the child in a situation that may endanger the child's life or health; or
(5)	whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child. §32A-4-2(B).

The children's court in the *Carl C.* case was able to determine that the abuser was either the mother or the father but could not determine which one. The Court of Appeals held that evidence that the abuse was perpetrated by either the mother or the father was sufficient for a court to conclude that "the action or inaction of a parent, guardian, or custodian" caused the abuse. *State ex rel. CYFD v. Carl C.*, 2012-NMCA-065, ¶12, 281 P.3d 1242. "Had the Legislature intended to require a court to specifically find which parent caused the abuse, it would have so specified." *Id.*

The term "physical abuse," as used in the definition of "abused child," includes but is not limited to any case in which the child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling or death and:

- there is not a justifiable explanation for the condition or death;
- the explanation given for the condition is at variance with the degree or nature of the condition;
- the explanation given for the death is at variance with the nature of the death; or
- circumstances indicate that the condition or death may not be the product of an accidental occurrence. §32A-4-2(F).

Other terms that are used in the definition of "abused child" and that have their own definitions are sexual abuse and sexual exploitation.

- "Sexual abuse" includes but is not limited to criminal sexual contact, incest or criminal sexual penetration as those acts are defined by state law. §32A-4-2(G). *See also* §§30-9-11, 30-9-13 and 30-10-3.
- "Sexual exploitation" includes but is not limited to:
  - allowing, permitting, or encouraging a child to engage in prostitution;
  - allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or
  - filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law. §32A-4-2(H).

"Neglected child" means a child:

(1)	who has been abandoned by the child's parent, guardian or custodian;
(2)	who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, guardian or custodian or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them;
(3)	who has been physically or sexually abused, when the child's parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable

	steps to protect the child from further harm;
(4)	whose parent, guardian or custodian is unable to discharge his responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity; or
(5)	who has been placed for care or adoption in violation of the law; provided that nothing in the Children's Code may be construed to imply that a child who is being provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof is for that reason alone a neglected child within the meaning of the Children's Code; and further provided that no child shall be denied the protection afforded to all children under the Children's Code. §32A-4-2(E).

"Abandonment," a term used in the above definition of "neglected child," includes instances when the parent, without justifiable cause:

- left the child without provision for the child's identification for a period of fourteen days; or
- left the child with others, including the other parent or an agency, without provision for support and without communication for a period of:
  - three months if the child was under six years of age at the commencement of the three-month period; or
  - six months if the child was over six years of age at the commencement of the six-month period. §32A-4-2(A).

Leaving an infant at a hospital in accordance with the Safe Haven for Infants Act protects a parent, guardian, or custodian from criminal prosecution for child abandonment, but does not protect against abuse and neglect proceedings under the Children's Code. §24-22-3 (**Note:** The Act was amended in 2013 to expand the sites at which infants can be left from just hospitals to hospitals, fire stations, and law enforcement agencies that have staff on-site at the time the infant is left. §24-22-1 *et seq*., as amended by 2013 N.M. Laws, ch. 20.)

Neglect also occurs when a parent fails to provide medical care necessary for the child's well-being when the parent is able to provide such care. §32A-4-2(E). In *State ex rel. CYFD v. Amanda M.*, 2006-NMCA-133, ¶¶29-30, 140 N.M. 578, the Court of Appeals upheld an adjudication of abuse and neglect when the evidence demonstrated that mother did not recognize and seek treatment for the child's severe head trauma even though the injury was visible to others who saw the child later and which the testimony established would have been visible to mother.

In *State ex rel. CYFD v. Amanda H.* (not to be confused with *Amanda M.)*, 2007-NMCA-029, ¶¶ 21-31, 141 N.M. 299, the Court of Appeals reversed an adjudication of neglect because of insufficient evidence. The evidence showed that the baby's positive toxicology result was likely a false positive, that mother's admitted use of illegal drugs during the first trimester of her pregnancy did not cause the baby to be born with a drug addiction or any other health problem, and that mother's history of violence, past drug addiction, and

criminality had not rendered her unable to properly care for her child. The court held that the evidence was not clear and convincing that mother either intentionally or negligently disregarded her child's well-being and needs, as required by §32A-4-2(E)(2), or that she was unable to provide proper parental care of her child because of her history of drug addiction, criminal misconduct, and violence, as required by §32A-4-2(E)(4). On its own, risk of future neglect is not evidence of neglect as defined in these statutes. *Id*. ¶29.

In *State ex rel. CYFD v. Shawna C.*, 2005-NMCA-066, 137 N.M. 687, one of the parents "contends that the district court effectively based its finding of abuse or neglect upon [parent's] character and mental deficiency 'standing alone,' without any showing of actual errors or omissions in [parent's] parenting." *Id.* ¶23. The Court of Appeals agreed "that low IQ, mental disability, or mental illness alone are not sufficient grounds for a finding of abuse or neglect." *Id.* ¶27. The question is whether the parent is "unable to discharge [her] responsibilities to and for the child." The statute requires a clear and convincing showing of an inability to parent in the specified circumstances, which is what the lower court found in that case. *Id.* ¶30.

15.5.4 Aggravated Circumstances

A specific inquiry occurs when CYFD alleges that the respondent has subjected the child to aggravated circumstances as defined in §32A-4-2, which is set forth below. When aggravated circumstances are alleged, the court must make and record its findings on whether they have been proven. The concept of aggravated circumstances is important, not with respect to whether the child is an abused or neglected child, but with respect to whether CYFD must undertake reasonable efforts to preserve or reunify the family. Specifically, when the court finds that aggravated circumstances exist, it may decide that CYFD is not required to make reasonable efforts toward preservation or reunification. ***See*** §15.5.5 below, as well as §16.12.2. *See also State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, 133 N.M. 136.

"**Aggravated circumstances**" include those circumstances in which the parent, guardian or custodian has:

(1) attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child's sibling;
(2) attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;
(3) attempted, conspired to subject or has subjected the child to torture, chronic abuse or sexual abuse; or
(4) had his parental rights over a sibling of the child terminated involuntarily. §32A-4-2(C).

Included within the definition of aggravated circumstances is the phrase "great bodily harm," which is also defined. "Great bodily harm" means an injury to a person that creates a high probability of death, that causes serious disfigurement, or that results in permanent or

protracted loss or impairment of the function of any member or organ of the body. §32A-4-2(D).

In *State ex rel. CYFD v. Raquel M.*, 2013-NMCA-061, ¶1, 303 P.3d 865, the Court of Appeals upheld a district court determination that termination of parental rights over a sibling constituted aggravated circumstances, even though the termination was on appeal when the determination was made. This issue arose when CYFD sought to terminate the mother's parental rights over a second child. When the court granted termination, Mother appealed. She argued that relieving CYFD of its obligation to make reasonable efforts based on the earlier termination of parental rights over a sibling, even though an appeal was pending, violated her right to due process. The Court of Appeals disagreed, saying that she was free, on her own, to engage in efforts toward reunification, and yet she failed to do so. *Id*. ¶23. (It is worth noting that the earlier termination was affirmed by the Court of Appeals during the pendency of the appeal regarding the Child. *Id*. ¶17.)

The appellate court in *Raquel M*. observed that, in some cases, the facts or circumstances may call for delaying an aggravated circumstances determination pending the outcome of an appeal. Whether the court should make such a determination and the timing of the determination is properly left to the sound discretion of the district court. 2013-NMCA-061, ¶26.

15.5.5 Reasonable Efforts

The court should consider whether reasonable efforts have been made to prevent removal of the child from the home or to make it possible for the child safely to return to the home. ASFA requires that the court make a "reasonable efforts" determination within 60 days of the removal of the child from the home. This determination may be made in the *ex parte* custody order, at the custody hearing, or at the adjudicatory hearing if the hearing takes place within the 60 day window. (Failure to make this determination within 60 days will result in the child being rendered ineligible for federal foster care payments for the duration of his or her stay in foster care.) ***See*** Handbook §38.4 on ASFA.

15.5.6 Active Efforts in ICWA Case

In an adjudication involving an Indian child, CYFD must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, ¶10, 149 N.M. 315. ***See*** §15.11.3 below. There is no exception in ICWA for aggravated circumstances. Even if the State might be relieved from proving reasonable efforts under ASFA, active efforts must still be proved. *See, e.g., In the Interest of J.S.B.*, Jr., 691 N.W.2d 611 (S.D. Sup. Ct. 2005).

15.6 Admissions, Including No Contest Pleas

Most often, if there is going to be an admission or no contest plea, the admission or plea will have resulted from the pre-adjudicatory meeting and be scheduled before the court

accordingly. However, a respondent could decide at any time, even in mid-trial, not to contest any further. At that point, counsel for the respondent should inform the court that the respondent is prepared to enter an admission, either by:

- admitting sufficient facts to permit a finding that some or all of the allegations of the petition are true; or
- entering a plea of no contest by declaring his intention not to contest some or all of the allegations in the petition. Rule 10-342(A).

Rule 10-342 has been amended to make it clear that a no contest plea is an admission for purposes of the case. However, the rule also provides that the no contest plea may not be used as an admission for any other civil or criminal purpose. *See* Rule 10-342(A).

The court may not accept an admission, including the entry of a no contest plea, without first addressing the respondent personally, in open court, to ensure that the admission is given freely, knowingly, and voluntarily. The court must determine that the respondent:

- understands the allegations of the petition;
- understands the dispositions that the court may make if the allegations of the petition are found to be true;
- understands that making an admission means that the court will enter a finding that the child is an abused or neglected child as to that respondent and that such a finding can be used against the respondent to establish the fact of abuse and/or neglect in the event the case proceeds to a hearing on a motion to terminate parental rights;
- understands that he or she has a right to deny the allegations in the petition and to have a trial on them; and
- understands that, by making an admission, he or she is waiving his right to trial; and
- that the admission is voluntary and not the result of force or threats or promises other than those in any consent decree agreement. Rule 10-342(C) as amended.

Practice Note: It is very important to ensure that a parent understands that, if he or she enters a plea to an aggravated circumstances allegation, the resulting finding may allow the court to relieve CYFD of any obligation to make efforts to assist the parent to reunify with the child. *See State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶12, 133 N.M. 136.

Before accepting an admission the court must satisfy itself that there is a factual basis for accepting it. However, if the admission is a no contest plea, the court may not question the respondent. Support for a finding that one or more of the statutory grounds alleged in the petition are true must be obtained by some other means. Rule 10-342(D) as amended.

If the child is in CYFD's custody, the court must accept or reject the admission, including a no contest plea, within five days after the admission is made. Rule 10-342(H). Once the court accepts an admission, including a no contest plea, with the exception of an admission accepted for purposes of a consent decree, the court may proceed to make any disposition permitted by law that it deems appropriate under the circumstances. Rule 10-342(E).

Practice Note: If the respondent makes an admission as to some but not all of the allegations in the petition, CYFD may proceed to prove the allegations that were not admitted. Whether the department will want to do so depends on the nature of the allegations in the case and the importance, if any, of obtaining findings on them.

To the extent that the disposition is tied to the findings in the adjudication, it may be very important to have a particular finding. The availability of treatment for the respondent or possibly the child may depend, for example, on the findings in the adjudication.

15.7 Consent Decrees

A consent decree in an abuse or neglect proceeding is an order of the court, after an admission has been made, that suspends the proceedings and in which, under terms and conditions negotiated and agreed to by the respondent and CYFD:

- legal custody of the child is transferred to CYFD for a period not to exceed six months from the date of the decree; and
- the child is allowed to remain with the respondent or other person, and the respondent will be under CYFD supervision for a period not to exceed six months. Rule 10-342(B).

If the court accepts the consent decree, the court may approve the disposition provided for in the decree or another disposition more favorable to the respondent than the one provided. If the court rejects the consent decree, the decree is null and void. Rule 10-342(F).

The procedural rules that apply to admissions, described in §15.6 above, also apply to consent decrees. *See* Rule 10-342.

Admissions and Consent Decrees – Some Pros and Cons

Admissions may be necessary to lay the groundwork for the treatment plan that is needed. Combined with a dispositional order, they also provide more flexibility than a consent decree. The circumstances of children and families can change and the court is able to adjust a dispositional order more readily than a consent decree, which would have to be renegotiated by the parties, a time-consuming and cumbersome process.

Also, the focus of a consent decree is upon the fulfillment of, or compliance with, the terms of the consent decree by the respondents, rather than the change in behavior needed to allow the child to be safe in the home. Rule 10-342(I) and (J). As a result, there is a subtle shift in the focus of the proceedings away from the well-being of the child.

Consent decrees may be desirable from the respondents' point of view in that they forestall a finding of neglect or abuse. On the other hand, due to their conditional or provisional nature, consent decrees may simply defer litigation and cause confusion if questions arise as to whether the conditions have been fulfilled. It is important to state the obvious, which is that a consent decree requires agreement, and CYFD may be constrained by its statutory duties from agreeing to consent decrees in many cases.

15.8 Use Immunity

If any of the parties would like the respondent to testify in the civil abuse or neglect case and the respondent risks criminal prosecution or conviction, they should consider applying for use immunity for the respondent. Under §32A-4-11, the children's court attorney may apply for use immunity for the respondent's in-court testimony, for any records, documents or objects produced by the immunized respondent and for any statement that the respondent makes in the course of a court-ordered psychological evaluation or treatment program. The Supreme Court rule on immunity, Rule 10-341, was amended effective January 7, 2013 to allow *any party or the court,* not just the children's court attorney, to seek use immunity for the respondent. The rule covers testimony and records and does not address statements the respondent makes during evaluation or treatment.

Rule 10-341also allows witness immunity *for any person* who has been or may be called to testify or to produce records, documents or other objects in the children's court proceeding. Again, any party may make the application to the court, or the court may consider granting immunity on its own motion. Rule 10-341(A).

Evidence compelled under an order granted pursuant to the rule or information directly or indirectly derived from the evidence may not be used against the person in any criminal case except as provided by Rule 11-413, which makes an exception for prosecutions for perjury or contempt. Rule 10-341(C).

See also Handbook Chapter 27 on Evidence for a more detailed discussion of use immunity. It is critical that the parties and their attorneys determine early on whether use immunity will be needed so that counsel can make a timely application.

15.9 Evidence

The Rules of Evidence apply at the adjudicatory hearing. Rule 10-141; Evidence Rule 11-1101. *See State ex rel. CYFD in the Matter of Esperanza M.*, 1998-NMCA-039, 124 N.M. 735, for a discussion of evidentiary issues arising in an adjudicatory hearing; ***see also*** Handbook Chapter 27 on evidence. In some cases due process may require the appointment of an expert witness at state expense to an indigent parent. *State ex rel. CYFD v Kathleen D.C.*, 2007-NMSC-018, 141 N.M. 535. (Respondents' attorneys should consult the *Kathleen D.C.* case if an expert may be needed.)

With regard to Indian children in foster care, the New Mexico Supreme Court in 2011 decided that the adjudicatory hearing is the appropriate time for the department to present evidence that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, ¶¶36-37, 149 N.M. 315. The court must make a determination to this effect that is supported by clear and convincing evidence, including testimony of qualified expert witnesses. ***See*** §15.11.3 below.

15.10 Burden of Proof

CYFD bears the burden of proof. It must prove that the child is an abused or neglected child, as the case may be, by clear and convincing evidence that is competent, material, and relevant in nature. §32A-4-20(H).

The statute does not specify the standard required to prove the existence of aggravated circumstances but the same clear and convincing standard is generally considered to apply. The courts have come close to addressing this issue but have not specifically ruled on it. *See State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶12, 133 N.M. 136. *But see Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (constitutional requirement of clear and convincing evidence is needed only for permanent termination of parental rights).

15.11 Findings

15.11.1 Abuse or Neglect; Aggravated Circumstances

If the court finds that the child is neglected or abused, the court must enter an order finding that the child is neglected or abused. §32A-4-20(H), as amended in 2014. The order ought to reflect first whether the finding was made pursuant to an admission or after an evidentiary

hearing. If the former, the order should state that a sufficient factual basis for the admission was provided, as required by Rule 10-342; if the latter, it should state that proof was by clear and convincing evidence and should be accompanied with appropriate findings of fact.

Case Note. In *State ex rel. CYFD v. Steve C.*, 2012-NMCA-045, 277 P.3d 484, the Court of Appeals reversed a finding of child abuse against the father, who had not had an opportunity to contest the charge. CYFD had alleged neglect in the petition but, based on the evidence at the adjudication, asserted at closing argument that the evidence supported a finding of abuse. The court proceeded to find abuse as well as neglect, without further hearing. The Court of Appeals held that §32A-1-18(A) and due process both required that the father be given notice and an opportunity to be heard on the allegations of abuse.

Any finding as to proof of aggravated circumstances must also be included in the order, including a recitation of the factual basis for the finding.

A party aggrieved by an order entered pursuant to §32A-4-20(H) may file an immediate appeal to the Court of Appeals. §32A-4-20(I), added in 2014.

15.11.2 Reasonable Efforts

The order should address the issue of reasonable efforts to prevent removal or reunify the family. The order should include sufficient findings related to the specific facts and circumstances of the case. These findings could be made by incorporating documentation supplied by CYFD, if all parties are in agreement on the substance of the report or findings. ***See*** Handbook §13.7.4, as well as §38.4 on ASFA.

15.11.3 Findings Required by ICWA

If the child is an Indian child, the proceeding is subject to the Indian Child Welfare Act and the court must make certain findings at the adjudicatory hearing. The New Mexico Supreme Court, in *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, 149 N.M. 315, addressed when and how a district court in an abuse and neglect proceeding must make the two factual findings required by 25 U.S.C. §1912(d) and (e):

- Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. §1912(d).

- No foster care placement may be ordered in such proceedings in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(e).

After an extensive analysis of the application of the ICWA requirements to proceedings under the Children's Code, the Supreme Court decided that the adjudicatory hearing is the most appropriate point in the proceeding to make the required findings. The adjudication incorporates the procedural due process protections and stringent standard of proof that parallel those required by ICWA. *Marlene C.*, 2011-NMSC-005, ¶36.

It is important to note that the standards and evidentiary requirements are different from and in addition to those required in non-ICWA cases. CYFD needs to satisfy the court that *active efforts* have been made to prevent removal, and that the evidence supporting removal includes the *testimony of qualified expert witnesses*.

ICWA Note. ***See*** Chapter 39 for more information on ICWA. Two excellent resources are the website of the Tribal-State Judicial Consortium (https://tribalstate.nmcourts.gov) and a manual called *A Practical Guide to the Indian Child Welfare Act*, published by the Native American Rights Fund and available on-line at http://www.narf.org/icwa/. Copies of ICWA, the ICWA regulations at CFR Title 25, Part 23, and the Bureau of Indian Affair's ICWA Guidelines can be found in both places.

15.11.4 Custody

The order should provide for custody of the child pending the next proceeding, which would be the dispositional hearing, and include a finding that such custodial arrangement is in the best interest of the child. *See* §32A-4-20(K) (formerly (J)).

15.12 Order

Any order of dismissal should state the grounds (such as a stipulation, lack of timeliness, or failure of proof) and clearly indicate that custody of the child is restored to the respondent. (Under §32A-4-20(H), if the court does not find that the child is abused or neglected, the court must dismiss the petition and may refer the family to CYFD for appropriate services.)

Another possibility is that a parent, guardian, or custodian who was not made a party to the petition appears at the hearing. The court may award custody of the child to that person and dismiss the case, depending on the circumstances. ***See*** Handbook §§12.4.

15.13 Motion for New Hearing

A motion for a new adjudicatory hearing may be filed by a party or on the court's own initiative within ten days of entry of judgment. Rule 10-146(A).

A motion based on newly discovered evidence may be made within 30 days of judgment but, if an appeal is pending, the court may grant the motion only on remand. The motion may be granted if the evidence will probably change the result, was discovered after the original

hearing and could not have been discovered before with due diligence, is material to the issue, is not merely cumulative, and is not merely impeaching or contradictory. Rule 10-146(A). A motion for a new adjudicatory hearing is automatically denied if not granted within 30 days from the date it is filed or, if the case is on appeal, within 30 days from the date of remand to the children's court. Rule 10-146(A).

The court may relieve a party from a final judgment after 30 days for a number of reasons, including mistake or excusable neglect, newly discovered evidence which could not have been discovered in time to move for a new trial earlier, or misrepresentation. This motion must be made within a reasonable time and, in some cases, no more than one year after the judgment. Rule 10-146(C).

15.14 Checklist

AJUDICATORY HEARING

CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Notice of hearing
  - Manner and date of service
  - Appointment of counsel
  - Language or cognitive challenges
- ☐ Inquiry regarding
  - Absent parents
  - Tribal affiliation
- ☐ Advisement of rights, if first court hearing
- ☐ Results of pre-adjudicatory meeting
- ☐ Stipulations, admissions, consent decrees
  - Advisement
  - Knowing, voluntary waiver of right to trial, if case settled
- ☐ Evidence on contested allegations
  - Rules of Evidence apply
  - Burden of proof: clear and convincing
- ☐ Findings of fact
  - Abused or neglected child
  - Aggravated circumstances, if alleged
  - Reasonable efforts to prevent removal
- ☐ ICWA findings if Indian child involved
  - Active efforts
  - Serious emotional or physical damage
- ☐ Custody pending dispositional hearing
- ☐ Visitation pending dispositional hearing
- ☐ Status of predisposition study
- ☐ Scheduling of dispositional hearing

CHAPTER 16

DISPOSITIONAL HEARING

The dispositional hearing takes place within 30 days of the adjudicatory hearing. This chapter covers:

- Purpose of dispositional hearing.
- Description of predisposition study.
- Findings required by Children's Code.
- Approval of treatment plan.
- Reasonable efforts determination.
- Decisions on custody and visitation.
- Placement preferences for Indian children.
- Issues related to undocumented immigrant children.

16.1 Purpose

The purpose of the dispositional hearing is to adopt a treatment plan, establish legal custody of the child, set visitation arrangements if appropriate, and to determine appropriate findings of fact as required by statute.

16.2 Timeline

The dispositional hearing can proceed on two different tracks:

- The disposition may follow immediately after the adjudication.

  This is the most efficient approach and should be anticipated where the parties have reached agreement at the pre-adjudicatory meeting or at mediation, or later announced their intention to enter into a plea of no contest. The advantages are that the parties are already in attendance before the court and no further scheduling is

necessary. It would be premature, however, if the initial assessments or evaluations have not been completed or if the treatment plan has not yet been formulated with sufficient specificity.

- If the dispositional hearing is not held in conjunction with the adjudicatory hearing, it must commence within thirty days after conclusion of that hearing. §32A-4-22(A).

16.3 Initiation and Notice

If disposition does not immediately follow adjudication, CYFD is responsible for scheduling a setting and notifying the parties of the dispositional hearing. Again, it is preferred practice to announce the setting in open court when the respondent is present, at the close of the adjudicatory hearing.

16.4 Participants

In addition to all the parties and attorneys who participated in the adjudicatory hearing, this phase expands to include contributions from the court appointed special advocate (CASA). This is the point at which the CASA volunteer may begin submitting reports to the court. When the CASA submits a report, he or she is supposed to serve the report on the parties, but not the court, at least five days prior to the hearing at which it will be considered. Rule 10-164(F).

This is also one of the points at which the foster parent may want to get involved. The Abuse and Neglect Act specifically requires that the foster parent, preadoptive parent, or relative providing care for the child be given "notice and an opportunity to be heard at the dispositional phase." §32A-4-20(C).

Practice Note: The statute on intervention also requires that the foster parent, preadoptive parent or relative providing care for the child be given notice of, and an opportunity to be heard in, any review or hearing with respect to the child. §32A-4-27(F).

Abuse and neglect hearings are closed to the general public. ***See*** Handbook §13.4.

16.5 Issues to be Considered

16.5.1 Legal Custody

At this point, the child has been adjudicated an abused or neglected child and it is up to the court to determine who will have legal custody of the child. The court will consider whether it is safe for the child to remain in or return to the custody of the parent or a previously non-custodial parent, or whether the child's best interest demands that custody be in CYFD.

In the most extreme cases, the court may conclude that the family is not likely to be rehabilitated and that efforts should be devoted to some other permanent plan for the child. This route is to be expected where the court entered a finding of aggravated circumstances at the adjudicatory hearing, although the court could order that CYFD implement a treatment plan despite the finding. §32A-4-22(C).

16.5.2 Treatment Plan

CYFD will propose a treatment plan, which should already have been discussed by the parties at the pre-adjudicatory meeting or at mediation, if there is mediation separately from the pre-adjudicatory meeting. The proposed plan may or may not be a matter of contention at the hearing. ***See*** §16.7 below.

16.5.3 Reasonable Efforts

The court is required to consider whether reasonable efforts have been made to preserve and reunify the family, with the paramount concern being the child's health and safety. Under certain circumstances, the court may also decide that reasonable efforts are not necessary. ***See*** §16.11.2 below.

16.6 Predisposition Study and Report

A treatment plan is only as effective as the assessment underlying it and the availability of the services in it. Section 32A-4-21 provides that CYFD will do a predisposition study and submit the study and report in writing to the court. The Children's Code requires the department to study the situation of both child and family from a variety of viewpoints, to report extensively on the situation, and to propose a treatment plan.

Under §32A-4-21(B), the predisposition study must contain:

1. a statement of the specific reasons for intervention by CYFD or for placing the child in CYFD's custody and a statement of the parent's ability to care for the child in the parent's home without causing harm to the child;

2. a statement of how an intervention plan is designed to achieve placement of the child in the least restrictive setting available, consistent with the best interests and special needs of the child, including a statement of the likely harm the child may suffer as a result of separation from parents, and a statement of how the intervention plan is designed to place the child in close proximity to the parent's home without causing harm to the child due to separation from parents, siblings or any other person who may significantly affect the child's best interest;

3. the wishes of the child as to the custodian;

4. whether the child has a family member who, after study by CYFD, is determined to be qualified to care for the child;

5. a description of services offered to the child, his or her family and his or her foster care family and a summary of reasonable efforts made to prevent removal of the child from the family or reasonable efforts made to reunite the child with family;

6. a description of the home or facility in which the child is placed and the appropriateness of the child's placement;

7. the results of any diagnostic examination or evaluation ordered at the custody hearing;

8. a statement of the child's medical and educational background;

9. if the child is an Indian child, whether the placement preferences set forth in the Indian Child Welfare Act (ICWA) or the placement preferences of the child's Indian tribe were followed and whether the child's treatment plan provides for maintaining the child's cultural ties;

10. a treatment plan that sets forth steps to ensure that the child's physical, medical, psychological, and educational needs are met and that sets forth services to be provided to the child and his or her parents to facilitate permanent placement of the child in the parent's home;

11. for children 16 years of age and older, a plan (known as the "Life Skills Plan") for developing the specific skills the child requires for successful transition into independent living as an adult, regardless of whether the child is returned to the parent's home;

12. a treatment plan that sets forth steps to ensure that the child's educational needs are met and, for a child 14 years or older, a treatment plan that specifically sets forth the child's educational and postsecondary goals; and

13. a description of the child's foster care placement and whether it is appropriate in terms of the educational setting and proximity to the school the child was enrolled in at the time of the placement. The description must include plans for travel for the child to remain in that school, if reasonable and in the child's best interest.

While not listed in §32A-4-21, the Children's Code requires that recommendations be made in the treatment plan for children who are undocumented immigrants. Section 32A-4-23.1, added in 2009, requires that, if a child is an undocumented immigrant, CYFD must include in the treatment plan a recommendation as to whether:

- the permanency plan for the child includes reuniting the child with the child's parents; and

- it is in the child's best interest to be returned to the child's country of origin.

If the permanency plan being considered does not include reunification, then CYFD needs to consider whether the child should be returned to the country of origin. If CYFD does not recommend return, then the department needs to determine whether the child may be eligible for special immigrant juvenile status (SIJS) under federal law. ***See*** Handbook §17.8 for more details on SIJS.

Services to Immigrant Children. Services to children alleged to have been abused, neglected, or abandoned must be provided without regard to a child's immigration status except where immigration status is explicitly set forth as a statutory or regulatory condition of coverage or eligibility. §32-4-23.1(A).

CYFD's predisposition report must be filed with the court and served on counsel for all of the parties, including the youth attorney and the GAL, at least five days prior to the dispositional hearing. (In practice, the dispositional hearing is held concurrent with the adjudicatory hearing, so the report would be circulated before the adjudicatory hearing. It would not be filed with the court in advance.) When served, the report should be accompanied by copies of any social, diagnostic, or other predisposition reports ordered by or submitted to the court, as well as a proposed disposition order. §§32A-4-18(G) and 32A-4-21(C); Rule 10-344(B).

The department's study and report should form the starting point for the court, but not just be "rubber stamped." They are served on the parties prior to the hearing so that all will have had the opportunity to supplement, clarify, or challenge the particulars. All concerned need to compare the study and report with the proposed treatment plan to ensure that they are consistent with and complement each other.

16.7 Effective Treatment Plan

The treatment plan is the core of the dispositional hearing. Section 32A-4-21(B)(10) requires a treatment plan that sets forth steps to ensure that the child's physical, medical, psychological, and educational needs are met and that sets forth services to be provided to the child and his or her parents to facilitate permanent placement of the child in the parent's home. The court contemplates the proposed plan, considers the input and perspective of the parties and the CASA, reviews the respective roles and responsibilities of different participants for the success of the plan, and orders its implementation, either as submitted or as amended by the court on its own or at the request of a party.

The treatment plan should focus on the safety threats and lack of protective capacities that caused the child's removal from the home and the elimination of the safety threats or development of the protective capacity needed for the parent to properly care for the child. However, it is important to remember that the plan is not just concerned with correcting the conditions that caused the child to come into care, although it should definitely address these issues. When out-of-home placement is proposed, the plan should also provide specific measures for the child that will facilitate permanent placement in the parent's home,

including visitation arrangements and medical, educational, and therapeutic services for the child. §32A-4-21(B)(10) and (12).

Practice Note: When reviewing the treatment plan at the dispositional hearing, the court should keep in mind that it will be looking to the treatment plan when it later assesses whether or not CYFD has been making reasonable efforts to reunify the family, as required by the Children's Code.

16.8 Sibling Placement

One of the findings that will be required at the close of the hearing is a finding on sibling placement. §32A-2-22(A). CYFD will need to provide information to the court to permit the court to determine whether the department has made reasonable efforts to place siblings in custody together and whether siblings not placed jointly have been provided reasonable visitation or other interaction. ***See*** §16.12.1 below for the information that the court will need in order to make the findings required by §32A-2-22(A).

16.9 Placement Preferences for Indian Children

For any Indian child, the court must verify that the child's placement complies with the preferences of the Indian Child Welfare Act or of the child's tribe and that the child's plan provides for maintaining the child's cultural ties. §32A-4-22(A)(11); ***see also*** Handbook §39.3.

Reflecting the ICWA requirements of 25 U.S.C. §1915, §32A-4-9(A) requires that an Indian child accepted for foster care placement be placed in the least restrictive setting that most closely approximates a family in which the child's special needs, if any, may be met. The child must also be placed within reasonable proximity to his or her home, again taking into account any special needs the child has. Preference shall be given, in the absence of good cause to the contrary, to a placement with:

- a member of the child's extended family;
- a foster care home licensed, approved, and specified by the child's tribe;
- an Indian foster care home licensed or approved by an authorized non-Indian licensing authority; or
- an institution for children approved by the child's tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

If these preferences are not followed or if the child is placed in an institution, a plan must be developed to ensure that his or her cultural ties are protected and fostered. §32A-4-9(B).

16.10 Evidence

The Rules of Evidence do not apply to dispositional hearings. *See* Evidence Rule 11-1101(D)(3). All relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value even though not competent had it been offered during the adjudicatory part of the hearing. §32A-4-20(I).

16.11 Burden of Proof

CYFD has the burden of proof on the issues of custody and treatment, with the standard being a simple preponderance of the evidence.
A finding that it would be futile to make further efforts toward family reunification may be made (***see*** §16.12.2 below) upon a showing by a preponderance of the evidence. Note, however, that futility will have to be proven again by clear and convincing evidence if relied upon as a ground for the termination of parental rights (***see*** Handbook §22.5).

16.12 Findings and Order

16.12.1 Findings required by §32A-4-22

At the conclusion of the dispositional hearing, the court must make and include in its judgment findings of fact on the following:

1. the interaction and interrelationship of the child with his or her parent, siblings, and any other person who may significantly affect the child's best interest;

2. the child's adjustment to his or her home, school, and community;

3. the mental and physical health of all individuals involved;

4. the wishes of the child as to his or her placement;

5. the wishes of the child's parent, guardian, or custodian as to the child's custody;

6. whether there exists a relative of the child or other individual who, after study by CYFD, is found to be qualified to receive and care for the child;

7. the availability of services recommended in the treatment plan prepared as a part of the predisposition study in accordance with the provisions of §32A-4-21;

8. the ability of the parent to care for the child in the home so that no harm will result to the child;

9. whether reasonable efforts were used by CYFD to prevent removal of the child from the home prior to placement in substitute care and whether reasonable efforts were used to attempt reunification of the child with the natural parent;

10. whether reasonable efforts were made by CYFD to place siblings together, unless such joint placement would be contrary to the safety or well-being of any of the siblings in custody, and whether any siblings who are not jointly placed have been provided reasonable visitation or other ongoing interaction, unless visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings; and

11. if the child is an Indian child, whether the placement preferences set forth in ICWA or the placement preferences of the child's Indian tribe have been followed and whether the Indian child's treatment plan provides for maintaining the Indian child's cultural ties. When placement preferences have not been followed, good cause for noncompliance must be clearly stated and supported.

The dispositional hearing is the hearing at which the court approves the treatment plan, orders CYFD to implement the plan, and orders the parents, guardian, or custodian to cooperate with the plan. §32A-4-22(C). If the parties agree, the court may adopt the treatment plan by attachment and incorporate it by reference into the order.

16.12.2 Reasonable Efforts

In connection with approval of the treatment plan, the Children's Code requires that reasonable efforts be made to preserve and reunify the family, with the paramount concern being the child's health and safety. However, the court may determine that reasonable efforts are not required to be made if the court finds:

- the efforts would be futile; or
- the parent, guardian, or custodian has subjected the child to aggravated circumstances. §32A-4-22(C).

The 2005 amendments to §32A-4-22(C) deleted a prior involuntary termination of parental rights from this list of reasons because a prior involuntary termination is already an aggravated circumstance under the statute. The result is the same but the statutory change requires CYFD to plead and prove a previous termination as an aggravated circumstance rather than a stand-alone reason not to require reasonable efforts.

If the court finds that no further efforts at reunification are required, it must conduct a permanency hearing within 30 days of the determination. CYFD must make reasonable efforts to implement and finalize the permanency plan in a timely manner. §32A-4-22(J).

Note on Futility: The parties and the court should be cautious about addressing the issue of futility at a hearing during which the Rules of Evidence do not apply. Counsel may want to

be prepared to present formal testimony and cross-examine witnesses. *See State ex rel. CYFD v. Vanessa C.*, 2000-NMCA-025, 128 N.M. 701, summarized in Handbook §21.7.1.

Note on Aggravated Circumstances: If aggravated circumstances were alleged in the petition and disputed by the respondent, the issue would have been tried at the adjudicatory hearing. The finding at that hearing would form the basis for the court's ruling on reasonable efforts at disposition. ***See*** the definition of aggravated circumstances in Handbook §15.5.4.

16.12.3 Custodial Determination

Under §32A-4-22(B), the court may enter its judgment making any of the following dispositions to protect the welfare of the child. The court may:

- permit the child to remain with the child's parent, guardian, or custodian, subject to those conditions and limitations the court may prescribe;
- place the child under CYFD's protective supervision; or
- transfer legal custody to any of the following:
    - the non-custodial parent, if it is found to be in the child's best interest;
    - an agency responsible for the care of neglected or abused children; or
    - a child placement agency willing and able to assume responsibility for the education, care, and maintenance of the child and licensed or otherwise authorized by law to receive and provide care for the child.

"Protective supervision" gives CYFD "the right to visit the child in the home where the child is residing, inspect the home, transport the child to court-ordered diagnostic examinations and evaluations, and obtain information and records concerning the child." §32A-1-4(T). Protective supervision allows CYFD to remain actively involved in implementing the terms of the treatment plan and to have access to the child to assure the child's safety even though the child has been returned to the parent's custody.

Any award of custody of the child should be supported by a finding that such award is in the child's best interest.

Practice Note: Custody and placement are two different concepts. When legal custody is awarded to CYFD, CYFD has the responsibility to make a placement for the child. Similarly, if legal custody is returned to a parent, that parent can make a placement decision.

The case of incarcerated parents illustrates the difference between custody and placement. While, in some situations, incarceration contributes to a situation of neglect, there may be incarcerated parents who can make responsible placement decisions for their child even though, as is obvious, they cannot provide a home for the child themselves. *See State ex rel. CYFD in the Matter of Sara R.*, 1997-NMSC-038, ¶17, 123 N.M. 711, for a similar discussion.

16.12.4 Visitation

If the child is not allowed to remain with his or her parent, guardian or custodian, any parent, guardian or custodian must be given reasonable rights of visitation as determined by the court, unless the court finds that the child's best interests preclude visitation. If the court finds that visitation is not in the best interest of the child, this finding should appear expressly in the order. §32A-4-22(D).

The court may also order reasonable visitation between the child and the child's siblings or any other person who may significantly affect the child's best interest, if the court finds the visitation to be in the child's best interest. §32A-4-22(E).

16.12.5 Indian Children

If the child is placed in CYFD's custody, CYFD must investigate whether the child is eligible for enrollment as a member of an Indian tribe and, if so, CYFD must pursue the enrollment on the child's behalf. §32A-4-22(I). In the *Marsalee P*. case, the Court of Appeals reversed a termination of parental rights, holding that the district court has an affirmative obligation to ensure that CYFD complies with §32A-4-22(I) before terminating a parent's parental rights. *State ex rel. CYFD v. Marsalee P*., 2013-NMCA-062, ¶27, 302 P.3d 761.

As noted in §16.9 above, if a child is an Indian child, then the treatment plan and the findings of fact are to report on whether placement preferences are followed and whether the treatment plan provides for maintaining cultural ties.

16.12.6 Educational Needs

The treatment plan will have set forth steps that need to be taken to ensure that the child's educational needs are met. ***See*** §16.6 above. It is very possible that the court will need to designate an educational decision maker for the child, such as for special education services, or appoint someone to serve as the child's parent for purposes of the federal Family Educational Rights and Privacy Act (FERPA), which governs access to the child's educational records. The Children's Court Rules Committee has proposed forms of dispositional orders that include such designations; these proposed forms were pending before the Supreme Court when the 2014 Handbook went to press.

For the importance of meeting the educational needs of children in care, *see also* the Report and Recommendations of the Joint Education Task Force, which was created by the Supreme Court and co-chaired by Justice Petra Jimenez Maes and Governor Susana Martinez. The report, which includes an Education Bench Card, was approved by the Court in April of 2014 and can be found at: http://www.nmcourts.gov/CourtImprovement/files/JETFfinal.pdf.

16.13 Child Support

If the child does not return home, the court is supposed to order the parent to pay the reasonable costs of support and maintenance for the child, to the extent the parents are financially able to pay. The court may use the child support guidelines set forth in §40-4-

11.1 to calculate a reasonable payment. §32A-4-26. As a matter of practice, courts often direct parents to pay child support but refer the order to the Child Support Enforcement Division of the Human Services Department to assist in determining the amount and collecting the payments.

16.14 Duration of Judgment

A judgment vesting legal custody of a child in an agency remains in force for an indeterminate period not exceeding two years from the date entered. §32A-4-24(A). Prior to the expiration of the judgment, the court may extend the judgment for additional periods of one year if it finds that the extension is necessary to safeguard the welfare of the child or the public interest. §32A-4-24(E).

A judgment vesting legal custody in an individual other than the child's parent or permanent guardian remains in force for two years from the date entered, unless terminated sooner by court order. § 32A-4-24(B).

A judgment vesting legal custody in the child's parent or a permanent guardian remains in force for an indeterminate period, until terminated by court order or until the child is emancipated or reaches the age of majority. §32A-4-24(C).

At any time before expiration, a judgment vesting legal custody or granting protective supervision may be modified, revoked or extended on motion by any party, including the child by and through the child's GAL. §32A-4-24(D). (The attorney for a child 14 or older would make the same motion, not as GAL, but as the attorney for a party, namely the child.)

When a child reaches 18 years of age, all neglect and abuse orders affecting the child automatically terminate, except as provided in §32A-4-23.1 and §32A-4-25.3(C), described below. Termination of the orders does not disqualify a child from eligibility for transitional services. §32A-4-24(F).

New in 2009, if a petition for special immigrant juvenile status and an application for adjustment of status have been filed but not granted by the time the child reaches age 18, the court may retain jurisdiction over the case for the sole purpose of ensuring that the child continues to satisfy the requirements for classification as a special immigrant juvenile. §32A-4-23.1(E). Retention of jurisdiction in this instance does not affect the transition services available to the child. §32A-4-23.1(H). The court's jurisdiction terminates upon the final decision of the federal authorities but in no event may the court retain jurisdiction after the child's 21st birthday. §32A-4-23.1(G) and (I). For more information on undocumented immigrant children, ***see*** Handbook §17.8.

Also new in 2009, the court may retain jurisdiction for one year after the child's 18th birthday if the court finds that CYFD did not make reasonable efforts to implement the following prior to the child's transition from foster care. CYFD must make reasonable efforts to:

- provide to the child written information concerning child's family history, whereabouts of any sibling if appropriate, and education and health records;
- provide to the child the child's social security card, certified birth certificate, state-issued ID card, death certificate of a parent, and proof of citizenship or residence;
- provide assistance to the child in obtaining Medicaid unless the child is ineligible for Medicaid; and
- make referral for a guardianship or limited guardianship if the child is incapacitated.

§32A-4-25.3(B). If the court finds that CYFD has not made reasonable efforts and that the termination of jurisdiction would be harmful to the youth, the court may continue to exercise its jurisdiction for a period not to exceed one year from the youth's 18th birthday. The young adult must consent to the court's continued jurisdiction. §32A-4-25.3(C).

16.15 Checklist

DISPOSITIONAL HEARING

CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Notice of hearing
- ☐ Inquiry regarding
  - Absent parents
  - Tribal affiliation
- ☐ Results of predisposition study, including plans for meeting a child's educational needs and the life skills plan for youth 16 or older
- ☐ CASA report
- ☐ Stipulations
- ☐ Testimony
  - Rules of Evidence do not apply
- ☐ Findings required by §32A-4-22(A)
- ☐ Approval of treatment plan
- ☐ Reasonable efforts determination
- ☐ Custody determination
- ☐ Visitation
- ☐ Indian child
  - In findings of fact
  - In treatment plan
  - Placement preferences
- ☐ Child support
- ☐ Scheduling of future meetings/hearings when court determines that reasonable efforts are not required
  - Permanency hearing within 30 days
  - Pre-permanency meeting/mediation prior to hearing
- ☐ Scheduling of future meetings/hearings in other cases
  - Initial judicial review within 60 days
  - Permanency hearing within 12 months of the date the child "entered foster care," as defined.
  - Pre-permanency meeting/mediation

CHAPTER 17

INITIAL JUDICIAL REVIEW

The initial judicial review must be held within 60 days of the dispositional hearing. This chapter covers:

- Purpose of the hearing.
- Compliance with treatment plan.
- Review of dispositional order.
- Evidentiary considerations.
- Transition planning for older youth.

17.1 Purpose

Because of the short time frame for resolving cases, the purpose of the initial judicial review hearing is to make sure that everyone is engaged in the treatment plan and barriers to implementing the plan are identified and addressed. If good assessment and treatment planning was done in conjunction with the dispositional hearing, there should be no need to make major changes to the treatment plan. If adjustments need to be made, however, this is the time to make them.

The initial judicial review provides the best, and often the only, opportunity to test how the treatment plan is performing in practice, to identify obstacles, and to modify or fine tune the plan as necessary. From a motivational standpoint, it represents the last chance for the court to encourage or admonish the respondent prior to the permanency hearing.

17.2 Timeline

The initial judicial review must be held within 60 days of the disposition, regardless of whether the dispositional hearing was held in conjunction with the adjudicatory hearing or at some time thereafter. §32A-4-25(A); Rule 10-346.

Practice Note: Some children's court judges have also used what they call "compliance hearings." These hearings have many of the same characteristics as a judicial review but are held with greater frequency, in some cases once a month, to allow the court and the parties

to check in with each other and address any problems as they arise. Not in the Children's Code or rules, these hearings may be scheduled at any time, at the request of a party or as the court deems necessary. Because of the burden on the parties that these may impose, the court should be careful to minimize formal reporting requirements and avoid holding the hearings too frequently.

17.3 Initiation and Notice

As with the earlier hearings in an abuse or neglect case, CYFD has the responsibility for requesting a date for the judicial review and notifying the parties. Rule 10-346. The children's court attorney must notify all parties, including the child by and through the child's guardian ad litem (GAL) or attorney, the child's CASA, the local citizen review board, or CRB, and the child's foster parent or substitute care provider, of the time, place, and purpose of the hearing. §32A-4-25(C). The notice to foster parents, pre-adoptive parents, and relative caregivers must expressly inform them of their right to be heard at the review. Rule 10-104.1.

CYFD has a specific obligation to send the CRB a copy of the adjudicatory order and the dispositional order at the same time it sends notice of the judicial review. §32A-4-25(A).

Practice Note: It is the preferred practice to announce the setting of the initial judicial review hearing in open court at the previous hearing, when the respondent is present. At this point, the previous hearing was probably the dispositional hearing.

17.4 Participants

Participants in the review include the parties and their attorneys, including the child's GAL or attorney, foster and pre-adoptive parents, treatment providers, and witnesses when necessary and appropriate. §32A-4-25.

A child under 14, although a party, may be excluded from the hearing if it is in the child's best interest. The child who is 14 or older may be excluded only if the court finds that there is a compelling reason for exclusion and states the factual basis for this finding on the record. §32A-4-20(E).

The CRB representative is permitted to attend and comment to the court. §32A-4-25(A). The CASA often presents findings and recommendations by written and/or oral reports to the court, although this may vary from court to court. ***See*** Handbook Chapter 9 on court appointed special advocates.

17.5 Conduct of the Hearing

At the initial judicial review, the parties must demonstrate to the court efforts made to implement the treatment plan approved by the court in its dispositional order. The court then determines the extent to which the plan has been implemented and makes any supplemental orders necessary to assure compliance with the plan and the safety of the child. §32A-4-25(A).
At the hearing, the court will measure the extent and quality of the respondent's compliance with each specific requirement of the plan. It will also consider any impediments that have been identified and any progress that has been made. The court will make such revisions to the plan as are necessary. The court also reviews the child's adjustment to placement, any change in the ability of the parent to meet the needs of the child, the quality and consistency of visitation, and any other matters touching on the child's welfare. These include the child's placement with siblings and the child's educational continuity, both important considerations added to the Children's Code in 2009 and emphasized in the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. ***See*** Handbook §38.9.

CYFD must also report the child's immigration status to the court at this first review. §32A-4-23.1(A) (added in 2009).

17.6 Evidence

The court may admit testimony by any person given notice of the hearing who has information about the status of the child or the status of the treatment plan. §32A-4-25(E). The Rules of Evidence do not apply to a judicial review hearing. §32A-4-25(E); Evidence Rule 11-1101(D)(3).

The fact that the Rules of Evidence do not apply does not preclude the taking of evidence with some semblance of courtroom formality. The proceeding is a "hearing," not a "meeting" or "conference," and the ramifications for parents of not working to change their behaviors or not complying with the treatment plan can be enormous.

There is some debate over the level of formality required. For example, in some jurisdictions, the children's court attorney makes an oral presentation based on the written reports, or the case worker gives an oral report of the status of the case without providing formal testimony. In other courts, the children's court attorney puts the case worker on the stand. Putting the case worker on the stand is suggested as the preferred practice. ***See*** Handbook §21.7.1 for a summary of *State ex rel. CYFD v. Vanessa C.*, 2000-NMCA-025, 128 N.M. 701.

17.7 Findings and Order

The Children's Code requires that the court make findings of fact and conclusions of law at the conclusion of the hearing. §32A-4-25(F).

The court's findings should address the reasonableness of CYFD's efforts to implement the treatment plan, the degree of compliance by the respondent, and whether continued custody in CYFD is in the best interest of the child. The court may make any supplemental orders necessary to assure compliance with the treatment plan and to protect the child. §32A-4-25(A).

If the child is an Indian child, the court must determine during review of the dispositional order whether the placement preferences set forth in the Indian Child Welfare Act or the placement preferences of the child's tribe were followed and whether the treatment plan provides for maintaining the child's cultural ties. When placement preferences have not been followed, good cause for noncompliance must be clearly stated and supported. §32A-4-25(G).

17.8 Undocumented Immigrant Children

17.8.1 Reporting Status to the Court

Whenever the court adjudicates that a child is abused or neglected, CYFD must determine the child's immigration status and report that status to the court at the first judicial review. §32A-4-23.1(A) (added in 2009).

17.8.2 Recommendations in the Treatment Plan

If the child is an undocumented immigrant, CYFD must include in the treatment plan a recommendation as to whether the permanency plan for the child includes reuniting the child with the child's parents and whether it is in the child's best interest to be returned to the child's country of origin. If the plan does not include reunification and CYFD has determined that it is not in the child's best interest to be returned to his or her country of origin, then the department must also determine whether the child may be eligible for special immigrant juvenile status (SIJS). *See* §32A-4-23.1 generally.

Federal Law. It is important to note that a child's eligibility for special immigrant juvenile status is based on federal immigration law and that the concept of reunification in the immigration laws is not necessarily the same as the concept in federal and state child welfare laws.

The Immigration and Nationality Act of 1990, as amended in 2008, defines a special immigrant in part as a child "whose reunification *with 1 or both* of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." 8 U.S.C. §1101(a)(27)(J) (emphasis added). CYFD recognizes this definition in its regulations. 8.10.7.29 NMAC. It may mean that a child who can be reunified with one parent but not the other should be considered for SIJS status.

The website for U.S. Citizenship and Immigration Services is http://www.uscis.gov. A website with extensive resources on SIJS specifically is that of the Immigrant Legal

Resource Center, http://www.ilrc.org.

17.8.3 Children's Court Order

If the child is eligible for SIJS, CYFD must move the children's court for a special immigrant juvenile status order containing a judicial determination that the child is deemed unable to reunify with one or both parents due to abuse, neglect or abandonment, and that it is not in the child's best interest to return to the country of nationality or last habitual residence. The department's motion must include a statement of the express wishes of the child, as expressed by the child or the child's GAL or attorney. §32A-4-23.1(C); 8.10.7.29 NMAC.

17.8.4 Applying for Special Immigrant Juvenile Status

The SIJS order issued by the children's court sets the stage for a possible SIJS petition with U.S. Citizenship and Immigration Services. After consulting with the child and the child's GAL or attorney, CYFD will determine whether the child's best interests would be served by the filing of a petition for SIJS and application for adjustment of status. If filing a petition and application is in the child's best interest, CYFD must file them on behalf of the child within 60 days after entry of the SIJS order by the children's court. §32A-4-23.1(D).

CYFD will advise the court in judicial review reports of the status of the petition and application process. §32A-4-23.1(J). If a petition and application have been filed but have not been granted by the time the child turns 18, the children's court may retain jurisdiction over the case for the sole purpose of ensuring that the child continues to satisfy the requirement for SIJS. The children's court attorney will request court jurisdiction and set review hearings for the purpose of ensuring that the child continues to satisfy the requirements for classification as a special immigrant juvenile and determining the status of the petition and application. §32A-4-23.1(E) and (F); 8.10.7.29 NMAC. The court's jurisdiction terminates upon the final decision of the federal authorities or the child's 21st birthday, whichever occurs first. §32A-4-23.1(G) and (I).

Practice Note. The Children's Code does not require that all of these actions take place at the initial judicial review. The action that is specifically required at that time is CYFD's report to the court on the child's immigration status. However, efforts to determine the child's status should begin as soon as the child is adjudicated abused or neglected, if not earlier. It is important that work commence to secure special immigrant juvenile status as soon as it appears that the child is eligible and that SIJS is appropriate. The entire process takes time.

17.9 Transition Planning for Older Youth

17.9.1 Transition Plan

Before the child's 17th birthday, the department will meet with the child to develop a transition plan for the child. The child's attorney and others of the child's choosing, including biological family members, are also included in the meeting. The department will assist the child in identifying and planning to meet the child's needs at age 18, including housing, education, employment or income, health and mental health, local opportunities for mentors, and continuing support services. §32A-4-25.2(A) (added in 2009).

If the initial judicial review is the first hearing after the child's 17th birthday, CYFD must present the child's proposed transition plan to the court at that hearing. The court will order a transition plan for the child, which will then be reviewed at every subsequent review and permanency hearing. §32A-4-25.2(B) and (C).

Transition Plan Compared to Life Skills Plan. The life skills plan is the plan required by §32A-4-21 (B)(11) for youth age 16 or older. This plan identifies the activities, tasks, and services needed for the youth to develop the life skills necessary to safely transition into independent living. The plan is included in the youth's case plan and reviewed by the court at disposition. 8.10.9.11 NMAC.

The transition plan required by §32A-4-25.2 focuses less on general life skills and more on the youth's needs, strengths, and goals in such adult areas as housing, education, employment or income, health and mental health, and local opportunities for mentors and continuing support services. 8.10.9.16 NMAC. There is a very distinct awareness that the child will be on his or her own momentarily and it is important that the court review and act on the transition plan at the first hearing after the child's 17th birthday. §32A-4-25.2.

Like the transition plan, the life skills plan is reviewed at every judicial review and permanency hearing. 8.10.9.11 NMAC.

17.9.2 Discharge Hearing

If the initial judicial review is the last judicial review or permanency hearing before the child turns 18, the court must both review the child's transition plan (***see*** §17.9.1 above) and determine whether CYFD has made reasonable efforts to implement the requirements of §32A-4-25.3(B). Section 32A-4-25.3 requires the court to determine:

- whether the child has been provided written information concerning:
  - the child's family history,
  - the whereabouts of any sibling, if appropriate, and
  - the child's education and health records;
- whether the child has been provided:
  - the child's social security card,
  - certified birth certificate,
  - state-issued identification card,
  - death certificate of a parent, and
  - proof of citizenship or residence;
- whether the child has been provided assistance in obtaining Medicaid, unless the

child is not eligible; and

- whether the child has been referred for a guardianship or limited guardianship if incapacitated.

This part of the judicial review or permanency hearing is called a "discharge hearing." If the court finds at the discharge hearing that CYFD has not made reasonable efforts to meet all of these requirements and that termination of jurisdiction would be harmful to the young adult, the court may continue to exercise its jurisdiction for up to one year after the child's 18th birthday. However, the young adult must consent to this continued jurisdiction of the court. §32A-4-25.3(C).

Continuing Jurisdiction at Age 18. Continued jurisdiction to ensure that the requirements of §32A-4-25.3(B) are met is one of two situations in which the court may continue jurisdiction past age 17. The other is when a petition for SIJS has been filed, in which case the court may retain jurisdiction until the petition is approved or the young adult turns 21, whichever occurs first. Jurisdiction in this instance is retained for the sole purpose of ensuring that the individual continues to satisfy the requirements for SIJS. §32-4-23.1. ***See*** Handbook §17.8 above.

17.10 Checklist

INITIAL JUDICIAL REVIEW HEARING CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Notice of hearing
- ☐ Inquiry regarding
  - Absent parents
  - Tribal affiliation/placement
  - Presence of foster parents
  - Presence of youth
  - Immigration status and SIJS eligibility, if any
- ☐ Rules of Evidence do not apply
- ☐ CASA report
- ☐ Implementation of treatment plan
  - Compliance
  - Modifications
  - Further assessments, evaluations
  - Sibling placement, if applicable
  - Educational continuity and progress
- ☐ Transition planning for older youth
  - If child is 16 or older, review of life skills plan
  - If child is 17 or older, approval of transition plan
  - If child is almost 18, conduct discharge planning hearing
- ☐ Scheduling
  - Permanency hearing w/in 6 months of the judicial review, or within 12 months of the child "entering foster care," as defined, whichever is sooner. If last hearing before child turns 18, include discharge hearing
  - Pre-permanency hearing meeting/mediation
  - Termination or permanent guardianship hearing, if appropriate

CHAPTER 18

PRE-PERMANENCY HEARING MEETING

This chapter covers:

- Requirement for a pre-permanency hearing meeting.
- Purpose and timing of the meeting.
- Nature and content of a permanency plan.
- Special considerations in developing a plan.

18.1 Purpose

As the permanency hearing approaches, some hard decisions have to be made. Either the child should be able to return home in the near future or, if the child cannot be returned home, then some other alternative permanency must be sought. The idea is "enough is enough."

CYFD usually will have conducted an internal case review involving the county office manager, the permanency planning worker, and the supervisor for the purpose of selecting the most appropriate permanency plan, which is brought to the table at the pre-permanency hearing meeting. The children's court attorney and a placement worker may also attend the review.

From CYFD's perspective, every child has a permanency plan from the outset. At this stage in the case, the focus is on selecting the best plan for the child based on the safety threats, protective capacities, history of the case, and the information that has developed.

18.2 Timing and Initiation

The Children's Code requires that the parties attend a meeting *prior* to the initial permanency hearing to attempt to settle issues attendant to the hearing. §32A-4-25.1(A). The Children's Court Rules require that the pre-hearing mandatory meeting take place not less than five days prior to the hearing. Rule 10-345(D).

Since court personnel or facilities are not necessarily involved, the meeting can be scheduled at the mutual convenience of the parties. However, given the time constraints operating in

these cases, the court should consider setting the meeting for the parties while everyone is present at the initial judicial review hearing.

The children's court attorney is responsible for notifying all the parties of the time and place of the meeting. Rule 10-345(D).

18.3 Participants

The Children's Code mandates that "all parties to the [permanency] hearing" attend the meeting. §32A-4-25.1(A). While the judge might schedule the meeting for the parties, he or she does not participate in the discussion.

CASA volunteers and foster parents should be invited, along with family members who might become permanent caretakers for the child. Therapists or other providers for the child may contribute useful information, particularly if the child has been placed in residential or treatment foster care facilities.

18.4 Conduct of the Meeting

The procedures for this meeting have developed as a matter of practice since 1997, when the law on permanency hearings was passed. Different areas of the state hold this meeting in different ways and at different places. A supervisor or a family centered meeting (FCM) facilitator for CYFD might act as a meeting facilitator. Alternatively, mediation may be used for and may take the place of the pre-permanency hearing meeting in some jurisdictions. Some courts routinely order mediation for the pre-permanency hearing meeting. ***See*** Handbook §29.4.

By the time the meeting takes place, CYFD should have prepared and served on each party a pre-permanency hearing report. The report should include the department's proposed permanency plan, as well as any changes to the disposition plan. §32A-4-25.1(A); Rule 10-345(C).

At the meeting, the parties need to discuss the proposed permanency plan and attempt to achieve consensus. If the parties support a permanency plan of reunification, they should also discuss a transition home plan. §32A-4-25.1(C) (requiring the court to adopt a transition plan for cases in which the permanency plan is reunification). If the parties support a plan other than reunification and the child is not currently placed with a relative, they should inquire into any previous efforts to identify and place with relatives. If these efforts have not been made, the parties should immediately identify grandparents or other relatives who may be appropriate and willing to give permanency to the child so that efforts to place can be initiated, including home studies. §32A-4-25.1(D).

Once the parties have identified a permanency plan they need to develop a method to accomplish the objective in a timely manner. In a broad sense, there are two possible objectives:

- **Reunification.** If the goal is to return the child home, then the plan should focus on those steps necessary to ensure that the child will be safe and to minimize the possibility of disruption. These steps should be formulated into a proposed transition plan for the court. Some tough questions may include:
    - Can an in-home safety plan be implemented to allow the child to return home?
    - At what point can legal custody be returned to the parents? Or should custody remain with CYFD with a trial home visit for some period of time?
    - Can legal custody be returned to the parent if the parent is incarcerated but it appears that he or she can make a responsible placement decision for the child?

- **Alternative Permanency Options.** If the child cannot safely be returned home, then the parties should identify the best alternative permanency plan available for the child. This may involve the placement of the child with a relative or other individual who is capable of providing care for the child over the long term. Ideally a parent who participates in this process will be in a better position to retain some relationship to the child, even if not as the primary custodian.

At the very least, even if the parties agree to disagree at this meeting, there should be a full and frank discussion as to all the alternatives and a narrowing of issues for the hearing.

18.5 Proposed Permanency Plan

18.5.1 Five Possible Goals

"Permanency plan" means a determination by the court that the child's interest will be best served by:

- reunification;
- placement for adoption after the parents' rights have been relinquished or terminated or after a motion has been filed to terminate parental rights;
- placement with a person who will be the child's permanent guardian;
- placement in the legal custody of CYFD, with the child placed in the home of a fit and willing relative; or
- placement in the legal custody of CYFD under a planned permanent living arrangement, only if there is substantial evidence that none of the above plans are appropriate for the child. §32A-1-4(Q); §32A-4-25.1.

Reunification. Reunification is likely to be the initial plan. It does not have to be limited strictly to a return to the parent or the home from which the child was removed. Depending on the circumstances, it could mean a return to the noncustodial parent.

Adoption. A plan of adoption is considered when efforts to reunite the child with his or her family have either been unsuccessful or are not in the child's best interest, and termination of parental rights is appropriate.

Permanent Guardianship. Permanent guardianship allows an adult to take on the roles and responsibilities of parents without termination of the parents' rights. This is often a role suited for relatives who are able and willing to care for the child on a permanent basis without the parents' rights being terminated. Note, however, that "permanent guardianship" is not necessarily permanent. ***See*** Handbook Chapter 23.

Placement with a Fit and Willing Relative. A relative may be able and willing to care for the child but may not be prepared to consider permanent guardianship or adoption, at least not initially. The child would remain in the custody of the department but be placed with the relative as a foster parent. The hope would be to find a legal arrangement that would make the placement more permanent, and out of the custody of CYFD as this does not establish true permanency for the child.

Planned Permanent Living Arrangement. Another planned permanent living arrangement is acceptable only if there is substantial evidence that none of the options listed above is appropriate for the child. Such an arrangement may be appropriate, for example, if an older child cannot return home but is attached to his or her parents, does not want to be adopted and is living with foster parents who want to continue caring for the child until emancipation, and no relative is available for placement purposes. The permanency plan goal needs to consider not only the child's living options but also relational permanency issues. ***See*** Handbook §38.4 on ASFA.

Practice Note: Sections 32A-1-4(Q) and 32A-4-25.1 conform with the Adoption and Safe Families Act, which limits the consideration of permanency plans to the five options listed above.

18.5.2 Agreement, If Possible

The proposed permanency plan should represent the agreement of the parties to the greatest extent possible. It must have a clearly stated outcome to be accomplished by a date certain. It should spell out specific roles and responsibilities for each participant. It can include intermediate objectives as well as necessary conditions (e.g., that the parent will maintain a stable household).

Practice Note: A plan of reunification may seem self-explanatory but still requires specificity as to any remaining safety threats and risk factors and how they are to be addressed. The parties should be cautious, however, about trying to "fix" conditions within the home or family structure, or affecting the caretaker's lifestyle that do not have a

demonstrable connection to those immediate safety and welfare factors that prevent the child from returning home. It is important to keep in mind that the family does not have to be the model of perfection in order for a child to return home.

If the parties are not able to agree on a proposed plan to submit to the court, then typically CYFD will propose a plan to the court and the other parties will raise and address their concerns at the hearing. Other parties may also advocate for an alternative permanency plan.

18.5.3 Substance Abuse Cases

Not only is substance abuse the single most common factor causing children to come into the state's care, but it is also among the most difficult to address within the statutory time frames. If the respondent has made little or no progress in treating the condition by the time of the pre-permanency hearing meeting, then a plan of reunification may not be viable. However, there are many instances where the parent has begun to show significant improvement, but may still require residential treatment or other major intervention for several months. Such situations pose a challenge to the creativity of the meeting participants. If they think that reunification is still an option, they need to be prepared to present evidence as to the compelling reasons for not changing the permanency plan to something other than reunification. ***See*** §32A-4-29(G) and ASFA note in §18.5.5 below.

18.5.4 Incarceration Cases

A respondent may be able to make responsible decisions for his or her child but not be in a position to provide daily necessities. If the parent is able to work out an arrangement with a substitute caretaker then intervention by CYFD may not be necessary. Conceivably, the court could return legal custody to the parent even though the child is physically placed with a substitute caretaker. This distinction may be useful for parents who are incarcerated or otherwise institutionalized, but who retain a positive relationship with their children and the ability to make responsible decisions.

18.5.5 Older Children

With this population, participants must be especially scrupulous in establishing a plan that is realistic. Problems commonly arise because:

- A child age 14 or older refuses to consent to adoption. (§32A-5-17(A) requires the consent of the child at that age.) If a child is not willing to consent, then adoption may not be an option. However, a child's initial refusal should be addressed through a therapeutic intervention to help the child explore the option.
- The urgency of the time frames in abuse or neglect cases may trigger termination of parental rights without adequate foresight for the "legal orphans" created thereby.

- The parties may erroneously assume that an older child is not adoptable when, in fact, the child in question has a good chance of being adopted.
- The permanency plan fails to assist an older child in a planned permanent living arrangement to prepare for transition into adulthood, not only with life skills but by facilitating relationships that will provide a support network to carry the child into adulthood.

If the permanency hearing will be serving as a discharge hearing for a young person approaching age 18, the parties may want to address at this meeting any issues associated with the transition plan for the youth or CYFD's efforts under §32A-4-25.3. *See* §§32A-4-25.2 and 25.3.

CHAPTER 19

PERMANENCY HEARING

This chapter covers:

- Purpose of the permanency hearing.
- Timeline for the hearing.
- The need to determine a permanency plan for the child.
- Reasonable efforts to finalize a permanency plan.
- Transition planning for older youth.

19.1 Purpose of Hearing

The purpose of permanency hearings in general is to compel a resolution of the case so the child does not remain indefinitely "in the system." The court conducts a permanency hearing to determine what permanency plan is in the child's best interest. §32A-4-25.1; Rule 10-345. The court must conduct an initial permanency hearing and then conduct permanency hearings at least annually. §32A-4-25.1(G).

19.2 Timeline

The initial permanency hearing must be conducted by the earliest of the following dates:

- 6 months after the initial judicial review hearing (§32A-4-25.1(A)); or
- 30 days after a judicial determination that reasonable efforts toward reunification are not required (§32A-4-25(K)); or
- 12 months after the child enters foster care (§32A-4-25.1(A)). A child enters foster care on the earlier of:
    - the date of the first judicial finding that the child has been abused or neglected, or
    - 60 days from the date the child was removed from the home. (§32A-4-25.1(F)).

If, for example, the court makes a finding of aggravated circumstances at the adjudicatory hearing and decides at the dispositional hearing that reasonable efforts are not required, then the court must hold a permanency hearing within 30 days of that second hearing. If the proceedings follow the general time frames set out in the Code, the typical scenario is that the permanency hearing is held within six months of the initial judicial review.

ASFA Note. New Mexico law conforms with ASFA. As a condition of state participation in Title IV-E, ASFA requires that there be a hearing at which a permanency plan is adopted by the court. This hearing must be held within 12 months of the date the child is considered to have entered foster care, which is the date the child is adjudicated abused or neglected or the date that is 60 days after the child was removed from the home, whichever occurs first. (If there is a judicial determination that reasonable efforts to reunify the child and family are not required, then the hearing must be held within 30 days of that determination.) ***See*** Handbook §38.4.

19.3 Initiation and Notice

The children's court attorney is responsible for requesting the hearing and providing notice. Notice must be given to the parties, the child by and through the child's GAL or youth attorney, the child's CASA, the local CRB, and the foster parent, preadoptive parent or relative providing care for the child. §32A-4-25.1(H); Rules 10-104.1 and 10-345(B).

19.4 Participants

Participants in the hearing are typically the parties and the CASA. Any person who has information about the status of the child or the treatment plan may give testimony, including anyone called as a witness by a party or any person given notice of the hearing. §32A-4-25.1(I). This includes the foster parent, preadoptive parent, or relative caregiver who has a right to be heard regardless of whether he or she is a formal party to the proceeding. §32A-4-27(F); Rule 10-104.1.

The Child and Family Services Improvement Act of 2006 requires the state to have procedural safeguards in place to assure that the court consults with the child in an age-appropriate manner regarding the proposed permanency plan for the child. ***See*** Handbook §38.8. The preferred practice in New Mexico is to involve children as much as possible in proceedings affecting them, including providing for their attendance at the hearing. Federal guidelines do allow the consultation with the child to take place through the child's GAL or attorney, however. What is critical is that the child's views on his or her permanency plan be obtained by the court for consideration during the hearing.

19.5 Reports

Prior to the permanency hearing, CYFD must submit a progress report on the child to the local CRB. The report should describe reasonable efforts toward reunification and achieving permanency for the child. The CRB may review the progress report, along with the child's dispositional order and any continuation of the order, and report its findings and recommendations to the court. §32A-4-25.1(A).

Rule 10-345(C) requires that CYFD, not less than five days prior to a permanency hearing, prepare and serve on each party a pre-permanency hearing report. The report must include the department's proposed permanency plan, as well as any proposed changes to the disposition plan (generally the treatment plan).

19.6 Evidence

The Rules of Evidence do not apply to permanency hearings. §32A-4-25.1(I); Rule 11-1101(D)(3). The court may admit testimony by anyone given notice of the hearing who has information about the status of the child or the status of the treatment plan, and all testimony is subject to cross-examination. §32A-4-25.1(I).

All parties have the opportunity to present evidence and cross-examine witnesses. §32A-4-25.1(B).

In *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, 136 N.M. 53, the court ruled that due process protections attach at the permanency hearings. "Because due process is a flexible right, the amount of process due at each stage of the proceedings is reflective of the nature of the proceeding and the interests involved, as well as the nature of the subsequent proceedings." *Id*. ¶25. The court determined that due process requires basic protections at critical stages of an abuse/neglect proceeding and that permanency hearings constitute a critical stage. *Id*. ¶¶28-29.

19.7 Burden of Proof; Rebuttable Presumption Eliminated

The 2005 amendments to the Children's Code eliminated the rebuttable presumption that the child's best interest will be served by returning the child to the parent, guardian or custodian. Now, after considering the evidence, the court must order one of the permissible permanency plans: reunification, placement for adoption, permanent guardianship, placement with a fit and willing relative, or placement in a planned permanent living arrangement. §32A-4-25.1(B).

19.8 The Permanency Plan

19.8.1 Permanency Plans

The court adopts a permanency plan for the child at the first permanency hearing. As described above and in Handbook Chapter 18, the plan for the child will be:

- reunification;
- adoption, with the state filing a termination of parental rights;
- permanent guardianship;
- placement with a fit and willing relative; or
- placement in a planned permanent living arrangement.

The last option is available only if there is substantial evidence that none of the other permanency plans is appropriate for the child. §32A-4-25.1(B)(5). ASFA regulations allow a planned permanent living arrangement only if CYFD presents to the court a compelling reason for determining that it is not in the best interest of the child to follow one of the other options. ***See*** Handbook §38.4 on ASFA.

19.8.2 Reasonable Efforts to Finalize Permanency Plan

One challenge posed by ASFA is its requirement that the state agency, in this case, CYFD, obtain a judicial determination that it made reasonable efforts to finalize the permanency plan in effect. Like the court's adoption of a permanency plan, the reasonable efforts determination must be made within 12 months after the child is considered to have entered foster care. ***See*** Handbook §38.4.

This judicial determination must be explicitly documented, made on a case-by-case basis, and so stated in the court order. A transcript of the court proceeding is the only other documentation that will be accepted. Affidavits, *nunc pro tunc* orders, and references to state law are not acceptable. ***See*** Handbook §38.4.

ASFA Note. As explained in §38.4, the so-called ASFA requirements are not requirements imposed directly on CYFD or the New Mexico children's courts. Rather, they are conditions that Congress and the federal agency implementing ASFA have placed on the state's receipt of federal dollars for foster care. Federal funds make up a considerable portion of the funds provided to maintain a child in foster care in New Mexico, and they make up a significant portion of the funds used by CYFD to administer the foster care program.

In the case of the "reasonable efforts to finalize a permanency plan" determination, a child becomes ineligible for Title IV-E foster care payments if the determination is not made within the required 12 months period. ***See*** Handbook §38.4 for further explanation.

19.8.3 Reunification; Adopting a Transition Home Plan

Whenever the court establishes reunification as the permanency plan, it must also adopt a plan for transitioning the child home and set a permanency review hearing within three months. §32A-4-25.1(C).

19.8.4 Reasonable Efforts to Locate Relatives

When the permanency plan is other than reunification, the court will have to determine whether the department has made reasonable efforts to:

- identify and locate all grandparents and other relatives; and
- conduct home studies on any appropriate relative expressing an interest in providing permanency for the child.

If the court finds that CYFD has not made reasonable efforts to identify and locate relatives and conduct home studies, the court will schedule a permanency review within 60 days to determine whether an appropriate relative placement has been made. §32A-4-25.1(D).

In *State ex rel. CYFD v. Laura J.*, 2013-NMCA-057, 301 P.3d 860 (filed 2012), the Court of Appeals held that "Section 32A-4-25.1(D) imposes a duty upon the district court to make a serious inquiry into whether the Department has complied with its mandate to locate, identify, and consider relatives with whom to place children in its custody." *Id*. ¶61. The court stated that "a pro forma ratification of the Department's assertions that such efforts have been made" will not satisfy this inquiry. To comply with §32A-4-25.1(D), "the court must conclude that the Department, *through all of its available resources*, has met its affirmative duty to 'identify and locate . . . . [and] conduct home studies on any appropriate relative expressing an interest in providing permanency for the child.'" *Id*. (emphasis added).

Another consideration is whether the department has investigated whether the child is eligible for enrollment as a member of an Indian tribe and, if the child is eligible, pursued enrollment on the child's behalf. This is required by §32A-4-22(I) and emphasized by the Court of Appeals in *State ex rel. CYFD v. Marsalee P*., 2013-NMCA-065, ¶¶25-27. It is conceivable that enrollment would assist CYFD in identifying and locating relatives.

19.8.5 Out-of-State Placement Considerations

If a child is not being returned to the parent, federal law requires that CYFD consider out-of-state as well as in-state permanent placements for the child, and CYFD will report on this at the permanency hearing. If the child is in out-of-state placement at the time of the hearing, the court will need to determine whether the out-of-state placement continues to be appropriate and in the best interests of the child, and the children's court attorney will request a finding on this matter. ***See*** Handbook §38.7 on the Safe and Timely Interstate Placement of Foster Children Act of 2006, as well as 8.10.7.18(G) NMAC.

CYFD places children in its custody in out-of-state placements and accepts children in the custody of another state for placement in New Mexico in accordance with the 2006 federal law and the Interstate Compact on the Placement of Children (ICPC), which is found at §32A-11-1. *See* 8.10.8.14 NMAC.

19.9 Transition Planning for Older Youth

19.9.1 Transition Plan

If the initial permanency hearing is the first hearing after the child's 17th birthday, CYFD must present the child's proposed transition plan to the court at that hearing. The Children's Code requires that the court order a transition plan for the child at the hearing. §32A-4-25.2(B). ***See*** Handbook §17.9 for a description of this plan and the process for developing a plan for the court's consideration.

Once the judge has ordered a transition plan, the plan must be reviewed at every subsequent review and permanency hearing. §32A-4-25.2(C).

Practice Note. As explained in Handbook §17.9, the transition plan is distinct from the life skills plan that was presented at disposition if the child was 16 or older. Both should be reviewed by the court at every judicial review and permanency hearing.

19.9.2 Discharge Hearing

If the permanency hearing is the last review or permanency hearing before the child turns 18, the court must conduct a discharge hearing as part of the hearing. The discharge hearing is described in detail in §17.9 of this Handbook. The court may retain jurisdiction after the child turns 18 if the department has not made reasonable efforts to meet the requirements of §32A-4-25.3(B), termination of jurisdiction would be harmful to the young adult, and the young adult consents.

19.10 Undocumented Immigrant Children

While the status of an undocumented immigrant child is reported at the initial judicial review, it may not have been clear whether the child is eligible for special immigrant juvenile status (SIJS). In that case, the matter should be revisited at the permanency hearing and CYFD should move the court for an SIJS order that includes the findings required to establish that the child meets the criteria for SIJS. CYFD's motion must include a statement of the express wishes of the child. ***See*** Handbook §17.8 for a discussion of SIJS and the responsibilities of the court and CYFD under §32A-4-23.1 of the Children's Code.

19.11 Future Permanency Determinations

19.11.1 Permanency Review Hearings

The Children's Code requires the court to hold a permanency review hearing within three months of the first one if the child was not returned home and the permanency plan is reunification. If the child is reunified before the review hearing, the hearing may be vacated. §32A-4-25.1(C).

The Code also requires the court to hold a permanency review hearing if the plan is not reunification and CYFD has not made reasonable efforts to make a relative placement. This review must be scheduled within 60 days of the permanency hearing and may be vacated if a relative placement is made. §32A-4-25.1(D).

See Handbook Chapter 20 on permanency review hearings.

19.11.2 Hearing on Permanency Plan Every 12 Months

The court must hold permanency hearings every 12 months when a child remains in the legal custody of CYFD. §32A-4-25.1(G). This requirement is consistent with ASFA and its regulations, which require that, at least once every 12 months, the court hold a hearing at which it adopts a permanency plan. At least once every 12 months, the state must also obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan in effect. ***See*** Handbook §38.4 on ASFA.

19.12 Checklist

PERMANENCY HEARING

CHECKLIST

Preliminary matters
Inquiries regarding
- Absent parents
- Tribal affiliation/placement
- Intervention
- Presence of foster parents
- Views of the child

Rules of Evidence do not apply
CRB report
CASA report
Result of pre-permanency hearing meeting
Proposed permanency plan
Treatment plan
- Progress and proposed modifications, if any
- Sibling placement, if applicable
- Educational continuity and progress
- Orders as appropriate

Presentation of evidence and cross-examination
Adoption of permanency plan
Reasonable efforts to finalize permanency plan
Reasonable efforts to locate relatives
Out-of-state placement considerations
Transition planning for older youth: life skills plan, transition plan, and discharge hearing
Special immigrant juvenile status, if applicable
Scheduling
- Permanency review hearing w/in 3 months if plan is reunification
- Permanency review hearing w/in 60 days if plan is not reunification and CYFD has not made reasonable efforts to locate relatives
- Permanency hearing every 12 months

CHAPTER 20

PERMANENCY REVIEW HEARING

This chapter covers permanency review hearings when:

- The permanency plan is reunification.
- The permanency plan is other than reunification.

20.1 Purpose

In 2005 the Children's Code was amended to create a permanency review hearing. §32A-4-25.1(C). If the permanency plan adopted by the court at the initial permanency hearing calls for reunification, the court will also need to adopt a plan to transition the child home and schedule a review hearing within three months. If the child is not reunified at the time of the review, the court will need to decide whether a different permanency plan is in the child's best interest.

The Code was amended in 2009 to create a permanency review when the plan adopted at the first permanency hearing is not reunification and reasonable efforts have not been made to identify relatives or conduct home studies on relatives willing to provide permanency for the child. §32A-4-25.1(D).

20.2 Timeline

If the court adopts a permanency plan of reunification at the first permanency hearing, the court must adopt a plan for transitioning the child home and schedule a permanency review hearing *within three months*. If the child is reunified, this subsequent hearing may be vacated. §32A-4-25.1(C); Rule 10-345(F).

If the court adopts a permanency plan other than reunification, the court must determine whether CYFD has made reasonable efforts to identify and locate all grandparents and other relatives. The court must also determine whether CYFD has made reasonable efforts to conduct home studies on any appropriate relative expressing an interest in providing permanency for the child. If the court finds that reasonable efforts have not been made to identify or locate relatives or to conduct home studies, the court will schedule a permanency review *within sixty days* to determine whether an appropriate relative placement has been made. If a relative placement is made, the subsequent hearing may be vacated. §32A-4-25.1(D) (added in 2009).

20.3 Initiation and Notice

The children's court attorney is responsible for giving notice of the permanency review hearing to the parties, including the child by and through the child's GAL or attorney, the CASA, if one has been appointed, the local CRB, and the foster parent, preadoptive parent, relative caring for the child, or substitute caregiver. §32A-4-25.1(H); Rules 10-104.1 and 10-345(B).

20.4 Conduct of the Hearing

20.4.1 Need for Action

The fact that the permanency review hearing is held at all means that the child has already been in custody for 12 months. If the plan is reunification, the child should be returning home. If the child cannot be returned home, the Children's Code requires the court to decide upon a permanency plan other than reunification. §32A-4-25.1(E); Rule 10-345(F) and (G).

Similarly, if the plan is not reunification, reasonable efforts need to be made to find grandparents and other relatives in hopes that the child can find permanency with members of his or her extended family. Relative placement is not always the solution but it carries the hope of providing permanency while allowing the child to maintain connections to his or her family.

20.4.2 Hearing When Plan Is Reunification

Based on the evidence presented at the review hearing, the court has one of three choices. It can:

- change the plan from reunification to one of the alternative permanency plans set forth in §32A-4-25.1(B) (***see*** Handbook §18.5.1 for a description of these plans);
- dismiss the case and return custody of the child to the parent, guardian, or custodian; or
- return the child to the custody of the parent, guardian or custodian, subject to any conditions or limitations as the court may prescribe, including protective supervision by CYFD and continuation of the treatment plan for not more than six months, after which the case must be dismissed. §32A-4-25.1(E); Rule 10-345(F).

If CYFD is given protective supervision, it may seek removal of the child from the home by obtaining an order in the case or by seeking emergency removal under §32A-4-6 during the period of protective supervision, if the child's best interest were to require such action. If the child is removed in this situation, the court will schedule a permanency hearing within 30 days of the child coming back into CYFD's legal custody. §32A-4-25.1(E).

Hard Decisions: The courts have to make hard decisions at this juncture. The statutory options seem simple enough on the surface. Since the Children's Code was first amended in 1997 to tighten the deadlines for making permanency decisions, judges and participants have struggled to find solutions in those situations where the child's best interests would still be served by returning home, but the process would take longer.

Such a predicament is particularly acute in cases involving older children who have an active relationship with the parent and who do not want to be adopted (under the Adoption Act, by age 14, children have a right to turn down an adoption), as well as in cases where the parent has been making some progress in treatment, but not swiftly enough. Where the presenting problem is substance abuse, this is a frequent scenario. These difficult dilemmas do not alter the fact, however, that the child should not remain indefinitely in substitute care, despite the human tendency to hold out for additional time in hope of a better resolution.

The New Mexico Court of Appeals recognizes the limited amount of time that parents have to rehabilitate and reunite with their children. *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶21, 136 N.M. 53**.** However, the court also has "no doubt that a parent, like a criminal defendant, has a constitutional right to fair notice and an opportunity to participate in all critical stages of abuse and neglect proceedings" and that "permanency hearings can represent a critical stage" in the proceeding. *Id*. ¶¶28-29. Ensuring due process to the parents while moving toward permanency for the child under statutory timelines is challenging but important.

20.4.3 Hearing When Plan Is Not Reunification

When the permanency plan is other than reunification, a review hearing is required 60 days after the first permanency hearing if the court finds that the department has not made reasonable efforts to identify relatives or conduct home studies on appropriate and willing relatives. If the department has not made reasonable efforts, then the court will conduct a review hearing to determine whether an appropriate relative placement has been made. If a relative placement is made, the hearing may be vacated. §32A-4-25.1(D).

This requirement for a review hearing on relative placement was added to §32A-4-25.1 in 2009 and placed in a new Subsection D above the procedural requirements for a review hearing on return home plans. However, the provisions of Subsection E on review hearings provide for court orders that are only pertinent to reunification. There is no guidance specifically for review hearings on relative placement. The review itself helps to ensure that reasonable efforts are made to identify and locate relatives and to conduct the necessary home studies for relative placement. Presumably the court may issue such orders as are necessary to ensure that "consideration has been given to the child's familial identity and connections," as required by the law. *See* §32A-4-25.1.

20.4.4 Evidence

At the permanency review hearing, all parties and the child's GAL or attorney have the opportunity to present evidence and cross-examine witnesses, and foster parents, pre-adoptive parents or relative care givers have the right to be heard whether or not they are parties. §32A-4-25.1(E); §32A-4-27(F); Rule 10-104.1.

While the Rules of Evidence do not apply at permanency hearings, the court should ensure that respondents have the opportunity to be heard in a meaningful manner. *Maria C.*, 2004-NMCA-083, ¶¶23, 26.

The court should obtain the child's views of his or her permanency plan during the hearing. **See** Handbook §19.4.

20.5 Reasonable Efforts to Finalize Plan

CYFD should be prepared to demonstrate to the court that it has made reasonable efforts to finalize the permanency plan in effect and to request a determination to this effect. CYFD must request this determination at least once every 12 months that the child remains in foster care and hence should be prepared to do so at this hearing. ***See*** Handbook §38.4 on ASFA.

20.6 Transition Planning for Older Youth

If the permanency review hearing is the first hearing after the child turns 17 or the last hearing before the child turns 18, then part of the hearing must be devoted to reviewing the transition plan for the child required by §32A-4-25.2, conducting the discharge hearing described in §32A-4-25.3, or both. ***See*** Handbook §§17.8 and 19.9 for more details.

20.7 Checklist

PERMANENCY REVIEW HEARING

CHECKLIST

- ☐ Preliminary matters
- ☐ Inquiries regarding
  - Absent parents
  - Tribal affiliation/placement
  - Intervention
  - Presence of foster parents
  - Views of the child
- ☐ Rules of Evidence do not apply
- ☐ CRB report
- ☐ CASA report
- ☐ Child returned home and dismissal or continued supervision
- ☐ If child cannot be returned home, adoption of alternate permanency plan (other than reunification)
- ☐ Reasonable efforts regarding relative placement if reunification not the permanency plan
- ☐ Reasonable efforts to finalize plan
- ☐ Transition planning for older youth
  - If child is 16 or older, review of life skills plan
  - If child is 17 or older, approval of transition plan
  - If child is almost 18, conduct discharge hearing
- ☐ Scheduling
  - Judicial review hearing
  - Hearings on pending motions for TPR or permanent guardianship

CHAPTER 21

PERIODIC JUDICIAL REVIEW

Judicial review hearings are held at least every six months. This chapter includes:

- Purpose of periodic judicial reviews.
- Timing of these reviews.
- Compliance with the treatment plan.
- Reasonable efforts to finalize the permanency plan in effect.
- Review and approval of the permanency plan as appropriate.
- Compliance with placement preferences for Indian children.
- Transition planning for older youth.
- Extension of jurisdiction in particular situations.

21.1 Purpose

By this point in the proceedings, unless there was a return home under protective supervision, or there has been a finding of some compelling reason to maintain a plan of reunification, the permanency plan is one that does not involve family reunification. Rather, the focus is on permanency for the child and on meeting the child's needs. The court determines the extent of compliance with the treatment plan and the progress being made toward finding a stable and permanent placement for the child.

Periodic judicial review hearings are an important tool for the court to use to ensure that progress is being made toward finding the child a stable and permanent home and to address any problems that arise. They are an important opportunity to ensure that CYFD is making reasonable efforts to finalize the permanency plan that is in effect for the child and to review the plan and determine whether it remains appropriate.

21.2 Timeline

Under §32A-4-25 and Rule 10-346, the court should be scheduling a judicial review hearing

every six months to review the department's progress in implementing the court's orders, including the treatment plan. These are often merged or scheduled together with permanency hearings held under §32A-4-25.1.

21.3 Initiation and Notice

As with the previous hearings, the children's court attorney has the responsibility for requesting the hearing and notifying the parties, including the child by and through the child's GAL or youth attorney, the child's CASA, the local citizen review board (CRB), and the child's foster parent, preadoptive parent, relative caregiver, or substitute care provider. §32A-4-25(C); §32A-4-27(F); Rule 10-104.1.

Prior to the review, CYFD must submit a progress report to the local CRB. The CRB is supposed to review the dispositional order or continuation of the order and CYFD's progress report and report its findings and recommendations to the court. §32A-4-25(B). The CRB's report becomes a part of the child's permanent record. §32A-4-25(J).

21.4 Participants

The review may be conducted by the court or by a special master, provided the court approves the findings made by the special master. §32A-4-25(B). Participants in the hearing may include the parties and their attorneys, the child's GAL or youth attorney, the child, the child's foster parents, the CASA, the CRB representative, and possibly treatment providers and witnesses. A child under 14 may be excluded from the hearing if the court finds that exclusion is in the child's best interest. A child who is 14 or older may be excluded only if the court finds a compelling reason to do so and states a factual basis for so finding. §32A-4-20(E).

It is rare in most parts of the state for the CRB representative to be present; the CRB report has been provided to the judge by this time. However, CRB representatives attend occasionally in some parts of the state.

It is important to note that foster parents, preadoptive parents, and relative caregivers have a right to notice of the time, place and purpose of any judicial review hearing that is scheduled, as well as the right to be heard. §32A-4-25(C) and (D); §32A-4-27(F); Rule 10-104.1.

Practice Note. In some parts of the state, foster parents are given the option of providing a written report to the court.

21.5 Conduct of the Hearing

21.5.1 Compliance with Treatment Plan

In general, the court is expected to use the judicial review hearing to review CYFD's progress in implementing the court's orders. Rule 10-346. The court must determine the extent of compliance with the treatment plan and whether progress is being made toward establishing a stable and permanent placement for the child. §32A-4-25(D).

CYFD must show that it has made reasonable efforts to implement the treatment plan approved at disposition and present a treatment plan consistent with the Children's Code for any period of extension of the disposition order. ***See*** Handbook §16.7. The respondent must show that efforts to comply with the treatment plan and efforts to maintain contact with the child were diligent and made in good faith. §32A-4-25(D).

21.5.2 Status of the Child

The court should review the child's adjustment to placement, any change in the ability of the parent to meet the needs of the child, the quality and consistency of visitation, and any other matters touching on the child's welfare, including but not limited to placement with his or her siblings and educational continuity. Sibling placement and educational continuity for the child are both concerns highlighted in the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 and the state Children's Code amendments in 2009. The court addressed both at disposition and should be sure to include them during the court's periodic reviews.

The judicial review hearing is often held in conjunction with a permanency hearing. Annual permanency hearings must be held for the court to determine whether CYFD is making reasonable efforts to finalize the permanency plan that is in effect for the child, whether the plan is reunification, adoption, permanent guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement. For the child to remain eligible for Title IV-E foster care payments, the court must make this finding at least once every 12 months while the child is in foster care. ***See*** Handbook §19.11.2, as well as §38.4 on ASFA.

21.5.3 Transition Planning for Older Youth

If the judicial review hearing is the first hearing after the child turns 17 or the last hearing before the child turns 18, then part of the hearing must be devoted to reviewing the transition plan for the child required by §32A-4-25.2, conducting the discharge hearing described in §32A-4-25.3, or both. The court will be asked to make findings during the discharge hearing portion of the judicial review. ***See*** Handbook §17.9 and §21.7.1 below for more details.

21.5.4 Indian Children

In cases involving Indian children, this hearing gives the court an opportunity to determine whether the placement preferences of the Indian Child Welfare Act or the child's tribe have been followed and whether the child's treatment plan provides for maintaining his or her

cultural ties. When placement preferences have not been followed, good cause for non-compliance must be clearly stated and supported. §32A-4-25(G); ***see also*** Handbook §39.3.

21.5.5 Undocumented Immigrant Children

If the child is an undocumented immigrant, CYFD may have filed a petition for special immigrant juvenile status (SIJS) and application for adjustment of status for the child. If this is the case, the case worker will advise the court of the status of the petition and application in the judicial review report. It will be important for the court to determine whether the federal immigration agency has officially approved the petition and application. If the petition and application have not been granted by the time the child reaches 18, the court may retain jurisdiction until the petition and application are granted or the child turns 21. Jurisdiction would be retained to ensure that the child continues to satisfy the requirements for classification as a special immigrant juvenile. Retention would not affect the transition services available to the child. §32-4-23.1.

Practice Note. If the child is an undocumented immigrant but the department has not filed for special immigrant juvenile status, the court may want to ask about the child's status at the judicial review. The child's eligibility for SIJS or the merits of petitioning for SIJS may have changed since the last hearing and the department may now be in a position to ask for the findings required for an SIJS order. ***See*** Handbook §17.8 for a discussion of the responsibilities of the court and the department under §32A-4-23.1.

21.5.6 Child Support

Parents have an obligation to pay to support the child in substitute care. If no child support order was entered previously, such as at the dispositional hearing, it should be entered at this time. In many courts, this means a referral to the Child Support Enforcement Division of the Human Services Department. ***See*** Handbook §16.13.

21.6 Evidence

All parties given notice of the hearing have an opportunity to present evidence and cross-examine witnesses. §32A-4-25(D). However, the formal Rules of Evidence do not apply. §32A-4-25(E); Rule 11-1101(D)(3). The court may admit testimony by any person who has information about the status of the child or status of the treatment plan. §32A-4-25(E).

The foster parent, preadoptive parent, or relative caregiver has a right to be heard at this hearing. §32A-4-25; Rule 10-104.1.

21.7 Findings and Order

At the conclusion of the hearing, the court must make findings of fact and conclusions of law. §32A-4-25(F).

21.7.1 Findings of Fact

Under §32A-4-25(D), the court's findings should address the reasonableness of CYFD's efforts to implement the treatment plan, the degree of compliance by the respondent, and whether continuation of custody is in the best interest of the child. The court must also review the placement status of any Indian child for compliance with ICWA, as noted above.

The judicial review hearing provides the court another opportunity, if appropriate, to determine whether CYFD is making reasonable efforts to preserve and reunify the family, with paramount concern being the child's health and safety. Alternatively, as with a dispositional hearing, the court may determine that reasonable efforts are not required because:

- the efforts would be futile; or
- the parent, guardian, or custodian has subjected the child to aggravated circumstances (***see*** Handbook §15.5.4 for definition). §32A-4-25(H)(5). Note: CYFD must plead and prove the existence of aggravated circumstances before the court can find that reasonable efforts are not required for one of these reasons.

Note on Futility Findings: In *State ex rel. CYFD v. Vanessa C.*, 2000-NMCA-025, 128 N.M. 701, an appeal from the termination of parental rights, the Court of Appeals discussed the making of futility findings at judicial review hearings at which the Rules of Evidence do not apply. At the third judicial review hearing in the case, the trial court found that CYFD had made reasonable efforts to reunite mother and children and that further efforts to do so would be futile. Mother argued on appeal that the trial court's reliance on hearsay evidence and oral argument and its failure to swear in witnesses and take formal testimony at the judicial review deprived her of a fair hearing.

The court observed, first, that, while a finding of futility results in the removal of a person's expectation of CYFD assistance, the parent still has the opportunity to receive assistance on her own and otherwise protect her parental rights. This argues against the need for additional procedural safeguards, particularly in the absence of objection by her. *Id.* ¶¶14-15. Also, mother knew in advance of the hearing that CYFD was planning to seek a finding of futility based on past judicial review reports. The court believed that this advance notice and the mother's opportunity at the judicial review to contest the validity of the previous reports also reduced her interest in having additional procedural safeguards. Her right to due process was not violated. *Id.* ¶¶17-19. The court proceeded, however, to say:

> In view of the fundamental interests that are at stake in termination of parental rights cases, we recommend that in the future, if the real potential for an adverse ruling is in the offing at a judicial review hearing, and the adverse ruling might be avoided through the exercise of certain procedural safeguards, counsel should be prepared to present evidence and cross-examine witnesses. Although the rules of evidence do not necessarily apply in judicial review hearings, the hallmarks of the adversarial process—the presentation of evidence and the cross-examination of witnesses – are both contemplated in and permitted by our statutes. *Id.* ¶21.

It is important that the court make findings with regard to whether CYFD is making reasonable efforts to finalize the permanency plan that is in effect for the child. These findings must be made at least once every 12 months while the child is in foster care, if the child is to continue receiving Title IV-E foster care payments. Similarly, the court should determine an appropriate permanency plan. ***See*** §21.5.2 above.

If the hearing is the last hearing before the child turns 18 then the court must also make findings regarding whether CYFD has made reasonable efforts to take all of the steps required for discharge under §32A-4-25.3. If CYFD has not made reasonable efforts, the court must also determine whether termination of jurisdiction at 18 would be harmful to the young adult. If so, the court may continue to exercise jurisdiction for a period not to exceed a year from the child's 18th birthday. In this case, the court must also determine if the young adult consents to continued jurisdiction. §32A-4-25.3(C).

The court may also need to consider findings to support special immigrant juvenile status (SIJS), if requested and appropriate. If a petition and application for SIJS are pending and the child is approaching 18, findings to this effect would support an order extending jurisdiction past the child's 18th birthday. §32A-4-23.1(E).

21.7.2 Order

Given §32A-4-25.1 and the ASFA regulations, some of the following situations may no longer be part of the picture. Nonetheless, under §32A-4-25(H) and based on its findings, the court may select any one of five dispositional alternatives:

- Return the child to the respondent and dismiss the case;
- Permit the child to remain with the respondent, subject to conditions, including protective supervision of the child by CYFD;
- Return the child to the respondent under the protective supervision of CYFD;
- Transfer to or continue legal custody in:
    - the non-custodial parent;
    - a prospective permanent guardian; or
    - CYFD, subject to additional orders as described below; or
- Retain the child in the legal custody of CYFD, with or without parent involvement in the treatment plan.

See discussion of reasonable efforts in §21.7.1 above. §32A-4-25(H).

The court may make additional orders regarding the treatment plan or placement of the child to protect the child's best interests if it determines that CYFD has:

- failed to implement any material provision of the treatment plan; or
- abused its discretion in the placement or proposed placement of the child. §32A-4-25(H)(6).

Note on the "abuse of discretion" standard for reviewing placement decisions. The Court of Appeals has emphasized that the Children's Code does not grant the court the power to dictate to the legal custodian where a child should be placed. Legal custody is a legal status created by court order that vests in a person or agency the right to determine where and with whom a child will live. Once legal custody is in CYFD, the children's court does not have the authority to prohibit the department from placing physical custody with a particular person. *State ex rel. HSD in the Matter of Jacinta M.*, 107 N.M. 769, 771 (Ct. App. 1988); *see also State ex rel. CYFD v. Senaida C.*, 2008-NMCA-007, ¶11, 143 N.M. 335.

Jacinta M. is worth noting for another reason. The children's court ordered that the child not be placed with the child's homosexual brother despite favorable recommendations. The Court of Appeals stated: "We believe the sexual orientation of a proposed [physical] custodian, standing alone, is not enough to support a conclusion that the person cannot provide a proper environment." 107 N.M. at 772.

If the court finds that the respondent has not complied with the court-ordered treatment plan, the court may order:

- the respondent to show cause why the respondent should not be held in contempt of court; or
- a hearing on the merits of terminating parental rights. §32A-4-25(H)(7).

If the court has reviewed the permanency plan (as distinct from the treatment plan) to determine the appropriate plan, its order should reflect approval of a permanency plan for the child. ***See*** §21.5.2 above.

21.8 Duration of Dispositional Order

Dispositional orders entered at a judicial review hearing remain in force for six months, except for orders that provide for the transfer of the child to the child's noncustodial parent or to a permanent guardian. §32A-4-25(I). However, this provision should be compared with §32A-4-24, which describes the "shelf life," so to speak, of the judgment and disposition entered after the dispositional hearing. ***See*** Handbook §16.14.

21.9 Continuation of Jurisdiction Past Age 17

The court may extend jurisdiction for up to one year past the child's 18th birthday if the court finds that CYFD did not make reasonable efforts to implement the requirements for discharge and that termination of jurisdiction would be harmful to the young adult. However, the young adult must consent to continued court jurisdiction. §32A-4-25.3(C).

Similarly, the court may extend jurisdiction up to age 21 if a petition and application for

special immigrant juvenile status for the youth have been filed and the federal immigration agency has not yet acted. Jurisdiction is extended only to ensure that the child continues to satisfy the requirements for classification as a special immigrant juvenile. §32A-4-23.1(E).

21.10 Checklist

PERIODIC JUDICIAL REVIEW

CHECKLIST

Preliminary matters
- Appearances
- Notice of hearing

Inquiry regarding
- Absent parents
- Tribal affiliation/placement
- Presence of foster parents

Rules of Evidence do not apply
CRB report and recommendations
CASA report
Treatment plan implementation, compliance
Reasonable efforts to finalize permanency plan
Adoption of a permanency plan
Custody and visitation
Sibling placement
Educational continuity
Transition planning for older youth: life skills plan, transition plan, discharge hearing
Special immigrant juvenile status, if applicable
Child support
Scheduling
- Further judicial reviews and permanency hearings
- Discharge hearing before child turns 18

CHAPTER 22

TERMINATION OF PARENTAL RIGHTS

This chapter covers:

- Voluntary termination (relinquishment) of parental rights.
- Involuntary termination of parental rights (TPR).
- Special considerations in termination of parental rights proceedings, including:
    - Timing under the Children's Code and ASFA
    - Applicability of the Indian Child Welfare Act
    - Effect of a parent's incarceration
    - Relevance of prospective adoptive family situation
    - Right to effective assistance of counsel
    - Limits on use of summary judgment

22.1 Introduction

22.1.1 Effect of Parental Rights Termination

Civil abuse and neglect proceedings may result in the profound consequence of termination of parental rights. The legal effects of termination are substantial. After termination, a natural parent's custodial rights are completely abolished. The order of the court terminating parental rights divests the natural parent of all legal rights and privileges with respect to the child and dispenses with the necessity for consent to or notice of adoptive proceedings concerning the child. §32A-4-29(L).

Termination of parental rights is a necessary prelude to adoption. Adoption is the legal process by which a child acquires parents other than the natural parents and parents acquire a child other than their natural child. The resulting legal relationship is identical to that of a natural parent and child. Termination of parental rights severs the child's legal tie to his or her natural parents so that adoption can occur. Thus, termination of parental rights is a critical tool to achieve permanency for children in the foster care system who cannot return home.

In most ordinary adoption cases not involving abuse or neglect proceedings, the natural parents agree to give up their parental rights and consent to adoption. In cases where the child is under the jurisdiction of the children's court based on alleged parental abuse or neglect, termination of parental rights can also be voluntary. A voluntary termination of

parental rights is called a "relinquishment." However, in abuse or neglect cases, terminations of parental rights are likely to be contested. An involuntary termination is called a "termination of parental rights" and may involve a contested judicial proceeding. Even if the parent has not been showing up for or otherwise participating in the proceedings, the state must prove by clear and convincing evidence that this absent parent's rights should be terminated.

22.1.2 Due Process Concerns

Because termination of parental rights proceedings affect the fundamental liberty interest of natural parents in the care, custody and management of their children, they raise both procedural and substantive due process concerns. The U.S. Supreme Court has identified a fundamental privacy interest in raising one's children. The Court called the right to conceive and raise one's children "essential" in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Court stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court invalidated, on both due process and equal protection grounds, an Illinois law under which children of unwed fathers became state wards upon the death of the mother. The *Stanley* Court declared that all parents were constitutionally entitled to a hearing on their fitness before their children were removed from their custody. In *Santosky v. Kramer*, 455 U.S. 745, 769 (1982), the Court held that before a state may sever the rights of parents regarding their natural child, due process requires the state to prove its allegations by at least clear and convincing evidence.

New Mexico case law in the area of termination of parental rights traditionally focused on the grounds for involuntary termination and the sufficiency of the evidence for termination in particular cases. In recent years, the state Supreme Court has underscored the importance of procedural due process guarantees. Quoting from *In the Matter of Ruth Anne E.*, 1999-NMCA-035, ¶¶17, 19, 126 N.M. 670, the Court wrote that "[d]ue process of law requires that termination proceedings be conducted with 'scrupulous fairness' to the parent" and that "[p]rocedural due process mandates that a person be accorded an opportunity to be heard at a meaningful time and in a meaningful manner." *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, ¶18, 133 N.M. 827.

In *State ex rel. CYFD v. Erika M.*, the Court of Appeals emphasized that termination of parental rights "implicates a significant deprivation of a liberty protected by due process" and that procedural due process "guarantees a parent a fair opportunity to be heard and present a defense." 1999-NMCA-036, ¶26, 126 N.M. 760. In *Ruth Anne E.*, the court held that an incarcerated father has the right to meaningful participation in the hearing, including the right to review the evidence presented against him and to present evidence on his behalf, and the opportunity to challenge the evidence presented. 1999-NMCA-035, ¶25. *See also State ex rel. CYFD v. Brandy S.*, 2007-NMCA-135, ¶32, 142 N.M. 705.

22.1.3 Constraints under the Children's Code and ASFA

In order to comply with its state plan requirements under the Adoption and Safe Families Act (ASFA), the state must file or join in a petition to terminate parental rights if the child has been in foster care for 15 of the most recent 22 months. This is now reflected in the Children's Code, at §32A-4-29(G). There are certain exceptions to this rule under ASFA, including an exception for situations where the state has compelling reasons for deciding that filing a petition would not be in the best interests of the child in question. ***See*** Handbook §38.4. The Children's Code contains a similar provision but it lists specific reasons that may be compelling, rather than require compelling reasons generally. *See* §32A-4-29(G). Both the Children's Code and ASFA also consider the date the child entered foster care to be either the date of the first judicial finding that the child has been abused or neglected or 60 days after the child was removed from the home, whichever occurred first. §32A-4-29(H). ***See*** §22.5.2 below.

22.2 Voluntary Termination of Parental Rights (Relinquishment): Procedure

22.2.1 Overview

At times parents who are parties to an abuse and neglect action decide to voluntarily relinquish their parental rights. Relinquishment can be a positive gesture that allows a parent a greater sense of dignity and control than a full-blown contested termination of parental rights trial.

A relinquishment to CYFD is heard in the context of the existing abuse and neglect proceeding, if a proceeding is pending, and is not a separate judicial proceeding. §32A-5-24(A). A parent may relinquish parental rights to CYFD only with CYFD's consent. §32A-5-23(B).

Relinquishment usually occurs as adoption plans are being made. However, relinquishment is sometimes sought where the likelihood of adoption is remote but a severance of the parent-child relationship is therapeutically necessary for the child's emotional or physical well-being. *See* 8.10.7.22(A) NMAC.

If a proposed relinquishment of parental rights is not in contemplation of adoption, under §32A-5-24(C) the court may not allow the relinquishment unless it finds that:

- good cause exists;
- CYFD has made reasonable efforts to preserve the family; and
- relinquishment is in the child's best interest.

The parent who is allowed to relinquish in this situation remains financially responsible for the child. The court may order the parent to pay the reasonable costs of the child's support and may use the child support guidelines to calculate a reasonable payment. §32A-5-24(C).

22.2.2 Counseling Required

Parent respondents in a civil abuse and neglect action must receive counseling before signing a relinquishment of parental rights, although counseling can be waived by the court for good cause. §32A-5-22(A). The counseling must meet the following specific requirements:

- Counseling may be provided by a trained counselor, CYFD or an agency, although generally it is provided by CYFD. §32A-5-22(G) and (H). CYFD has identified employees who are qualified to do the counseling.
- Counseling should be private for a minimum of one session for adult parents. §32A-5-22(D)(1). Parents who are minors must have counseling for a minimum of two sessions, one of which must be conducted without the minor parent's parent or guardian. §32A-5-22(D)(2).
- Counseling must be conducted in the primary language of the person receiving the counseling. §32A-5-22(E).
- Counseling must cover the alternatives to and the consequences of relinquishment and adoption. §32A-5-22(C)(2).
- After counseling is completed, a counseling narrative must be prepared pursuant to CYFD regulations to accompany the relinquishment form to be filed with the court. §32A-5-22(F).

22.2.3 Relinquishment Form

There are also specific requirements for the form of the relinquishment. §32A-5-21. The relinquishment must be in writing and must state all of the following under §32A-5-21(A):

- Date, place, and time of execution.
- Date and place of birth of the prospective adoptee and any names by which the prospective adoptee has been known.
- Name and address of the agency or CYFD.
- That the person executing the relinquishment has been counseled as provided in §32A-5-22 by a certified counselor of the person's choice and that with this knowledge the person is "voluntarily and unequivocally" consenting to the adoption of the named prospective adoptee.
- That the consenting party has been advised of the legal consequences of the relinquishment by independent legal counsel or a judge.
- That the relinquishment cannot be withdrawn.
- That the person executing the relinquishment has received or been offered a copy of the relinquishment.
- That a counseling narrative has been prepared pursuant to CYFD regulations and is attached to the relinquishment form.
- That the person who performed the counseling meets the requirements of §32A-5-22 (G) and (H).

- That the person executing the relinquishment waives further notice of the adoption proceedings.
- That all parties in a closed adoption understand that the court will not enforce any contact, regardless of any informal agreements that have been made between the parties.

If English is not the first language of the relinquishing parent and the relinquishment is in English, the person taking the relinquishment must certify in writing under §32A-5-21(C):

- that the relinquishment document was read and explained in the person's first language;
- that the meaning and implications of the document were fully understood by the person; and
- the name of the individual who read and explained the document.

22.2.4 Execution of the Relinquishment

Relinquishments in a pending abuse and neglect proceeding are heard within the context of that proceeding. §32A-5-24(A). A court hearing for the purpose of taking a relinquishment must take place within seven days of the request for a setting. §32A-5-21(F). In all hearings concerning relinquishment of parental rights to CYFD, the child must be represented by a guardian ad litem (GAL). If the child is 14 years or older and in CYFD custody, the attorney appointed for the child under the Abuse and Neglect Act represents the child in any proceeding for TPR under §32A-5-24. §32A-5-24(B).

The relinquishment hearing enables the judge to review the relinquishment form with the relinquishing parent and that parent's counsel and to ascertain that the parent understands the legal consequences of relinquishment. If the parent's first language is not English, an interpreter might be present in court to confirm that the relinquishing parent does indeed understand the form and the consequences of the relinquishment. ***See*** Handbook §15.3. The judge can also use the opportunity to confirm that counseling was received as required by law and to ascertain whether CYFD consents to the relinquishment.

The Adoption Act was amended in 2012 to prohibit unauthorized adoption services and to require prospective adoptive parents to file a full accounting of their costs and expenses before the court may approve a consent to adoption or relinquishment. §32A-5-23(D), as amended. However, this accounting is only required in CYFD adoptions or in stepparent adoptions when ordered by the court. §32A-5-23(E). In other words, the court may order the filing of an accounting in a given case.

Once the relinquishment is signed, it will be filed with the court. If an adoption petition is being heard outside the abuse or neglect proceeding (***see*** Handbook §30.3), the relinquishment must also be filed with the court in which the adoption petition is filed, before adjudication of the petition. §32A-5-23(C).

Practice Note: Several entities either want or require originally signed relinquishment documents. These include the court approving the relinquishment, the adoption worker, the adoption attorney, and the adoption court. Hence, it is recommended that multiple originals be signed at the time of relinquishment, although certified copies should be an acceptable alternative for all or most purposes.

22.2.5 Finality

Whether a relinquishment can be withdrawn depends on the governing law. Under the Indian Child Welfare Act, parents of an Indian child who are relinquishing may withdraw their consent "for any reason at any time prior to the entry of a final decree of termination or adoption…and the child shall be returned to the parent." 25 U.S.C. §1913(c). Because of ICWA, which imposes stringent requirements on relinquishments of Indian children (***see*** Handbook Chapter 39), parents of Indian children have a greater ability to withdraw their consent to relinquishments than do other parents.

In cases in which ICWA does not apply, a relinquishment may be withdrawn only prior to the entry of a decree of adoption and only on the basis of fraud. §32A-5-21(I). The New Mexico Supreme Court has stressed that fraud is the only ground upon which a person can withdraw a relinquishment and consent to adoption. *State ex rel. HSD in the Matter of Kira M.*, 118 N.M. 563, 570 (1994). In *Kira M.*, the Court affirmed denial by the children's court of a biological mother's motion to withdraw consent, which did not allege that consent was given due to fraud. The court observed, though, that the children's court has "the ability under its reservoir of equitable power to protect the interests of natural parents in exceptional cases." *Id.* at 570.

22.3 Voluntary Termination of Parental Rights (Relinquishment): Special Circumstances

22.3.1 Minor Parents

A relinquishment executed by a minor parent cannot be revoked simply because of the parent's minority. §32A-5-17(C). New Mexico requires minor parents seeking to relinquish to undergo a minimum of two separate counseling sessions prior to relinquishment, one of which must be without the presence of the minor parent's parent or guardian. §32A-5-22(D)(2).

At times a minor may be both the subject of an abuse and neglect case and a respondent in the same case. This situation means that a child might have both a guardian ad litem or youth attorney and respondent's counsel.

22.3.2 Parents of Indian Children

The Indian Child Welfare Act imposes specific requirements on a parent of an Indian child who voluntarily consents to termination of parental rights. 25 U.S.C. §1913(a). The consent must be in writing and recorded before a judge of a court of competent jurisdiction. The presiding judge must certify in writing that the consent's terms and consequences were fully explained in detail and fully understood by the parent. The judge also must certify either that the parent fully understood the explanation in English or that it was translated into a language that the parent understood. ICWA declares invalid any consent given prior to or within ten days after birth of the Indian child. ***See*** Handbook §39.2.10.

22.3.3 Conditions on Relinquishments

Under New Mexico law, "[u]nconditional consents or relinquishments are preferred." Conditional consents or relinquishments must be for good cause and must be approved by the court. If the desired condition is for specific adoptive parents or requires the other parent to consent before the adoption decree is entered, the condition is considered for good cause. §32A-5-21(D).

Practice Note: Where relinquishment is being made to CYFD and the condition being requested is for specific adoptive parents, CYFD requires that an adoptive home study be approved and a placement agreement signed with the designated adoptive parents before it agrees to the conditional relinquishment. *See* 8.10.7.22(F) NMAC.

There are specific time frames for conditions. All conditions must be met within 180 days of the conditional consent or relinquishment or the conclusion of any litigation concerning the petition for adoption. The court may extend the 180 day time frame for good cause. §32A-5-21(D). If the condition is not met within the required time period, the relinquishment is not effective. Conditions, while they may seem like a good idea at the time, can also result in permanency being delayed.

In some situations, post-adoption contact between biological parents and the child may be desired. The only way to have continued contact, however, is through an open adoption.

> When a parent relinquishes the parent's rights [to the department under §32A-5-24], the parent shall be notified that no contact will be enforced by the court, regardless of any informal agreement, unless the parties have agreed to an open adoption ….

§32A-5-24(D). Open adoption agreements can be entered into under §32A-5-35 and are enforceable in the adoption proceeding (not the abuse and neglect case). Mediation provides a good environment to discuss and work out the terms of an open adoption and to develop a draft Post Adoption Contact Agreement. ***See*** Handbook §30.4.2.

Practice Note: CYFD administrative rules prohibit CYFD from accepting a conditional relinquishment "with the condition that the relinquishing parent shall be a post-adoption contact." 8.10.7.22(F) NMAC.

Additionally, for all relinquishments the children's court attorney must create a court record that "the relinquishment is voluntary, and that no promises were made to the parent, no fraud was involved, that the parent understands the consequences and the finality of the decision, and unless the adoption is open, the court shall not enforce any agreements regarding contact with the child." 8.10.7.22(B) NMAC.

Finally, no one may relinquish parental rights to CYFD without CYFD's consent. §32A-5-23(B); 8.10.7.22(C) NMAC.

22.4 Involuntary Termination of Parental Rights: Grounds

22.4.1 Overview

The court is required under the termination of parental rights, or TPR, statute to 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." §32A-4-28(A). The court should consider, for example, whether the child, if age 14 or over, will consent to an adoption. If the child will not agree, an adoption is unlikely (§32A-5-17) and the court may query whether termination of parental rights is appropriate. .

There are three specific grounds for termination of parental rights in New Mexico:

- Abandonment.
- Failure to ameliorate the causes and conditions of the abuse and neglect, despite reasonable efforts by CYFD.
- Disintegration of the parent-child relationship accompanied by a psychological parent-child relationship between the child and his caretaker. §32A-4-28(B).

At least one of the grounds must be pled and proven with some specificity for TPR to occur. *In the Matter of the Termination of Parental Rights with Respect to R.W.*, 108 N.M. 332, 335-336 (Ct. App. 1989).

In the case of an Indian child, any party seeking TPR must make certain showings with the use of qualified expert witnesses, and the standard of proof is beyond a reasonable doubt. ***See*** §22.4.5 below.

Incarceration: Section 32A-4-28(D) provides that CYFD may not petition, nor join in another party's petition, to terminate parental rights when the sole factual basis for the motion is that the child's parent is incarcerated. This reflects prior case law**.** *In re C.P.*, 103 N.M. 616, 621 (Ct. App. 1985); *Adoption of Doe*, 99 N.M. 278, 282 (Ct. App. 1982).

While incarceration cannot be the basis for TPR by itself, the court may, for example, look to whether the crime committed relates to the parent's ability to care for the child or consider the arrangements that the parent made to carry out his or her parental

responsibility, the extent of age-appropriate contact between parent and child, or whether the parent took advantage of any treatment available in the correctional system. *See, e.g., State ex rel. CYFD v. Christopher L.*, 2003-NMCA-068, 133 N.M. 653. *See also State ex rel. CYFD v. Joe R.*, 1997-NMSC-038, 123 N.M. 711; *State ex rel. CYFD v. Hector C.*, 2008-NMCA-079, 144 N.M. 222.

22.4.2 Abandonment

The TPR statute, §32A-4-28, does not define abandonment but the term is defined elsewhere in the Abuse and Neglect Act. As defined in §32A-4-2(A), abandonment includes instances where the parent, without justifiable cause:

- Left the child without provision for the child's identification for a period of 14 days; or
- Left the child with others, including the other parent or an agency, without provision for support and without communication for a period of:
    - three months if the child was under six years of age at the commencement of the three-month period; or
    - six months if the child was over six years of age at the commencement of the six-month period.

Unlike termination based on abuse or neglect, which requires the implementation of a treatment plan (***see*** §22.4.3 below), termination based just on abandonment does not. "There is no indication that the parent who has abandoned the child must receive services or benefit from a treatment plan…. Instead, the statute simply requires a finding that the child has been abandoned." *State ex rel. CYFD v. Benjamin O.*, 2009-NMCA-039, ¶¶30-31, 146 N.M. 60. *See also State ex rel. CYFD v. Christopher B.*, 2014-NMCA-016, ¶10, 316 P.3d 918 (filed 2013). "Abandonment is a stand alone basis for termination of parental rights." *Christopher B.*, ¶12.

However, there has been some confusion over "abandonment" as a stand-alone basis for termination of parental rights under §32A-4-28(B)(1) and abandonment as a form of "neglect," which then forms the basis of a termination proceeding under §32A-4-28(B)(2). (*See* §32A-4-2(E) for the definition of "neglected child," which includes abandonment.) If the child is found to be an abused or neglected child at adjudication, then reasonable efforts to reunify and the implementation of a treatment plan are in order. If reunification efforts fail and CYFD moves to terminate parental rights, the department would typically proceed under §32A-4-28(B)(2), discussed in the next section.

The Supreme Court addressed the distinction between the two approaches to abandonment recently in the case *In the Matter of Grace H., State ex rel. CYFD v. Maurice H.*, 2014-NMSC-___ (No. 34,126, June 12, 2014). In a 4-1 decision, the Court held that §32A-4-28(B)(1) is to be used to terminate parental rights by a finding of abandonment where a parent is absent prior to termination. Section 32A-4-28(B)(2) is to be used when a parent is present and expresses a legitimate desire to take responsibility for the child prior to termination. *Grace H.*, ¶44. This would be the case even if the parent met the technical

definition of "abandonment" at some point before the parent presented him- or herself to CYFD and expressed a desire to participate. *Id.* ¶42.

Christopher B., which was decided in October 2013, involved abandonment as a stand-alone basis for termination. Father appealed the termination as a denial of due process because he did not receive notice and an opportunity to participate at the permanency stage of the abuse and neglect proceedings against Mother. The Court of Appeals upheld the termination, concluding that Father did not demonstrate how or why his presence at the permanency hearings might have changed the outcome in any way. *State ex rel. CYFD v. Christopher B.*, 2014-NMCA-016, ¶8, 316 N.M. 918 (filed 2013). This case was not discussed in *Grace H.* and the facts and arguments in the case were very different, so it is not clear how the Supreme Court would have resolved the issues.

22.4.3 Failure to Ameliorate the Causes and Conditions of the Abuse or Neglect

The second and, in the context of abuse and neglect cases, most common type of TPR focuses on the likelihood that the causes and conditions that led to the abuse or neglect will not change. In this type of TPR, the movant must show under §32A-4-28(B)(2) that:

- The child was abused or neglected; and
- The conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by CYFD to assist the parent in adjusting the conditions which render the parent unable to properly care for the child.

CYFD must offer evidence about the neglect or abuse of the child, the attempts the agency made to ameliorate the conditions leading to the abuse and neglect, and the fact that, despite these efforts, the parents failed to make changes. *In the Matter of the Termination of Parental Rights of Reuben and Elizabeth O.*, 104 N.M. 644, 648 (Ct. App. 1986). In some of these cases, the parent simply fails to follow the treatment plan and does not make sufficient changes. In others, the parent has complied with the treatment plan, and even made some progress, but is still unable to change the conditions that caused the abuse or neglect. This was the case in *Athena H.,* where the mother's mental illness, coupled with "the severe psychological trauma and emotional damage … the children suffered while in mother's care," made it impossible for her to "safely parent her children and meet their psychological and emotional needs in the foreseeable future." *State ex rel. CYFD v. Athena H.*, 2006-NMCA-113, ¶9, 140 N.M. 390. The court found that CYFD's efforts were reasonable and upheld the termination of parental rights, explaining that "compliance with the terms of a treatment plan is not dispositive of the issue of parental termination." *Id.*

Practice Note: The emphasis of the statute is on the need for a change in the conditions that rendered the parent unable to properly care for the child, not on compliance with the treatment plan unrelated to the change needed. The court and the parties should be careful not to focus so much on the treatment plan that they lose sight of the statutory concern: Have the causes and conditions of the abuse or neglect been ameliorated to allow the child to return home?

Assessing whether the conditions and causes of the abuse and neglect are unlikely to change in the foreseeable future does not require the children's court to wait in cases of minimal parental improvement. The Court of Appeals has recognized that avoiding TPR in cases where there has been minimal parental improvement may be detrimental to a child. *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, ¶24, 133 N.M. 827; *State ex rel. HSD in the Matter of Dennis S.*, 108 N.M. 486, 488 (Ct. App. 1989). The children's court "is not required to place the children indefinitely in a legal holding pattern. To do so would force the children to wait for the uncertain possibility that the natural parents, despite their persistent and long-standing disregard of the children's interest, may remedy past faults which have rendered the children neglected." *Reuben and Elizabeth O.*, 104 N.M at 650-651. Thus, the statute's reference to "foreseeable future" means "within a reasonably definite time or within the near future." *Id*. at 650.

The "reasonable efforts" required of CYFD do not demand a Herculean effort by it to assist the parents in adjusting the conditions that render the parent unable to care properly for the child. As the court opined in one case, "[t]he reasonable efforts requirement does not …compel unreasonable efforts." *In the Matter of the Termination of Parental Rights with Respect to Kenny F.*, 109 N.M. 472, 476 (Ct. App. 1990). When it becomes clear that preserving the family is not compatible with protecting the child, further efforts at preservation are not required. *Id*.

The Court of Appeals has stated that CYFD is not required to return the child home and wait for negative consequences to occur to demonstrate that there would be negative consequences. *In the Matter of the Termination of Parental Rights with Respect to R.W.*, 108 N.M. 332, 338 (Ct. App. 1989). Also, when more than one child is involved, "the court should not be forced to refrain from taking action until each child suffers an injury." *In the Matter of the Termination of Parental Rights with Respect to I.N.M.*, 105 N.M. 664, 669 (Ct. App. 1987). In *I.N.M.*, the court upheld the TPR for a child who had been somewhat neglected but whose sibling had been severely abused. Efforts can also be reasonable despite language barriers, if there was a sufficient attempt to communicate with the parent about all aspects of the case. *State ex rel. CYFD v. William M.*, 2007-NMCA-055, ¶¶50-51, 141 N.M. 765.

On the other hand, CYFD's efforts will not be considered reasonable if it does not adequately inform a parent of the specific conditions that must change in order to avoid termination. In *State ex rel. CYFD v. Joseph M.*, 2006-NMCA-029, 139 N.M. 137, CYFD implemented a treatment plan addressing substance abuse, anger management, domestic violence, counseling, and parenting classes, but never "specifically and pointedly told [Father] that a failure to separate from Mother could constitute a basis for terminating his rights as a parent because that relationship rendered him unable to properly care for his children." *Id*. ¶20. According to the court, it was "incumbent on the Department to have a specific treatment plan or specifically alert Father to the consequences of his staying with Mother." CYFD's failure to do so led the court to conclude that CYFD did not make reasonable efforts in this case, despite an otherwise extensive treatment plan. *Id*. ¶¶22-23.

Also, the evidence to establish abuse or neglect need not be from the prior adjudication of abuse or neglect. *State ex rel. HSD, Soc. Serv. Div. v. Ousley*, 102 N.M. 656, 659 (Ct. App. 1985). However, the evidence of abuse or neglect, and of reasonable efforts, must be based on current evidence. *State ex rel. CYFD v. Benjamin O.*, 2007-NMCA-070, ¶43, 141 N.M. 692; *State ex rel. HSD v. Natural Mother*, 96 N.M. 677, 679 (Ct. App. 1981).

In some instances, CYFD might not need to make any efforts to reunite the family. That is, in some cases, no efforts whatsoever may be reasonable. In the *Kenny F.* case, the Court of Appeals suggested that after a mother had lost parental rights to two of her four children further efforts to reunite her with another child would be "futile," but the appellate court did not define futile. 109 N.M. at 476-77. New Mexico's termination statute now empowers the children's court to find that "efforts by the department or another agency are unnecessary" when:

- there is a clear showing that the efforts would be futile; or
- the parent has subjected the child to aggravated circumstances. §32A-4-28(B)(2).

Section 32A-4-2(C) defines "aggravated circumstances" as circumstances where the parent has done one of the following:

- attempted, conspired to cause, or caused great bodily harm to the child or great bodily harm to the child's sibling;
- attempted, conspired to cause, or caused great bodily harm or death to another parent, guardian or custodian of the child;
- attempted, conspired to subject, or subjected the child to torture, chronic abuse, or sexual abuse; or
- had his or her parental rights over a sibling of the child terminated involuntarily.

In the *Amy B.* case, the Court of Appeals upheld the constitutionality of the aggravated circumstances provision as applied. The court, citing the legislative history of ASFA and cases from other states, concluded that the statute does not create a presumption of unfitness at the TPR trial but rather gives the trial court discretion not to require reunification efforts, if warranted by all the relevant facts. "[ASFA], in eliminating the requirement of reasonable efforts under certain circumstances, and in requiring the states to follow suit in order to be eligible for federal benefits, was responding to perceived excesses in the application of the reasonable efforts requirement." *State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶7, 133 N.M. 136.

In *State ex rel. CYFD v. Raquel M.*, 2013-NMCA-061, 303 P.3d 865, the Court of Appeals held that the mother was not denied due process when the district court decided there were aggravated circumstances because her parental rights had been terminated to a sibling, even though the earlier termination was still on appeal. The Court applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 336 (1976), and concluded that the finding did not engender a risk of an erroneous deprivation of the mother's parental rights. 2013-NMCA-061, ¶23.

22.4.4 Disintegration of the Parent-Child Relationship and Development of a New Psychological Parent-Child Relationship between the Child and Caretaker

The third ground for TPR in New Mexico is sometimes called the "foster parent bonding" ground. It enables the children's court to terminate parental rights when the child has been placed in the care of others, including relatives, either by court order or otherwise and when several conditions are present. §32A-4-28(B)(3). These conditions are:

- The child has lived in the home of others for an extended period of time;
- The parent-child relationship has disintegrated;
- A psychological parent-child relationship has developed between the substitute family and the child;
- The child no longer prefers to live with the natural parent, if the court determines the child is of sufficient capacity to express a preference; and
- The substitute family desires to adopt the child.

A finding by the court that all of the above conditions exist creates a rebuttable presumption of abandonment. §32A-4-28(C). Thus, the "foster parent bonding" ground for TPR is a type of presumptive abandonment. While the focus can be upon the parental conduct, the manner in which these factors are weighed is impacted by the child's perspective. *In the Matter of Samantha D.*, 106 N.M. 184, 186 (Ct. App. 1987).

In *In the Matter of the Adoption of J.J.B.*, 119 N.M. 638 (1995), the Supreme Court pointed out that proof of abandonment required a showing that parental conduct evidenced a conscious disregard of obligations owed to the child and that such conduct led to the disintegration of the parent-child relationship. The Court emphasized that "evidence of the disintegration of the parent-child relationship is of no consequence if not caused by the parent's conduct." 119 N.M. at 648. In *J.J.B.*, the Court reversed a finding of abandonment.

The Court of Appeals has considered the "disintegration of the parent-child relationship" element in some depth. In *State ex rel. CYFD in the Matter of John D.*, 1997-NMCA-019, 123 N.M. 114, the court focused on the parental conduct toward the child, noting that if the disintegration of the parent-child relationship was not caused by the parent's conduct, the mother could rebut the presumption of abandonment. *Id.* ¶7. The *John D.* court concluded that the parent's physically violent conduct toward her child was "directly responsible" for the disintegration of the parent-child relationship and upheld the trial court's termination finding. *Id.* ¶9. In an earlier case, the Court of Appeals explained that the "requisite disregard may be inferred from purposeful parental conduct." *In the Matter of the Termination of Parental Rights with Respect to C.P.*, 103 N.M. 617, 621 (Ct. App. 1985).

Generally, a TPR motion based on disintegration will involve psychological evidence that looks at the child's bonding to his or her biological parents and to the potential adoptive parents. Evaluation of a child's attachment to his or her caretaker should not involve comparisons of the biological home and the foster home, however. Case law emphasizes that it would be impermissible for the children's court to engage in a comparison of "the relative

merits of the environments provided by the foster parents and by the natural parents." *State ex rel. HSD v. Natural Mother*, 96 N.M. 677, 679 (Ct. App. 1981). The fact that a child might be better off in a different environment does not constitute a basis for TPR. *In the Matter of the Termination of Parental Rights with Respect to R.W.*, 108 N.M. 332, 335 (Ct. App. 1989).

22.4.5 Additional Standards for Indian Children Under ICWA

In cases involving Indian children, the Indian Child Welfare Act requires that the party seeking TPR under state law satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. The party must also satisfy the court that these efforts have proved unsuccessful. 25 U.S.C. §1912(d). For TPR to be ordered, there must also be a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(f). ***See*** Chapter 39 on Indian children and ICWA.

22.5 Involuntary Termination of Parental Rights: Procedure

22.5.1 Overview

Terminations of parental rights that take place in civil abuse and neglect cases are often highly emotional in nature. The consequences of a termination are profound. Children stand to lose a relationship with a parent who may be loved even if he or she has been neglectful or abusive. Children also risk losing contact with siblings and with extended family members. Parents facing terminations are generally sad and angry at their predicaments or, by virtue of mental illness, substance abuse or developmental disabilities, may be confused about what is happening to them. In addition to the high stakes involved, there generally has been a lengthy history of failed efforts to reunite the family. Because of that history, there may be some built-up frustration on the part of the professionals working with the family, including the case worker, therapists, lawyers and the judge, at the parents' inability to understand or to alter poor parenting or lifestyle choices that endanger their children. Following the appropriate procedures to comply with due process requirements becomes especially important under these circumstances.

ASFA Note: Compounding the emotional and procedural challenges inherent in the TPR proceeding are the deadlines confronting the state and parents under the Adoption and Safe Families Act. To meet ASFA requirements, §32A-4-29 requires the filing of a petition for TPR by the end of the child's 15th month in foster care, except in certain circumstances. §32A-4-29(G); ***see*** Handbook §22.1.3.

When a motion for TPR is filed, CYFD must perform concurrent planning. §32A-4-29(F). However, the department is likely to have begun concurrent planning at an earlier stage. ***See*** Handbook §3.4.

22.5.2 Initiation of TPR

An involuntary TPR is initiated by the filing of a motion for TPR in the abuse and neglect proceeding. §32A-4-29(A). Thus, a TPR does not require a separate judicial proceeding with separate pleadings and a separate case number. The Children's Code allows "any party" to file for TPR. §32A-4-29(A). If a party other than CYFD files a TPR motion concerning a child in state custody, CYFD either may litigate the motion filed by the other party or may move that the TPR motion be found premature and denied. §32A-4-29(E).

Practice Note. Section 32A-4-29 makes it clear that only parties may file a motion to terminate parental rights in the abuse or neglect proceeding. This means that persons who were not parties to the proceeding originally or who have not been joined as parties would have to move to intervene and become a party in order to file. *See* Rule 10-121 on parties and Rule 10-122 on intervention; ***see also*** Handbook §§25.2 and 25.3.

When a child has been in foster care for 15 of the previous 22 months, CYFD must file a motion to terminate unless:

1. a parent has made substantial progress toward eliminating the problem that caused the child's placement in foster care, it is likely the child will be able to safely return home within three months, and the child's return home will be in the child's best interest;
2. the child has a close and positive relationship with a parent and a permanent plan that does not include TPR will provide the most secure and appropriate placement for the child;
3. the child is 14 or older, is firmly opposed to TPR, and is likely to disrupt an attempt to place him or her with an adoptive family;
4. a parent is terminally ill, but in remission, and does not want his or her parental rights terminated, provided that the parent has designated a guardian for the child;
5. the child is not capable of functioning if placed in a family setting, in which case the court must reevaluate the child's status every 90 days (unless the court makes a final determination that the child cannot be placed in a family setting);
6. grounds do not exist for TPR;
7. the child is an unaccompanied, refugee minor and the situation regarding the child involves international legal issues or compelling foreign policy issues;
8. adoption is not an appropriate plan for the child; or
9. the parent's incarceration or participation in a court-ordered residential substance abuse treatment program constitutes the primary factor in the child's placement in substitute care and TPR is not in the child's best interest. §32A-4-29(G).

For purposes of §32A-4-29, a child is considered to have entered foster care on the earlier of (1) the date of the first judicial finding that the child has been abused or neglected, or (2) the date that is 60 days after the date the child was removed from the home. §32A-4-29(H).

Practice Note. The preferred practice is to obtain specific findings to support the decision not to seek TPR if the child has been in foster care for 15 out of the last 22 months. To support the decision not only under §32A-4-29(G) but also under ASFA, it would be preferable to state in the findings that the reason for not pursuing TPR is a "compelling reason."

Under Rule 10-121(B) the parties to a neglect or abuse proceeding are:

- the state;
- a parent, guardian, or custodian who has allegedly neglected or abused a child;
- the child alleged to be neglected or abused; and
- any other person made a party by the court.

If a motion to terminate parental rights is filed, a parent who was not already a party to the abuse or neglect proceeding must be named in the motion and joined as a party in the case at this time. Rule 10-121(D). "Parent," as defined in the Children's Code, includes a biological or adoptive parent who has a constitutionally protected liberty interest in the care and custody of the child. §32A-1-4(P). Accordingly, a parent need not be joined if the parent has not established a protected liberty interest in his relationship with the child. ***See*** Handbook §2.2.

In a split decision, the Court of Appeals has held that a guardian appointed under the Kinship Guardianship Act is a necessary party to the termination proceeding if the guardianship has not been revoked under the Act. *State ex rel. CYFD v. Djamila*, 2014-NMCA-045, ¶¶1-2, 322 P.3d 444, *cert. granted*, 2014-NMCERT-004. In *Djamila*, the guardian had been a party to the abuse and neglect case but was dismissed against her wishes before the motion for termination of parental rights was heard.

22.5.3 TPR Motion Requirements

The party seeking TPR must request it by motion, filed with the court. §32A-4-29(B). The motion must be substantially in the form approved by the Supreme Court. Rule 10-347; Children's Court Form 10-470.

Children's Court Forms: As the 2014 Handbook went to press, the Supreme Court was considering proposed revisions to the Children's Court Forms. The abuse and neglect forms would be recompiled into a new Part 5 of the Rules and Forms, many of the forms would be amended and new forms would be added.

According to §32A-4-29(B), the motion must state all of the following:

- the date, place of birth, and marital status of the child, if known;
- the grounds for termination and the supporting facts and circumstances;
- the names and addresses of the persons or agency to whom custody might be transferred;

- whether the child resides or has resided with a foster parent who wishes to adopt the child;
- whether the motion is in contemplation of adoption;
- the relationship or legitimate interest of the moving party to the child; and
- whether the child is subject to the Indian Child Welfare Act.

If ICWA applies to the child, the TPR motion must state all of the following under §32A-4-29(B)(7):

- the tribal affiliations of the child's parents;
- the moving party's specific actions to notify the parents' tribes and the results of such actions, including the names, addresses, titles, and telephone numbers of the persons contacted; and
- what specific efforts were made to comply with the placement preferences stated in ICWA or mandated by the appropriate tribe.

The moving party must attach to the TPR motion copies of any correspondence with the tribes. §32A-4-29(B)(7).

When a motion for TPR is filed, the moving party must also file a motion for court-ordered mediation between the parent and any prospective adoptive parent to discuss an open adoption agreement. §32A-4-29(D) (added in 2009). Any agreement reached before TPR must be made part of the court record. *Id*.

22.5.4 Notice and Service

Under §32A-4-29(C), the moving party must serve all of the following persons with notice of the filing of the TPR motion and a copy of the motion:

- other parties;
- the foster parent, preadoptive parent, or relative providing care for the child with whom the child is residing;
- foster parents with whom the child has resided for 6 months within the previous 12 months;
- custodian of the child;
- any person appointed to represent any party; and
- any other person the court orders.

In serving notice, the party moving for TPR must comply with the Children's Court Rules for service of motions, except that foster parents and all attorneys of record must be served by certified mail. §32A-4-29(C). The notice must state that the person served is required to file a written response to the motion within 20 days if he or she intends to contest the motion. §32A-4-29(C).

The party moving for TPR need not serve a parent who was provided notice of the abuse and neglect proceeding under §32A-4-17 and who failed to make an appearance. §32A-4-29(C). Under §32A-4-17, the original summons is required to state clearly that the proceeding could ultimately result in termination of the respondent's parental rights.

On the other hand, a parent who is being joined in the case for the first time must be served with a summons and a copy of the motion in the manner provided in Rule 10-103 on service of process. Rule 10-121(D).

In any case involving a child subject to ICWA, the moving party must send notice by certified mail to the tribes of the child's parents and to any "Indian custodian" as defined by ICWA. §32A-4-29(C); ***see*** Handbook Chapter 39. ICWA imposes additional requirements for proper notice and service in TPR proceedings involving Indian children. ICWA requires the party moving for TPR to "notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." 25 U.S.C. §1912(a). If the identity or location of the parent or Indian custodian and the tribe cannot be determined, the moving party must notify the Secretary of the Interior. The Secretary then has 15 days after receipt of notice to notify the parent or Indian custodian and the tribe. *Id.*

Practice Note: As a matter of practice, when notice is sent to the Secretary, it is also sent to the regional office of the Department of the Interior's Bureau of Indian Affairs.

22.5.5 Right to Counsel

In cases of involuntary TPR, parents have the right to legal counsel. The right to counsel arises at the inception of the abuse or neglect case and continues through any TPR proceedings. For parents who are unable to obtain counsel for financial reasons, or when the court determines that "the interests of justice [so] require," the court will appoint counsel. §32A-4-10(B). Similarly, children are represented in all abuse or neglect proceedings, including TPR proceedings, by a guardian ad litem or a youth attorney, depending on the child's age. §32A-4-10(C). ICWA also guarantees appointment of counsel in TPR proceedings involving Indian children. 25 U.S.C. §1912(b).

In *State ex rel. HSD in the Matter of the Termination of the Parental Rights of James W.H.*, 115 N.M. 256, 257 (Ct. App. 1993), the Court of Appeals held that the right to effective assistance of counsel extends to TPR cases. The Children's Court Rules prohibit the appointment of an attorney to represent more than one parent "[i]n any proceeding or case that may result in the termination of parental rights." Rule 10-314(B).

22.5.6 Timing of the TPR Hearing

The party filing the TPR motion should request a hearing on the motion. §32A-4-29(D). The hearing must be scheduled at least 30 days but no more than 60 days after service is completed on the parties entitled to service. *Id.* This 30-day time minimum comports with ICWA's requirement that there be at least 10 days notice to the parent and the tribe in a TPR

proceeding involving an Indian child, with the opportunity, if requested, for a 20-day extension. 25 U.S.C. §1912(a).

The 60-day deadline for holding the hearing on a motion for TPR was the subject of discussion in *State ex rel. CYFD v. Anne McD.,* 2000-NMCA-020, 128 N.M. 618. Mother sought to have the motion dismissed for failure to hold a hearing within the 60 days required by statute. The court noted that, in contrast to the statute on adjudicatory hearings, §32A-4-29 does not provide a remedy for failure to hold the TPR hearing within 60 days.

> The purpose of this provision is to ensure that the termination proceedings take place in a relatively timely manner, consistent with the best interests of the child…. Requiring that a motion be dismissed without prejudice serves no practical purpose since it would only lead to a subsequent refiling of the motion and further delays.

2000-NMCA-020, ¶40. The children's court did not abuse its discretion in permitting the hearing to occur outside the time limit. *Id.* ¶41.

The moving party must also file a motion for court-ordered mediation between the parent and any prospective adoptive parent to discuss an open adoption agreement. If an open adoption agreement is reached at any time before termination of parental rights, it must be made a part of the court record. §32A-4-29(D). The Children's Court Mediation Program conducts open adoption mediations before or after TPR, depending on the circumstances of the case. ***See*** Handbook §29.4 on mediation.

22.5.7 Conduct of the TPR Hearing

The children's court judge hears the TPR motion. There is no right to a jury trial in termination of parental rights proceedings under either the Children's Code or the state constitution. *State ex rel. CYFD in the Matter of T.J.,* 1997-NMCA-021, ¶¶4,10, 123 N.M. 99.

In a case decided prior to the 1997 amendments to the Children's Court Rules, the Court of Appeals held that the Rules of Civil Procedure apply in TPR proceedings. *State ex rel. CYFD, In re T.C.,* 118 N.M. 352 (Ct. App. 1994). "If the rules did not apply, there would be no stated procedure as the Children's Court Rules do not provide a procedure….[I]n order to ensure fairness and certainty in these proceedings, we hold that the Rules of Civil Procedure apply in all proceedings to terminate parental rights." 118 N.M. at 354.

In 1997, the Supreme Court amended Rule 10-101 to provide that the Children's Court Rules govern procedure in the children's courts in all matters involving children alleged by the state to be abused or neglected, *including proceedings to terminate parental rights that are filed pursuant to the Abuse and Neglect Act.* Rule 10-101(A)(1)(c). Presumably, the Rules of Civil Procedure can be looked to for guidance when procedures are not set forth in the Children's Court Rules, such as the motion for summary judgment at issue in the *T.C.* case.

The Rules of Evidence apply in termination proceedings. Rule 10-141; *see also* Rule 11-1101.

A question posed in *Anne McD.* was whether the parent's due process rights were violated when the court permitted six out of the seven witnesses for CYFD to appear by telephone in a TPR hearing. The Court of Appeals held that the mother's rights to procedural due process were not violated under the circumstances in the case. *State ex rel. CYFD v. Anne McD.*, 2000-NMCA-020, ¶33, 128 N.M. 618. While so holding, the Court emphasized the importance of a parent's right to procedural due process prior to TPR and directed trial courts to be guided in the future by a series of criteria whenever a party requests permission to elicit telephone testimony from its witnesses in TPR cases. *See Anne McD.* ¶21 for the list of considerations. The Court also stated that, before such testimony can be elicited over objection, the children's court should state in the record the reasons why telephonic testimony is to be allowed and explain why the use of such testimony will not prejudice a party's rights or lead to an increased risk of deprivation of a parent's right to procedural due process. *Id*. ¶35.

The Court of Appeals has also addressed a situation where the district court had taken judicial notice of the file below, including all pleadings. The Court of Appeals used a balancing test to determine if the taking of judicial notice had violated the mother's due process rights. It determined that because the record reflected sufficient evidence presented at trial, other than the material subject to judicial notice, to support the findings of the trial court, the mother's due process rights to a fair trial had not been violated. The Court warned against the blanket use of judicial notice in termination of parental rights cases. *State ex rel. CYFD v. Brandy S.*, 2007-NMCA-135, ¶32, 142 N.M. 705.

In ICWA cases, the party seeking TPR must offer the testimony of one or more qualified expert witnesses. "No termination of parental rights may be ordered in such proceedings in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of *qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f) (emphasis added). ***See*** Handbook Chapter 39.

In cases involving children who are eligible for enrollment in an Indian tribe, the children's court should ensure that CYFD has pursued enrollment on their behalf. In the *Marsalee P*. case, the Court of Appeals reversed a termination of parental rights because CYFD had not fulfilled its obligation under §32A-4-22(I) to pursue enrollment for the child in the Navajo Nation. The Court also held that the district court had an affirmative obligation to ensure that CYFD complied with §32A-4-22(I) before terminating parental rights. *State ex rel. CYFD v. Marsalee P*., 2013-NMSC-062, ¶27.

22.5.8 Right of the Parent to Participate in the TPR Hearing

In *In the Matter of Ruth Anne E.*, 1999-NMCA-035, ¶¶16, 25, 126 N.M. 670, the court found that a parent does not have a procedural due process right to appear in person at a TPR hearing but does have a right to participate meaningfully in the hearing. The parent in that

case was incarcerated and unable to attend the TPR hearing. The court stated that "because a fundamental liberty interest is implicated in proceedings involving the termination of parental rights, a parent who is incarcerated and is unable to attend the hearing on the state's petition to terminate …is entitled to more than simply the right to cross-examine witnesses or present argument through his attorney, or to present deposition testimony …." 1999-NMCA-035, ¶25. The court found that a parent who is unable to attend the hearing must have the right to "meaningful participation" in the hearing. After reviewing the state's evidence, the parent must be able to present evidence by deposition or by telephone and to challenge the state's evidence through additional cross-examination or rebuttal testimony. *Id.* ¶¶28-29.

In *State ex rel. CYFD v. Christopher L.*, 2003-NMCA-068, 133 N.M. 653, the parties tried to secure the incarcerated father's presence but were unsuccessful. The judge offered the father the opportunity to participate in his TPR hearing by phone but he cursed the judge and hung up. The Court of Appeals ruled that the father was not denied due process when the children's court proceeded without him, based on this fact among others. *Id*. ¶¶22-24.

In *State ex rel. CYFD v. Mafin M.*, 2003-NMSC-015, 133 N.M. 827, the Supreme Court observed that the mother was suffering from severe mental illness and acute substance abuse and that the procedures discussed in *Ruth Anne E.* were simply unworkable given her mental and physical condition. "As the record demonstrates, the district court made every reasonable attempt to allow her to participate meaningfully in the proceedings." 2003-NMSC-015, ¶21. (*See* the case for a description of these efforts.) The Supreme Court concluded that "she needed an indeterminate amount of time to prepare herself to be in a position to participate in the proceedings" and that "[a]ny further delays in the proceedings would have been unwarranted and would have infringed upon the State's compelling interest in the welfare of the boys." Quoting an earlier case, the court continued: "When balancing the interest of parents and children, the court is not required to place the children indefinitely in a legal holding pattern, when doing so would be detrimental to the children's interests." *Id*. ¶¶22-24.

22.5.9 Propriety of Summary Judgment

Summary judgment may be used to terminate parental rights where there are no disputed issues of material fact underlying the basis for termination. *State ex rel. CYFD in re T.C.*, 118 N.M. 352, 353 (Ct. App. 1994). However, summary judgment is not appropriate where material facts are in dispute. *State ex rel. CYFD v. Erika M.*, 1999-NMCA-036, ¶29, 126 N.M. 760. The court in *Erika M.* recognized that due process considerations in TPR proceedings should limit summary judgment to rare cases and might limit a trial court's reliance on judicial review hearings for its findings. ¶¶26-28.

22.5.10 Burden of Proof on TPR Motions

The grounds for most termination of parental rights motions must be proved by clear and convincing evidence. §32A-4-29(I). This standard requires proof stronger than a mere "preponderance" and yet something less than "beyond a reasonable doubt." *In the Matter of the Adoption of Doe*, 98 N.M. 340, 345 (Ct. App. 1982). Where a TPR motion involves a

child subject to the Indian Child Welfare Act, the grounds for termination must be proved by the higher standard of beyond a reasonable doubt. §32A-4-29(I). Evidence, including testimony of qualified expert witnesses, must show beyond a reasonable doubt that continued custody with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. *Id.*; 25 U.S.C. §1912(f); ***see*** Handbook §39.2.9.

22.5.11 Order Terminating Parental Rights

If the court terminates parental rights, it must appoint a custodian for the child and fix responsibility for the child's support. §32A-4-29(J). If the TPR concerns a child to whom ICWA applies, the court must make specific findings that ICWA's requirements have been met. §32A-4-29(K). Presumably, this provision obligates the court to find that it has complied with ICWA's jurisdictional, notice, service, appointment of counsel, burden of proof, and placement preference requirements. ***See*** Handbook Chapter 39 on ICWA.

22.5.12 Effect of a TPR Judgment

A TPR judgment divests the parent of all legal rights and privileges with respect to the child and dispenses with the necessity of obtaining parental consent to adoption or notifying the parent of any subsequent adoption proceeding concerning the child. The judgment does not affect a child's inheritance rights from and through the child's parents unless and until there is an adoption. *See* §32A-4-29(L).

Section 32A-4-29(L) is silent on the subject of child support. The Court of Appeals, in a domestic relations case brought by a mother for child support arrearages, held that termination of parental rights terminated the child support obligation. *Aeda v. Aeda*, 2013-NMCA-095, 310 P.3d 346. The Court reached this result after an extensive analysis of the statute in effect at the time mother petitioned to terminate the father's parental rights. The statute, which was adopted in 1985, did not mention child support and the Court concluded that "[t]he fundamental and terrible act of severing the parent-child relationship cuts off all connection between them except as specifically excepted by the Legislature." 2013-NMCA-095, ¶38.

22.5.13 Attorney's Fees

The GAL or youth attorney for the child may recover attorney's fees from CYFD in one very particular situation involving termination of parental rights. To recover attorney's fees under §32A-4-30:

- the child must be in CYFD's legal custody;
- the GAL or the youth attorney must:
  - request in writing that CYFD move for TPR;
  - give CYFD written notice that, if CYFD does not move for TPR, the GAL or attorney will make the motion for TPR and seek attorney's fees;
  - successfully move for TPR; and
- CYFD must refuse to litigate the motion for TPR or fail to act in a timely manner.

The GAL or youth attorney would apply to the court for the award of fees under this statute.

22.5.14 Denial of TPR

When the court denies a motion for TPR, the court must issue appropriate orders immediately. The court must direct the parties to file a stipulated order and interim plan or a request for hearing within 30 days of the date of the hearing denying TPR. §32A-4-29(M).

22.6 Checklist: Voluntary Termination of Parental Rights (Relinquishment)

RELINQUISHMENT CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Notice of hearing
  - Language or cognitive challenges
- ☐ If relinquishment to CYFD, consent by CYFD
- ☐ If not in contemplation of adoption:
  - Good cause
  - Reasonable efforts to preserve family
  - Best interests of child
- ☐ Counseling
  - Meets all requirements of §32A-5-22
  - Counseling narrative filed with court
- ☐ Form of relinquishment
  - Signed by parent relinquishing
  - Meets all requirements of §32A-5-21
  - Parent understands legal consequences
- ☐ If Indian child,
  - Terms/consequences explained to/understood by parent
  - Explanation in language parent understands
  - More than ten days since birth
- ☐ Unconditional relinquishment unless:
  - Good cause and approved by court
  - Condition satisfied w/in 180 days

22.7 Checklist: Involuntary Termination of Parental Rights

TERMINATION OF PARENTAL RIGHTS HEARING CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Service of motion
  - Notice of hearing
  - Appointment of counsel
  - Language or cognitive challenges
- ☐ Inquiries regarding
  - Absent parents*
  - Tribal affiliation
  - Concurrent planning
  - Mediated open adoption agreement
- ☐ Advising parent(s) of rights, if first hearing for parent(s)
- ☐ Stipulations, if any
- ☐ Evidence on contested allegations
  - Rules of Evidence apply
  - Burden of proof: usually clear and convincing
  - Burden of proof: if Indian child, beyond reasonable doubt
- ☐ Findings on alleged grounds for termination
  - Abandonment
  - Conditions and causes unlikely to change
  - Foster care bonding/presumptive abandonment
- ☐ If Indian child,
  - Notice to tribe and Indian custodian
  - Beyond reasonable doubt, expert testimony
  - Findings that ICWA requirements were met
- ☐ If TPR ordered,
  - Custodian and child support
- ☐ If TPR denied,
  - Stipulated order and interim plan, or
  - Request hearing w/in 30 days
- ☐ Scheduling of judicial review w/in 6 months

***To free a child for adoption, all parents with a constitutionally protected interest must have relinquished parental rights or had their rights terminated.**

CHAPTER 23

PERMANENT GUARDIANSHIP HEARING

This chapter focuses on permanent guardianship in the context of an abuse or neglect proceeding. It covers:

- Filing and service of a motion for permanent guardianship.
- Findings required for permanent guardianship.
- Comparison with guardianship under the Probate Code and the Kinship Guardianship Act.

23.1 Purpose

Four separate statutes potentially apply to a request for appointment of a guardian for a child:

- §§32A-4-31 and 32A-4-32, relating to appointment of a guardian in the context of an abuse and neglect proceeding;
- §§45-5-201 to 45-5-212, relating to appointment under the Probate Code;
- §32A-2-14(K), relating to appointment of a guardian as a basic right guaranteed a juvenile in delinquency proceedings; and
- §§40-10B-1 to 40-10B-15, relating to the appointment of a guardian under the Kinship Guardianship Act, enacted in 2001. ***See*** Handbook, Chapter 30A.

Permanent guardianship under the Abuse and Neglect Act gives the guardian all of the rights and responsibilities of a parent except for those listed in the decree of permanent guardianship, if any. §32A-4-31(A). The decree is not a termination of parental rights and a child's inheritance rights are not affected. §32A-4-32(F).

While termination of parental rights together with adoption provides permanency for many children, something not quite so final is the better option for others. For example, the child may be a 15 year old who would prefer to live with his grandparents, or other relatives may be willing to raise a child whose parent is in prison. Guardianship is an option in such cases.

Note on Guardianship. One of the limitations to guardianship as a permanency option has been the absence of subsidies comparable to adoption subsidies for special needs children. The Fostering Connections legislation in 2008 now allows for the use of federal Title IV-E funds for guardianships approved for relatives. However, the state must pass certain laws to allow this to happen, including providing for matching funds and Medicaid eligibility. Given the state's budget constraints, guardianships are not yet available in New Mexico.

23.2 Timeline

There is no specific timeline applicable to the appointment of a permanent guardian under the Abuse and Neglect Act. However, the court cannot act on a motion for permanent guardianship until it makes the findings required by §32A-4-31(C). For these findings, ***see*** §23.10 below.

23.3 Initiation

Any party may file a motion for permanent guardianship. If someone other than the prospective guardian files the motion, the motion must be verified by the prospective guardian. §32A-4-32(A) and (C).

The motion must state:

- The date, place of birth, and marital status of the child, if known;
- The facts and circumstances supporting the grounds for permanent guardianship;
- The name and address of the prospective guardian and a statement that the person agrees to accept the duties and responsibilities of guardianship;
- The basis for the court's jurisdiction;
- The relationship of the child to the petitioner and the prospective guardian, if different from the petitioner; and
- Whether the child is subject to the Indian Child Welfare Act. §32A-4-32(B).

If the Indian Child Welfare Act applies to the child, the motion must also state:

- The tribal affiliations of the child's parents;
- The specific actions taken by the petitioner to notify the parents' tribes and the results of the contacts, including the names, addresses, titles, and telephone numbers of the persons contacted. Copies of any correspondence with the tribes must be attached as exhibits; and
- The specific efforts that were made to comply with the placement preferences in ICWA or the placement preferences of the tribes. §32A-4-32(B).

23.4 Service and Notice

Notice of the filing of the motion, together with a copy of the motion, must be served by the moving party on:

- the child's parents, including any parent who has not previously been made a party to the proceeding;
- foster parents with whom the child is residing;
- the foster parent, preadoptive parent, or relative providing care for the child with whom the child has resided for six months;
- the child's custodian;
- CYFD;

- any person appointed to represent a party, including the child's guardian ad litem or youth attorney; and
- other persons the court orders provided with notice. §32A-4-32(D).

If the child is an Indian child, in addition to the people listed above, notice must be served on the tribes of the child's parents and any Indian custodian as defined in the Indian Child Welfare Act. *Id*.

The notice and motion must be served in accordance with the Children's Court Rules for the service of motions. *Id*.

23.5 Issues to be Considered

In proceedings for permanent guardianship, the court must give primary consideration to the physical, mental, and emotional welfare and needs of the child. §32A-4-31(A).

Any adult, including a relative or foster parent, may be appointed as a permanent guardian, but an institution may not. In any case involving a child in CYFD's custody, CYFD's consent to the guardianship must be obtained. If the child is 14 years of age or older, he or she may nominate his or her own guardian, and the court must appoint that person, unless the court finds the appointment is contrary to the child's best interests. §32A-4-31(B).

Besides finding that the guardianship is in the child's best interest, the court must also determine that: (1) the child has been adjudicated abused or neglected; (2) CYFD has made reasonable efforts to reunite the child with the parent, and further efforts would be unproductive; (3) reunification would not be in the child's best interests because the parent is unwilling or unable to properly care for the child; and (4) the likelihood of adoption is remote, or termination of parental rights would not be in the child's best interests. §32A-4-31(C).

23.6 Stipulations

A stipulation to appoint a permanent guardian for a child must be made in the context of a pending motion. Guardians are ill-advised to enter into private informal agreements regarding guardianship of a child. It is doubtful that such agreements will be recognized as binding agreements between the parties to appoint one of the parties as the permanent guardian of the child. *See In the Matter of the Guardianship of Ashley B.G.*, 1998-NMCA-003, 124 N.M. 468. However, nothing in the Children's Code precludes the court from entering an order appointing a permanent guardian if the parties stipulate to the findings required by §32A-4-31(C) and the court is assured that the parent's consent is knowingly and intelligently given.

23.7 Contested Case

The finding on abuse and neglect required for permanent guardianship is that the child has been adjudicated an abused or neglected child. §32A-4-31(C). The allegation of abuse or neglect is not relitigated on the motion for permanent guardianship. However, other issues, such as

reasonable efforts or best interests of the child, could be contested. While the appointment of a permanent guardian does not terminate parental rights, the children's court must conduct a trial and make the findings listed in §23.10 below.

Note that instead of finding that termination of parental rights *would be* in the child's best interests, the court must specifically find either that the likelihood of adoption is remote or that termination of parental rights *would not be* in the child's best interests.

23.8 Evidence

The Rules of Evidence apply to a hearing on a motion for permanent guardianship. Rule 10-141.

23.9 Burden of Proof

The grounds for permanent guardianship must be proved by clear and convincing evidence**.** In the case of an Indian child, the grounds must be proven beyond a reasonable doubt and meet the requirements of 25 U.S.C. §1912(f). §32A-4-32(E). Section 1912(f) of the Indian Child Welfare Act requires evidence, including expert testimony, that continued custody in the parent or Indian custodian is likely to result in serious emotional or physical harm to the child. ***See*** Handbook §39.2.9 on ICWA's evidentiary standards.

23.10 Findings and Order

In order to appoint a permanent guardian, the children's court must find that the guardianship is in the best interest of the child and must make four additional findings prior to the appointment:

- the child has been adjudicated abused or neglected;
- CYFD has made reasonable efforts to reunite the child with the parent, and further efforts would be unproductive;
- reunification would not be in the child's best interest because the parent continues to be unable or unwilling to properly care for the child; and
- either the likelihood of adoption is remote, or termination of parental rights would not be in the child's best interest. §32A-4-31(C).

If the child is 14 or older, the court must appoint a person nominated by the child, unless the court finds the appointment contrary to the child's best interest. §32A-4-31(B).

Upon a finding that grounds exist for a permanent guardianship, the court may incorporate into the final order provisions for:

- visitation with the natural parents, siblings, or other relatives; and
- any other provision necessary to rehabilitate the child or provide for the child's continuing safety and well-being. §32A-4-32(G). This could include child support from the biological parents.

The court retains jurisdiction to enforce its judgment of permanent guardianship. §32A-4-32(H).

23.11 Periodic Judicial Review

Section 32A-4-25(B) requires that a judicial review hearing be held within six months of the court's decision on a motion for permanent guardianship, and every six months thereafter. For information about judicial review hearings, ***see*** Handbook Chapter 21.

23.12 Revocation of Order

Any party to the abuse or neglect proceeding may move for revocation of the order granting guardianship when there is a "significant change of circumstances," including that:

- the parent is able and willing to properly care for the child; or
- the guardian is unable to properly care for the child. §32A-4-32(I).

The court may revoke the order when a significant change of circumstances has been proven by clear and convincing evidence and it is in the child's best interest to revoke the order. §32A-4-32(K).

The court must appoint a GAL for the child in the revocation proceeding if the child is under age 14. The court must appoint an attorney for the child if the child is age 14 or older at the inception of the proceeding. §32A-4-32(J).

If there are allegations of abuse or neglect by the permanent guardian after establishment of the guardianship, the proceedings to revoke the permanent guardianship could lead to the ultimate termination of parental rights of the biological parent. *State ex rel. CYFD v. Browind C.*, 2007-NMCA-023, 141 N.M. 166.

23.13 Distinguishing Guardianship under Probate Code and Kinship Guardianship Act

23.13.1 Probate Code

The Probate Code provides that "[t]he court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order." §45-5-204. Unlike the Abuse and Neglect Act, the Probate Code does not provide authority for the appointment of a guardian in a situation where parental rights have not been terminated or suspended. *See, e.g., In the Matter of the Guardianship of Ashleigh R.*, 2002-NMCA-103, 132 N.M. 772, and *In the Matter of the Guardianship Petition of Lupe C.*, 112 N.M. 116 (Ct. App. 1991).

In *Lupe C.*, the court held that a parent's right to custody is not suspended by circumstances if in fact the parent has lawful custody, is present, and has not voluntarily relinquished physical custody of the child. 112 N.M. at 120. Rather, the Children's Code provides the mechanism for removing a child from the custody of a parent where the parent has and is exercising custody of the child. *Id*. at 122.

The court in *Ashleigh R*. held that the district court erred in appointing the grandparents as guardians under the Probate Code when the mother contested the appointment, even though the child was living with the grandparents at the time they filed for guardianship. Parental rights are not "suspended by circumstances" just by virtue of the fact that the parent had voluntarily relinquished custody. 2002-NMCA-103, ¶¶7-11.

A question that the courts and members of the legal community have debated over the past several years is whether and how a prospective guardian, concerned about a child's well-being, may obtain guardianship when the parent still has a right to custody, has not consented to the guardianship, and is not the subject of a pending abuse or neglect proceeding filed by CYFD. The Kinship Guardianship Act, passed by the Legislature in 2001, addresses many of these situations, although not all of them.

23.13.2 Kinship Guardianship Act

The Kinship Guardianship Act, §§40-10B-1 to 40-10B-15, was enacted in 2001 to address the need to establish a legal relationship between a child and a kinship caregiver when the child is not residing with either parent. The Act provides for a caregiver's affidavit, for short term situations where medical or educational issues need to be addressed. Also, a caregiver with whom a child resides and who provides the child with the care, maintenance and supervision consistent with what a parent provides, may petition the court for guardianship. The court may appoint a guardian if the parent consents in writing, the parent's rights have been terminated or suspended by prior court order, or the child has been residing with the petitioner for 90 days or more and the parent is currently unwilling or unable to care for the child or there are extraordinary circumstances.

Kinship guardianships enable caregivers to secure educational services and medical care and to meet other needs of the children in their care. They are also intended to provide children with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally. Again, though, it is important to recognize the limits of kinship guardianship as an option. For someone to be able to petition the court for appointment under the Kinship Guardianship Act, the person must be an adult *with whom the child resides* and who provides the child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child. Like guardianship under the Probate Code, kinship guardianship does not authorize the court to remove the child from the parents' home. ***See*** Handbook Chapter 30A for a more detailed summary of the Kinship Guardianship Act.

23.14 Checklist

PERMANENT GUARDIANSHIP HEARING

CHECKLIST

- ☐ Preliminary matters
  - Appearances
  - Service of motion
  - Notice of hearing
- ☐ Inquiry regarding:
  - Absent parents
  - Tribal affiliation
- ☐ Stipulations, if any
- ☐ Evidence on contested allegations
  - Rules of Evidence apply
  - Burden of proof: usually clear and convincing
  - Burden of proof: if Indian child, beyond reasonable doubt
- ☐ Findings
  - Child adjudicated abused or neglected
  - Reasonable efforts by CYFD; further efforts not productive
  - Reunification not in child's best interest
  - Likelihood of adoption remote; TPR not in child's best interest
  - Guardianship in child's best interest
- ☐ If 14 or older, has child nominated a person to be guardian?
- ☐ If an Indian child,
  - Notice to tribe and Indian custodian
  - Proof beyond reasonable doubt
  - Placement preferences
- ☐ Order
  - Visitation with parents, siblings, other relatives
  - Provisions for child's rehabilitation, safety, well-being.
- ☐ Scheduling of judicial review w/in 6 months

CHAPTER 24

APPEALS

This chapter covers some of the basic requirements for appeals, including:

- Filing and docketing an appeal.
- Deadlines under the different calendars.
- Jurisdiction during an appeal.
- Preserving error for review.

The chapter also covers expedited appeals from the ten-day custody hearing.

24.1 Overview

A significant number of abuse or neglect cases find their way into the appellate courts, and it is incumbent on both the children's court and the parties before the children's court to be prepared for the possibility of appeal. Considerations include, for practitioners, the importance of proposing and, for children's court judges, the importance of making sufficient findings, and for all the participants, the desirability of making a complete record to permit adequate review. Taking and docketing appeals properly is also critical.

24.2 Appeals as of Right

These final orders are appealable as of right to the Court of Appeals:

- An order dismissing an abuse and neglect petition.
  State ex rel. CYFD in the Matter of Vincent L., 1998-NMCA-089, 125 N.M. 452.
- An order finding a child is abused or neglected.
  State ex rel. CYFD v. Frank G. and Pamela G., 2005-NMCA-026, ¶41, 137 N.M. 137, *aff'd sub nom. In the Matter of Pamela A.G.*, 2006-NMSC-019, 139 N.M. 459.
- An order terminating parental rights.
  State ex rel. CYFD v. Erika M., 1999-NMCA-036, 126 N.M. 760.
- Any other final order. *See* the annotations to Rule 12-201 for examples.

For a discussion of what constitutes a final order, *see Kelly Inn No. 102, Inc. v Kapnison*, 113 N.M. 231, 236 (1992), discussed in the Court of Appeals' opinion in *Frank G. and Pamela G.*, 2005-NMCA-026, ¶40, 139 N.M. 439.

The parties also now have the right to appeal orders issued after the ten-day custody hearing. Section 32A-4-18 was amended in 2014 to provide a right to an immediate appeal from a custody order entered under that section. *See* S.B. 183 as enacted, 2014 N.M. Laws, ch. 69.

Appeals from Custody Orders. If the order issued under §32A-4-18 grants legal custody of the child to or withholds it from one or more of the parties to the appeal, the appeal is to be expedited and heard at the earliest practicable time. §32A-4-18(I), added in 2014. The statute as amended specifies that the children's court retains jurisdiction to take further action in the case pursuant to §32A-1-17(B).

The Supreme Court has amended Rule 10-315 and approved new Rule 12-206A to establish special procedures for expedited appeals of orders that grant or withhold custody after the 10-day hearing, pursuant to §32A-4-18. The rules depart from key provisions of the appellate rules, such as those on docketing appeals (Rule 12-208), calendar assignments (Rule 12-210), and computation of time (Rule 12-308). According to the commentary for Rule 12-206A, the expedited appellate review process is intended to implement a party's right to an immediate appeal without delaying the subsequent stages of an abuse and neglect proceeding or tolling or extending the corresponding time limits. *See also* Rule 10-343(D) (stating that an appeal from an order under Rule 10-315 and §32A-4-18 does not affect the time limits for adjudicatory hearings).

24.3 Appeals by Leave

All orders not appealable as of right are appealable by leave of the Court of Appeals as an interlocutory appeal, if so certified with specific language by the children's court judge in the order from which review is sought. Rule 12-203.

24.4 Time Requirements

24.4.1 Filing an Appeal as of Right

Except for appeals of custody orders under §32A-4-18(I), an appeal as of right is taken by filing a notice of appeal with the district court clerk within 30 days after the entry of the order or judgment appealed from. Rule 12-201(A)(2). An appeal of a custody order under §32A-4-18(I) is initiated by filing a declaration of expedited appeal with the Court of Appeals within 5 days after the children's court's custody order. Trial counsel must file the declaration and serve it on the children's court, the trial judge, trial counsel of record for each party other than the appellant, and the court monitor or court reporter who took the record. Rule 12-206A(C).

The Court of Appeals has held that ineffective assistance of counsel is presumed where counsel fails to file a timely notice of appeal. In *In the Matter of Ruth Anne E., State ex rel. CYFD v. Lorena R.*, 1999-NMCA-035, ¶¶9-10, 126 N.M. 670, a parent's late appeal from a termination of parental rights was deemed to have been timely filed and was considered on the merits. Similarly, when counsel did not file a timely notice of appeal from an adjudication of abuse and neglect, the Court of Appeals presumed ineffective assistance of

counsel and deemed the appeal to be timely filed. *State ex rel. CYFD v. Amanda M.*, 2006-NMCA-133, ¶22, 140 N.M. 578. "[I]t is well settled that failure to timely file a notice of appeal from either an adjudication of abuse or neglect or an order terminating parental rights constitutes ineffective assistance of counsel per se, such that the merits of an appeal will be considered notwithstanding the procedural deficiency." *State ex rel. CYFD v. Lance K.*, 2009-NMCA-054, ¶51, 209 P.3d 778. This does not mean an appeal can be filed at any time regardless of the time limits found in the Rules of Appellate Procedure. A conscious decision by a respondent not to file an appeal is not the same as the failure of counsel to file an appeal in a timely manner even though the respondent wanted it filed. The reported cases deal only with the latter situation.

It is very important that respondents' counsel, in particular, consult Rule 10-352 as amended in 2013. The rule requires that a notice of appeal from a judgment on a petition alleging abuse or neglect or a judgment on a motion to terminate parental rights be signed by both the appellant and the appellant's counsel, unless the appellant is a minor child or state agency. However, the appeal may be filed without the appellant's signature if counsel certifies that the appeal is not frivolous or that:

- The appellant contested the proceedings and expressed an intention to appeal the judgment or disposition; and
- The appellant has failed to maintain contact with counsel and, despite diligent efforts, counsel has been unable to locate the appellant to sign the notice of appeal. In this case, counsel must specify the last date on which the appellant contacted counsel and the efforts counsel has made to locate the appellant. Rule 10-352(B)(2).

(Note that Rule 10-352 applies to judgments. It is not clear how or whether the rule will be applied to appeals from custody orders entered after the 10-day custody hearing.)

Appointment of Appellate Counsel. Under amendments to Rule 12-303 effective for cases filed on or after July 1, 2014, trial counsel has the responsibility for seeking an order from the Court of Appeals appointing appellate counsel, unless trial counsel intends to continue the representation or appellate counsel has already been retained to represent the respondent in the proceeding. Even when appellate counsel will be appointed, as in the case of an appeal by a respondent, the obligation of trial counsel to advocate for his or her client in the docketing statement cannot be understated. *See State ex rel. CYFD v. Alicia P.*, 1999-NMCA-098, ¶¶7-9, 127 N.M. 661 (filed 1998).

As a practical matter, trial counsel will have to handle an appeal from a custody order under §32A-4-18 from beginning to end because the timeline for the appeal is so short. ***See*** §24.4.3 below.

24.4.2 Filing an Interlocutory Appeal

An interlocutory appeal is taken by filing an application for leave to file an interlocutory appeal with the Court of Appeals within 15 days after the entry of the order appealed from. Rule 12-203(A). An interlocutory appeal can only be filed if the trial court judge certifies in

writing that the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. §39-3-4(A).

24.4.3 Filing the Docketing Statement or Declaration of Expedited Appeal

Unless otherwise ordered by the Court of Appeals, or the appeal is being taken from a custody order under §32A-4-18, trial counsel is responsible for preparing and filing the docketing statement with the Court of Appeals within 30 days after the filing of the notice of appeal. Rule 12-208(A). If the appeal is being taken from a custody order under §32A-4-18, trial counsel must file a declaration of expedited appeal with the Court of Appeals within five days of the filing of the children's court order. Rule 12-206A(C). The required contents of the docketing statement or the declaration of expedited appeal are spelled out in Rules 12-208 and 12-206, respectively.

Practice Note. This is one of the most important parts of the appeal process. The instructions found in Rules 12-208 and 12-206A must be followed carefully and what is said in the docketing statement or declaration of expedited appeal must be clear with specific references to the record and legal authorities.

In the case of an appeal from a judgment, the docketing statement will most likely determine whether the appeal is assigned to the summary calendar or the general calendar under Rule 12-210. In the case of an appeal under §32A-4-18, the declaration of expedited appeal is the ***only*** chance that the appellant has to present the issues being appealed; no further briefing by the appellant may be made. *See* Rule 10-206A.

24.4.4 Deadlines for Other Submittals

Appeals from §32A-4-18 Custody Orders. Within 10 days of the filing of the declaration of expedited appeal, the Court of Appeals may affirm the order of the children's court if it appears that the appeal is without merit or order the parties other than the appellant to file a response within 10 days of the date of the order requesting the response. The Court of Appeals has a very short timeline for making a decision. Rule 12-206A(C) and (F).

The remainder of the discussion below applies only to appeals from judgments rendered at adjudication or on a motion for termination of parental rights.

Cases Assigned to the Summary Calendar. If the case is assigned to the summary calendar, no transcript of proceedings is to be filed. Counsel has 20 days from the date of service of the appellate court clerk's notice of proposed summary disposition to file a memorandum in response to the notice. Rule 12-210(D).

Cases Assigned to the General Calendar, Non-Expedited Bench. If the case is assigned to the general calendar, the case will be further assigned to the expedited bench or the non-expedited bench. For the non-expedited bench:

- A transcript of proceedings must be filed as provided by Rule 12-211. *See* §24.6 below.
- Briefs are to be filed in accordance with Rules 12-201(B) and 12-213.
- All documents filed with the Court of Appeals, including briefs, must now be in 14 point typeface.
- Appellant's brief in chief must be filed within 45 days after the transcript is filed in the appellate court. Rule 12-210(B).
- Appellee's answer brief must be filed within 45 days after service of appellant's brief in chief. Rule 12-210(B).
- Appellant's reply brief must be filed within 20 days after service of appellee's answer brief. Rule 12-210(B).
- The brief in chief and answer brief are limited to 35 pages and the reply brief, if any, is limited to 15 pages. If the page limit is exceeded, the party filing the brief must certify the number of words or number of lines, and that number cannot exceed the number provided for in the applicable rule.

Cases Assigned to the General Calendar, Expedited Bench. The expedited bench decision program was created by Order of the Court of Appeals. *In re Court of Appeals Caseload*, No. 1-21 (filed Oct. 17, 1995), is reprinted as an Appendix to *State v. Curley*, 1997-NMCA-038, 123 N.M. 295. The Court of Appeals issued Order No. 1-46 on June 23, 2010, modifying Order No. 1-21. Order No. 1-46 is available on the Court of Appeals' website.

The parties may file written objections to an order assigning a case to the expedited bench within 10 days of the order. The court has the discretion to keep a case on the expedited bench despite objection by a party.

In re Court of Appeals Caseload, Order No. 1-46, provides the following schedule for cases assigned to the expedited bench:

- The brief in chief is to be filed and served within 30 days after the transcript is filed, the answer brief is to be filed within 30 days of service of the brief in chief, and the reply brief is to be filed within 15 days of service of the answer brief.
- The brief in chief and answer briefs are limited to 20 pages, in 14 point typeface, and the reply brief, if any, is limited to 10 pages, except by leave of the court. The same rule regarding certifying the number of words or numbers of lines if the page limit is exceeded for briefs in cases on the general calendar, non-expedited bench, applies to briefs in the expedited bench decision program. Order No. 1-46 sets out the word or line limits for briefs in the expedited bench decision program.
- Once the case is briefed, it is submitted to a panel of three judges for decision at the next available submission date. A hearing is scheduled at the next argument calendar after submission at which the panel will announce its decision, unless the panel removes the case from the expedited bench decision program. The notice of hearing will provide a method for counsel to waive attendance at the hearing for announcement of the Court of Appeals' decision. If all counsel waive attendance, no hearing will be held and the opinion will be issued within 24 hours of the hearing

date. Oral argument is not automatically held, but the Court of Appeals will grant all requests for oral argument and the argument will be held on the hearing date.

- If oral argument is held, a decision is ordinarily announced from the bench, and a written decision is usually filed within 24 hours.

Practice Note. There has been some confusion over the deadline for the filing of the brief of the child's guardian ad litem in an appeal. Although, unlike an amicus curiae, the child is a party to the case, guidance can be taken from Rule 12-215 governing the time for filing briefs of amicus curiae, which provides that "[a]n amicus curiae shall file its brief within seven (7) days after the due date of the principal brief of the party whose position it supports." This means that if the GAL supports the trial court's judgment, the GAL's brief should be filed within the time frame of the appellee's answer brief; if the GAL opposes the trial court's judgment, the GAL's brief should be filed within the time frame of the appellant's brief in chief. Following this guideline allows the appellant or appellee to respond to the GAL's brief in addition to the primary brief in the case. The GAL can always file a motion with the Court of Appeals for direction on when the GAL's brief should be filed in a particular appeal.

24.5 Filing the Transcript of Proceedings

24.5.1 Audio Recorded Transcripts

If the transcript of proceedings is an audio recording, within 15 days after receipt of the general calendar assignment, the district court clerk must prepare and send the original and two duplicates of the audio recording and an index log to the appellate court, and must prepare and maintain one duplicate. Rule 12-211(B). For appeals of custody orders under §32A-4-18(I), trial counsel for the appellant must attach an audio recording of the custody hearing to the declaration of expedited appeal. Rule 12-206A(D). (To facilitate this expedited appeal, the children's court is required to make an audio recording of the hearing and provide it immediately upon request to a party wishing to appeal. Rule 10-315(C).)

24.5.2 Other Transcripts

If the transcript of proceedings is not an audio recording, within 15 days after service of the general calendar assignment, appellant must file in district court a description of the parts of the proceeding the appellant intends to include in the transcript. Rule 12-211(C)(1). Within 15 days after appellant's designation, appellee may file in district court a designation of additional parts to be included or may apply to the district court for an order requiring appellant to designate such parts. Rule 12-211(C)(1).

Each party designating a portion of the transcript must make satisfactory arrangements with the court reporter for payment for the transcript. Proof of such arrangements must be filed with the district court within 15 days of the designation. Rule 12-211(C)(2).

Computer-aided transcripts must be filed within 30 days after the filing of the certificate of satisfactory arrangements. If the transcript is not a computer-aided transcript, it must be filed

within 60 days after the filing of the certificate. Rule 12-211(C)(3).

The parties may agree upon a statement of facts and proceedings and stipulate that they deem the statement sufficient for purposes of review. They must file the statement as a transcript of proceedings within 60 days of service of the general calendar assignment, unless otherwise ordered by the court. Rule 12-211(I).

24.6 Priority of Cases

Rule 12-206A sets forth a short timeline for deciding appeals of orders granting or withholding custody under §32A-4-18. Within 10 days of the filing of the declaration of expedited appeal, the Court of Appeals must either affirm the order of the children's court, if it appears that the appeal is without merit, or order the parties to respond to the declaration within 10 days. In that case, the court must dispose of the appeal within 30 days of the filing of the declaration, although an extension of up to 15 days is available if necessary to protect the health and safety of the child. Rule 12-206A(F).

Appeals from judgments in abuse and neglect and termination of parental rights cases are given priority by the Court of Appeals when scheduling cases for submission to a panel for a decision. The Court of Appeals has also adopted a policy aimed at expediting these appeals to the extent possible consistent with the due process rights of the parties.

Supreme Court Practice Note. Appellate practitioners should be aware that cases are being expedited at the Supreme Court level as well. Supreme Court Order No. 13-8500, issued on June 5, 2013, shortens the schedule for briefing and oral argument when a petition for writ of certiorari is granted in an abuse or neglect or termination of parental rights proceeding, unless otherwise ordered by the Court.

Court of Appeals' decisions on appeals from §32A-4-18 custody orders are not subject to further review at all. Rule 12-206A(G).

24.7 Standard of Review

It is the state's burden to prove the statutory grounds for adjudication of abuse or neglect and for termination of parental rights by clear and convincing evidence, with a beyond a reasonable doubt standard required for termination in the case of an Indian child. §§32A-4-20(H) and 32A-4-29(I); *State ex rel. CYFD in the Matter of Sara R.*, 1997-NMSC-038, ¶10, 123 N.M. 711; *State ex rel. CYFD v. Tammy S.*, 1999-NMCA-009, ¶13, 126 N.M. 664 (filed 1998). The appellate court will uphold the judgment if, viewing the evidence in the light most favorable to the judgment, a fact finder could properly determine that the required standard was met. *In the Matter of the Termination of Parental Rights of Eventyr J.*, 120 N.M. 463, 466 (Ct. App. 1995).

Questions of law are reviewed *de novo*. *Martinez v. Martinez*, 93 N.M. 673 (1979). A claim that procedural due process was denied is also reviewed *de novo*. *In the Matter of Ruth Anne E.*, 1999-NMCA-035, ¶22, 126 N.M. 670.

24.8 Stay of Proceedings

The order of the children's court from which an appeal is taken is not suspended during the pendency of the appeal unless the children's court or the appellate court specifically orders the stay or suspension of the order. The Children's Code, the Children's Court Rules, and the Rules of Appellate Procedure set forth procedures and requirements for a stay. *See* §32A-1-17 and Rules 10-151 and 12-206.

24.9 Jurisdiction During an Appeal

24.9.1 Children's Court Jurisdiction During Appeal

The children's court judgment stands until reversed. The children's court retains jurisdiction in the case to enforce (or stay) the order while it is on appeal and to take other actions for the welfare of the child. This was reasonably clear given the ongoing responsibilities of the children's court in an abuse or neglect case under the Children's Code, together with the New Mexico Supreme Court's opinions in *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231 (1992), and *Albuquerque Journal v. Jewell*, 2001-NMSC-005, 130 N.M. 64. It has been confirmed by the Court of Appeals in *State ex rel. CYFD v. Frank G. and Pamela G.*, 2005-NMCA-026, 137 N.M. 137, *aff'd, In the Matter of Pamela A.G.*, 2006-NMSC-019, 139 N.M. 459.

Kelly Inn v. Kapnison was not a child welfare case but the Court's opinion may be helpful to children's court judges and practitioners debating the jurisdiction of the children's court to address the needs of the child while a case is on appeal. The Court observed:

> [T]he rule that an appeal "completely divests" the trial court of jurisdiction over "the case" or "the litigation" has, through frequent repetition, taken on the character of an inflexible law of nature rather than a pragmatic guideline enabling trial courts to determine when to proceed further with some part of a case and when to refrain because issues already resolved are under consideration by an appellate court….
>
> It is clear … that a pending appeal does not divest the trial court of jurisdiction to take further action when the action will not affect the judgment on appeal and when, instead, the further action enables the trial court to carry out or enforce the judgment. 113 N.M. at 241.

When considering a question about the jurisdiction of the trial court more than 30 days after entry of judgment, under §39-1-1, the Court stated: "The trial court retains the same jurisdiction to deal with matters collateral to or separate from the issues resolved in the judgment as it has following the filing of the notice of appeal." 113 N.M. at 244.

Albuquerque Journal v. Jewell involved the taking of a writ to the Supreme Court, not a regular appeal, but the same uncertainty over the continued role of the children's court existed. The lower court did not believe it had jurisdiction over its order once the matter went before the appellate court. The Supreme Court disagreed. In accordance with Rule 12-

504(D)(1), a party seeking a stay of some action must include a request for a stay in its petition. Unless a stay is granted, the children's court retains jurisdiction over the order, notwithstanding the appellate court's consideration of its propriety. 2001-NMSC-005, ¶8.

Frank G. and Pamela G. puts the matter to rest:

> While an appeal of an abuse and neglect adjudication is pending, the children's court has jurisdiction to take further action in the case under Section 32A-1-17(B) which states that an appeal to this Court 'does not stay the judgment appealed from.' The Abuse and Neglect Act provides for additional services by CYFD and further hearings by the court to monitor the actions of CYFD, the well-being of the child, and the progress of the parent.

2005-NMCA-026, ¶42. With regard to appeals under §32A-4-28(I), the statute provides that the children's court has jurisdiction to take further action pursuant to §32A-1-17(B) while appeals of custody orders are pending.

24.9.2 Appellate Jurisdiction After Children's Court Dismissal

An "appeal of an abuse or neglect adjudication challenging the sufficiency of the evidence is not rendered moot by the district court's dismissal of the underlying case while the adjudication is on appeal." *State ex rel. CYFD v. Amanda H.*, 2007-NMCA-29, ¶1 and ¶¶13-18 (note that this is a different case than *Amanda M.*, cited earlier). The court concluded that cases challenging the sufficiency of the evidence of abuse or neglect are capable of repetition but may evade appellate review because district courts are required to dispose of Children's Code cases quickly, and may do so before the Court of Appeals is able to complete its review. As such, these cases may fall within an exception to the mootness doctrine.

24.9.3 Children's Court Jurisdiction After Appellate Reversal

"[A]fter an adjudication of abuse or neglect is reversed by [the Court of Appeals], the district court, on remand, retains jurisdiction to determine whether the parent prevailing on appeal should regain custody of the child…. We do not believe that an automatic return of a child to his or her parent following a reversal of an adjudication of abuse or neglect is necessarily in the child's best interests, particularly where … the parent has not had actual custody of Child for a number of years." *State ex rel. CYFD v. Benjamin O.*, 2007-NMCA-070, ¶35, 141 N.M. 692 (citations omitted). The presumption exists that "Child should be returned to [parent] at the time the adjudication was reversed, unless the district court determined that [parent] was unfit or that there were extraordinary circumstances that justified denying [parent] custody. Such findings should be expressly made by the court." *Id.* ¶36.

24.10 Preserving Error for Appeal

To preserve error for review, it is important to raise the issue in the trial court. According to the Court of Appeals in *Yeager v. St. Vincent Hospital*, 1999-NMCA-020, ¶8, 126 N.M. 598 (filed in 1998):

> Generally, "a party's failure to request findings and conclusions on specific factors or issues it wishes to be considered results in the waiver of any argument it may wish to raise on appeal as to those issues." *Cordova v. Taos Ski Valley, Inc*., 121 N.M. 258, 263, 910 P.2d 334, 339 (Ct. App. 1995). "However, where the record is sufficiently clear to allow the appellate court to understand which issues were raised and argued to the trial court, and not abandoned, the appellate court may address these issues on their merits."

Yeager, ¶8. This comports with the Rules of Appellate Procedure. According to Rule 12-216, to preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required nor is it necessary to file a motion for a new trial to preserve questions for review.

Note. Rule 12-216 does not preclude the appellate court from considering jurisdictional questions or, in its discretion, questions involving general public interest or fundamental error or fundamental rights of a party. Rule 12-216(B)

The Court of Appeals addressed preservation of error in a case challenging the appointment of the grandparents as guardians under the Probate Code, over the mother's objections. In the court below, mother's attorney did not cite to past authorities or specifically argue that the district court did not have authority under the Probate Code to appoint guardians for the girls. Yet the Court of Appeals decided that requested findings of fact to the effect that the mother had not abused or neglected the girls, that she was a fit parent, and that her parental rights should not be terminated were sufficient to alert the trial court to the appropriate standards to apply. The court cited for support another appellate decision in which the parties having advised the district court of the general theory was sufficient to preserve an issue for appeal. *In the Matter of the Guardianship of Ashleigh R*., 2002-NMCA-103, ¶12, 132 N.M. 772, citing *Quintana v. Baca*, 1999-NMCA-017, ¶12, 126 N.M. 679.

The Supreme Court addressed preservation in a case asserting that the respondent mother had a due process right to have an expert appointed at the State's expense to assist in her defense. The Court found that the mother had preserved the issue for appeal by raising it in post-trial motions before the district court entered its findings and judgment because "they alerted the trial court to the alleged error before the entry of the court's final findings and judgment, giving the trial court the opportunity to correct the error." *State ex rel. CYFD v. Kathleen D.C*., 2007-NMSC-018, ¶10, 141 N.M. 535.

A word of caution is due about no contest pleas. A claim that a plea was involuntary or unknowing may be waived if the respondent does not move to revoke or withdraw the plea when she first learns the consequences and if she does not appeal at the time. *State ex rel. CYFD v. Amy B.*, 2003-NMCA-017, ¶9, 133 N.M. 136. In *Amy B*., the mother raised the issue for the first time in the Court of Appeals after the children's court had terminated her parental rights. Yet she had entered the no contest plea at adjudication and did not move to revoke or withdraw it at disposition when she learned the consequences of the plea, nor did she appeal the disposition. As a result, she waived any issue concerning an involuntary or unknowing plea.

CHAPTER 25

PARTIES; INTERVENTION

This chapter describes:

- The parties to the abuse or neglect proceeding.
- Persons who may intervene in the proceeding.
- The unique role of the foster parent or other care provider, as well as CASAs and CRBs.

25.1 Original Parties to the Proceeding

Children's Court Rule 10-121(B) lists the parties to an abuse or neglect action:

- the state;
- a parent, guardian, or custodian who has allegedly neglected or abused the child;
- the child alleged to be neglected or abused;
- any other person made a party by the court (***see*** §§25.2 and 25.3 below).

The state may also join as parties the non-custodial parent or parents, the guardian or custodian of the child, or any other person permitted by law to intervene in the proceedings. Rule 10-121(C).

If a motion for termination of parental rights (TPR) is filed in the case, the list of necessary parties under Rule 10-121 expands to include any parent who has a constitutionally protected liberty interest in the child (***see*** Handbook Chapter 2). If that parent was not already a party, he or she must be joined in the action and served with summons and a copy of the motion. Rule 10-121(D).

The Term "Parent." The term "parent" is defined in the Children's Code only by way of example: According to §32A-1-4(P), the term "includes a biological or adoptive parent if the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child." There may be other persons who should be joined as parents, such as a presumed father who is not the biological father. The Adoption Act requires the consent of the presumed father for an adoption to take place, which makes it particularly important that the presumed father be brought into the case if TPR is a possibility. *See* §32A-5-17, as well as the definition of presumed father at §32A-5-3.

In a 2-1 decision, the Court of Appeals in 2014 held that a guardian appointed under the Kinship Guardianship Act who was a party to the abuse and neglect proceeding could not be dismissed involuntarily before a hearing on termination of parental rights, even though the guardian was not a parent. The appellate court held that the guardian was a necessary party until the guardianship was revoked under the Act. The Supreme Court has granted certiorari in the case. *State ex rel. CYFD v. Djamila*, 2014-NMCA-045, 322 P.3d 444, *cert. granted*, 2014-NMCERT-004.

25.2 Intervention as of Right

25.2.1 Statute

Under §32A-4-27, the following persons are entitled to intervene as a matter of right and may do so during any stage of the proceeding:

- the child's parent, if not named in the petition alleging abuse or neglect; or
- when the child is an Indian child, the Indian child's tribe. §32A-4-27(D).

The child's foster parent is also entitled to intervene as a matter of right when the following conditions are met:

- the foster parent desires to adopt the child;
- the child has resided with the foster parent for at least six months within the year prior to the termination of parental rights;
- a motion for termination of parental rights has been filed by a person other than the foster parent; and
- bonding between the child and the child's foster parent is alleged as a reason for terminating parental rights in the motion for termination. §32A-4-27(E).

25.2.2 Rule

Rule 10-122 also provides that the child's parents and Indian tribe may intervene as a matter of right. In case of the foster parents described above, the rule only addresses permissive intervention and provides for intervention by persons with a statutory right to intervene "upon timely application" and subject to "such terms and conditions as the judge may prescribe." ***See*** §25.3.2 below.

25.3 Permissive Intervention

25.3.1 Statute

Under §32A-4-27, the court may permit any of the following people to intervene as a party, with a motion for affirmative relief, at any stage of the proceeding:

- a foster parent with whom the child has resided for at least six months;
- a relative within the fifth degree of consanguinity with whom the child has resided;
- a stepparent with whom the child has resided; or
- a person who wishes to become the child's permanent guardian. §32A-4-27(A).

Motions for affirmative relief might include, for example, a motion to adopt, a motion for permanent guardianship, a motion for visitation, or any other motion regarding the interaction with the child. Failure to bring to the court's attention the motion for affirmative relief can defeat the attempt to intervene. *In Re Marcia L.*, 109 N.M. 420, 421 (Ct. App. 1989).

When determining whether the movant should be permitted to intervene, the court must consider:

- the person's rationale for intervening; and
- whether intervention is in the best interest of the child. §32A-4-27(B).

When the court determines that the child's best interest will be served by the intervention, the court may grant the motion unless the party opposing it can demonstrate that:

- a viable plan for reunification with the respondents is in progress, and
- intervention could impede the progress of the reunification plan. §32A-4-27(A)-(C).

25.3.2 Rule

Rule 10-122 provides that, upon timely application, the following persons may be permitted to intervene under such terms and conditions as the judge may prescribe:

- the child's guardian or custodian or any other person permitted by law;
- any person with a statutory right to intervene; or
- any person who has a constitutionally protected liberty interest in the proceeding if the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Rule 10-122.

The decision of the court on a motion for intervention can be reviewed on appeal for abuse of discretion only. *In re Melvin B., Sr.*, 109 N.M. 18 (Ct. App. 1989).

Case Note: *State ex rel. CYFD v. Laura J.*, 2013-NMCA-057, involved a situation in which Colin, a cousin to the child, had been allowed to intervene in the children's court proceeding, pursuant to the parties' stipulation. The issue on appeal was whether Colin had standing to appeal, and the Court of Appeals decided that he did. In the course of reaching that conclusion, the Court wrote: "As reflected in the order granting Colin status as an intervenor, the Department in effect stipulated that Colin had a sufficient legal interest under Section 32A-4-25.1 to seek consideration as a viable placement for Child so as to preserve family connections." 2013-NMCA-057, ¶48.

25.4 Non-Party Participants

25.4.1 Foster Parents, Preadoptive Parents, Relatives Providing Care

The Abuse and Neglect Act requires that the foster parent, preadoptive parent, or relative providing care for the child be given notice of, and an opportunity to be heard in, any review or hearing with respect to the child. The foster parent, preadoptive parent, or relative need not become a party to the review or hearing to participate in this manner. §32A-4-27(F).

Similar provisions are found in other sections of the Act:

- The foster parent, preadoptive parent or relative providing care must be given notice and an opportunity to be heard at the dispositional phase. §32A-4-20(C).
- The children's court attorney must give notice to the foster parent or substitute care provider of the time, place and purpose of judicial review hearings. §32A-4-25(C).
- The children's court attorney must give notice to the foster parent or substitute care provider of the time, place and purpose of permanency hearings. §32A-4-25.1(G).

The Children's Court Rules emphasize the importance of ensuring that foster parents, preadoptive parents, or relatives providing care for the child are informed of their right to be heard at permanency and periodic judicial review hearings. *See* Rule 10-104.1.

25.4.2 CASA and CRB Representatives

Once the adjudication is concluded, there tends to be increasing involvement on the part of court appointed special advocates (CASAs) and the local citizen review boards (CRBs):

- If a CASA has been appointed, the CASA will assist the court in determining the best interests of the child and often submits reports to the court during the course of the proceeding post-adjudication. Rule 10-164.
- The children's court attorney must send notice of judicial review and permanency hearings to the child's CASA and the contractor administering the local CRB. §§32A-4-25(C) and 32A-4-25.1(G)).

- Prior to the initial judicial review, CYFD must send copies of the adjudicatory and dispositional orders and notice of the judicial review to the local CRB. A representative of the CRB is invited to attend and comment to the court. §32A-4-25(A).
- Prior to any subsequent judicial review, CYFD is to send a progress report to the CRB, which may review the dispositional order and the report and submit its findings and recommendations to the court. §32A-4-25(B).
- The Citizen Substitute Care Review Act, §§32A-8-1 to 32A-8-7, also refers to judicial reviews. Prior to any judicial review, the CRB will review the dispositional order or continuation of the order and CYFD's progress report on the child and submit a report to the court. The parties in the proceedings are to be given notice of the review board meeting and an opportunity to participate fully in the meeting. §32A-8-6.
- Prior to the first permanency hearing, CYFD is to submit a progress report to the local CRB. The CRB may submit its findings and recommendations to the court. §32A-4-25.1(A).

See Handbook Chapters 9 and 10 for descriptions of the roles and responsibilities of CASAs and CRBs respectively.

CHAPTER 26

DISCOVERY AND DISCLOSURE

This chapter covers:

- The rules on discovery.
- The rules on disclosure.

26.1 Overview

A series of discovery rules applies to both abuse and neglect cases and delinquency proceedings. *See* Rules 10-131 through 10-138. For abuse and neglect cases, the Supreme Court has also adopted requirements for the disclosure of certain information irrespective of any requests for discovery. These disclosure rules are similar but not the same as the disclosure rules in Article 2 for delinquency cases. *See* Rules 10-331 through 10-333, described in §26.3 below.

Practice Note: The Children's Court Rules are organized in articles. Article 1 contains rules that apply to both abuse and neglect proceedings and delinquency proceedings. Article 2 contains rules applicable just to delinquency and Article 3 applies to abuse and neglect. Article 4 contains forms approved by the Supreme Court for use in abuse and neglect or delinquency proceedings, as applicable. A proposal pending in the Supreme Court in June 2014 would separate the abuse and neglect forms into a new Article 5.

26.2 Discovery Rules

26.2.1 Scope of Discovery

Rule 10-133 of the Children's Court Rules describes the scope of discovery as follows:

> Unless limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the act charged or alleged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

The rule provides for two forms of discovery, "statements," and depositions, as described in this chapter.

26.2.2. Forms of Discovery; Procedures

Statements: Any person, other than the respondent, with information subject to discovery must give a statement if requested by a party. If the person refuses, the party may obtain the statement by serving a "notice of statement" upon the person to be examined and upon other parties at least 5 days before the date scheduled for the statement. A subpoena may be served to secure the presence of the person to be examined or the materials to be examined during the statement. Rule 10-133(A).

Depositions: Depositions may be taken upon:

- agreement of the parties; or
- order of the court at any time after the petition is filed, upon a showing that it is necessary to take the person's deposition to prevent injustice.

Attendance of witnesses can be compelled by subpoena. If a subpoena duces tecum for the production of documents or things is to be served, the designation of materials to be produced must be attached to or included with the notice of deposition. Rule 10-133(B), (D) and (E).

Rule 10-133 describes in extensive detail the procedures to be followed for depositions, which are similar but by no means identical to the procedures outlined in the Rules of Civil Procedure. Rule 10-134 provides very specific practices and procedures to be followed when a deposition is to be recorded by audiotape or videotape. Rule 10-132 allows the parties to vary procedures by written stipulation. Rule 10-136 allows for motions for orders compelling discovery in depositions, and sanctions for failure to comply. All of these rules should be reviewed in their entirety when depositions are under consideration.

Rule 10-135 allows for the use of depositions in court proceedings for any purpose permitted by the Rules of Evidence. It also addresses the effect of errors and irregularities in a deposition to be used in court.

26.2.3 Protective Orders

Either a party or the person from whom discovery is sought may move for a protective order for good cause shown, and the order may be issued by the court in which the action is pending or the court in the district where the deposition or statement is to be taken. Rule 10-138. The court may make any order which justice requires in order to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery, or economic reprisals. Rule 10-138 lists a number of restrictions that may be included in the order, including that the deposition or statement be conducted with no one present but the persons designated by the court.

If the moving party is concerned that a showing of good cause requires the disclosure of information that should not be disclosed, the party may make the showing of good cause in the form of a written statement for inspection by the court in camera. If the court does not

permit the in camera showing, the statement will be returned to the movant upon request or sealed. Rule 10-138(B).

26.3 Disclosure Rules

26.3.1 Disclosure by Parties Required

Rules 10-331, 10-332, and 10-333 provide specifically for the disclosure of certain information by CYFD, the respondent, and the child's guardian ad litem or attorney, respectively. These rules are similar but not identical to the rules that apply in delinquency proceedings (Rules 10-231 and 10-232).

Practice Note: Rules 10-331, 10-332 and 10-333 require that the parties disclose the witnesses they intend to call. When thinking about potential witnesses, it is important to keep in mind any need for an interpreter. Rule 10-167, which became effective in January 2013, sets forth the procedures for the use of court interpreters. The rule, for example, requires that the court be notified in writing of the need for an interpreter for a witness *upon service of the notice of hearing*, which could be before the deadline for disclosure. Rule 10-167 allows the court to assess costs against a party for failing to provide timely notification of a need for a court interpreter, unless the party establishes good cause for the delay. Rule 10-167(B); *see also* Form 10-441 and 442. ***See*** Handbook §15.3 for a more detailed discussion of Rule 10-167.

26.3.2 Disclosure by CYFD under Rule 10-331

CYFD must disclose certain information and make it available to the parties at least 15 days before the adjudicatory hearing or termination of parental rights hearing, although the court may shorten the time. CYFD must disclose and make available:

- statements made by the respondent or a co-respondent, or copies thereof, which are within the possession, custody, or control of CYFD and the existence of which is known, or by the exercise of due diligence may become known, to the children's court attorney;
- books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are in CYFD's possession, custody, or control and which are intended as evidence at the hearing, or were obtained from or belong to the respondent;
- results or reports of physical or mental exams, and of scientific tests and experiments made in connection with the case, which are within CYFD's possession, custody or control and the existence of which is known, or by the exercise of due diligence, may become known to the children's court attorney; and
- a written list of the names and addresses of all witnesses the children's court attorney intends to call, together with any recorded or written statement made by the witness. Rule 10-331(A).

The parties may examine, photograph, or copy material so disclosed. Rule 10-331(B).

The court may order any other discovery permitted by the Rules of Civil Procedure and may order or limit the production of books, documents, photographs, tangible objects, reports, or other information as may be necessary to ensure a fair consideration of the allegations while considering the best interests of the child. Rule 10-334.

Unless otherwise ordered, the children's court attorney is not required to disclose material if:

- the disclosure will expose a confidential informer; or
- there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment which outweighs any usefulness of the disclosure to defense counsel. Rule 10-331(D).

At least 10 days before the hearing, the children's court attorney must file a certificate stating that all information required to be produced has been produced, except as specified. If information specifically excepted is later furnished, a supplemental certificate must be filed specifying the material furnished. Copies of the certificate and any supplemental certificate must be served on the parties. Rule 10-331(C).

Rule 10-331(C) requires that certificates filed by the children's court attorney acknowledge the continuing duty to disclose additional information obtained prior to the adjudicatory hearing or TPR hearing. ***See*** §26.3.5 below.

26.3.3 Disclosure by Respondent under Rule 10-332

The requirements for disclosure by the respondent are similar but not the same as for CYFD. The respondent must disclose the following information and make it available to the parties at least 15 days before the adjudicatory hearing or TPR hearing, unless the court orders a shorter time:

- books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the respondent and which the respondent intends to introduce in evidence or which were prepared by a witness whom the respondent intends to call;
- results of reports of physical or mental exams and of scientific tests or experiments made, or copies thereof, within the possession or control of the respondent, which the respondent intends to introduce or which were prepared by a witness the respondent intends to call; and
- a list of the names and addresses of the witnesses the respondent intends to call, together with any recorded or written statement made by the witness. Rule 10-332(A).

The parties may examine, photograph, or copy any material so disclosed. Rule 10-332(B).

Except as to scientific or medical reports, the rule does not authorize the discovery or inspection of:

- reports, memoranda, or other internal defense documents made by the respondent or respondent's attorneys in connection with the investigation or defense of the case, or
- statements made by the respondent to respondent's agents or attorneys. Rule 10-332(C).

Like the children's court attorney, the respondent must file a certificate stating that all required information has been produced, except as specified. This certificate must be filed at least 10 days before the hearing in question. If information specifically excepted is later furnished, a supplemental certificate must be filed specifying the material furnished. Copies of the certificate and any supplemental certificate must be served on the parties. Rule 10-332(D).

Rule 10-332(D) requires that certificates filed by the respondent acknowledge the continuing duty to disclose additional information obtained prior to the adjudicatory hearing or TPR hearing. ***See*** §26.3.5 below.

26.3.4 Disclosure by Child's GAL or Youth Attorney under Rule 10-333

The requirements for disclosure by the GAL or youth attorney for the child are similar but not the same as the requirements for disclosure by CYFD and the respondent under Rules 10-331 and 10-332, respectively. Unless the court orders a shorter time, the GAL/youth attorney must disclose certain information and make it available to the parties at least 15 days before the adjudicatory hearing or TPR hearing. The GAL/youth attorney must disclose and make available:

- a statement of the child's declared position;
- a statement of the GAL's position (but not the youth attorney's since the youth attorney is client-directed and does not have a separate position);
- any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the GAL/youth attorney and which the GAL/youth attorney intends to introduce in evidence or which were prepared by a witness whom the GAL/youth attorney intends to call;
- results or reports of physical or mental exams and of scientific tests or experiments made, or copies thereof, within the possession or control of the GAL/youth attorney, which the GAL/youth attorney intends to introduce or which were prepared by a witness the GAL/youth attorney intends to call; and
- a list of the names and addresses of the witnesses the GAL/youth attorney intends to call, together with any recorded or written statement made by the witness. Rule 10-333(A).

The parties may examine, photograph, or copy any material disclosed. Rule 10-333(B).

Except for scientific or medical reports, the rule does not authorize discovery or inspection of:

- reports, memoranda, or other internal defense documents made by the GAL/youth attorney in connection with the investigation or defense of the case; or
- statements made by the child to the GAL/youth attorney unless such statements contradict prior statements made by the child in connection with any allegation of abuse or neglect. Rule 10-333(C).

Like the children's court attorney and the respondent, the GAL or youth attorney must file a certificate stating that all required information has been produced, except as specified. This certificate must be filed at least 10 days before the hearing in question. If information specifically excepted is later furnished, a supplemental certificate must be filed specifying the material furnished. Copies of the certificate and any supplemental certificate must be served on the parties. Rule 10-333(D).

Rule 10-333(D) also requires that certificates filed by the GAL/youth attorney acknowledge the continuing duty to disclose additional information obtained prior to the adjudicatory hearing or TPR hearing. ***See*** §26.3.5 below.

26.3.5 Continuing Duty to Disclose

All three of the disclosure rules require that the parties acknowledge in their certifications the continuing duty to disclose additional information. Under Rule 10-137, the parties have a continuing duty to disclose information that would have been subject to disclosure if known at the time:

> If, subsequent to compliance with Rule 10-231, 10-232, 10-331, 10-332, 10-333 or 10-334 NMRA and prior to or during the adjudicatory hearing or termination of parental rights hearing, a party discovers additional material or witnesses which the party would have been under a duty to produce or disclose at the time of such previous compliance if it were then known to the party, the party shall promptly give written notice to the other party of the existence of the additional material or witnesses.

26.3.6 Sanctions for Failure to Disclose

All three of the disclosure rules close with the statement:

> If [CYFD, the respondent, or the GAL/youth attorney] fails to comply with any provision of this rule, the court may enter an order pursuant to Rule 10-137 NMRA or Rule 10-165 NMRA.

Under Rule 10-165, an attorney who willfully fails to observe requirements of the rule may be held in contempt of court and subject to disciplinary action. Under Rule 10-137, the court may order discovery or inspection of the materials not previously disclosed, grant a continuance, prohibit the non-disclosing party from calling the witness or introducing into evidence the material not disclosed, or make other orders appropriate under the circumstances.

26.4 Court-Ordered Diagnostic Examinations and Evaluations

At the conclusion of the custody hearing, the court may order the respondent or the child alleged to be neglected or abused, or both, to undergo appropriate diagnostic examinations or evaluations. Copies of the reports must be provided to the parties at least five days before the adjudicatory hearing, but not to the court. §32A-4-18(G). Rule 10-335 also provides for court-ordered diagnostic examinations and evaluations:

> At any time after the commencement of an abuse or neglect proceeding, upon motion of a party or upon the court's own motion, the court may order a respondent or any child alleged to be neglected or abused to undergo a diagnostic examination or evaluation. Copies of any diagnostic examination or evaluation report shall be provided to the parties. If the examination is ordered prior to the adjudicatory hearing, copies of the diagnostic or evaluation report shall be provided to the parties at least five (5) days prior to the adjudicatory hearing. Diagnostic or evaluation reports shall not be provided to the court prior to the adjudicatory hearing.

26.5 Discovery in Practice

Traditional discovery as practiced in other types of civil litigation has not played a large role in civil abuse and neglect proceedings to date. One of the reasons for the limited use of discovery is the short timeline. The custody hearing is held within 10 days of the filing of the petition alleging abuse or neglect and the adjudicatory hearing takes place within 60 days of service of the petition. Another reason is that informal discovery does take place. Affidavits filed early in the case provide information to the parties, the case worker submits a written or verbal report at the custody hearing, CYFD usually makes its files available to the GAL, youth attorney, and respondents' attorneys, and the pre-adjudicatory and pre-permanency meetings all provide further opportunity for information-sharing.

Important Note: The disclosure rules reflect the fact that the timelines are short in these cases and that there is little time for the back-and-forth process involved in more formal discovery. They are significant requirements and the consequences of non-compliance can be serious. If the disclosures are not made, the court can prohibit the party from using the witnesses and materials that have not been disclosed, with obvious ramifications. Continuances ordered so that other parties can review surprise information can also pose problems, given busy court dockets and the time-sensitive nature of the proceedings.

CHAPTER 27

EVIDENCE

This chapter covers general evidentiary issues in civil abuse and neglect proceedings; rules applicable to the specific stages of abuse and neglect proceedings are discussed in the chapters on those stages. This chapter addresses:

- Evidentiary rules and procedures applied to child witnesses, with emphasis on eliciting testimony from children.
- Rules governing privileges and use immunity.

Please note:

- Proceedings under the Abuse and Neglect Act are civil in nature. Criminal standards do not apply. *Crawford v. Washington* and related cases, which deal with the Confrontation Clause, are discussed briefly in §34.6.7 of this Handbook.
- The rules of evidence apply to all proceedings in children's court except where a statute or rule specifies otherwise. Rule 10-141. Evidence Rule 11-1101(D) provides that the rules of evidence, other than those governing privileges, do not apply to the issuance of *ex parte* custody orders, custody hearings, dispositional hearings, permanency hearings, or judicial reviews.
- The New Mexico Rules of Evidence were amended in 2012 and 2013 to be consistent with the restyled Federal rules. According to the Committee commentary, most of the changes are stylistic and are not intended to change the result in any ruling on admissibility.

27.1 Competency of a Minor to Testify

27.1.1 The Law

Statute. §32A-6A-5: "The fact that a child has received treatment or habilitation services or has been accepted at or admitted to a hospital or institutional facility shall not constitute a sufficient basis for a finding of incompetence or the denial of a right or benefit of any nature that the child would otherwise have."

Rule. Rule 11-601 of the Rules of Evidence: "Every person is competent to be a witness unless these rules provide otherwise."

Case Law. Children have been accepted as competent witnesses in federal court, *see Wheeler v. U.S.*, 159 U.S. 523, 524-25 (1895), and New Mexico courts for over 100 years. In *Territory v. DeGutman***,** 8 N.M. 92, 97-98 (1895), a ten year old child was declared competent to testify. The court observed that trial judges should inquire into the "degree of understanding possessed [by the child], and if it then appears that the child has sufficient natural intelligence, and understands the nature and effect of an oath, he [should] be permitted to testify, whatever his age may be."

The statement in *DeGutman* essentially summarizes the rule as it remains today. To testify, a witness must possess all of the following:

- capacity to observe;
- sufficient intelligence;
- adequate memory;
- ability to communicate;
- awareness of the difference between truth and falsehood; and
- appreciation of the obligation to tell the truth in court.

These requirements apply to all witnesses, including children. *Myers on Evidence of Interpersonal Violence*, §2.01. Provided they meet the criteria for testifying, children of any age may testify. There is no particular age below which children are automatically disqualified from testifying. *Id*. In *State v. Hunsaker*, 693 P.2d 724 (Wash. 1984), a three year old child was found competent to testify about what had happened to her when she was age two.

New Mexico Cases. Cases addressing this issue include:

- *State v. Armijo***,** 18 N.M. 262 (1913). An "apparently ignorant and illiterate" 15 year old was permitted to testify. The appellate court will not review the discretion of the trial court in permitting a child of tender years to testify, except in a clear case of abuse of discretion.

- *State v. Ybarra*, 24 N.M. 413 (1918). A child of "tender years" was permitted to testify. The court held that although the child stated that he did not understand the nature of an oath, that "is not of itself sufficient ground for his exclusion as a witness, where it clearly appears that the child has sufficient intelligence to understand the nature of an oath and to narrate the facts accurately, and knows that it is wrong to tell an untruth and right to tell the truth, and that if he told an untruth he would be punished, and from other facts, that he is in fact competent."

- *State v. Manlove*, 79 N.M. 189 (Ct. App. 1968). A 6-year old girl victim of sexual assault was permitted to testify. The court stated there is no rule of law setting a birth date for presumed competency, and the burden of showing incompetency is on the party asserting it. The court held that "the trial court must determine from inquiries

the child's capacities of observation, recollection and communication, and also the child's appreciation or consciousness of a duty to speak the truth."

- *State v. Barnes*, 83 N.M. 566 (Ct. App. 1972). Two boys aged 10 and 11 were held competent to testify. The issue of competence was within the trial court's discretion.

- *State v. Estrada*, 86 N.M. 286 (Ct. App. 1974). The trial court did not abuse its discretion in finding a child witness competent to testify who had just turned 8 and stated that to tell a lie meant you were not telling the truth and that he would get into trouble if he told a lie.

- *State v. Noble*, 90 N.M. 360 (1977). A 7-year old eyewitness understood her duty to tell the truth and thus was competent to testify. The court can determine, after inquiring into the child's capacities of observation, recollection, and communication, and also the child's appreciation or consciousness of a duty to speak the truth, whether the witness's testimony is competent.

- *State v. Macias*, 110 N.M. 246 (Ct. App. 1990). "Competency means that the witness appreciates the duty to speak the truth and possesses the intelligence and the capacities to observe, recollect, and communicate." In order for the videotaped interviews of children aged 3 and 4 to fall within the Rule 11-804(B)(2) exception to the hearsay rule that requires witness to be unavailable, the children had to be declared incompetent to testify. The court concluded that the incompetency determination was inadequate because the children were not questioned about their ability to recall or the duty to tell the truth.

- *State v. Fairweather*, 116 N.M. 456 (1993). "A child witness, or any competent witness for that matter, need not know the consequences of perjurious testimony, or even what the term 'perjury' means; he or she need only know that lying is wrong." Thus, even though there were inconsistencies in one of the boys' testimony, this did not mean the boy was incompetent to testify.

- *State v. Ruiz*, 2007-NMCA-014,141 N.M. 53. The competency of a child victim was challenged based on a claim of non-reliability due to suggestive questioning and interviewing techniques. "Although New Mexico's courts have recognized the dangers associated with suggestive interviewing techniques in cases of this nature [citation omitted], neither this Court, nor the New Mexico Supreme Court, has adopted the novel *Michaels* approach, which places a heavy burden on the proponent of child victim testimony to establish its reliability." (*Michaels* refers to *State v. Michaels*, 642 A.2d 1372 (N.J. 1994).) "When an individual's competency to testify is challenged, the district courts are merely required to conduct an inquiry in order to ensure that he or she meets a minimum standard, such that a reasonable person could 'put any credence in their testimony.' "

At any proceeding with a child witness, the trial judge must decide whether the witness is competent to testify. Starting with the threshold assumption that any witness is competent unless shown otherwise, it has been unclear what methods and procedures the court should use for determining testimonial competency when a minor witness's ability is questioned. Some basic rules, however, apply to this determination.

27.1.2 Procedure for Determining Testimonial Competence

Competency Examination. When testimonial competence is questioned and properly raised before the court, the judge may conduct a competency examination. The approach is similar to that used for *voir dire* of experts or other witnesses whose testimony must be evaluated under the balancing tests of Rules 11-401 and 11-403. In practice, most judges expect the proponent of a child's testimony to establish competency as foundation for the child's testimony.

Burden of Proof. The burden of proof in such proceedings is upon the party challenging the child witness's competency. The party questioning competency must raise the issue to the court and must make an objection if the party believes that a particular procedure in making the inquiry is incorrect. *State v. Manlove*, 79 N.M. 189, 190, 192-193 (Ct. App. 1968).

Application of Rules of Evidence. Except for the rules relating to privilege, the Rules of Evidence do not apply to the court's inquiry. Rule 11-104(A); *see Myers on Evidence of Interpersonal Violence*, §2.13. The court should exercise its discretion based upon the child witness's responses to questions, as well as by observing the child's overall demeanor and maturity. The court may also rely on extrinsic evidence, such as testimony or reports from doctors, psychologists, therapists, or evaluators, if determined necessary. *See Myers*, §218. As with most other evidentiary issues, the court has broad discretion to admit or exclude the testimony of a child witness, and reversal is only upon a showing of abuse of discretion. *State v. Macias*, 110 N.M. 246, 249 (Ct. App. 1990); *see also Myers*, §2.13.

Continuing Duty. The court's duty to determine competency does not end after a threshold decision is made to allow a child to testify. Throughout the child's testimony, the court must continue observing and evaluating the child for competence and after a child finishes testifying, the court may properly consider a motion to reconsider its earlier decision to allow the testimony, and/or to strike the witness's evidence. *Kentucky v. Stincer*, 482 U.S. 730 (1987).

Evaluation Format. The examination format should be governed by the needs of the child, and lies within the discretion of the trial judge. *State v. Manlove*, *supra*; *People v. District Court of El Paso County*, 776 P.2d 1083, 1087 n.4 (Colo. 1989). During the competency evaluation, the court typically does not discuss with the child the facts or merits of the case, but has discretion to do so if the judge finds it an important area to explore with respect to the competency question. *People v. Trujillo*, 923 P.2d 277, 281 (Colo. App. 1996); *but see State v. Scott*, 501 N.W.2d 608, 613-615 (Minn. 1993). The accused need not be present during this *voir dire* of the child witness. *Kentucky v. Stincer*, 482 U.S. 730 (1987); *see also* 18

U.S.C. §3509(c)(5). Courts have been permitted to conduct *voir dire* of the child with or without the participation of counsel during or before trial. The judge may choose a setting other than the courtroom (such as chambers) for the competency evaluation. Leading questions are not prohibited in the court's evaluation hearing. *Burkett v. State*, 439 So.2d 737, 745 (Ala. Crim. App. 1983).

Child Development Considerations. Recent research has revealed that generally a majority of 5-year old children correctly identify truthful statements and lies and recognize that lying is bad. However, most children up to the age of 7 cannot define the terms "truth" or "lie" or explain the difference between them. Because children may be capable of testifying truthfully despite their limited vocabulary and linguistic immaturity, age appropriate and developmentally sensitive techniques should be used to elicit information useful to the court for determining competency. In their paper *Young Maltreated Children's Competence to Take the Oath*, Applied Developmental Science, Vol. 3, No. 1, 1999, Professors Lyon and Saywitz propose various strategies for the court to consider in determining whether a child is competent to testify and be placed under oath. All areas important to the court's determination (capacity to observe, memory, differentiation of truth from falsehood, differentiating fact from fantasy, understanding of the duty to testify truthfully, etc.) can be effectively evaluated with age sensitive techniques yielding high confidence in the final determination.

27.1.3 Use of Psychological Testimony or Reports Regarding Competence

Parties to litigation (noncriminal cases) may seek a psychological evaluation of a child witness for the purpose of buttressing or attacking the witness's credibility. The court has discretion to entertain such motions, although the Rules of Civil Procedure authorizing independent psychological evaluations do not directly apply. Rule 1-035 provides that "[w]hen the mental or physical condition . . . of a party, or of a person . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination ...." Arguably, when a child witness's competency is before the court, that subject is "in controversy." Rule 1-035, however, is not designed to address competency, but addresses those situations when a person's mental condition is relevant to a substantive fact at issue in the case, such as damages in personal injury litigation. Since testimonial competency is a preliminary issue of trial administration, the purpose for the rule is not directly implicated.

The court has discretion, however, to allow such an evaluation, or to order one itself, if in its discretion such information would be probative of the competency issue. New Mexico courts have not dealt with this issue directly, but in *Anderson v. State*, 749 P.2d 369, 371-372 (Alaska App. 1988), the court discusses the inherent authority of the trial judge to acquire information in this manner. In any case, expert testimony relating to the issue of competency can be admissible. *State v. Ruiz*, 2007-NMCA-014, ¶24, 141 N.M. 53.

27.2 Alternatives for Presenting Child Testimony

27.2.1 Videotape: Criminal Proceedings

Constitution. In *Maryland v. Craig*, 497 U.S. 836, 856 (1990), the Supreme Court held that the confrontation clause of the federal Constitution does not guarantee criminal defendants an absolute right to a face-to-face meeting with the witness. In *Craig*, the defendant was completely deprived of his right to a face-to-face confrontation with the child witness as the child testified via television monitor out of the presence of the defendant. The Court stated that prior to the admission of such testimony, the trial court must find "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." The Court discussed the reasoning of *Coy v. Iowa*, 487 U.S. 1012 (1988), which initially addressed this question for the federal bench. 497 U.S. at 844.

Statute. §30-9-17: "In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years." ***See also*** the description of the Uniform Child Protection Measures Act, which took effect in 2012, in Handbook §27.2.3. below.

Rules. Rule 10-234 (delinquency cases) and Rule 5-504 (adult cases) govern videotaped depositions in sexual abuse cases. ***See*** Handbook §34.6.4 for a summary of Rule 5-504.

Case Law. New Mexico courts have discussed the admissibility of videotaped testimony in a number of cases, several of which are described in §34.6.4.

27.2.2 Videotape: Civil Proceedings

Statute. ***See*** the description of the Uniform Child Protection Measures Act in Handbook §27.2.3 below.

Rules. Rule 10-135 provides that any part or all of a deposition may be used for any purpose permitted by the Rules of Evidence. Rule 10-134, which sets forth detailed requirements for videotaped depositions, requires that a party desiring to use a videotaped deposition pursuant to Rule 10-135 is responsible for having appropriate playback equipment and an operator available at trial. Rule 10-134(D).

Case Law. Depositions are not intended to substitute for live witnesses at trial, nor are they intended for use by the deposed party at trial. The party seeking to use the deposition instead of a live witness has the burden of showing one or more of the circumstances set forth in the rules. *Niederstadt v. Ancho Rico Consolidated Mines*, 88 N.M. 48, 50 (Ct. App. 1975); *Arenivas v. Continental Oil Co.*, 102 N.M. 106, 109 (Ct. App. 1983); *Reichert v. Atler*, 117 N.M. 628, 632 (Ct. App. 1992); *Albuquerque National Bank v. Clifford*, 91 N.M. 178, 181 (1977).

The use of videotaped depositions or admission of any other type of hearsay as to the child's statements arises when the child is unable to testify or testimony in a traditional courtroom setting would be traumatic for the child. Although the stricter requirements of the Confrontation Clause, as discussed in *Crawford v. Washington*, 541 U.S. 36 (2004), do not apply in civil cases, due process considerations govern the determination of the fairness of the trial procedures. The New Mexico Supreme Court has indicated that in-court testimony with confrontation is preferred and if there is a sufficient basis for in court testimony not to occur, the trial court "should explore alternatives for the questioning of a child," including videotaped depositions, in-camera testimony or other methods at the discretion of the trial court. *In the Matter of Pamela A. G.*, 2006-NMSC-019, ¶18, 139 N.M. 459.

27.2.3 Uniform Child Witness Protective Measures Act

A law passed by the Legislature and signed by the Governor in 2011 allows for alternative methods of providing child testimony. The Uniform Child Witness Protective Measures Act is similar to §30-9-17 and Rules 10-234 and 5-504 in some ways but is not limited to cases involving sexual abuse and is not limited to criminal cases. The statute contains different provisions for criminal and noncriminal proceedings. In a noncriminal proceeding, the court may allow a child witness under the age of 16 to testify by closed-circuit television, deposition, or other means if the presiding officer finds that allowing the child to testify by an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the finder of fact. An alternative method ordered by the presiding officer must permit a full and fair opportunity for examination or cross-examination by each party, subject to such protection of the child witness as the presiding officer deems necessary. *See* §§38-6A-1 through 38-6A-9 (effective July 1, 2012).

As of June 2014, the Supreme Court had not adopted rules for children's court in connection with the Act.

27.3 Rules of Evidence and Application to Child Witnesses

27.3.1 Use of Leading Questions on Direct Examination

Rule. Rule 11-611(C): Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. On cross examination, or when a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions.

New Mexico appellate courts have held that leading questions are often permissible when a witness is immature, timid, or frightened, although the words of a prosecutor cannot be substituted for the testimony of the witness. *State v. Orona*, 92 N.M. 450, 454-455 (1979). In a child sexual abuse case, where the court drew a stick figure to help the victim testify, the drawing was relevant, and the court's leading questions to the victim tended to clarify the evidence. *State v. Benny E.*, 110 N.M. 237, 244 (Ct. App. 1990).

27.3.2 Hearsay

Rule. Rule 11-801(C): Hearsay is "a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."

The hearsay rule and its exceptions are the subject of considerable litigation when the testimony of a child is offered in legal proceedings. Some of the most common uses of the rules for purposes of introducing child testimony are set forth below.

Statements Offered NOT to Prove the Matter Asserted. As the rule states, only if the out of court statement is offered to prove the truth of the matter asserted is it excluded. There can be relevant purposes for a statement even when not directly offered to prove the truth of the statement itself. For example, a young child's explicit and detailed out of court statements to police or interviewers about sexual activity the child has experienced may not be directly admissible to prove that the child actually engaged in such acts with the accused, but may be relevant and admissible for another purpose, such as to prove that the child has sophisticated sexual knowledge and familiarity with various sexual activities or adult physical/anatomical sexual phenomena that is inconsistent with her/his age. *In Re Jean Marie W.*, 559 A.2d 625, 629 (R.I. 1989); *Drumbarger v. State*, 716 P.2d 6, 10 (Alaska App. 1986).

Similarly, written or drawn assertions (such as pictures or a diary, written or drawn outside of the courtroom) may be admissible to prove knowledge inconsistent with age or fear of the accused, while the specific acts depicted in the writings and drawings, if offered to show that the child and the accused engaged in such conduct, may violate the hearsay rule.

Statements for Medical Diagnosis or Treatment. Rule 11-803(4) (formerly Rule 11-803(D)): "A statement that (a) is made for – and is reasonably pertinent to -- medical diagnosis or treatment, and (b) describes medical history, past or present symptoms, pain, or sensations, their inception, or their general cause" may be admitted regardless of whether the declarant is available as a witness.

This exception to the hearsay rule is one of the most commonly used methods of introducing into evidence a child's statement of injury, abuse, etc. A party seeking introduction of the testimony has the burden of proving that all elements of the rule are satisfied. *State v. Altgilbers*, 109 N.M. 453 (Ct. App. 1989) (criminal case). The proponent of the testimony must show that the physician can testify that the out-of-court statement was elicited for purposes of diagnosis or treatment, and the statement assisted in reaching such goals. *See also U. S. v. Tome (II)*, 61 F.3d 1446 (10th Cir. 1995). In sexual abuse cases particularly, the child's statements admitted under this rule may be the only evidence of what happened.

In *State v. Mendez*, 2010-NMSC-044, 148 N.M. 761, a criminal case, the New Mexico Supreme Court overruled portions of *State v. Ortega*, 2008-NMCA-001, 143 N.M. 261, and held that

statements made by a child to a nurse with the sexual assault nurse examiner program (SANE) may fall within the 11-803(4) hearsay exception. The court stated: "The trial court must therefore carefully parse each statement made to a SANE nurse to determine whether the statement is sufficiently trustworthy, focusing on the declarant's motivation to seek medical care and whether a medical provider could have reasonably relied on the statement for diagnosing or treating the declarant." *Id.* ¶43.

State ex rel. CYFD in the Matter of Esperanza M., 1998-NMCA-039, 124 N.M. 735, contains extensive discussion of this rule in the context of a civil abuse and neglect proceeding. Esperanza M. was 13 years old when she reported to a school counselor that her father had sexually abused her. The child was subsequently interviewed by a CYFD social worker, the staff of the Children's Safe House, and a medical doctor. The child repeated her allegations to the pediatrician, but the physical examination was essentially normal, with no evidence of sexual abuse. The child later was interviewed by a psychologist and again repeated allegations of sexual abuse perpetrated by her father.

At the trial, neither the child nor her parents testified. The court admitted the child's statements implicating her father through the testimony of the pediatrician and the psychologist, finding that the child made the statements to each witness under the circumstances contemplated by Rule 11-803(D) (now Rule 11-803(4)).

- <u>Pediatrician Testimony</u>: The doctor testified on what the child said happened and who the child identified as the perpetrator. The parents argued that the statements made to the doctor shortly after the child first disclosed abuse were made in the context of an "investigation" of abuse, and were not genuine "treatment or diagnosis" statements. The court dismissed this objection, holding that it is "immaterial whether the examination was part of an investigation, so long as it was for diagnosis or treatment."

  The parents also argued that the pediatrician's testimony, including the child's identification of her father as the perpetrator of sexual abuse, should not have been admitted because it invaded the fact finder's function under the holding in *State v. Alberico*, 116 N.M. 156 (1993). Again, the court rejected any suggestion that testimony elicited through Rule 11-803(D) should be limited except as stated in the rule. The test for admissibility of diagnosis or treatment statements is whether the statements were "reasonably pertinent" to the physician's diagnosis or treatment. The proponent of testimony through 11-803(D) witnesses must lay an adequate foundation that the witness indeed relied upon the statements in forming his or her opinions about the diagnosis and treatment of the patient. Examination of the record revealed that such a foundation was established and the testimony therefore was properly admitted.

- <u>Psychologist Testimony</u>: The parents challenged the trial court's admission of the child's statements to the psychologist identifying her father as the perpetrator of abuse. The psychologist testified that she did not need to know the identity of the

alleged perpetrator to form her opinions or to provide treatment. Accordingly, the court should not have admitted the child's statements implicating her father as the abuser. Absent the proper foundation – that the psychologist relied upon the statements to form a professional opinion – Rule 11-803(D) was not available as a method of introducing hearsay statements.

- Social Worker and School Counselor Testimony: The parents also sought reversal of the trial court's admission of testimony elicited from the social worker and the school counselor who interviewed the child. The court reviewed each witness's testimony and found the foundation inadequate in each situation to permit hearsay testimony to be introduced under Rule 11-803(D). The court did not rule out the possibility that such testimony may be admissible in other cases if a proper foundation were laid.

It may be proper to allow the physician to testify who the child patient believed was the perpetrator of the injury or abuse, as the child's statements identifying the perpetrator may be "pertinent" to the physician's diagnosis or treatment and therefore admissible. *U.S. v. Tome (II)*, 61 F.3d 1446, 1450 (10th Cir 1995). In *State v. Skinner* a criminal case, the New Mexico Court of Appeals upheld under Rule 11-803(D) the district court's admission of the child's statements to a doctor during a SANE exam concerning the nature and scope of the abuse and the identity of the perpetrator. The Court noted that victim statements involving identification of the abuser may be admissible where the identity of the abuser is pertinent to psychological treatment or where treatment involves separating the victim from the abuser. *State v. Skinner*, 2011-NMCA-070, ¶¶18-19, 150 N.M. 26.

In addition, statements made by a child that are "reasonably pertinent to" "medical diagnosis or treatment" need not be made to a medical doctor. As one court held: "[t]hose who treat child abuse must be attentive to emotional and psychological injuries as well as physical harm. [citation omitted] We cannot conclude that therapy for sexual abuse, as an exercise in healing, differs materially from other medical treatment for the purposes of [the rule]." *In the Dependency of M.P.*, 882 P.2d 1180, 1184 (Wash. App. Div. I 1994). The *Esperanza M.* court indicated (perhaps) its willingness to consider the applicability of Rule 11-803(D) to witnesses other than medical doctors and psychologists, stating "[t]here is support for the broadening of this hearsay exception in child abuse cases to embrace statements identifying abusers and describing their acts because such cases involve abuse victims who talk to psychologists and social workers." The court did not reach the issue, however, because inadequate foundation was laid for the evidence to be considered. 1998-NMCA-039, ¶20.

Excited Utterances. Rule 11-803(2) (formerly Rule 11-803(B)): "A statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused" is not excluded by the hearsay rule.

In *State v. Apodaca*, 80 N.M. 244 (Ct. App. 1969), a 4-year old child victim of sexual assault was crying and "looked scared" when she awakened the morning after she was allegedly sexually assaulted and made statements implicating the defendant. The court quoted from an earlier New Mexico decision stating that "the element of spontaneity [required under the

common law *res gestae*] is not to be determined by time alone. It is sufficient for the statement to be substantially contemporaneous with the shocked condition, but not necessarily with the startling occurrence." 80 N.M. at 247.

For admissibility, the court must determine that there was some shock, startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting, and that the utterance was made before there was time to contrive and misrepresent. *State v. Maestas*, 92 N.M. 135, 141 (Ct. App. 1978).

The holding that the timing of the statement by itself is not determinative of admissibility is of special importance in cases involving children. While the amount of time passing between the event and the statement is an important issue, no particular amount of time will render a statement inadmissible under this rule. The startled condition of the declarant and level of distress the declarant has suffered, together with all other evidence of the circumstances of the statement itself, are the determinative factors. *State v. Robinson*, 94 N.M. 693, 697-698 (1980); *State v. Maestas*, 92 N.M. 135, 140-141 (Ct. App. 1978); *State v. Mares*, 112 N.M. 193, 201 (Ct. App. 1991).

Prior Consistent Statement of a Witness. Rule 11-801(D)(1)(b): A prior statement by a witness is not hearsay if "[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement … (b) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying."

This rule is often overlooked by counsel in child abuse litigation. Statements of the witness meeting the criteria of the rule are not hearsay**.** The statements become important and powerful evidence especially when it is asserted that the child's testimony is "coached" or the result of improper or influential questioning by social workers, police detectives or others who initially received the reports of abuse or prepared the child to testify. *Tome v. U.S. (Tome I)*, 513 U.S. 150 (1995); *State v. Sandate*, 119 N.M. 235 (Ct. App. 1994). This rule applies when the child, or any other witness, has testified.

Records of Regularly Conducted Activity. Rule 11-803(6) (formerly Rule 11-803(F)): Not excluded by the hearsay rule, even if the declarant is available, are:

> [a] record of an act, event, condition, opinion, or diagnosis if (a) the record was made at or near the time by – or from information transmitted by – someone with knowledge, (b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit, (c) making the record was a regular practice of that activity, and (d) all of these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Paragraph 11 of Rule 11-902 NMRA or Paragraph 12 of Rule 11-902 NMRA or with a practice permitting certification. This exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

New Mexico's child abuse reporting statute, §32A-4-3, has resulted in hospitals, clinics, physicians, social workers, school teachers, school administrators, etc., developing business practices of recording and keeping writings that memorialize statements made alleging abuse. CYFD has formal procedures for receiving and recording reports of abuse and neglect and for creating investigative reports. If a proper foundation is laid, such materials may meet the tests for admissibility set forth in the rule. The rule, however, does not automatically imply admission of all the recorded information after the foundation is established. Information contained in the records needs to be scrutinized to determine whether it meets this or other exceptions to the hearsay rule, or is otherwise admissible. Hearsay within hearsay problems are common when lawyers invoke this exception. There may also be issues of privilege; ***see*** §27.4.1 below.

Residual Exception. Rule 11-807: "Under the following circumstances, a hearsay statement is not excluded by the hearsay rule even if the statement is not specifically covered by a hearsay exception in Rule 11-803 NMRA or Rule 11-804 NMRA: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice."

The rule further specifies that a "statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it."

The court in *State ex rel. CYFD in the Matter of Esperanza M.*, 1998-NMCA-039, 124 N.M. 735, discussed the use of the catch-all hearsay exception (now known as the residual exception) in children's court proceedings. The petitioner (CYFD) argued that various hearsay statements should be admitted under this exception, asserting that "the best interests of the child must be recognized and harmonized with the rules of evidence . . . when out-of-court statements are needed to establish that the child was sexually abused." The court concluded that there should be no "best interests of the child" analysis where the court is considering whether particular evidence is or is not admissible under the rule. The court acknowledged its "strong tradition of protecting a child's best interests," but cautioned that the catch-all nature of this exception to the hearsay rule is not intended to permit admission of evidence which "almost, but not quite, fits another specific exception." The rule "cannot be used to circumvent the strict requirements of the other hearsay exceptions . . . which are designed to promote guarantees of reliability and trustworthiness." *Id.* ¶¶24-30.

In a criminal case decided in 2002, a divided New Mexico Supreme Court rejected as too narrow the view that the catch-all exception should not be used when the out-of-court statement is of a type expressly considered by other exceptions but which do not satisfy the rules for those exceptions. *State v. Trujillo*, 2002-NMSC-005, ¶16, 131 N.M. 709. In the majority's opinion, the catch-all exception could be used to admit hearsay that otherwise

bears indicia of trustworthiness equivalent to those other specific exceptions. *Id*.

In *State v. Massengill*, the Court of Appeals upheld the lower court's decision in a criminal child abuse case to allow the admission of out-of-court statements made by a 2 1/2 year old child to a doctor and her parents. The statements to her parents were not sufficiently contemporaneous to warrant admission under the present sense impression exception but were properly admitted under the catch-all and medical diagnosis or treatment exceptions. 2003-NMCA-24, ¶¶10, 12, 21, 133 N.M. 263. ***See*** Handbook §34.6.7 for a summary of the case.

In *Frank G. and Pamela G.,* the Court of Appeals affirmed the judgment of the children's court in favor of CYFD (and the amicus brief filed by the National Association of Counsel for Children) upholding admission of a child's out-of-court statements under the residual and medical diagnosis or treatment hearsay exceptions. *State ex rel. CYFD v. Frank G. and Pamela G*., 2005-NMCA-026, 137 N.M. 137 (affirmed on due process grounds in *In the Matter of Pamela A.G.,* described below). The Court of Appeals held that the child's hearsay statements were properly admitted through testimony by the foster mother, CYFD social worker, safe house interviewer, and program therapist under the catch-all exception to the hearsay rule. The Court found that the record supported sufficient guarantees of trustworthiness and that: 1) each statement was offered as evidence of a material fact, 2) each statement was more probative on the point offered than any other reasonably obtained evidence, and 3) justice and the purpose of evidentiary rules would be served by admission of each statement. *Id*. ¶¶16-23.

The Court of Appeals also held that the testimony of the program therapist, a licensed master social worker (LMSW), was properly admitted under the medical diagnosis or treatment exception, Rule 11-803(D) (now (4)). This expands the exception beyond medical doctors and psychiatrists to include social workers providing treatment. It is also important to note that the therapist's testimony included identification of the defendant. The court distinguished *In the Matter of Esperanza M.,* noting that in the case at hand the required foundation had been laid to establish that the identity of the perpetrator was "reasonably pertinent" to the therapist's diagnosis or treatment. *Id.* ¶¶28-32.

The Court of Appeals held that the trial court did not need to find the child competent in order to admit her hearsay statements. 2005-NMCA-026, ¶¶24-27. The court also held that the parents' due process rights were not violated by admission of the hearsay statements, applying the *Mathews v. Eldridge* balancing test and noting that the Confrontation Clause does not guarantee face to face cross-examination in civil proceedings. *Id*. ¶¶34-37.

In its opinion on certiorari, *In the Matter of Pamela A.G.,* 2006-NMSC-019, 139 N.M. 459, the Supreme Court reiterated that procedural due process is a "flexible right" and that the amount of due process afforded a party depends on the particular circumstances of each case. The Court restated the parents' important constitutional rights that the law shields from unnecessary intrusion, and the government's significant (and sometimes competing) interest in the safety of children. Balancing this tension requires that parents be given reasonable

opportunities to cross-examine and confront an accusing witness. Invoking *Matthews v. Eldridge*, the Court summarized the analysis as an inquiry into whether the procedures used by the trial court increased the risk of erroneous deprivation of the private interest, namely, the parents' fundamental right to maintain their relationship with the child. *Id.* ¶¶12-13.

The Court focused on what the parents *did not do* in the trial court to insure they obtained a fair trial. The parents never tried to call the child as a witness, they did not ask to question her, and did not indicate what questions either at the trial court or on appeal they would have asked. The parents sought the exclusion of the statements, but did not challenge any part of the statements themselves. They were given the opportunity to cross-examine the witnesses who repeated the child's statements in trial, and to challenge the methods used to obtain the incriminating out-of-court statements. *Id*. ¶¶15,20.

Relying on *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶50, 136 N.M. 53, the Court acknowledged that cross-examination almost always enhances "the integrity of the fact-finding process." It also recognized that there are circumstances when other procedural safeguards must supply the "scrupulous fairness" required when the State "interferes with a parent's right to raise their children." *Pamela A.G.*, 2006-NMSC-019, ¶18. Examining all of the factors in the record, the Court concluded the test was met in this case because the trial judge established an adequate procedure and utilized adequate safeguards of fairness based upon the child's age, the nature of the relationship between child and accused, and the emotional state of the child.

27.4 Privileges and Evidentiary Immunities

27.4.1 Privileges

The Supreme Court amended the rules on privilege, primarily for style, effective for all cases pending or filed on or after December 31, 2013. This section quotes the rules as amended.

Rule 11-509(B). "A child alleged to be delinquent or in need of supervision and a parent, guardian or custodian who allegedly neglected a child has a privilege to refuse to disclose, or to prevent any other person from disclosing confidential communications, either oral or written, between the child, parent, guardian or custodian and a probation officer or a social services worker which are made during the course of a preliminary inquiry."

This privilege has not been discussed by the New Mexico appellate courts, nor are its purpose, use and meaning clear from the text. While for parents, guardians, and custodians it applies only to those who have been accused of neglect (and not abuse), and only to statements that the party intended to be "confidential," there is little guidance in the rule itself as to when the privilege is appropriate. The rule refers to a "preliminary inquiry," which is not defined in the Children's Code or Children's Court Rules in the abuse/neglect context, although preliminary inquiries are a part of delinquency proceedings (Rule 10-211). CYFD policies for investigation of neglect allegations include the procedure for informing parents of certain procedures that implicate their rights. At the outset of the investigation, CYFD is to

inform the parents that prior to any legal proceeding, the parents' interactions with CYFD are voluntary and the investigation, findings and disposition are confidential under §32A-4-33. There is no other specific procedure for informing parents that they can remain silent. There is likewise no mechanism in the proceedings for an investigating social worker to withhold "privileged" communications from disclosure if the privilege is invoked. *See* 8.10.3.12 NMAC.

Rule 11-504. Physician-patient and psychotherapist-patient privilege.
Generally, statements made by persons to their physicians, psychotherapists, or licensed mental-health therapists are made with the expectation of confidentiality and this privilege supports that expectation. The communications must be intended to be confidential and must be for the purpose of diagnosis or treatment. The communications can include family members if they are participating in the diagnosis and treatment. Rule 11-504(B).

There is an exception for this privilege relating to any statutory duty that the physician, psychotherapist, licensed mental health therapist, or patient may have to report to a public employee or public agency. Rule 11-504(D)(4). The duty to report child abuse or neglect is found at §32A-4-3 and extends to "every person, including a licensed physician; a resident or intern examining, attending or treating a child; … a social worker acting in an official capacity; or a member of the clergy who has information that is not privileged." In a criminal case alleging criminal sexual contact of a minor, the Court of Appeals in a split decision upheld a defendant's privilege under Rule 11-504 to prevent both his social worker and his ex-wife from disclosing information he communicated during counseling sessions. The court held that neither the social worker nor the ex-wife were subject to the mandatory reporting requirements of §32A-4-3. *State v. Strauch*, 2014-NMCA-020 (filed 2013), ¶¶1, 19, and 28, 317 P.3d 878, *cert. granted*, 2014-NMCERT-001.

When a report of child abuse or neglect is required to be made under §32A-4-3, §32A-4-5(A) provides for the admissibility of the "report or its contents or any other facts related thereto or to the condition of the child who is the subject of the report," notwithstanding the physician-patient privilege or any similar privilege or rule against disclosure. *See In the Matter of* C*andice Y.*, 2000-NMCA-035, ¶¶35-36, 128 N.M. 813 (upholding admission of mother's counseling records and testimony related to the records as to matters about which the counselor was required to make a report of child abuse or neglect.)

27.4.2 Use Immunity

§32A-4-11: This statute authorizes the children's court attorney to apply for use immunity at any stage of an abuse and neglect proceeding for:

- Respondent's in-court testimony. The in-court testimony of a respondent who is granted use immunity "shall not be used against that respondent in a criminal prosecution," although the respondent may be prosecuted for perjury. §32A-4-11(A).
- Records, documents and other physical objects produced by an immunized respondent under court order. §32A-4-11(B).

- Respondent's statements made in a court-ordered psychological evaluation or treatment program to a professional designated by CYFD in furtherance of the court order. Immunity attaches only to statements made during the course of the actual evaluation or treatment, and does not attach to statements made to CYFD employees, agents or representatives during investigation of alleged abuse or neglect. §32A-4-11(C). Immunized statements that are in writing must be deleted before any report is released to law enforcement officers or district attorneys. §32A-4-11(E).

The children's court attorney must request a hearing on the immunity application and give at least 48 hours' notice to all parties and the district attorney for the county in which the abuse or neglect allegedly occurred. The district attorney has standing to object to the order of immunity. §32A-4-11(G). Use immunity orders cannot be entered *nunc pro tunc*. §32A-4-11(F).

Additionally, §32A-4-12 (Protective Orders) provides:

- At any stage of an abuse or neglect proceeding, the children's court attorney may apply for a protective order restricting the release of immunized testimony, immunized verbal statements for the purpose of psychological evaluation or treatment, or records, documents or other physical objects produced by an immunized respondent under court order. A protective order applies to everyone, except as otherwise stated in the order. Its purpose is to allow respondents to engage in evaluation and treatment programs as ordered by the court and to ensure that their statement will remain confidential without disclosure to anyone, including law enforcement officers and district attorneys. §32A-4-12(A).
- The children's court attorney must request a hearing and give at least 48 hours' notice to all parties and to the district attorney for the county in which the abuse or neglect allegedly occurred. The district attorney has standing to object to a protective order. §32A-4-12(B).
- After the hearing, the court may issue a protective order if doing so will reasonably assist in the provision of diagnostic and therapeutic services to the respondent and the respondent is otherwise likely to refuse to make statements on the basis of the privilege against self-incrimination. §32A-4-12(C).

Rule 10-341. Rule 10-341 provides for witness immunity to any person who may be called to testify, including but not limited to the respondents, or to produce records, documents or objects. The rule was amended effective January 7, 2013, to allow any party or the court, on its own motion, to apply for immunity for the witness. Formerly, only the children's court attorney could make the application. This change in the rule is similar to the change made to Rule 5-116 of the Rules of Criminal Procedure in 2010 in response to *State v. Belanger*, discussed below.

To issue an order for use immunity under Rule 10-341, the court must find that:

- the testimony, or the record, document, or other object may be necessary to the public

interest;
- the person has refused or is likely to refuse to testify or to produce the record, document or other object on the basis of the person's privilege against self-incrimination; and
- the district attorney was properly served.

Evidence compelled under the order, or any information directly or indirectly derived from such evidence, may not be used against the person in a criminal case except as provided by Rule 11-413 (formerly Rule 11-412) of the Rules of Evidence. Rule 10-341(C).

Case Law. In *State v. Olivas*, 1998-NMCA-024, 124 N.M. 716, the court held that the U.S. Supreme Court analysis in *Kastigar v. U.S.*, 406 U.S. 441 (1972), applied to criminal prosecutions of child abuse where the accused has provided testimony in companion children's court proceedings alleging the same misconduct. Quoting earlier cases, the court stated that "[o]nce defendants have shown that they have testified under a grant of immunity, the prosecuting attorneys then 'have the burden of showing that their evidence is not tainted [by exposure to prior immunized testimony] by establishing that they had an independent, legitimate source for the disputed evidence.'" 1998-NMCA-024, ¶6.

The issue of immunity most frequently arises when the children's court attorney seeks an order at the custody hearing to compel respondent parents to undergo psychological evaluation. *See* Rule 10-335. The respondents, concerned that statements made during the evaluation could later be used against them in criminal proceedings, might refuse to participate without use immunity. The children's court proceedings would be frustrated as information vital to determination of the respondents' fitness to care for the child and/or their need for and amenability to treatment may be permanently unavailable to the parties and the court.

The *Olivas* case demonstrates that the specific language used in the order granting immunity and the timing of the order may be critical to later determinations of what evidence is subject to a *Kastigar* exclusion argument. The distinctions in §32A-4-11 for immunity for in-court statements, production of tangible things, and statements made to psychologists performing court-ordered evaluations and treatment are important to note. Because criminal proceedings arising from abuse and neglect allegations frequently are commenced months after the children's court proceedings are underway, the potential impact the immunity order may have on subsequent litigation is difficult to foresee, and the actual wording of the order may be critical to the success or failure of the future prosecution.

In *State v. Belanger*, a criminal child abuse case, the defendant sought use immunity for a witness but the prosecutor refused to apply for it. The New Mexico Supreme Court departed from the rule in place at the time that use immunity is only available at the request of the prosecutor, finding that not giving the courts a role in granting use immunity raised constitutional concerns for the defendant. The Court ruled that district courts may grant use immunity in limited circumstances with or without the concurrence of the prosecutor. 2009-NMSC-025, ¶35, 146 N.M. 357. If the prosecutor objects to granting use immunity to a

defendant, under the balancing test established in *Belanger* the defendant must show the proffered testimony is admissible, relevant, and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree. Once the defendant meets its burden, the state must prove that "'immunity would harm a significant governmental interest.'" *State v. Ortega*, 2014-NMSC-017, ¶¶12-13 (citing *Belanger*, ¶38). Cost and inconvenience to the state is not a sufficient reason for a district court to deny use immunity. *Id.* ¶13.

As noted, since *Belanger*, the criminal and children's court rules on use immunity have been revised to allow the court to issue an order granting use immunity upon application of any party (the criminal rule specifies the prosecuting attorney or the accused) or upon the court's own motion. *See* Rule 5-116; Rule 10-341.

CHAPTER 28

COURT ORDERS DURING PENDENCY OF PROCEEDING

This chapter covers:

- Provisions of the Children's Code authorizing the court to address situations that may arise.
- The equitable powers of the Children's Court.

28.1 Introduction

Situations that give rise to allegations of child abuse or neglect, the family circumstances involved in those cases, and the needs of the children over time all increase the odds of problems arising in a case "in between" hearings. Problems may also arise for which the Children's Code provides no ready solution. This chapter is an effort to compile in one place some of the statutory tools available to the court and also to describe its equitable powers.

28.2 *Ex Parte* Custody Orders

While most motions for an *ex parte* custody order will be filed at the same time as the petition alleging abuse or neglect and commencing the proceeding, the Children's Code allows an *ex parte* custody order to be issued at any time during the proceeding. §32A-4-16. Such an order could be used, for example, where a child needed to be retaken into the legal custody of CYFD due to an emergency situation, after the parent/respondent had been granted legal custody of the child at some stage of the proceedings. An order may be issued upon the same type of sworn statement of facts required for an *ex parte* order at the beginning of the proceeding. ***See*** Handbook §§12.5 and 12.6.

28.3 Temporary Restraining Orders

Either on the court's own motion or the motion of a party, the court may make an order restraining the conduct of any party over whom the court has obtained jurisdiction if:

- the court finds that the person's conduct is or may be detrimental or harmful to the child and will tend to defeat the execution of any order of the court; and

- due notice of the motion and the grounds for the motion and an opportunity to be heard on the motion have been given to the person against whom the order is directed. §32A-1-18(D).

28.4 Change of Placement

Under §32A-4-14, the court may be asked to consider whether CYFD has abused its discretion in changing a child's placement during the course of the abuse or neglect proceeding. Under the statute, if CYFD decides to change a placement, it must send notice to the child's GAL, all parties (which includes the child but, as with other parties, notice is sent to the child's attorney), the child's CASA, the child's foster parents, and the court ten days prior to the placement change, although in an emergency CYFD can move the child and send notice within three days of the move. When the child's GAL requests a court hearing to contest the proposed change, the department may not change the placement pending the results of the court hearing, unless an emergency requires changing the placement prior to the hearing. While the statute is silent, this last provision arguably applies when the attorney for an older child contests a proposed change as well.

ASFA Note: Section 32A-4-14, like §32A-4-25(H)(6), appears to contemplate review of the department's placement decision, not substitute placement by the court. This is an important distinction. According to the ASFA regulations, federal financial participation in foster care payments is not available when a court orders a placement with a specific foster care provider. ***See*** Handbook §38.4.

28.5 Contempt of Court

The children's court may punish a person for contempt of court for disobeying an order of the court or for obstructing or interfering with the proceedings of the court or the enforcement of its orders. §32A-1-18(C).

The court has the power and authority to issue orders at any stage of the proceeding to compel the appearance of witnesses, the giving of testimony, and the production of evidence by witnesses, including any party. (Production of evidence includes an order to the respondent to undergo a psychological diagnostic evaluation and treatment.) Failure or refusal to obey the court's order may be punished as contempt. A claim of self-incrimination does not excuse the person from complying with the court's order, as in the case of a court-ordered psychological evaluation. §32A-4-13; ***see*** Handbook §27.4.2 on immunity.

28.6 Findings and Remedies as Appropriate

The Children's Code provides in §32A-1-18(A) for the court to make findings or afford remedies as appropriate:

> When it appears from the facts during the course of any proceeding under the Children's Code that some finding or remedy other than or in addition to those indicated by the petition or motion are appropriate, the court may, either on motion by the children's court attorney or that of counsel for the child, amend the petition or the motion and proceed to hear and determine the additional or other issues, findings or remedies as though originally properly sought.

The Code allows for flexibility in reaching solutions for children, and essentially allows the court to conform the proceedings to the facts that are established during the course of the proceeding. However, it is important to be attentive to the parties' rights to be heard on the issues that develop. In a case decided in 2012, the Court of Appeals held that the instructions in §32A-1-18(A) to "*proceed to hear* and determine the additional or other issues, findings or remedies" required the trial court to give the father a hearing after allowing CYFD to amend a petition post-trial to add a claim of abuse in addition to neglect to conform to the evidence. *State ex rel. CYFD v. Steve C.*, 2012-NMCA-045, ¶11, 277 P.3d 484 (emphasis added).

28.7 Equitable Powers of the Court

The New Mexico Supreme Court has discussed the "strong tradition of protecting a child's best interests in a variety of circumstances" and observed that it is "well-settled law" that when the case involves children, the trial court has broad authority to fashion its rulings in the "best interests of children." The court's authority under the "best interest of the children" rule is essentially equitable. *Sanders v. Rosenberg*, 1997-NMSC-002, ¶10, 122 N.M. 692. *Sanders* was a case involving a custody dispute after a divorce, but it was cited approvingly in *State ex rel. CYFD v. C.H., In the Matter of A.H.*, 1997-NMCA-118, 124 N.M. 244, which continued to note that a court of equity has the power of devising a remedy to fit the circumstances of the situation. *Id*. ¶8.

This power to devise remedies is subject to legislative direction, and nothing in the appellate courts' discussions suggests that a children's court's equitable powers override the dictates of the Children's Code. In *Sanders v. Rosenberg*, the Supreme Court noted:

> [W]hen dealing with children, the district court is exercising its equitable powers. … The touchstone of equity is that it is flexible; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case the complex relations of all the parties … [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.

Sanders v. Rosenberg, 1997-NMSC-002, ¶10, 122 N.M. 692, quoting *In re Adoption of San Francisco A.*, 116 N.M. 708, 713-714 (Ct. App. 1993). What these discussions suggest is that the court may, and should, exercise its equitable powers as appropriate to address the best interests of a child, within the broad scope and subject to the specific provisions of the Children's Code.

CHAPTER 29

CASE MANAGEMENT

This chapter addresses:

- One family-one judge concept.
- Dockets and scheduling.
- Special masters.
- Mediation, including:
  - History and use in New Mexico.
  - Elements of a successful program.
  - Child protection mediation resources and guidelines.

29.1 One Family-One Judge Concept

29.1.1 Purpose

Continuity and consistency are fundamental to prompt and appropriate resolution of abuse and neglect cases. This is most attainable by the assignment of a case to a single judge for the duration of the proceedings. The judge in an abuse or neglect case presides over a process. Everyone involved should have the benefit of clearly defined goals and consistency in moving towards them. The one family-one judge concept helps provide that consistency.

Where possible, courts should create children's court divisions to assign responsibility for abuse and neglect cases to one judge. This requires the judge to assume responsibility for an entire docket and usually results in a degree of specialization not previously attainable. Creation of divisions generally requires the cooperation and agreement of the other judges on the court. If judges in the district rotate through division assignments, it is recommended that an assignment to the children's court division should be for more than two years.

29.1.2 Coordination of Cases

Another aspect of the one family-one judge concept is coordination of abuse and neglect cases with other related cases on the docket. It is not uncommon for families involved in abuse and neglect cases to have juvenile delinquency, domestic relations, domestic violence, paternity, custody, child support, or visitation cases occurring simultaneously. This presents the court with a serious risk of inconsistent, even conflicting, court orders directed to the same parties. This situation can be avoided by assignment of these cases to the judge

handling the abuse and neglect case. Alternatively, it would be helpful if the courts and parties in the different cases would communicate sufficiently to avoid or minimize conflicting court orders. At a minimum, the judge handling the abuse or neglect case should be aware of the other cases and their potential to adversely affect the case plan.

Many times permanence cannot be attained until custody and visitation orders in all related domestic cases are aligned with the treatment plan and permanency goal in the abuse and neglect case. The judge hearing the abuse and neglect case may have resources available that are not available in domestic relations courts. The judge handling the abuse and neglect case should be willing to address the issues in a related domestic relations case as necessary to achieve the safety, permanence, and well-being of the child. The judge, for example, could handle the adoption of the child within the abuse and neglect case. Certainly, the judge must be aware of the status of any adoption proceeding pending in another court.

When criminal proceedings arise out of the same facts as the abuse or neglect case, the prosecutor should be aware of and support the goals of the children's court with regard to the family. If this is not attainable, at a minimum the judge should proceed with the abuse or neglect case in a manner that avoids undue delay in attaining permanency for the child.

Similarly, the judge hearing the abuse or neglect case should be made aware of any delinquency proceedings that may be pending before a different judge and that affect a child who is a party to the abuse or neglect case. This would assist the judge in ensuring, for example, that appropriate services were being provided to the child and family.

29.2 Dockets and Scheduling

29.2.1 Urgency of Resolution

Abuse and neglect cases present a serious scheduling challenge because they always involve a number of parties and attorneys, and potentially many witnesses. Yet the emphasis in federal law, the New Mexico Children's Code, and in court rules on deadlines and generally short time limits reflects a policy determination that these cases need to move promptly to a resolution. The constant attention directed to the need to expedite permanency is the result of an acute awareness that children in abuse and neglect cases are put at a serious disadvantage by protracted proceedings.

Poor docketing and scheduling can seriously undermine the statutory and rule-based urgency that policy makers strive to create. Abuse and neglect cases should enjoy a priority over essentially all other matters on the court's docket. Many judges are not assigned exclusively to these matters and need to juggle other docket assignments, such as criminal or civil, as well.

The perception of the parties that the court will allocate all necessary judicial resources to these cases is essential. There will be times when it will be necessary to scramble to make the deadlines, but failure to do so runs the risk of creating the perception that the court does not share the commitment of policy makers to urgency regarding these matters. Other risks

of not meeting required time frames include possible dismissal of the petition alleging abuse or neglect if adjudication does not commence within 60 days of service of the petition, or the withdrawal of federal foster care funds, as required by the Adoption and Safe Families Act and regulations when certain timelines are not met. ***See*** Handbook §38.4.

29.2.2 Regular Dockets

Regular dockets should be established allocating certain days of the week and certain weeks of the month or year to abuse and neglect proceedings, with sufficient time allowed for each hearing. The court should have time available every week for custody hearings and review hearings, with time allocated for adjudicatory hearings every month.

While most cases will resolve with agreements at the adjudicatory hearing, some could require long, even multi-day, hearings. Adroit use of pretrial hearings and prompt notice to the court of settlements arising from the pre-adjudicatory meeting will help identify those adjudicatory hearings that may be lengthy and require more time.

Occasionally the involvement of expert witnesses and complex issues will call for the court to be intensely involved in pretrial management of the case, similar to a complex, multi-party civil case. It is preferred that hearings be set at a particular time rather than on trailing dockets to allow Children, Youth and Family Department (CYFD) employees, therapists, court appointed special advocates (CASAs) and others to plan to be available and participate. Continuances and other extensions of time limits should never become commonplace.

29.2.3 Advance Calendaring

Advance calendaring involves setting upcoming court dates and related events at the earliest possible point in an abuse or neglect case and as far in advance as reasonable. Ideally, at the conclusion of the custody hearing, the court would schedule the mandatory pre-adjudicatory meeting, the adjudicatory and dispositional hearings, the initial judicial review, the mandatory pre-permanency meeting, and the permanency hearing. Alternatively, at the conclusion of the adjudicatory and dispositional hearings, the court would schedule the initial judicial review, the mandatory pre-permanency meeting, and the permanency hearing. Advance calendaring may also include advance notice about the court's expectations in terms of reports and other information to be presented at the different hearings, and their timely submittal. A scheduling order would be entered and distributed to the parties.

A variation on advance calendaring is special calendaring, where certain situations in the case set up special requirements for hearings or other activities. One of the most common situations is where the court finds that reasonable efforts to reunify the family are no longer required, either because such efforts would be futile or because the parent has subjected the child to aggravating circumstances, in which case a permanency hearing must be held within 30 days. ***See*** Handbook §19.2. As a best practice, the court would set a date and time for the permanency hearing at the time the finding is made, and a scheduling order would be entered and distributed to the party. Similarly, if the child is approaching 15 out of the last 22 months in foster care, the court would set a date for the filing of a motion to terminate

parental rights, or for CYFD to appear in court to explain why moving to TPR would not be appropriate at this time. ***See*** Handbook §22.5.2

Advance calendaring is particularly important in child abuse and neglect cases where time frames are firmly fixed in federal and state law. Advance calendaring is also instrumental in ensuring that efforts to achieve permanency for the child are moving forward as efficiently and effectively as possible.

29.3 Special Masters

A special master may be appointed by a children's court judge pursuant to Rule 10-163 to assist with a children's court proceeding. Rule 10-163 requires all special masters to have been licensed to practice law in New Mexico for at least three years before appointment and to be familiar with children's court cases. They may perform any of the functions of a children's court judge, but concurrence of the parties is required before a special master may preside at adjudicatory and dispositional hearings.

Practice Note. As discussed earlier in this chapter, continuity and consistency are fundamental to prompt and appropriate resolution of abuse and neglect cases. District courts are urged to designate certain judges as children's court judges and to assign a single judge to a case for the duration of the proceedings. ***See*** §29.1.1 above. The children's court judge should similarly keep the need for continuity and consistency in mind when deciding whether or not to appoint a special master to a case.

All recommendations of a special master are contingent upon approval of the children's court judge. At the end of a proceeding, the special master prepares and files a report with proposed findings of fact, conclusions of law, recommendations, and orders. This report does not become an order of the court until approved by a children's court judge. Once the report is filed, the parties may file exceptions to the report. After receipt of the special master's report, the court must:

- review the special master's recommendations and determine whether to adopt the recommendations;
- conduct a hearing appropriate and sufficient to resolve any timely filed specific objections (the hearing consists of a record review unless the court determines that additional evidence will aid the resolution of the objections); and
- make an independent determination of the objections.

The court may adopt, modify or reject the recommendations. The court may also receive further evidence or recommit the recommendations to the special master with instructions. After the hearing, the court will enter a final order, with findings and conclusions when required by law. Rule 10-163(C) - (F).

Rule 10-163(H) provides that the time limits in the rules may not be tolled or enlarged because of the appointment of a special master. This should be taken into consideration when the court is deciding whether to appoint a special master in a given case.

29.4 Mediation

29.4.1 Overview of Mediation in Abuse and Neglect Cases

The use of mediation in abuse and neglect cases began in the early 1980s in a limited number of courts across the nation and has expanded rapidly since that time, both in the U.S. and other countries. Sometimes referred to as child protection, dependency, permanency, or child welfare mediation, the practice refers to the use of trained, neutral, third party mediators in child abuse and neglect cases as a means of resolving disputes and expediting permanency for children in foster care.

Following decades of experience with child protection mediation programs, a group of experts developed a set of Child Protection Mediation Guidelines. The Guidelines were adopted and approved by the Association of Family and Conciliation Courts Board of Directors in 2012 and can be found on their website at: http://www.afccnet.org/ResourceCenter/PracticeGuidelinesandStandards. The boards of directors of the National Council of Juvenile and Family Court Judges and the Association for Conflict Resolution have also endorsed the Guidelines.

Individual programs vary in the way they are structured, the stage in the case at which mediation occurs, and the issues that are mediated. For example, some programs use volunteer or contract mediators, while others use court employed mediators. In some courts, cases are mediated only at the adjudication stage or only at the permanency or termination stage while, in others, cases may be mediated at multiple stages. Finally, there are programs that limit the types of issues that are mediated (e.g. visitation) while others mediate all topics including placement, treatment plans, compliance issues, relinquishment, termination of parental rights, guardianship, and adoption. To date there is no evidence that any one model of mediation is more effective than another, although there is some evidence that mediation tends to be most successful when offered early in the case.

Evaluative studies of abuse and neglect mediation programs nationwide reveal that:

- Most cases settle in mediation, with agreement rates ranging from 70 to 90 percent.
- Families are generally very satisfied with the mediation process.
- There is evidence that parties are more likely to comply with mediated agreements, that mediated cases are less likely to return to court for a contested hearing, and that mediation reduces the amount of time spent in contested hearings.
- Mediated and non-mediated agreements are generally comparable. To the extent that there are differences, mediated agreements tend to be more detailed and likely to reference specific services to be provided for the child. Additionally, mediated agreements typically provide more visitation than do litigated plans, an important predictor of a successful reunification.

- Professionals are often resistant to mediation initially. Once they try it, however, they tend to like it. Attorneys and agency workers report that it is useful to have everyone in the same room at the same time to resolve as many issues as possible, and that, while mediation may involve more time up front, it actually saves time later.
- Finally, there is also some objective evidence that mediation may result in significant time and cost savings.
- Quite a number of program evaluations have been done on a variety of child protection mediation programs.
    - New Mexico Children's Court Mediation Program evaluations can be found at: https://ccmediation.nmcourts.gov/index.php/resources/21-resources/documents-and-forms/52-documents-and-forms.html
    - Other recent evaluation reports and articles include:
        - *Assessing Efficiency and Workload Implications of the King County Mediation Pilot*, National Council of Juvenile and Family Court Judges, Alicia Summers, Steve Wood, and Jesse Russell (2011) http://www.ncjfcj.org/sites/default/files/King%20County%20Mediation%20Pilot%20Article.pdf
        - *New York City Child Permanency Mediation Program Evaluation*, Center for Policy Research, Nancy Thoennes and Rasa Kaunelis (2011) http://nycourts.gov/ip/cwcip/Publications/permMediation.pdf
        - *Child Protection Mediation: An Evaluation of Services Provided by Cook County Juvenile Court*, Resolution Systems Institute, Jennifer Shack (2010) http://courtadr.org/files/RSI-CPDStudy.pdf
        - *What We Know Now: Findings From Dependency Mediation Research*, 47 Family Court Review 21 (2009) (citing numerous other articles and studies)

29.4.2 Abuse and Neglect Mediation in New Mexico

The Children's Court Mediation Program is a partnership between the Administrative Office of the Courts (AOC) and CYFD that provides mediation services in child abuse and neglect cases in New Mexico. The primary purpose of the program is to assist in meeting the Adoption and Safe Families Act (ASFA) goals of permanency, child safety, and child well-being. By providing a non-adversarial approach, the mediation program assists the courts, CYFD and families facing long-term issues such as substance abuse, domestic violence, poverty, and mental illness, work together to reach permanency solutions for children. The program, first piloted in March 2000, now serves families in all judicial districts in New Mexico and works closely with and supports the First Judicial District's in-house child welfare mediation program.

Cases are mediated at all stages of an abuse and neglect case, from investigation (prior to legal filing) to reunification or termination of parental rights (TPR), including open adoption referrals. A trained professional mediator meets with the parents, attorneys, workers, and

other interested parties and assists in achieving agreements regarding placement, visitation, treatment, and permanency. Any party involved with abuse and neglect cases may request mediation. Approximately 750 cases are referred to the program each year.

The flexible organizational structure of the program allows for centralized coordination through the AOC with local autonomy by the district courts and local CYFD offices. The AOC oversees regional coordinators who work directly with the implementation teams comprised of judges, respondents' attorneys, guardians ad litem (GALs), youth attorneys, CYFD staff and attorneys, CASAs, and other interested parties. The teams are a decision-making body responsible for developing protocol that meets the needs of that particular court. The AOC works with each site to provide quality assurance by offering ongoing training and education for mediators, professionals, and families and supervising program evaluation.

Ongoing independent evaluation results indicate that mediation conserves both judicial and CYFD resources by reducing the time parties spend in post-mediation court hearings and that it improves the quality of and compliance with case or treatment plans. Mediation in abuse and neglect cases also facilitates enhanced communication and problem solving by clarifying issues, exploring new options, and providing opportunities for collaboration.

29.4.3 How the Children's Court Mediation Program Works

Implementation teams for each local program may determine specific program procedures including the types of cases referred, scheduling process, and logistics, but all Children's Court mediation programs abide by the following general protocol.

Case Referral - All child abuse and neglect cases, from investigations (i.e., pre-legal, prior to a legal filing) to reunification (i.e., child is returned home) or the termination of parental rights, including open adoption referrals, may be referred to mediation. Any party involved in a child abuse and neglect case may request mediation, including CYFD staff, respondents' attorneys, GALs, youth attorneys, or the court. Referrals for mediation are made directly to the regional program coordinators.

Notification - Legal cases require a court order/stipulated court order, filed by the CYFD children's court attorney (CCA) with endorsed copies mailed to the parties entitled to notice. These include respondents' attorneys, GALs, youth attorneys, permanency planning workers, CCAs, CASAs, Citizen Review Board (CRB), and the regional program coordinator.

Case Development - The regional coordinator assigns a mediator who contacts all the parties to confirm scheduling and logistics, identify issues, gather additional information that could affect the mediation process, and answer any questions the parties may have about mediation. Mediators are responsible for checking with CYFD or the court about any necessary logistical arrangements.

Pre-mediation - Mediators may meet with, or contact by telephone, the parties prior to the mediation to discuss the mediation process, confidentiality, expectations, and willingness to participate.

Mediation - The mediation may include individual and joint meetings, and multiple sessions, as appropriate. For legal cases, mediators are responsible for bringing the *Report of Mediation* form to the mediation and ensuring that it is completed before giving it to the CCA for filing with the court. An *Agreement to Mediate* must be signed for any pre-legal case and for all mediations conducted without a court order.

Reports - Mediators will provide, upon request, a summary report to all the parties attending the mediation. A summary report is not signed by the parties and is distributed by either the mediator or the CCA.

Agreements - If an agreement is reached during mediation, the mediator is responsible for assisting parties with drafting the written agreement for review by all parties. For pre-legal cases, the parties are responsible for enforcing the terms of any agreement. In legal cases, the CCA is typically responsible for securing signatures and ensuring that the agreement is filed with the court and/or entered into the court record. The court will monitor the enforcement of any agreement between the parties and CYFD.

The mediator generally distributes a draft post adoption contact agreement (PACA), which includes the terms of contact, to all parties for review. The adoption attorney, or other designated attorney, then drafts the formal agreement, circulates it to all parties and attorneys, and ensures that the agreement is signed by birth and adoptive parents and filed with the court. The Child Protection Best Practices Bulletin titled *Open Adoption and Mediated Post Adoption Contact Agreements (PACA)* provides detailed information about mediating open adoptions. To download a copy of this Best Practices Bulletin visit: http://childlaw.unm.edu/resources.php.

Case Closing - Mediators are responsible for distributing the *Feedback Forms* to the parents and children (if in attendance) at the conclusion of the mediation and sending all required paperwork to the regional program coordinator within 15 days of the completion of a case.

29.4.4 Elements of a Successful Program

The literature in this area, as well as New Mexico's experience, suggest six factors that are critical to a successful mediation program:

- **Central coordination with local autonomy.** The ability of the courts, CYFD and the professionals involved with mediating abuse and neglect cases to make decisions at a local level is critical to ensuring the long-term viability of a mediation program. Centralized oversight, accountability, evaluation, training, and technical assistance should be balanced with localized program control, flexibility, and day-to-day management.

- **Support of the local judiciary.** The local judiciary must support the project. Lawyers, case workers, and others are often initially resistant to mediation. However, once they participate they are virtually unanimous in their support of the process. The support of the local children's court judge is crucial to get the program off the ground and to maintain its ongoing viability.
- **Competent and professional mediators.** Mediators must understand the legal issues as well as the child welfare system and the emotional/psychological issues specific to abuse and neglect cases. They need both mediation experience and training specific to abuse and neglect mediation.
- **Informed and educated professional participants.** "Buy-in" from lawyers, case workers, treatment service providers, CASAs, and others is essential during both the planning and the implementation stage. Once the program is in place, there should be regular contact with participants to address any concerns that they may have. Mediation participants training should also be provided to those professionals who will be participating in mediation on a regular basis.
- **Quality assurance.** To ensure the delivery of consistent, high quality mediation services, it is important to establish the parameters for and monitor program evaluation and assessment of outcomes, mediator qualifications and assessment, and ongoing training and education for mediators, professionals, and families. The performance and effectiveness of a program should be monitored through a variety of methods that include the collection and analysis of evaluation data such as number of cases, who attended, hours spent, total cost, issues mediated, demographic information about the families, levels of agreement, and satisfaction.
- **Stable and consistent funding.** It is difficult to attract competent mediators and secure the trust and confidence of the parties and the courts in the absence of a stable funding source. Possible funding sources include private, state, and federal grants as well as state recurring funds.

The Children's Court Mediation Program has developed the following steps to create and implement a successful local mediation program:

Step One: Gain Judicial Support

Participation of a willing and supportive judge is the first step. Typically, a local judge or court administrator contacts the AOC with an interest in the mediation program. The AOC then meets with the local judge(s) and court administrator to provide information, answer questions, and confirm interest in developing a program.

Step Two: Connect with Regional Program Coordinator

The court and the AOC will work together to connect the court with the regional coordinator. The regional coordinator, with the oversight of the AOC, works with the implementation team and mediators to implement the plan and assist with the ongoing monitoring of the program.

Step Three: Form an Implementation Team

The AOC and/or regional program coordinator works with the court and CYFD to form an

Implementation Team to develop a plan for the program and to oversee the plan's implementation. The Team includes representatives from all stakeholder groups, including judges, court administrators, CYFD staff, respondents' attorneys, GALs, youth attorneys, CASAs, mediators, and the CRB.

Step Four: Develop a Plan

The AOC and/or a regional program coordinator works with the team to develop a plan that best meets their needs. The plan should include, at a minimum, the following information:

- case referrals (*i.e.*, types of cases to be mediated, pre-legal, legal, open adoption);
- scheduling process (who can make referrals and how, who is responsible for filing and/or notification, who may attend, logistics, etc.);
- how mediated agreements will be handled;
- mediator qualifications aligned with the statewide program;
- mediator list;
- implementation team list;
- reporting process aligned with the statewide program;
- an evaluation plan aligned with the statewide program; and
- all related forms.

Step Five: Establish the Mediator Pool

The AOC and regional coordinator will recruit and train mediators to establish a local pool of qualified mediators. Programs may access mediators from other judicial districts, as needed.

Step Six: Train the Professionals

The AOC and regional coordinator will provide the professionals involved in child abuse and neglect cases with an orientation to the mediation program and introduction to the mediation process. These participant trainings or workshops may be repeated as needed.

Additional information about the Children's Court Mediation Program can be obtained from the AOC at the website: https://ccmediation.nmcourts.gov.

29.4.5 References

The Family Court Review produced a special issue titled *Mediating and Conferencing in Child Protection Disputes*, 47 Family Court Review No. 1 (2009). Several articles of particular interest include:

- *Reflections on the State of Consensus-Based Decision Making in Child Welfare*, by Bernie Mayer, pp. 10-20;
- *What We Know Now: Findings from Dependency Mediation Research*, by Nancy Thoennes, pp. 21-37;
- *A Guide to Effective Child Protection Mediation: Lessons Learned from 25 Years of Practice*, by Marilou Giovannucci and Karen Largent, pp. 38-52;
- *Family Group Conferencing and Child Protection Mediation: Essential Tools for Prioritizing Family Engagement in Child Welfare Cases*, by Kelly Browe Olson, pp.

53-68.

- *Child Protection Mediation: A 25-Year Perspective,* by Hon. Leonard Edwards, pp. 69-80;
- *Child Protection Mediation: The Cook County, Illinois Experience – A Judge's Perspective,* by Hon. Patricia M. Martin, pp. 81-85; and
- *Empowering Parents in Child Protection Mediation: Challenges and Opportunities,* by Gregory Firestone, pp. 98-115.

A prior issue of this same publication was also devoted to abuse and neglect mediation, 35 Family and Conciliation Court Review No. 2 (1997).

Additional articles of interest include:

- Edwards, Hon. Leonard, *Mediation in Child Protection Cases,* 5 Journal of the Center for Families, Children, and the Courts 57 (2004).
- Largent, Karen, *Child Protection Mediation and Family Engagement,* 25 Protecting Children 229 (2010).
- Olson, Kelly Browe, *Lessons Learned from a Child Protection Mediation Program,* 41 Family Court Review 480 (2003).

CHAPTER 30

ADOPTION

This chapter describes adoption:

- In the context of an abuse or neglect proceeding; and
- As an independent proceeding.

30.1 Introduction

The Adoption Act was enacted by the New Mexico Legislature as part of the extensive revision of the Children's Code in 1993. *See* §§32A-5-1 through 32A-5-45. It was amended in 2001, 2003, and 2005 to implement, at the state level, the Hague Convention on intercountry adoptions and the federal Intercountry Adoption Act, and to make state law consistent with the federal Child Abuse Prevention and Treatment Act. It was further amended in 2009 to address representation of older youth, to require certificates of search in putative father registries and to provide for contact between siblings in open adoption agreements. In 2012, the Act was amended to require prospective adoptive parents to file an accounting of their costs and expenses before the court will approve a consent to adoption or relinquishment. This requirement only applies in stepparent adoptions or adoptions under the Abuse and Neglect Act when ordered by the court. The amendments also prohibit unauthorized adoption services and limit advertising of adoption services.

The Adoption Act governs the range of adoptions that take place – the adoption of children who are in CYFD's custody, as well as adoptions handled by private child placement agencies, independent adoptions, and intercountry adoptions. However, there are certain ways in which adoptions taking place in connection with abuse or neglect proceedings are handled differently than other adoptions. This chapter discusses the range of adoptions and their accompanying procedures.

The Adoption Act authorizes CYFD to adopt regulations to implement the Act. These regulations are found in Title 8, Chapter 26 of the New Mexico Administrative Code.

30.2 Adoption in an Abuse or Neglect Case

30.2.1 When Adoption Can Be Granted in an Abuse or Neglect Case

Adoption is one of the possible outcomes of an abuse or neglect proceeding. If the court in the abuse or neglect case is hearing a motion to terminate parental rights, the court may consider adoption in the same proceeding. An adoption petition does not have to be filed in a

separate proceeding with a separate filing fee. This approach is most often taken in the case of "foster care conversion," where the foster parents have intervened in the abuse or neglect case and want to adopt the child. They can file a motion to adopt, and no filing fees would be required.

Absent an appeal of the TPR, the court may proceed to grant adoption of the child if the court finds that:

- parental rights should be terminated;
- the requirements for the adoption of a child have been satisfied;
- the prospective adoptive parent is a party to the action; and
- good cause exists to waive the filing of a separate adoption petition. §32A-4-28(F).

As noted, it is essential that the prospective adoptive parent be a party to the abuse or neglect proceeding if the court is to consider a motion to adopt in the same action. To determine who may intervene and become parties to the abuse or neglect action, ***see*** Handbook Chapter 25. If the prospective adoptive parent is not a party to that action, an adoption petition would have to be filed in a separate proceeding under the Adoption Act. ***See*** discussion below.

30.2.2 Compliance with the Adoption Act

As a general rule, adoptions heard in abuse and neglect cases must still comply with the requirements of the Adoption Act. Under §32A-4-28(F), the court may enter a decree of adoption only after finding that the party seeking to adopt the child has satisfied all of the requirements of that Act.

Section 32A-4-28(F) specifically provides that the court and the parties must comply with the time requirements in the Adoption Act, unless the termination of parental rights occurs under §32A-4-28(B)(3), which allows for TPR where the parent-child relationship has disintegrated and other conditions are met. ***See*** Handbook §22.4.4.

Until 2005, a child ten years of age or older could not be adopted without the child's consent unless the court found that the adoptee did not have the mental capacity to give consent. §32A-5-17. In 2005, the law was changed to provide that a child's consent to adoption is required only if the child is age 14 or older. As before, the child's consent is not required if the court finds that the child does not have the mental capacity to consent. §32A-5-17.

Any adoption decree entered pursuant to the Abuse and Neglect Act must conform to the requirements of the Adoption Act. The court will assign an adoption case number to the decree, which will have the same force and effect as other adoption decrees. §32A-4-28(F).

30.2.3 Effective Date of Adoption

Unless otherwise stipulated by the parties, the adoption decree cannot take effect for 60 days after the termination of parental rights, which allows CYFD sufficient time to provide counseling for the child and otherwise prepare the child for adoption. §32A-4-28(F).

30.3 Proceedings under the Adoption Act

The Adoption Act is intended to be a practical guide for the legal practitioner and the judge. Many of the sections contain lists of requirements to be addressed at the various steps in the proceedings, from the initiation of a petition for adoptive placement through the obtaining of a final decree of adoption.

30.3.1 Confidentiality of Records

After the petition for adoption is filed and before the decree is entered, the records in an adoption proceeding are open to inspection only by the attorney for the petitioner, the department or the agency, the adoptee's guardian ad litem (GAL), an attorney retained by the adoptee or other persons upon order of the court for good cause shown. All records, whether on file with the court, an agency, CYFD, an attorney or other provider of professional services in connection with an adoption are confidential and may be disclosed only in accordance with the Adoption Act. §32A-5-8(A) and (B). Hearings in adoption proceedings are confidential and must be held in closed court without admittance of any person other than parties or their counsel. §32A-5-8(C). Any person who intentionally and unlawfully releases any information or records that are confidential under the Adoption Act or who makes other unlawful use of these records is guilty of a petty misdemeanor. §32A-5-8(D).

Practice Note: A question that arises is whether the court appointed special advocate, or CASA, has access to records in an adoption proceeding. The CASA is specifically listed as one of the persons who has access to records in an abuse or neglect case, §32A-4-33(B), but is not explicitly included as one who has access under the Adoption Act. §32A-5-8(A). However, the Adoption Act does allow other persons to access records in an adoption case "upon order of the court for good cause shown." §32A-5-8(A). Under appropriate circumstances, the court could enter an order allowing the CASA access.

30.3.2 Consent and Relinquishment

Under the Adoption Act, an adoption cannot be granted unless the following people consent to the adoption or relinquish their parental rights:

1. The adoptee, if 14 years or older, except when the court finds that the adoptee does not have the mental capacity to give consent;
2. The adoptee's mother;
3. The adoptee's adoptive parent;
4. The adoptee's presumed father (***see*** Appendix B for the definition of "presumed father");
5. The adoptee's acknowledged father (***see*** Appendix B and *In the Matter of the Adoption Petition of Bobby Antonio R. (Helen G. v. Mark J.H.)*, 2008-NMSC-002, 143 N.M. 246;
6. CYFD or the agency to whom the adoptee has been relinquished that has placed the adoptee up for adoption, unless the court finds that the withholding of consent by CYFD or the agency is unreasonable; and

7. The guardian of the adoptee's parent when, pursuant to the Probate Code, that guardian has express authority to consent to adoption. §32A-5-17(A).

In the case of an Indian child, consent to the adoption or relinquishment of parental rights must be obtained from an "Indian custodian" as required by the Indian Child Welfare Act (***see*** Handbook Chapter 39). §32A-5-17(B).

As noted above, an adoption cannot be granted unless the acknowledged father consents or relinquishes his parental rights. In *In the Matter of the Adoption Petition of Bobby Antonio R.*, 2008-NMSC-002, ¶51, the New Mexico Supreme Court held that the biological father in the case had not taken sufficient steps to become an acknowledged father under the Adoption Act. The Supreme Court agreed with the Court of Appeals that, when the basis of the father's status as an acknowledged father is registration with the putative father registry, the father's consent to an adoption is required only if he registers within ten days of the child's birth. *Id*. ¶14. However, the Supreme Court reversed the Court of Appeals on the basis that Mark was not an "otherwise … acknowledged father" entitled to the right to consent under §32A-5-19. *Id*. ¶6. The filing of a paternity action and petition for custody in response to the petition for adoption was insufficient to give the biological father the status of "acknowledged father" under the Adoption Act. *Id*. ¶¶24-32. The father must bring such an action before the adoption petition is filed, or have filed with the putative father registry. *Id*. ¶30. Importantly, the Court held that under the Adoption Act the "mere" biological relationship is not sufficient to give a father a veto over an adoption. *Id.* ¶¶8, 32 and 34.

Bobby Antonio R. was a case in which the Court relied on the district court's finding that the father knew or should have known that he had likely fathered a child by mother, and this finding was important to the Court's decision. The Court indicated that there may be different considerations where a father had no reason to know that he fathered a child or where a mother affirmatively rejected support and assistance from the father and the father was not otherwise aware of a possible adoption. *Id.* ¶49.

Consent or relinquishment can be implied where the parent, without justifiable cause:

- left the adoptee without provision for the child's identification for a period of 14 days; or
- left the adoptee with others, including the other parent or an agency, without provision for support and without communication for a period of three months if the adoptee was under the age of six at the commencement of the 3-month period; or six months if the adoptee was over the age of six at the commencement of the six month period. §32A-5-18(A).

Consent or relinquishment may not be implied unless notice of hearing is served on the parent in question; the court must make a decision on the implied consent before proceeding to the adjudicatory hearing on the adoption. §32A-5-18(B).

Consent or relinquishment is not required of:

- a parent whose rights have been terminated pursuant to law;
- a parent who has relinquished the child to an agency for adoption;
- a biological father of an adoptee conceived as a result of rape or incest;
- any person who has failed to respond when given notice of the adoption proceeding under §32A-5-27; or
- any alleged father who failed to register with the putative father registry within 10 days of the child's birth and who is not the acknowledged father (***see*** Appendix B for the definition of alleged father). §32A-5-19.

Before consenting to an adoption, the parent or parents must usually go through counseling. §32A-5-22. The consent itself must be in writing and must provide all of the information required by §32A-5-21, including a statement in closed adoptions that all parties understand that the court will not enforce any contact, regardless of any informal agreements made by the parties. §32A-5-21(A)(7). In addition, the consent must be signed before and approved on the record by a judge who has jurisdiction over adoptions. §32A-5-23. Prior to approval of a consent to adoption, the prospective adoptive parents must file a full and specific accounting of their costs and expenses. §32A-5-23(D). However, stepparent adoptions or adoptions pursuant to the provisions of the Abuse and Neglect Act are not subject to this requirement, unless ordered by the court. §32A-5-23(E). Licensed adoption agencies are no longer authorized to take consents to adoption.

The counseling requirements as well as the requirements for the written form of the consent or relinquishment are described in detail in Chapter 22 on termination of parental rights. ***See*** Handbook §§22.2 and 22.3 on voluntary termination (relinquishment).

When a parent elects to relinquish parental rights to CYFD in connection with an abuse or neglect proceeding, a motion to accept the relinquishment is heard in the abuse and neglect case. §32A-5-24; ***see*** Handbook §§22.2 and 22.3.

30.3.3 Involuntary Termination of Parental Rights

If the parents of the child do not relinquish their parental rights to free the child for adoption, the court may consider a petition to terminate parental rights (TPR). The TPR can take place in a separate action prior to the filing of the petition to adopt, simultaneously with the petition to adopt, or by motion in the adoption proceeding. The proceeding may be initiated by CYFD, by a child placement agency, or any other person having a legitimate interest in the matter, including a petitioner for adoption or the child. The petition must state, among other things, that the petition is in contemplation of adoption. §§32A-5-15, 32A-5-16.

Abuse/Neglect Cases. See §§32A-4-28 and 32A-4-29 for the standards and procedures for TPR in cases brought under the Abuse and Neglect Act.

The court will, upon request, appoint counsel for an indigent parent who is unable to obtain counsel, or the court may appoint counsel for an indigent parent if counsel in the interest of

justice. §32A-5-16(E). The court must first advise the parent that he or she is entitled to have counsel appointed if indigency is established. "[T]he fact that Section 32A-5-16(E) emphasizes the request for an attorney does not obviate the necessity of first telling the parent that such a request may be honored as a matter of right." *Chris L. v. Vanessa O.*, 2013-NMCA-107, ¶15, 320 P.3d 16. Court appointed counsel will be paid at the rate determined by the Supreme Court for court-appointed attorneys. §32A-5-16(E).

A GAL will be appointed for the child in all contested cases. If the child is 14 or older and in CYFD's custody, the child's attorney in the abuse and neglect case will represent the child in the adoption case. §32A-5-16(F).

The grounds for termination must be proven by clear and convincing evidence, except in cases involving Indian children, where the standard is beyond a reasonable doubt. §32A-5-16(H); ***see*** Handbook §39.2.9.

The physical, mental and emotional welfare and needs of the child are the primary considerations for termination. The court may terminate parental rights under the Adoption Act for the same reasons as are outlined in the Abuse and Neglect Act: abandonment, abuse or neglect, or disintegration of the parent-child relationship (presumptive abandonment). However, the Adoption Act does not contain a requirement that CYFD make reasonable efforts to work with the parents when abuse or neglect is alleged. §32A-5-15; ***see*** Handbook §22.4 on the grounds for termination under the Abuse and Neglect Act.

In *Matter of the Adoption of J.J.B.*, 119 N.M. 638 (1995), a biological father sought reversal of the trial court's decision to terminate his parental rights. Deciding that any presumption of abandonment under the predecessor to §32A-4-28(B)(3) and §32A-5-15(B)(3) was rebutted as a matter of law, the Supreme Court emphasized that proof of abandonment required a showing that parental conduct evidenced a conscious disregard of obligations owed to the child and that such conduct led to the disintegration of the parent-child relationship. The court emphasized that "evidence of the disintegration of the parent-child relationship is of no consequence if not caused by the parent's conduct." 119 N.M. at 648, 651.

In *Helen G. v, Mark J.H.*, 2006-NMCA-136, 140 N.M. 618, the Court of Appeals reversed the termination of a biological father's parental rights in an adoption proceeding because the district court erroneously relied exclusively on the father's conduct prior to the child's birth to establish that the father caused the disintegration of the parent-child relationship. Explaining that the father "could not have a 'relationship' with the child in utero," the court concluded that there was no "relationship that could be subject to disintegration until the child was born." *Id*. ¶37. Because the district court "improperly focused on [the father's] pre-birth conduct," the Court of Appeals concluded that the district court's finding that the father presumptively abandoned the child was not supported by substantial evidence. *Id*. ¶40. The New Mexico Supreme Court reversed the decision of the Court of Appeals on other grounds and did not address the abandonment issue. *In the Matter of the Adoption Petition of Bobby Antonio R.*, 2008-NMSC-002, ¶¶6 and 51, 143 N.M. 246. It remains to be seen whether the Court would consider steps taken or not taken during pregnancy to affect a determination of abandonment for purposes of TPR. If the court terminates parental rights, it must appoint a custodian for the child. The court may commit the child to the custody of

CYFD, the petitioner, or an agency willing to accept custody for the purpose of placing the child for adoption. In the case of an Indian child, the termination order must include specific findings under ICWA. §32A-5-16(I); ***see*** Handbook Chapter 39.

30.3.4 Placement for Adoption

Before a petition for adoption can be granted, the adoptee must be placed in the home of the petitioner. Placement is made by CYFD, by an appropriate public authority of another state, by a placement agency, or by court order. §32A-5-12(A). There is an exception to this placement requirement for adoptions taking place under the Abuse and Neglect Act. §32A-5-12(B). The rule also does not apply to certain independent adoptions, that is, stepparent or relative adoptions where the child has lived with the stepparent or relative for one year before the petition is filed as well as situations where the person designated to care for the child in the will of the deceased parent wants to adopt the child and the child has lived with that person for one year. §32A-5-12(C).

When a placement order is required, the petitioner must file a request with the court to allow the placement. A hearing and the court decision on the request for placement must occur within 30 days of the filing of the request. §32A-5-13(H). Although placement may not take place until an order is obtained, §32A-5-13(A), an order allowing placement may be entered prior to service of the request for placement. §32A-5-13(G).

As a general rule, a pre-placement study, formerly known as a home study, is filed prior to the hearing on the request for placement. The requirements for a pre-placement study are described in detail in §32A-5-14. The study must be current, which means that it was prepared or updated within one year immediately prior to the date of placement. §32A-5-13(B). The court's order allowing placement must include a finding that the study complies with §32A-5-14. §32A-5-13(I).

In all adoptions, prior to any placement being made, the person making the placement must provide full disclosure. §32A-5-12(E). "Full disclosure" is defined as mandatory and continuous disclosure by the investigator, agency, department, or petitioner throughout the proceeding and after finalization of the adoption of all known, non-identifying information regarding the adoptee, including health history, psychological history, mental history, hospital history, medication history, genetic history, physical descriptions, social history, placement history, and education. §32A-5-3(N).

30.3.5 Fingerprinting and Criminal History Records Check

CYFD is required to obtain fingerprints and complete a nationwide criminal history check of all adults living in the home of a prospective foster or adoptive parent. Criminal history records obtained by CYFD are confidential and may not be released or disclosed except by court order or with the written consent of the person who is the subject of the record. Anyone who releases or discloses criminal history records or information contained in those records without a court order or written consent of the person concerned is guilty of a misdemeanor. §§32A-5-14.1, 32A-15-3.

30.3.6 Petition for Adoption

A petition for adoption must be filed within 60 days of the adoptee's placement in the proposed adoptive home if the adoptee is under the age of one, or within 120 days if the adoptee is over the age of one, at the time of placement. Extensions of time are permitted under certain conditions. §32A-5-25.

The allegations that must be included in a petition for adoption are set forth with specificity in §32A-5-26. If anonymity is being preserved, the adoptee's birth name can be filed by counsel for petitioner in a separate document. §32A-5-26(D). If the adoptee is an Indian child, any correspondence from the tribe must be attached to the petition and the efforts made to follow the placement preferences of the Indian Child Welfare Act must be stated. §32A-5-26(M); ***see*** Handbook §39.3 on placement preferences under ICWA.

CYFD must be given notice of the petition, which is accomplished by leaving a copy of the petition with the clerk of the court, who is required to mail the copy to CYFD within one working day of the petition being filed. §32A-5-7. CYFD has the authority to intervene in any action filed under the Adoption Act; intervention is effected by filing a motion for an entry of appearance and an appropriate response. §32A-5-6(C).

The Adoption Act contains a list of the persons who must be served with the petition and some additional requirements for service in the case of an Indian child. §32A-5-27(A) and (D). Notice does not have to be served on alleged fathers or on persons whose parental rights have been relinquished or terminated. §32A-5-27(B). Notice by publication is permitted if a motion is made and supported by an affidavit swearing that after investigation the identity and/or whereabouts of the parent remain unknown. §32A-5-27(F).

Any person responding to a petition for adoption must file a verified response within 20 days if the person intends to contest the adoption. However, if an agency, CYFD, or an investigator preparing the post-placement report wants to contest the adoption, they must notify the court within 20 days of completion of the post-placement report, discussed below. §§32A-5-27(E) and 32A-5-28.

The court may appoint a GAL for the adoptee at any time in an adoption proceeding upon the motion of a party or the court's own motion. A GAL must be appointed for an adoptee when the adoption is contested. The court may appoint the child's attorney appointed under the Abuse and Neglect Act if the child is 14 or older and in the custody of CYFD. §§32A-5-33.

The court is required to adopt a presumption in favor of appointing a GAL for the adoptee, or a youth attorney if the adoptee is 14 or older, when visitation between the biological family and the adoptee is included in an agreement. This presumption may be waived for good cause shown. §32A-5-35(B); ***see*** Handbook §30.4.2 on open adoption.

Pending a final decree, custody of the adoptee lies with the petitioners pursuant to §32A-5-29. The adoptee cannot leave the county during the pendency of the proceedings for more than 15 days without court permission. §32A-5-30.

30.3.7 Post-Placement Reports

Post-placement reports are required in adoptions. The investigation may be conducted by CYFD, an agency, or a certified investigator, and may be the same entity or person who conducted the pre-placement study.

The post-placement report (formerly called the investigation) must include the information specified in §32A-5-31(A), including information concerning the interaction between petitioners and the adoptee, the adjustment of the adoptee since placement, the integration and acceptance of the adoptee by the petitioner's family, the petitioner's ability to meet the physical and emotional needs of the adoptee, and full disclosure as defined by the Act. The report must also contain an evaluation of the proposed adoption with a recommendation as to the granting of the petition. For a child under the age of one at the time of placement, the report must be filed with the court within 60 days of receipt of notice of the proceeding. For a child one year of age or older, the report must be filed within 120 days. Concurrently, the deliverer must forward a copy to the petitioner's attorney or to the petitioner, if not represented by counsel, and to CYFD, if the report is not generated by CYFD. The court may grant extensions if the report is received 30 days prior to a final hearing. §32A-5-31.

30.3.8 Hearing on Adoption Petition

The court is expected to conduct adoption proceedings in a way that protects confidentiality. The petitioner and the adoptee must attend the hearing unless the court waives a party's appearance for good cause shown (such as burdensome travel requirements). §32A-5-36. The Rules of Evidence apply to the hearing. Rule 11-1101(A)-(B).

To grant the petition under §32A-5-36, the court must find that the petitioner has proved by clear and convincing evidence that:

- the court has jurisdiction to enter a decree of adoption affecting the adoptee;
- the adoptee has been placed with the petitioner for 90 days if under the age of one at the time of placement or for 180 days if one year of age or older, unless the requirement is waived by the court for good cause shown;
- all necessary consents, relinquishments, terminations, or waivers have been obtained;
- the post-placement report has been filed;
- service of the petition has been made or dispensed with pursuant to §32A-5-27;
- at least 90 days have passed since the filing of the petition, except that the court may shorten or waive this when the child is being adopted by a stepparent, relative, or person named in the child's deceased parent's will, as described in §32A-5-12;
- the petitioner is a suitable adoptive parent and the best interests of the adoptee are served by the adoption;
- if visitation between the biological family and the adoptee is contemplated, that the visitation is in the child's best interest;
- if the adoptee is foreign born, the child is legally free for adoption and a certificate issued by the U.S. Secretary of State has been filed with the court certifying the adoption as a convention adoption (***see*** Handbook §30.4.4 below);

- the results of the criminal records checks required by the Adoption Act have been received and considered;
- when the child is an Indian child, the placement preferences of ICWA or the child's tribe have been followed or good cause for noncompliance is clearly stated and supported and provision has been made to ensure that the child's cultural ties to the tribe are protected and fostered (***see*** Handbook §30.4.1 below); and
- if the adoption involves an interstate placement, the requirements of the Interstate Compact on the Placement of Children, §32A-11-l *et seq*., have been met. ***See*** Handbook §30.4.3.

Also, if a biological father who is neither a presumed father nor an acknowledged father whose consent is necessary for an adoption nevertheless contests the adoption and requests custody of the child, the court must conduct a hearing to adjudicate the person's rights pursuant to the Adoption Act. §32A-5-36(C). In that instance the court will consider evidence presented by the parties, and make a determination as to whether the adoption is in the best interests of the child. §32A-5-36(H) and *In the Matter of the Adoption Petition of Bobby Antonio R.*, 2008-NMSC-002, ¶35, 143 N.M. 246.

30.3.9 Adoption Decree

A decree of adoption must be entered within six months of the filing of the petition for adoption if the adoptee is under age one or within 12 months if the adoptee is age one or over, although extensions are possible for good cause shown. In any adoption of an Indian child, the court clerk must provide the Secretary of the Interior with a copy of the adoption decree and other information as required by ICWA. §32A-5-36(J)-(L); ***see*** Handbook Chapter 39 on ICWA.

After adoption, the adopted child and the adoptive parents have the same legal relation of parent and child as if the adoptee were the biological child of the adoptive parent and the adoptive parent were the biological parent of the child. The adopted child has all rights and is subject to all of the duties of that relation, including the right of inheritance from and through the adoptive parent. §32A-5-37.

If the court determines that any of the requirements for a decree of adoption have not been met or that the adoption is not in the best interest of the child, the court must deny the petition and determine, in the child's best interests, the person who shall have custody of the child. §32A-5-36(H). There may be special circumstances in which that person is someone other than the child's natural parents, even if parental rights have not been relinquished or terminated. *In the Matter of the Adoption of J.J.B.*, 119 N.M. 638, 650-655 (1995).

30.3.10 Revoking a Decree of Adoption

A decree of adoption may not be attacked more than one year after the entry of the decree, except that in the adoption of an Indian child, the parent or Indian custodian can petition to invalidate the adoption as provided in the Indian Child Welfare Act. §32A-5-36(K); ***see*** Handbook §39.2.10.

In the case of consent to adoption or relinquishment of parental rights in non-ICWA cases, the consent or relinquishment may be challenged only before the decree of adoption is entered, and only on the grounds of fraud. §32A-5-21(I). This statutory restriction was addressed in *State ex rel. HSD in the Matter of Kira M.*, 118 N.M. 563 (1994), where the biological mother had sought to withdraw her consent to adoption. The Supreme Court observed that the legislature limited the grounds to fraud "in a sound expression of public policy in order to bring a high degree of certainty, finality, and stability to adoption and relinquishment proceedings." 118 N.M. at 570. The Court also recognized, however, that the children's court has the power to grant the request of a natural parent to withdraw consent under exceptional circumstances, if consistent with the best interests of the child. In *Kira M.*, the facts did not provide such exceptional circumstances. *Id.*

In *In the Matter of the Adoption Petition of Drummond*, 1997-NMCA-094, 123 N.M. 727, the court considered when, if ever, an adoption decree may be reopened after the statutory one-year deadline for attacking such decrees had passed. Citing *Kira M.*, the court decided that exceptional circumstances existed in the case to justify reopening the adoption decree under Rule 60(B)(6) of the Rules of Civil Procedure. *Drummond*, ¶¶15-17.

In *Drummond*, the biological mother had been living with her child and her parents, who had adopted the child. In the course of the adoption, her parents assured her that nothing would change with the adoption and that she would still be the child's mother. In fact, she remained, for all practical purposes, the child's mother after the adoption. However, when she began dating a man her parents did not like, her parents asked her to leave the home without the child. According to the Court of Appeals, the adoption was never meant to be a real adoption or to change the mother's actual relationship with the child. The district court's decision to set aside the adoption decree was affirmed and the case remanded to determine the best interests of the child with regard to her custody and control. *Id.* ¶21.

30.4 Special Considerations

30.4.1 Adoption of Indian Children

The protections set forth in the Indian Child Welfare Act, including provisions for notice to the child's tribe, transfer to tribal court and placement preferences, apply to all proceedings involving an Indian child under the Adoption Act. §32A-5-4; ***see*** Handbook Chapter 39 on ICWA. The Adoption Act and the regulations implementing the Act also make extensive provision for the procedures to be followed in the case of the adoption of Indian children. These should be reviewed with care, together with ICWA, in any case involving an Indian child or a child who might be an Indian child.

In adoptive placements of Indian children under the state Adoption Act, preference must be given, in the absence of good cause to the contrary, to a placement with:

- a member of the child's extended family;
- other members of the child's Indian tribe; or

- other Indian families.

An Indian child accepted for pre-adoptive placement must be placed in the least restrictive setting that most approximates a family in which the child's special needs, if any, may be met. The child must also be placed within reasonable proximity to the child's home, taking into account the child's special needs. For further details, *see* §32A-5-5.

In any pre-adoptive placement, a preference must be given, in the absence of good cause to the contrary, to a placement with:

- a member of the child's extended family;
- a foster home licensed, approved and specified by the child's tribe;
- an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- an institution for children approved by the tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

If these preferences are not followed or if the child is placed in an institution, a plan must be developed to ensure that the Indian child's cultural ties are protected and fostered. §32A-5-5.

The Multiethnic Placement Act does not apply to Indian children under ICWA. ***See*** Handbook §38.6.

30.4.2 Open Adoptions

Absent a finding to the contrary, an agreement reached between the adoptive parents and the biological parents concerning contact with each other or with the adoptee will be presumed in the best interests of the adoptee and included in the final decree of adoption. The agreement may also include contact between siblings and the adoptee based on a finding that it is in the best interests of the adoptee and his or her siblings and a determination that the siblings' parent, guardian or custodian has consented to the agreement. §32A-5-35(A).

The agreement is considered an open adoption although the types of contact to which the parties agree can vary greatly. For example, the "contact" may include:

- an exchange of identifying or non-identifying information; or
- visitation between the parents or the parents' relatives or the adoptee's siblings and the adoptive parents; or
- visitation between the parents or the parents' relatives or the adoptee's siblings and the adoptee. §32A-5-35(A).

As noted earlier, the court may appoint a GAL for the adoptee. If visitation between the biological family and the adoptee is included in the agreement, the court must adopt a presumption in favor of appointing a GAL, although this presumption may be waived for good cause shown. If the child is 14 or older, the court may appoint counsel for the child. §32A-5-35(B).

In determining whether an agreement is in the adoptee's best interests, the court will consider the adoptee's wishes but those wishes do not control the court's findings as to best interests. §32A-5-35(C).

The open adoption agreement is negotiated between the adoptive and biological parents. The agreement must be in writing as it is included in the final decree of adoption. §32A-5-35(A) (contrast, *Vigil v. Fogerson*, 2006-NMCA-10, 138 N.M. 822). Every agreement must contain a clause stating that the parties:

- agree to the continuing jurisdiction of the court;
- agree to the agreement; and
- understand and intend that any disagreement or litigation regarding the terms of the agreement will not affect the validity of the relinquishment of parental rights, the adoption, or the custody of the adoptee. §32A-5-35(D).

If the decree contains an agreement for contact, the court will retain jurisdiction after the decree of adoption to hear motions brought to enforce or modify the agreement. The court may not grant a request to modify unless the moving party demonstrates a change in circumstances and the agreement is no longer in the adoptee's best interests. §32A-5-35(E).

Practice Note: Open adoption should be seriously considered as an option to support the best interests of the child in an abuse or neglect proceeding. And where open adoption is an option, mediation may be a good forum in which to hammer out a post-adoption contact agreement, making it more likely that efforts toward permanency will be brought to a successful conclusion.

The Child Protection Best Practices Bulletin titled *Open Adoption and Mediated Post Adoption Contact Agreements (PACA)* provides detailed information about mediating open adoptions. To download a copy of this best practices bulletin, visit: https://childlaw.unm.edu/resources.php. Additional information about open adoption mediation can be found on the Children's Court Mediation Program (CCMP) website at: http://ccmediation.nmcourts.gov.

Since 2009, when a motion for termination is filed, the moving party must also file a motion for court-ordered mediation between the parent and any prospective adoptive parent to discuss an open adoption agreement and any agreement reached before TPR must be made part of the court record. §32A-4-29(D). The CCMP conducts open adoption mediations either before or after TPR, depending on the specific circumstances of the case.

30.4.3 Interstate Compact on the Placement of Children

The Interstate Compact on the Placement of Children (ICPC) is a binding reciprocal agreement among all of the states and territories of the United States. As enacted in New Mexico, the compact can be found at §32A-11-1. If an adoption involves the interstate placement of the adoptee, the requirements of the ICPC must be met. §32A-5-36(F)(13).

30.4.4 Intercountry Adoptions

In 2003, the Adoption Act was amended to implement the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption for the state of New Mexico, provide that the protections and requirements in the federal Intercountry Adoption Act apply to proceedings involving a convention adoption, and authorize CYFD to act as an accrediting entity with respect to convention adoptions. *See, e.g.*, §§32A-5-3, 32A-5-26, 32A-5-36, 32A-5-39, and 32A-5-39.1. "Convention adoption" is defined to include an adoption by a U.S. resident of a child who is a resident of a foreign country that is a party to the Hague Convention and an adoption of a child who is a U.S. resident by a resident of a foreign country that is a party to the Hague Convention. §32A-5-3(I).

The 2005 amendments to the Adoption Act clarify that a foreign decree or order of adoption must be recognized as if it were a New Mexico decree or order of adoption if it was entered by a court or other entity in another country acting pursuant to that country's law or pursuant to any convention or treaty or intercountry adoption that the United States has ratified. §32A-5-39.

30.4.5 Reproductive Alternatives

Sperm donors, artificial insemination, and other assisted reproduction methods are governed by §40-11A-701 through §40-11A-707, enacted in 2009.

Surrogate mothers are discussed in §32A-5-34. Petitioners for adoption may pay those expenses of the biological mother that are reasonably related to the adoption. §32A-5-34(A). The legislature added the reasonableness requirement in 2005 to ensure that the surrogate mother is not being paid for conceiving and carrying the child, which is prohibited by §32A-5-34(F). The biological mother may elect not to consent to the adoption or to relinquish parental rights. §32A-5-34(D).

30.5 Subsidized Adoptions

30.5.1 Adoption of Children with Special Needs

There are many situations in which an adoptive family is capable of providing the permanent family relationship needed by a difficult-to-place child in all respects except that the needs of the child are beyond the economic resources and ability of the family. In these cases, CYFD may make payments to the adoptive parents or to medical vendors on behalf of the child. §32A-5-44(A).

According to the statute, a difficult-to-place child is one who has a mental, physical, or emotional disability or who is in special circumstances by virtue of age, sibling relationship, or racial background. §32A-5-44(B).

Subsidy payments may include payments to vendors for medical or surgical expenses and

payments to the adoptive parents for maintenance and other costs incidental to the adoption, care, training, and education of the child. Payments may be made until the child reaches age 18 unless the child is enrolled in the medically fragile waiver program, in which case payments may continue until the child is 21. A written agreement between the adoptive parents and CYFD outlining the terms and conditions of the subsidy plan based on the individual needs of the child should precede the decree of adoption. §32A-5-45(B) and (C).

Practice Note: The agreement is best negotiated prior to placement to ensure that the terms and conditions of the subsidy are well understood and the adoption is likely before the child is placed in the home.

30.5.2 Sources of Funds for Subsidized Adoptions

There are currently two sources of funds for subsidies for parents adopting special needs children. The primary source is Title IV-E of the federal Social Security Act. ***See*** Handbook §38.3. Title IV-E funds may be available if the child was eligible for Title IV-E foster care maintenance payments or if the child meets the requirements of Title XVI of the Social Security Act for the receipt of Supplemental Security Income benefits. 42 U.S.C. §673(a)(2). State funds are also available for adoption subsidies.

30.6 Useful Checklists

The Children's Court Division of the 2nd Judicial District Court has a number of checklists that it finds helpful in adoption cases. One is a Consent and Relinquishment Checklist that may be used by judges taking a party's consent to adoption or relinquishment of parental rights. Another is a checklist used by the Trial Court Administrative Assistant for proper maintenance of the court's adoption files. Both checklists are reprinted here, beginning on the next page, as examples of useful court tools.

CONSENT and RELINQUISHMENT CHECKLIST

1. Administer oath.

2. Prescription medication?

3. Consumed alcohol or drugs in last 24 hours?

   Anything else that would affect your ability to understand and answer my questions?

4. Independent legal counsel?

   A. Attorney – did you have a choice in the selection of your independent legal counsel?
   B. Are you satisfied with representation? What was the most important thing that your attorney explained to you?
   C. Did you have an opportunity to privately disclose any **reservations** you may have or to report any **coercive** influences?
   D. Attorney Fees paid by agency or adoptive parents – issue?

5. Counseling Narrative – Read, reviewed and signed?

   A. Counselor of your choice?
   B. Questions asked regarding whether child has Native American heritage?
   C. With the information received in counseling and with the knowledge you now have, are you voluntarily and unequivocally consenting to the adoption of your child?

6. Form of Consent/Relinquishment

   A. Reviewed form with your attorney?
   B. Questions regarding the meaning of any of the terms or provisions of the form?

7. What rights does any parent have to her/his child?

   A. Control activities; make decisions about child; custody
   B. Right to withhold consent to adoption
   C. Notice of legal action involving child that may affect your rights –waiver of notice

8. By signing Consent/Relinquishment you are giving up your rights to your child.

9. Once given, you may not withdraw your consent/relinquishment.

10. Once you sign Consent/Relinquishment, the document is legally binding, final and irrevocable. Please tell me in your own words what that means.

11. Has anyone promised you anything of value in exchange for your consent/relinquishment?

12. Has anyone threatened you or forced you to give consent/relinquishment against your will?

13. Conditional consent: Conditions??

14. No informal agreements for pictures, information or visits will be enforced by the court. Only written open adoption agreements approved by the court will be enforced.

15. Option for Open Adoption: Discuss.

16. If your open adoption agreement is not approved by the court, are you still willing to give consent/relinquishment? [Present a hypothetical that addresses whether a court-approved open adoption agreement is an expectation that motivates his/her consent/relinquishment.]

17. Failure to abide by the terms of open adoption agreement does not affect the validity of the relinquishment, adoption or custody of the child.

18. Explain other parent's due process rights and importance of giving notice to him/her. [Explain in context of ensuring permanency of placement and avoiding disruption for the child. If facts warrant, probe for information as to identity and whereabouts of other birth parent.]

19. Have you been offered a copy of the Consent/Relinquishment?

20. Questions of attorney, court or counselor?

21. FINDINGS

22. OBTAIN SIGNATURE

TRIAL COURT ADMINISTRATIVE ASSISTANT ADOPTION FILE CHECKLIST

1. Birthparent Narrative (including counselor's certification)

    - Birthmother
    - Birthfather

2. Birthparent Consent, relinquishment, or waiver

    - Birthmother
    - Birthfather
    - Signed by judge?
    - Attorney for birthmother? (not required, but preferred)
    - Attorney for birthfather? (not required, but preferred)

3. Affidavit for Release of Information

4. Full disclosure documentation

5. Adoptee counseling narrative if 10 or over

6. Adoptee consent if 14 or over

7. Placement agency/CYFD consent

8. Subject to ICWA?

    - If yes, then was proper notice sent to tribe?
    - Tribal intervention or concurrence?

9. Background records checks (+ detailed report if results are positive)

    - FBI – not older than 2 years
    - State – not older than 1 year

10. Request for Order of Placement (if not an agency or CYFD adoption)

11. Order allowing placement (if not an agency or CYFD adoption)

12. Adoption Petition w/Petitioner verification (or Motion if CYFD adoption)

13. Notice of Adoption Petition (if not by relinquishment/consent) – must reflect TPR if no response

    - Birthfather
    - Birthmother
    - Death certificate of any deceased birthparent
    - Surviving parents of a deceased birthparent

14. Putative father registry check response

15. Motion for Service by Publication with affidavit (if not by relinquishment/consent or direct notice)

16. Order for Service by Publication

17. Certificate of Mailing

    - CYFD Central Adoptions
    - Agency

18. Pre-placement study (less than 1 year old) & updates, as appropriate (with counselor certification)

19. If open-adoption, then open-adoption agreement (OAA)

20. Motion/order for GAL if not waived in cases where OAA provides for contact

21. GAL report when GAL appointed

22. Motion for order to leave county of residence (if leaving county for more than 15 days)

23. Order of residence (if leaving county for more than 15 days)

24. Original birth certificate

25. Affidavit of publication

26. Certificate of service (if by mail, proof of certified delivery/return receipt)

27. Certificate as to the State of the Record

28. Motion for default judgment

29. Default judgment

30. Post-placement report with counselor certification

31. Statement of accounting

32. Request and order for hearing

33. Final decree

CHAPTER 30A

KINSHIP GUARDIANSHIP

This chapter summarizes the Kinship Guardianship Act, enacted in 2001. It covers:

- Eligibility for appointment by the court as a kinship guardian.
- Procedures for appointment of kinship guardian.
- Provisional adoption of kinship guardianship forms.
- The Caregiver's Authorization Affidavit.

30A.1 Purpose of Kinship Guardianship Act

The Kinship Guardianship Act (KGA), §§40-10B-1 to 40-10B-15, was enacted in 2001. As stated in the Act, its purposes are to:

- create procedures for establishing a legal relationship between a child and a kinship caregiver when the child is not residing with either parent; and
- provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally, and emotionally to the maximum extent possible when the child's parents are not willing or able to do so.

Kinship guardianship is not the same thing as "permanent guardianship" under the Abuse and Neglect Act. For someone to be able to petition the court for appointment under the Kinship Guardianship Act, the person must be an adult with whom the child resides, although not necessarily a blood relative. Kinship guardianship does not authorize the court or law enforcement to remove the child from the parents' home. For further comparison with permanent guardianship under the Abuse and Neglect Act, as well as guardianship under the Probate Code, ***see*** Handbook §23.13.

In *In the Matter of the Guardianship of Victoria R.*, the Court of Appeals for the first time reviewed a judgment awarding guardianship under the KGA. 2009-NMCA-007, 145 N.M. 500. The court in this case was comparing KGA proceedings with termination of parental rights. The court noted four important differences:

- nothing in the KGA indicates that it can be invoked to terminate a parent's rights;
- unlike termination of parental rights, a KGA guardianship is revocable;
- under the KGA the court may order that the parent retain rights and duties; and
- the court retains continuing jurisdiction over a KGA guardianship.

2009-NMCA-007, ¶8. The court noted that the "Legislature did not intend a KGA guardianship to completely and irrevocably sever the relationship between a parent and the child, nor did it intend for a KGA guardianship to be a one-size-fits-all remedy." *Id.* Furthermore, "KGA guardianship cases do not represent a 'bipolar' contest between parents and the party invoking the authority of the state to override the decision of the child's parents: '[t]here is at a minimum a third individual, whose interests are implicated in every case to which the statute applies--the child.'" *Id.* ¶11 (citation omitted).

According to the concurring opinion in *Victoria R.*, the KGA "represents a significant change in the area of children's rights . . . [and] recognizes the emergence of a new body of children's rights." 2009-NMCA-007, ¶21, 145 N.M. 500 (Pickard, J., specially concurring).

30A.2 Proceeding to Appoint Guardian

30A.2.1 Petition

Under the Kinship Guardianship Act, a caregiver with whom a child resides and who provides the child with the care, maintenance and supervision consistent with what a parent provides may petition the district court for guardianship. At the time of filing of the petition, the petitioner must obtain an order of the court setting a date for the hearing on the petition. The date must be at least 30 and no more than 90 days from the date of filing.

The caregivers who may petition for appointment are:

- a kinship caregiver (kinship meaning the relationship that exists between a child and a relative of the child, a godparent, a member of the child's tribe or clan or an adult with whom the child has a significant bond);
- a caregiver age 21 or older with whom no kinship exists but whom a child age 14 or older nominates; or
- a caregiver clearly designated by a parent in writing. §§40-10B-5, 40-10B-4.

If an abuse or neglect proceeding is pending, the petition and notice of hearing must be served on CYFD. The petition and notice must also be served on the child if 14 years of age or older, the parents, any person with custody or visitation rights and, in the case of an Indian child, the tribe. §§40-10B-4 to 40-10B-6. Failure to give notice may violate due process. *See In the Matter of the Guardianship of Kaitlynn Alexis Ware*, 2010-NMCA-083, ¶19, 148 N.M. 616.

The court may appoint a guardian ad litem for the child upon a party's motion or solely in the court's discretion. If a parent is participating in the proceeding and objects to the appointment of a guardian, then the court must appoint a guardian ad litem. Likewise, in a proceeding to revoke a guardianship previously established, the court must appoint a guardian ad litem if the guardian objects to revocation. §40-10B-9.

30A.2.2 Appointment

Under §40-10B-8(B), the court may appoint a guardian after hearing if:

- the parent consents in writing;
- the parent's rights have been terminated or suspended by prior court order; or
- the child has been residing with the petitioner and without a parent for 90 days or more and the parent with legal custody is currently unwilling or unable to care for the child or there are extraordinary circumstances; and
- no guardian is currently appointed under the Probate Code (***see*** Handbook §23.13).

If an award of guardianship is based on parental consent, the consent of both parents is not required provided that each parent meets at least one of conditions in §40-10B-8(B). The Supreme Court has reasoned that if the consent of both parents were required to meet the parental consent prong, then a parent demonstrated to be unfit or absent would have the power to veto a guardianship. Instead, §40-10B-8(B) requires each parent to meet one of its conditions but does not require both parents to satisfy the same condition. *Freedom C. v. Brian D., In the Matter of Guardianship of Patrick D.*, 2012-NMSC-017, ¶¶17-18, 290 P.3d 909. Moreover, the fact that one parent lives in the same house as the kinship guardian does not necessarily preclude application of the KGA. ¶¶32-34.

The "extraordinary circumstances" standard was addressed in *In the Matter of the Guardianship of Victoria R.*, 2009-NMCA-007, ¶16, 145 N.M. 500. In that case, the Court of Appeals affirmed the trial court's award of guardianship to the third party petitioner over the objection of one of the biological parents, holding that extraordinary circumstances were established. These included a showing that the child was primarily bonded to petitioners, considered them her parents, and would suffer significant depression if her relationship with petitioners was abruptly terminated. *Id.* ¶26. *See also* the discussion of extraordinary circumstances in the concurring opinion. *Id*. ¶¶27-30 (Pickard, J., specially concurring).

In contrast, the Court of Appeals in *Stanley J. v. Cliff J., In the Matter of the Kinship Guardianship of Adam L.*, 2014-NMCA-029, 319 P.3d 662, reversed the district court's award of guardianship, concluding that the petitioners had not proven extraordinary circumstances by clear and convincing evidence. In that case, Mother had died after a lengthy illness and the teenage children wanted to stay in Grady and finish school there. However, their Father, who lived in Texas, was a fit parent and wanted custody. The court held that, while moving to Texas would result in a life-changing experience for the children and undoubtedly result in emotional stress or apprehension, whether they should be moved to Texas was a parenting decision for Father, not the courts, to make. *Id*. ¶21. This was a 2-1 decision; the Supreme Court denied certiorari in early 2014.

The court must find in all cases that the best interests of the child will be served by the requested appointment. §40-10B-8(A).

The burden of proof is clear and convincing evidence, except in cases involving an Indian child, in which case the burden of proof is proof beyond a reasonable doubt. §40-10B-8(C).

If the child is 14 years old or older, the court must appoint the person nominated by the child unless the court finds the nomination contrary to the child's best interest. The court may not appoint a person against whom the child has filed a written objection. §40-10B-11.

The court may order a parent to pay the costs of support and maintenance to the extent the parent is financially able to pay. The court may also order visitation between a parent and the child to maintain or rebuild a parent-child relationship if visitation is in the best interests of the child. §40-10B-8(D) and (E).

30A.2.3 Rights and Duties

A guardian appointed under the Kinship Guardianship Act has the legal rights and duties of a parent except the right to consent to adoption. The guardian also does not have the parental rights and duties that the court orders be retained by a parent. Unless the court otherwise orders, the guardian may make all decisions regarding visitation between a parent and the child. §40-10B-13.

30A.2.4. Revocation

The guardianship may be revoked by order of the court. Any person, including a child who has reached his or her 14th birthday, may bring a motion to revoke a kinship guardianship under the KGA. §40-10B-12; *Vescio v. Wolf*, 2009-NMCA-129, ¶13, 147 N.M. 374. The person moving for revocation must attach to the motion a transition plan proposed to facilitate the reintegration of the child into the home of a parent or new guardian. The court may grant the motion if it finds that a preponderance of the evidence proves a change of circumstances and revocation is in the child's best interest. §40-10B-12.

It is important to seek revocation of a KGA guardianship through the procedures set forth in the Act if the guardianship should end. In a 2-1 decision, the Court of Appeals held that a person whose guardianship had not been revoked Act was entitled to participate in the abuse or neglect case as it moved to termination and adoption. The Supreme Court has accepted certiorari on the case. *State ex rel. CYFD v. Djamila*, 2014-NMCA-045, 322 P.3d 444, *cert. granted*, 2014-NMCERT-004.

30A.2.5 Forms Approved by the Supreme Court

The following forms are available in the Civil Forms:

4-209B	Order for service of process by publication in a newspaper (guardianship proceedings)
4-981	Petition for order appointing kinship guardian
4-982	Summons kinship guardianship proceedings
4-983	Nomination of kinship guardian
4-984	Motion for appointment of temporary guardian
4-985	Parental consent to appointment of guardian and waiver of service of process

	(paternity admitted)
4-986	Parental consent to appointment of guardian and waiver of service of process (paternity not admitted)
4-987	Order appointing temporary kinship guardian
4-988	Order appointing kinship guardian by consent (paternity admitted)
4-989	Order appointing kinship guardian by consent (paternity not admitted)
4-990	Order appointing kinship guardian without consent of both respondents
4-991	Motion for revocation of kinship guardianship

30A.3 Caregiver's Authorization Affidavit

30A.3.1 Purpose and Effect

Judges, advocates, social workers, and parents should be aware of a temporary option available to parents and caregivers under the Kinship Guardianship Act. If the child lives with a caregiver who is a grandparent, aunt, uncle, or other qualified relative (which may include an adult with whom the child has a significant bond), the caregiver may execute a caregiver's authorization affidavit. The affidavit is valid for up to a year after the date on which it is executed. *See* §40-10B-15.

Execution of the affidavit does not make the caregiver a legal guardian. However, it authorizes the caregiver to enroll the child in school and to secure medical care, dental care, and mental health care for the child to the same extent as a guardian under the Kinship Guardianship Act. Caregivers must be able to state in the affidavit that they have told the parents or other legal custodians and received no objection or that they have been unable to contact the parents or other legal custodians to notify them of the intended authorization.

Anyone who acts in good faith reliance on a caregiver's authorization affidavit to provide medical, dental, or mental health care to a child is protected from criminal culpability, civil liability, or professional disciplinary action. This protection applies even though a parent having parental rights or a person having legal custody has contrary wishes as long as the provider of services has no actual knowledge of those wishes.

30A.3.2 Form of Affidavit

The statute, §40-10B-15, requires that the caregiver's authorization affidavit be in substantially the following form:

Caregiver's Authorization Affidavit

Use of this affidavit is authorized by the Kinship Guardianship Act.

Instructions:
A. Completion of Items 1-4 and the signing of the affidavit is sufficient to authorize enrollment of a minor in school and authorize school-related medical care.
B. Completion of Items 5-8 is additionally required to authorize any other medical care.

Print clearly:
The minor named below lives in my home and I am 18 years of age or older.
1. Name of minor: _____
2. Minor's birth date: _____
3. My name (adult giving authorization): _____
4. My home address: _____
5. ( ) I am a grandparent, aunt, uncle or other qualified relative of the minor (see back of this form for a definition of "qualified relative").
6. Check one or both (for example, if one parent was advised and the other cannot be located):
( ) I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.
( ) I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.
7. My date of birth: _____
8. My NM driver's license or other identification card number: _____

WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment or both.
I declare under penalty of perjury under the laws of the state of New Mexico that the foregoing is true and correct.
Signed: _____

The foregoing affidavit was subscribed, sworn to and acknowledged before me this _____ day of _____ 20_____, by _____.
My commission expires: _____ _____
Notary Public

Notices:
1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody and control of the minor, and does not mean that the caregiver has legal custody of the minor.
2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.
3. This affidavit is not valid for more than one year after the date on which it is executed.

Additional Information:
TO CAREGIVERS:
1. "Qualified relative", for purposes of Item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, godparent, member of the child's tribe or clan, an adult with whom the child has a significant bond or any person denoted by the prefix "grand" or "great", or the spouse or former spouse of any of the persons specified in this definition.
2. If the minor stops living with you, you are required to notify any school, health care provider, mental health care provider, health insurer or other person to whom you have given this affidavit.

3. If you do not have the information requested in Item 8, provide another form of identification such as your Social Security number or Medicaid number.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. No person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical, dental or mental health care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for such reliance if the applicable portions of the form are completed.
2. This affidavit does not confer dependency for health care coverage purposes.

CHAPTER 31

FAMILIES IN NEED OF COURT-ORDERED SERVICES

This chapter addresses:

- The purpose of the Families in Need of Court-Ordered Services (FINCOS) process.
- Initiation of a FINCOS case.
- Protective custody, including:
  - Grounds for taking a child into protective custody without a court order.
  - Hearing requirement.
- Adjudication and disposition.
- Periodic judicial review.

31.1 Purpose

Families in Need of Court-Ordered Services (FINCOS) is a statutorily created process established in 1993. Its purposes, as stated in §32A-3B-1, are:

- through court intervention, to provide services for a family in need of services when voluntary services have been exhausted; and
- to recognize that many instances of truancy and running away by a child are symptomatic of a family in need of services and that in some family situations the child and parent are unable to share a residence.

The phrase "family in need of court-ordered services" is defined in §32A-3B-2 to mean that:

- The child or family has refused family services; or
- CYFD has exhausted appropriate and available family services; and
- Court intervention is necessary to provide family services to the child or family; and
- One of the following circumstances exists:
  - The child is subject to compulsory school attendance and is absent from school without an authorized excuse more than ten days during a school year. (This was amended in 2009 to change "semester" to "year.")
  - The child is absent from the child's place of residence for a time period of 12 hours or more without consent of the child's parent, guardian, or custodian.

(This section of the statute was amended in 2007 to shorten the time period from 24 to 12 hours. ***See*** box in §31.3.1 below.)

- The child refuses to return home and there is good cause to believe that the child will run away from home if forced to return to his parent, guardian, or custodian.
- The child's parent, guardian, or custodian refuses to allow the child to return home and a petition alleging neglect of the child is not in the child's best interests.

31.2 Initiation of Proceedings

The procedure to provide court-ordered services to the child or family is very similar to abuse and neglect proceedings. The case commences with CYFD filing a petition alleging the family is in need of court-ordered services. A petition may not be filed unless the children's court attorney, after consultation with CYFD, determines and endorses upon the petition that filing is in the best interests of the child and family. §32A-3B-10.

The petition must include the following allegations, as required by §32A-3B-11(A):

- The child or the family is in need of court-ordered family services;
- The child and the family participated in or refused to participate in a plan for family services and CYFD has exhausted appropriate and available services; and
- Court intervention is necessary to assist CYFD in providing necessary services to the child and the family.

Section 32A-3B-11(B) requires that a petition alleging a child's chronic absence from school be accompanied by an affidavit filed by a school official in accordance with §32A-3A-3, but the provision in §32A-3A-3 for affidavits by school officials was repealed in 2005.

31.3 Protective Custody

31.3.1 Obtaining Custody of the Child

Section 32A-3B-3 provides that a law enforcement officer may take a child into protective custody without a court order when the officer has reasonable grounds to believe that the child:

- has run away from the child's parent, guardian, or custodian;
- is without parental supervision and is suffering from illness or injury;
- has been abandoned; or
- is endangered by his surroundings and removal from those surroundings is necessary to ensure the child's safety.

Runaway Child: In 2007, a section was added to the Children's Code entitled "Runaway child; law enforcement; permitted acts." This section provides that, whenever a law enforcement agency receives a report from a parent, guardian, or custodian that a child over whom the parent, guardian, or custodian has custody has left home without permission and is believed to have run away, a law enforcement agent may help the parent, guardian, or custodian locate the child and:

- return the child to the parent, guardian, or custodian unless safety concerns are present;
- hold the child for up to six hours if the parent, guardian, or custodian cannot be located, so long as the child is not placed in a secured setting; or
- after the six hours has expired, follow the procedures outlined in §32A-3B-3. §32A-1-21 (amended in 2009).

A child taken into protective custody may not be held involuntarily for more than two days, unless a petition to extend the protective custody is filed under the FINCOS Act or the Abuse and Neglect Act. When a petition is filed, the children's court or district court may issue an *ex parte* custody order based on a sworn written statement of facts establishing probable cause that protective custody is necessary. §32A-3B-4(D) and (E).

When a child is taken into protective custody and is not released to the parent, guardian, or custodian, CYFD must provide prompt written notice to the parent, guardian, or custodian of the reasons for placing the child in protective custody. This notice must be provided within 24 hours of the child being taken into protective custody. §32A-3B-5(A). In addition, when a child is taken into protective custody, CYFD must make a reasonable effort to determine if the child is an Indian child. §32A-3B-3(C). If the child is an Indian child and is not being released, CYFD must also provide notice to the child's tribe. §32A-3B-5(D).

31.3.2 Place of Custody; Indian Placement Preferences

According to §32A-3B-6, a child placed in protective custody may be placed in the following community-based shelter-care facilities:

- a licensed foster-care home or any home authorized under the law for the provision of foster care, group care, or use as a protective residence;
- a facility operated by a licensed child welfare services agency;
- a facility provided for in the Children's Shelter Care Act, §§32A-9-1 through 32A-9-7; or
- in a home of a relative of the child, when the relative provides the court with a sworn statement that the relative will not return the child to the dangerous surroundings that prompted protective custody for the child.

A child in protective custody may not be held in a jail or other facility intended or used for the detention of delinquent children unless the child is also alleged or adjudicated delinquent. §32A-3B-6.

An Indian child taken into protective custody must be placed in the least restrictive setting that most closely approximates a family in which the child's special needs, if any, may be met. The Indian child must also be placed within reasonable proximity to the child's home, taking into account any special needs of the child. Preference will be given to placement with:

- a member of the Indian child's extended family;
- a foster care home licensed, approved and specified by the Indian child's tribe;
- an Indian foster care home licensed or approved by an authorized non-Indian licensing authority; or
- an institution for children approved by the Indian child's tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

When these placement preferences are not followed or if the Indian child is placed in an institution, a plan must be developed to ensure that the Indian child's cultural ties are protected and fostered. §32A-3B-6.1.

31.3.3 Protective Custody Hearing

A protective custody hearing must be held within 10 days from the date the petition for protective custody is filed to determine if the child should remain with the family or be placed in CYFD's custody pending adjudication on the petition for court-ordered services. §32A-3B-7(A). The Rules of Evidence do not apply to protective custody hearings. §32A-3B-7(F).

When the protective custody hearing is conducted, the court is required by §32A-3B-7(C) to release the child to the parent, guardian, or custodian unless probable cause exists to believe one of the following:

- The child is in immediate danger from his surroundings and the child's removal from those surroundings is necessary for the child's safety or well-being;
- The child will be subject to injury by others if not placed in CYFD's protective custody; or
- A parent, guardian, or custodian of the child or any other person is unable or unwilling to provide adequate supervision and care for the child.

At the conclusion of the hearing, if the court determines that protective custody pending adjudication is appropriate, under §32A-3B-7(D) the court may:

- Award custody of the child to CYFD; or
- Return the child to the child's parent, guardian, or custodian, subject to conditions that will reasonably assure the safety and well-being of the child.

The court may also order the child and family to participate in an assessment and referral process. §32A-3B-7(E).

31.3.4 Change in Placement

When CYFD changes the placement of a child in protective custody, it must provide written notice of the proposed change to the parties and the child's tribe (if the child is an Indian child) ten days before the change occurs, except in the case of emergency. §32A-3B-9(A).

If the child's GAL or attorney requests a hearing to contest the proposed change in placement, CYFD may not change the placement before the result of the hearing, unless an emergency requires changing the placement before the hearing. §32A-3B-9(B).

When a child's placement is changed because of an emergency and prior notice is not given, CYFD must send written notice of the change within three days of the change to the parties and to the child's tribe if the child is an Indian child. §32A-3B-9(C).

31.4 Adjudication and Disposition

31.4.1 Timing of the Adjudicatory Hearing

An adjudicatory hearing must be commenced within 60 days after the date the petition is served on the respondent. Note that this time limit used to be 90 days; it was changed to 60 days in 2009.

When the adjudicatory hearing does not begin within the time limit or within any extension of the time limit, the petition must be dismissed with prejudice. §32A-3B-12.

31.4.2 Conduct of the Hearing; Confidentiality

Adjudicatory hearings are conducted in the same manner as adjudicatory hearings in abuse or neglect cases. The adjudicatory hearing is closed to the general public, but the parties, their counsel and witnesses may be present. §32A-3B-13(B). The court may exclude a child under 14 if it determines that exclusion is in the child's best interests. The court may also exclude a child who is 14 or older, but only after the court makes a finding that there is a compelling reason to exclude the child and states the factual basis for the finding. §32A-3B-13(C).

In addition to the parties, counsel and witnesses, the court may admit any other person having a proper interest in the case or the work of the court to a closed hearing on the condition that they do not disclose any information that would identify the child or family involved in the proceedings. §32A-3B-13(B).

Anyone admitted to a closed hearing who intentionally divulges information concerning the hearing is guilty of a petty misdemeanor. §32A-3B-13(D).

31.4.3 Evidence; Findings Required

The court must find, on the basis of a valid admission of the allegations in the petition or on the basis of clear and convincing evidence that is competent, material and relevant, that the child is a child of a family in need of court-ordered services. §32A-3B-14(B).

If the court finds that the child is a child of a family in need of court-ordered services, the court may proceed immediately or at a postponed hearing to disposition of the case. If the court does not find that the child is a child of a family in need of court-ordered services, the court must dismiss the petition. §32A-3B-14(B).

31.4.4 Dispositional Hearing

Prior to the dispositional hearing, the court must direct CYFD to prepare a written family services plan to correct the problems that caused the child to be adjudicated a child of a family in need of court-ordered services. §32A-3B-15.

At the conclusion of the dispositional hearing, the court is required to make findings in the dispositional judgment on the 13 factors listed in §32A-3B-16(A):

- The ability of the parent and child to share a residence;
- The interaction and interrelationship of the child with the parent, siblings, and any other person who may significantly affect the child's best interest;
- The child's adjustment to home, school, and community;
- Whether the child's educational needs are being met;
- The mental and physical health of all individuals involved;
- The wishes of the child as to who should be the custodian;
- The wishes of the child's parent, guardian, or custodian as to the child's custody;
- Whether there exists a relative of the child or any other individual who, after study by CYFD, is found to be qualified to receive and care for the child;
- The availability of services recommended in the treatment plan;
- CYFD’s efforts to work with the parent and child in the home and a description of the in-home treatment programs that CYFD has considered and rejected;
- When the child is an Indian child, whether the placement preferences set forth in the Indian Child Welfare Act or the placement preferences of the child's tribe have been incorporated into the plan. When placement preferences have not been incorporated, an explanation must be clearly stated and supported;
- When the child is an Indian child, whether the plan provides for maintaining the Indian child's cultural ties; and
- When the child is an undocumented immigrant, whether the family services plan included referral to nongovernmental agencies that may be able to assist the child, and family when appropriate, in addressing immigration status.

Under §32A-3B-16(B), when there is an adjudication regarding a family in need of court-ordered services, the court will enter judgment and make any of the following dispositions:

- Permit the child to remain with the child's parent, guardian, or custodian, subject to conditions and limitations the court may prescribe.
- Place the child under the protective supervision of CYFD.
- Transfer legal custody of the child to:
    - CYFD;
    - An agency responsible for the care of neglected or abused children; or
    - The child's non-custodial parent, if that is in the child's best interests.
- If the evidence indicates that the child's educational needs are not being met, the local education agency may be joined as a party and directed to:
    - Assess the child's needs within 45 days;
    - Attempt to meet the child's educational needs; and
    - Document its efforts to meet the child's educational needs.

When the child is an Indian child, the court must consider the child's cultural needs during disposition. When reasonable, the child must be provided access to cultural practices and traditional treatment. §32A-3B-16(D).

The statute also contains specific provisions on the disposition of a child who has or may have a developmental disability or mental disorder. §32A-3B-17. The court may order CYFD to secure an assessment of the child and prepare appropriate referrals for services. If necessary, CYFD may also initiate proceedings for involuntary placement for residential mental health or developmental disability services under the Children's Mental Health and Developmental Disabilities (MHDD) Act. The hearing may be held as part of the FINCOS proceeding or in a separate proceeding. In either case, a younger child will be represented by the same GAL as in the FINCOS case, while a youth who is 14 or older may choose to be represented in the mental health proceedings by his or her attorney in the FINCOS case, or by an attorney appointed under the MHDD Act. §32A-3B-17.

MHDD Act: Note that the Children's Mental Health and Developmental Disabilities Act was revised significantly in 2007 and is now found in Article 6A of Chapter 32A.

31.4.5 Time Limits on Dispositional Judgments

The duration of a dispositional judgment varies depending on the person or entity granted legal custody. §32A-3B-18. For example, a judgment vesting legal custody of a child in an agency remains in force for an indeterminate period not exceeding two years from the date entered. However, the court may extend this judgment for additional periods of one year if, before it expires, the court finds that the extension is necessary to safeguard the welfare of the child or the public interest. §32A-3B-18(A) and (E).

A judgment giving legal custody of a child to an individual other than the child's parent remains in force for two years from the date entered unless terminated sooner by court order. §32A-3B-18(B).

A judgment vesting legal custody of a child in the child's parent or a permanent guardian

remains in force for an indeterminate period from the date entered until terminated by court order or until the child is emancipated or reaches the age of majority. §32A-3B-18(C).

On the motion of a party, including the child through the child's GAL or attorney, a dispositional judgment may be modified, revoked or extended at any time before it expires. §32A-3B-18(D).

When a child reaches 18 years of age, all FINCOS orders affecting the child terminate automatically. The termination of these orders does not disqualify a child from eligibility for transitional services. §32A-3B-18(F).

31.5 Periodic Judicial Review

Dispositional judgments must be periodically reviewed using basically the same procedures used for abuse or neglect proceedings under the Children's Code. §32A-3B-19. If at any judicial review the court finds that the child's parent, guardian, or custodian has not complied with the treatment plan, the court may order the child's parent, guardian, or custodian to show cause why he or she should not be held in contempt of court and subject to sanctions. The court may also direct CYFD to show cause why an abuse or neglect action has not been filed or if the local education agency has been made a party, direct the local education agency to show cause why it has not met the child's educational needs. Dispositional orders entered after a judicial review remain in force for a period of six months. §32A-3B-19(H).

31.6 Confidentiality

All records or information concerning a family in need of court-ordered services, including social records, diagnostic evaluations, psychiatric or psychological reports, videotapes, transcripts, and audio recordings of a child's statement of abuse or medical reports, obtained as a result of a FINCOS investigation or proceeding are confidential and closed to the public. §32A-3B-22(A).

Under §32A-3B-22(B), these records and information may be disclosed only to:

- the parties;
- court personnel;
- CASAs;
- the child's GAL or attorney;
- the attorney representing the child in an abuse or neglect action, a delinquency action, or any other action, including a public defender;
- CYFD personnel;
- any local CRB;
- law enforcement officials;
- district attorneys;
- a state or tribal government social services agency of any state;
- those persons or entities of an Indian tribe specifically authorized to inspect the

records pursuant to the federal Indian Child Welfare Act or its implementing regulations;

- tribal juvenile justice system and social service representatives;
- a foster parent, under certain circumstances;
- school personnel involved with the child, if the records concern the child's school or educational needs;
- health care or mental health professionals involved in the evaluation or treatment of the child, the child's parents, guardian, or custodian or other family members;
- protection and advocacy representatives; and
- any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court.

Anyone who intentionally and unlawfully releases any information or records that are closed to the public is guilty of a petty misdemeanor. §32A-3B-22(C).

CHAPTER 32

MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES

This chapter describes:

- The Children's Mental Health and Developmental Disabilities Act as amended in 2007 and 2008.
- The Act's relationship to proceedings under the Abuse and Neglect Act.

32.1 Purpose

The Children's Mental Health and Developmental Disabilities Act (CMHDD Act), §§32A-6A-1 through 32A-6A-30, is the article of the Children's Code governing the provision of mental health care and rehabilitation services to children with developmental and mental health needs. The Act was repealed and replaced in 2007 and significant changes were made to its provisions. This chapter describes the Act as adopted in 2007 and amended in 2008.

The purposes of the CMHDD Act are to:

- provide children with access to appropriate assessments, services and treatment;
- provide children with access to a continuum of services to address their habilitation and treatment needs;
- provide children with access to services for identification, prevention, and intervention for developmental and mental health needs;
- promote delivery of services in a culturally appropriate, responsive, and respectful manner;
- protect the substantive and procedural rights of children regardless of service setting; and
- encourage support for family as critical members of the treatment or habilitation team whenever clinically appropriate. §32A-6A-2.

The provisions of the CMHDD Act apply to children who receive mental health or rehabilitation services whether or not they are affected by abuse or neglect. §32A-6A-3. However, children who are in state custody are at increased risk for developmental

disabilities and mental health problems due to the abuse or neglect that led to their involvement with the state. Treatment issues also arise in abuse and neglect cases in the context of treatment plans developed for children with such conditions.

32.2 Relationship to Abuse or Neglect Proceeding

The CMHDD Act outlines the rights of children and youth when receiving mental health or habilitation services regardless of setting. It also sets forth the procedures required for placing children with mental health problems or developmental disabilities in residential treatment facilities, as described later in this chapter. The Abuse and Neglect Act explains how some of these procedures are supposed to be handled for children involved in abuse or neglect proceedings.

32.3 Definitions

In general, habilitation refers to the services provided to children with developmental disabilities that are aimed at enabling the child to attain, maintain, or regain maximum functioning or independence. §32A-6A-4(K). Treatment refers to behavioral health services provided to enable the child to attain, maintain, or regain maximum functioning. §32A-6A-4(DD).

32.4 Rights Regardless of Setting

Children receiving treatment and habilitation services in New Mexico have certain rights regardless of setting (such as community outpatient services, treatment foster care, or residential services).

- Children have a right to individualized treatment or habilitation services based on an individualized treatment or habilitation plan. §32A-6A-7.
- Seclusion and restraint are generally prohibited, are for the most part limited to emergency use only, and in those emergencies must follow the protocol set forth in the Act. §§32A-6A-9, 32A-6A-10, and 32A-6A-11.
- Aversive interventions listed in the Act are also prohibited. §§32A-6A-4(A) and 32A-6A-8.

32.5 Consent

The CMHDD Act as amended in 2007 clarifies issues related to consent to treatment or rehabilitation services, medication, and residential treatment.

The law provides that informed consent of the child's legal custodian is required before treatment or rehabilitation is provided to a child under 14, except that the child may initiate and consent to an initial assessment with a clinician for medically necessary early intervention services. Such services are limited to verbal therapy and limited to two calendar

weeks. §32A-6A-14. This exception allows younger children to access mental health professionals for a short initial assessment of need.

For children under 14, the legal custodian may consent to disclosure of the child's mental health or habilitation records. These records may also be disclosed to the child's court-appointed GAL, without consent of either the child or the legal custodian. §32A-6A-24(B). Consent also is not required when disclosure is necessary for treatment, when disclosure is necessary to protect against a clear and substantial risk of imminent serious physical injury or death inflicted by the child on self or another, and in certain other instances. §32A-6A-24(D).

A child aged 14 or older is presumed to have capacity to consent to treatment and habilitation services, and a child with capacity has the right to consent. §32A-6A-15. A child aged 14 or older with capacity may consent to psychotropic medication but the legal custodian must be notified. §32A-6A-15(B). A child aged 14 years or older can consent to residential treatment but the legal custodian must also consent to such treatment. §32A-6A-21(B).

Capacity Defined. The term "capacity" is defined as the ability to:

- understand and appreciate the nature and consequences of proposed health care, including significant benefits, risks, and alternatives; and
- make and communicate an informed health care decision. §32A-6A-4(C).

A process is also set forth in the CMHDD Act to allow a legal custodian to consent to services when a child aged 14 or older does not have capacity, so long as the child does not object to the decision or the custodian's assumption of that authority. However, a legal custodian cannot consent to residential treatment without the proper consent of the child. §32A-6A-16.

If the child does not agree to allow the legal custodian to consent to services and the child does not have capacity to consent, the procedures in the Act for obtaining a treatment guardian must be followed. §32A-6A-16; §32A-6A-17.

A child aged 14 or older who has capacity may refuse treatment recommended by a mental health or developmental disabilities professional. The child may not be determined to lack capacity solely on the basis that the child chooses not to accept recommended treatment. §32A-6A-16(C).

Practice Note: It is important to understand who has the right to consent to services – the child or the legal custodian. The presumption is that children aged 14 years of age or older have the right to consent to their own mental health or habilitation services. If there is concern about the child's capacity, those concerns should be addressed using the procedures set forth in the Act.

Children aged 14 years of age or older with capacity to consent have the right to consent to release of their confidential mental health or habilitation records. §32A-6A-24(C). However,

there are some instances when a child's consent to release of records is not required. For example, when a clinician determines that release without consent of the child aged 14 or older will not cause substantial harm to the child, then a summary of the child's assessment, treatment plan, progress, discharge plan, and other information essential to the child's treatment may be released to the child's legal custodian. §32A-6A-24(D)(3). A primary caregiver may also be provided with information necessary for the continuity of treatment without the child's consent. §32A-6A-24(D)(4). Finally, a court may order release of records for good cause shown if certain findings are made. §32A-6A-24(D)(7).

32.6 Out-of-Home Placement

Children in out-of-home treatment or habilitation programs have specific rights regarding their care. §32A-6A-12. Children in treatment foster care or other out-of-home placements that are not residential treatment or habilitation programs as defined in the CMHDD Act are afforded basic rights under the Act. They can also access the state's protection and advocacy system or may obtain representation from other attorneys to assist them to enforce these rights. §32A-6A-13(C). However, children are only provided with a court-appointed guardian ad litem (GAL) or attorney paid by the state when placed in the most restrictive residential treatment or habilitation program as defined under the Act or when they are subject to a petition for a treatment guardian. §32A-6A-13(A), (B).

32.7 Process for Placing Child in Residential Treatment or Habilitation Program

When children are placed in the most restrictive residential treatment or habilitation programs, they are afforded additional rights under the CMHDD Act. The term "residential treatment or habilitation program" is defined as the diagnosis, evaluation, care, treatment, or habilitation rendered in a mental health or developmental disabilities facility when the child resides on the premises and where one or more of the following measures is available for use:

- a mechanical device to restrain or restrict the child's movement;
- a secure seclusion area from which the child is unable to exit voluntarily;
- a facility or program designed for the purpose of restricting the child's ability to exit voluntarily; or
- the involuntary emergency administration of psychotropic medication. §32A-6A-4(AA).

The habilitation or treatment of a child must be consistent with the least restrictive means principle, which is defined in §32A-6A-4(M). This means that the treatment or habilitation and the conditions of treatment or habilitation, separately or in combination:

- are no more harsh, hazardous, or intrusive than necessary to achieve acceptable treatment objectives for the child;
- involve no restrictions on physical movement and no requirement for residential care,

except as reasonably necessary for the administration of treatment or for the protection of the child or others from physical injury; and
- are conducted at the suitable available facility closest to the child's place of residence.

Placement in a residential treatment or habilitation program can be either voluntary or involuntary. §§32A-6A-20, 32A-6A-21, and 32A-6A-22. In both cases, the Act requires that certain procedures be followed.

As a general rule, when involuntary placement is needed, CYFD will petition for the child's placement under the CMHDD Act and the petition will be heard by the court as part of the abuse and neglect proceeding, although it may also be heard in a separate proceeding. §32A-4-23(B), (D). All parties to the abuse or neglect case must be given notice of the hearing. §32A-4-23(D). Similarly, when a child subject to the Abuse and Neglect Act is receiving residential treatment or habilitation services, any documentation required by the CMHDD Act is filed with the court as part of the abuse or neglect case. §32A-4-23(F). The court clerk is required to maintain a separate section within the abuse or neglect file for documents pertaining to actions taken under the CMHDD Act. §32A-4-23(G).

It is important to note that children subject to the Abuse and Neglect Act who receive residential treatment enjoy all of the substantive and procedural rights set forth in the CMHDD Act. §32A-4-23(H).

32.8 Voluntary Placement

32.8.1 Children Under Age Fourteen

A child under the age of 14 can be admitted to a residential program with the informed consent of the child's legal custodian for up to 60 days. §32A-6A-20(B). For children in state custody under the Abuse and Neglect Act, this means that CYFD, as legal custodian, would provide the consent.

All children under the age of 14 being admitted to residential programs have a GAL appointed by the court for them. §32A-6A-20(G). In the case of a child in an abuse or neglect case, the GAL for the child in that case serves as GAL for purposes of the CMHDD Act as well. §32A-4-23(E). The GAL has the duty to inform the child of his or her rights, which are set forth in §32A-6A-21(I) and §32A-6A-12.

The GAL must determine within seven days after admission whether the legal custodian has consented to the residential placement, whether the admission is in the child's best interest, and whether the placement is consistent with the least restrictive means principle. The GAL, representing the child's best interests, has the duty of certifying to the court whether admission to the facility is appropriate. §32A-6A-20(G) and (H); Form 10-493. The admission will be considered appropriate if the GAL certifies that:

- The child's legal custodian understands and consents to the admission;

- The admission is in the child's best interests; and
- The admission is appropriate for the child and consistent with the least restrictive means principle.

If the GAL makes this certification to the court, the placement remains in effect and is considered voluntary even if the child disagrees with the placement.

Placements must be reviewed at least every 60 days, following the procedures and timelines set forth in the CMHDD Act. If the child's physician or licensed psychologist determines that it is in the child's best interest to continue the admission, the residential treatment or habilitation program will notify the GAL, who will then personally meet with the child, the child's legal custodian, and the child's clinician. It is then the GAL's duty to ensure that the legal custodian understands and consents to the program and to make the same type of certification as was made at the time of the initial admission. §32A-6A-20(K).

If the GAL does not feel he or she can certify that the admission (or continued admission) is appropriate, the child must be released or involuntary placement procedures initiated. §32A-6-20(L). Involuntary placement is described in §32.9 below.

32.8.2 Children Age Fourteen or Older

Under the CMHDD Act, a child 14 years of age or older may voluntarily admit him or herself to a residential treatment or habilitation program, with the informed consent of the child's legal custodian. §32A-6A-21. Instead of a GAL, the law requires that the child have an attorney, who is his or her own attorney, not the attorney for the parent or other legal custodian. If the legal custodian does not obtain an attorney for the child, the court will appoint one. §32A-6A-21(D). Even if the legal custodian obtains the attorney, the attorney represents the child, not the legal custodian. It is important to note that the attorney takes direction from the child as client and advocates for the child's wishes.

In the case of a child subject to the Abuse and Neglect Act, the child's attorney in the abuse or neglect proceeding continues to serve in the CMHDD Act proceeding. However, the child may, after consultation with this attorney, elect to be represented by counsel appointed under the CMHDD Act instead. §32A-4-23(E).

Because children 14 years of age or older have the independent right to consent to residential placement, the child's attorney must meet with the child and determine, within seven days after admission, whether or not the child consents to the placement. At the meeting, the attorney must first explain to the child:

- the child's right to an attorney;
- the child's right to terminate his voluntary admission and the procedures to effect termination;
- the effect of terminating the child's voluntary admission and the options of the physician and other interested parties to the petition for involuntary admission; and

- the child's rights under the CMHDD Act, including the right to:
    - legal representation;
    - a presumption of competence;
    - receive daily visitors of the child's choice;
    - receive and send uncensored mail;
    - have access to telephones;
    - follow or abstain from the practice of religion;
    - a humane and safe environment;
    - physical exercise and outdoor exercise;
    - a nourishing, well-balanced, varied and appetizing diet;
    - medical treatment;
    - educational services;
    - freedom from unnecessary or excessive medication;
    - individualized treatment and habilitation; and
    - participation in the development of the individualized treatment plan and access to that plan on request.

See §§32A-6A-21(I) and §32A-6A-12.

If the attorney determines that the child understands his or her rights and voluntarily and knowingly desires to remain as a patient in the residential program, the attorney will so certify on a form designated by the Supreme Court within seven days of the child's admission. §32A-6A-21(J); Form 10-494. A child voluntarily admitted has the right to immediate discharge upon his or her request, except in those situations in which involuntary placement proceedings are commenced. The child is considered to have made a request for discharge when he or she informs the director, physician, or any other member of the program staff that he desires to be discharged; this request need not be in writing. §32A-6A-21(L).

As in the case of younger children, a child 14 years of age or older who is voluntarily admitted to a treatment or habilitation program must have his or her voluntary admission reviewed every 60 days. The procedures for this review are also similar.

32.9 Involuntary Placement

Any person who believes that a child, as a result of a mental disorder or developmental disability, is in need of residential services may request that a children's court attorney file a petition with the court for the child's involuntary placement. §32A-6A-22(D). When a child asks to be discharged from a voluntary program and the director, a physician, or a licensed psychologist in the program thinks that involuntary placement is needed, the request to the children's court attorney must be made the first business day after the child requests discharge. §32A-6A-21(L).

When the child is a child involved in a civil abuse, neglect, or family in need of court-ordered services case, the CYFD children's court attorney is the children's court attorney for

purposes of filing the petition for involuntary placement. In other CMHDD Act cases, the district attorney is the children's court attorney for this purpose. §32A-1-6(E).

Upon receiving the petition, the court will appoint counsel for the child if the child does not already have an attorney or GAL. The attorney or GAL will represent the child at all stages of the proceeding. §32A-6A-13(A).

The involuntary placement hearing must be held within seven days of an emergency admission or within five days from a child's declaration that he or she desires to terminate his or her voluntary admission. §32A-6A-22(G); §32A-6A-21(L). Seven days in this context means seven working days. Rule 10-107 of the Children's Court Rules and Rule 1-006 of the Rules of Civil Procedure both provide that weekends and holidays do not count when the period of time required for an action is less than eleven days. (**Note**: In a case involving the adult version of the CMHDD Act, the New Mexico Supreme Court held that the seven day rule was not jurisdictional and that the hearing could be postponed for good cause shown. *NM Dept. of Health v. Compton*, 2001-NMSC-032, ¶18 n.3 and ¶24, 131 N.M. 204.)

The court may order involuntary placement only if it is shown by clear and convincing evidence:

- that as a result of mental disorder or developmental disability the child needs the treatment or habilitation services proposed;
- that as a result of mental disorder or developmental disability the child is likely to benefit from the treatment or habilitation services proposed;
- that the proposed involuntary placement is consistent with the treatment or habilitation needs of the child; and
- that the proposed involuntary placement is consistent with the least restrictive means principle. §32A-6A-22(K).

The court must include in its findings a statement of the legal custodian's opinion about whether the child should be involuntarily placed, a statement of the efforts made to ascertain that opinion, or a statement explaining why it was not in the child's best interest to have the legal custodian involved. §32A-6A-22(J).

If the court decides that the child does not meet the criteria for involuntary placement, the child must be released from the residential treatment facility, but the court may order the child to undergo nonresidential treatment as may be appropriate and necessary or it may order no treatment. §32A-6A-22(L).

Every child in involuntary placement has the right to periodic review, including a new hearing, at the end of each placement period. An involuntary placement period may not exceed 60 days. §32A-6A-22(M).

32.10 Forms

The New Mexico Supreme Court has adopted several forms for use in cases under the CMHDD Act. As late as June 2014, these forms were forms adopted in 2002 and do not reflect the 2007 amendments to the Act. However, new forms have been proposed and will be considered by the Supreme Court later in 2014. In the meantime, see Forms 10-491 through 10-495 in the Children's Court Rules and Forms.

CHAPTER 33

JUVENILE DELINQUENCY

This chapter describes:

- The Delinquency Act generally, and
- The Act in relation to the Abuse and Neglect Act.

Proceedings under the Delinquency Act are explained at length in the New Mexico Juvenile Justice Handbook, which can be found at http://childlaw.unm.edu.

33.1 Purpose of the Delinquency Act

An act committed by a child that would be designated a crime if committed by an adult is considered a "delinquent act" and addressed under the Delinquency Act, §§32A-2-1 through 32A-2-33. Part of the Children's Code, the Delinquency Act is intended to remove from children the adult consequences of criminal behavior while at the same time holding them accountable for their actions to the extent of the child's age, education, mental and physical condition, background, and other relevant factors.

The Act is intended also to provide these children a program of supervision, care, and rehabilitation, and to provide effective deterrents to acts of juvenile delinquency, including an emphasis on community-based alternatives. An additional purpose of the Delinquency Act is to strengthen families and to successfully reintegrate children into homes and communities. §32A-2-2.

In 2007, the Legislature amended §32A-2-2 and added eight additional statutory objectives. One of the explicit purposes of the Act is now to eliminate or reduce disparities based upon race or gender. This was reiterated in 2009, when the general purpose section of the Children's Code, §32A-1-3, was amended to specify that the Code is to be construed to effectuate the legislative purpose of reducing overrepresentation of minority children and families in the juvenile justice system through early intervention, linkages to community support services, and the elimination of discrimination.

33.2 Relationship between Delinquency and Abuse or Neglect

Children who are in CYFD's custody because of abuse or neglect are sometimes involved in the juvenile justice system as well. As a matter of reality, it is sad but true that many young people in the juvenile justice system are youth who suffered abuse or neglect as they were growing up.

Delinquency proceedings focus on the acts of the child. In contrast, abuse or neglect proceedings focus on the acts of the parents. The abuse and neglect case is brought if it is in the best interests of the child while the delinquency case is brought if it is in the best interest of the child and the public. *Compare* §32A-4-15 *and* 32A-2-8.

A child who is involved in both an abuse or neglect proceeding and a delinquency proceeding will be represented by a guardian ad litem or "youth attorney" in the abuse and neglect case and defense counsel in the delinquency case. The term "youth attorney" is used simply to describe the attorney who represents a youth age 14 or older in the child welfare case. Both this attorney and the attorney in the delinquency case represent the young person under the traditional client-directed model of representation.

Although the guardian ad litem (GAL) for children under age 14 in the abuse or neglect case is an attorney, he or she performs a different role than the youth attorney and defense counsel, both of whom are client-directed. ***See*** Chapter 6 on the GAL's role.

In the past, the same attorney was sometimes asked to serve both as the child's GAL in the abuse or neglect case and the child's attorney in the delinquency case. The potential conflict in these roles was recognized by the Supreme Court in *State v. Joanna V.*, 2004-NMSC-024, ¶¶12, 13, 136 N.M. 40, wherein the Court described the potential conflict between the role of the GAL, who represents the best interests of the child, and the role of defense counsel, who follows the instruction of the child client, even though those instructions may not be in the child's best interests. In 2005, the Legislature amended the Children's Code to provide that "[a] guardian ad litem shall not serve concurrently as both the child's delinquency attorney and guardian ad litem." §32A-1-7(I).

33.3 Delinquent Children

A "delinquent child" is a child who has committed a delinquent act. §32A-2-3(B). A "delinquent act" is defined as an act committed by a child that would be designated as a crime under the law if committed by an adult. §32A-2-3(A). Examples of delinquent acts include, but are not limited to, driving while intoxicated, reckless driving, illegal use of glue, aerosol spray or other chemical substance, violating the Criminal Code provisions on unauthorized graffiti, and violating an order of protection under the Family Violence Protection Act. *Id.*

In *American Civil Liberties Union of New Mexico v. City of Albuquerque*, 1999-NMSC-044, ¶19, 128 N.M. 315, the Supreme Court held that the Children's Code preempts local government from enacting a teen curfew ordinance which subjects minors to criminal sanctions of incarceration and fines for activity which is not unlawful when committed by adults. As previously noted, under §32A-2-3(A), a delinquent act is an act that would be a crime if committed by an adult. In the *ACLU* case, the Court reasoned that, because an adult could not be charged with violating the curfew law, it could not be a delinquent act, and held that imposing criminal sanctions on children outside the context of the Children's Code was an invalid exercise of power by the city. *Id.* ¶¶10-19.

Children against whom formal court proceedings are brought are in one of three categories:

Delinquent Offender: This designation refers to a child who has committed a delinquent act, who is subject to juvenile sanctions only, and who is not a youthful offender or a serious youthful offender. §32A-2-3(C).

Youthful Offender: This designation refers to a delinquent child who is subject to juvenile or adult sanctions because he or she:

- was 14 to 18 years of age at the time of the offense and is adjudicated for second degree murder, assault with intent to commit a violent felony, kidnapping, aggravated battery, aggravated battery against a household member or upon a peace officer, shooting at a dwelling or occupied building or shooting at or from a motor vehicle, dangerous use of explosives, criminal sexual penetration, robbery, aggravated burglary, aggravated arson, or abuse of a child that results in great bodily harm or death to that child;
- was 14 to 18 years of age at the time of the offense and is adjudicated for any felony offense after having three prior, separate felony adjudications within a three-year period immediately preceding the present offense; or
- was 14 years old and adjudicated for first degree murder. §32A-2-3(J).

An alleged youthful offender is tried in children's court and may only be considered for an adult sanction after an amenability hearing, described further in §33.5.7 below.

Serious Youthful Offender: This designation refers to an individual 15 to 18 years of age who is charged with and indicted or bound over for trial for first degree murder. A serious youthful offender is **not** considered a delinquent child, being the only juvenile who can be tried as an adult in New Mexico. §32A-2-3(H). For that reason, and because of the differences in the way the cases are handled, serious youthful offenders will not be discussed further in this chapter.

Note that a child 14 years of age or older who is charged with first degree murder but found to have committed a youthful offender offense is subject to juvenile or adult sanctions under §32A-2-20. If the child is found to have committed a delinquent act that is neither first degree murder nor a youthful offender offense, then the child is subject only to disposition as a delinquent offender. §32A-2-20(H) *and* §32A-2-19.

33.4 Preliminary Inquiry; Informal Action by Juvenile Probation Officer

A child becomes involved in the juvenile justice system by referral to CYFD's juvenile probation services. Upon receiving the referral, CYFD will conduct a preliminary inquiry to determine the best interests of the child and the public regarding what action should be taken. §32A-2-7(A).

At the outset of a preliminary inquiry, CYFD must advise the parties of their basic rights and inform the child of the right to remain silent. §32A-2-7(B).

If the child is not in detention, a preliminary inquiry must be conducted within 30 days of CYFD's receipt of the referral from law enforcement. This period may be extended if necessary to complete a thorough inquiry and if the extension is not prejudicial to the best interests of the child. §32A-2-7(C).

If the child is in detention, probation services must give the child's parent, guardian or custodian, or attorney reasonable notice of the preliminary inquiry, as well as an opportunity to be present. §32A-2-7(C). When a child is detained, CYFD must complete its preliminary inquiry and the children's court attorney must file a delinquency petition within two days from the date of detention, excluding Saturdays, Sundays, and legal holidays ("two working days"), or the child must be released. Rules 10-211(C) and 10-107; §32A-2-13(A). The time limit for filing a petition in Rule 10-211(C) differs from the time limit in §32A-2-13, which specifies 24 hours. According to the committee commentary to Rule 10-211, this difference is intentional and the rule applies because the time limit is procedural.

If, as a result of the preliminary inquiry, CYFD determines that a delinquency petition is unnecessary, it has the authority, among other things, to make referrals for services that are appropriate or desirable and to informally dispose of up to three misdemeanor charges brought against a child within two years. §32A-2-5(B).

Examples of informal dispositions by the juvenile probation officer include:

- counseling and releasing the child without further action;
- requiring the child to perform community service;
- requiring the child to make victim restitution;
- referring the child to a particular program; or
- some form of informal supervision.

Some of the programs that may be available include first offender diversion programs**,** parent-child mediation, victim-offender mediation, family counseling, or alcohol and drug education. Even letters of apology or essays are used.

If the report alleges a felony or the child has been referred for three or more prior misdemeanors within two years of the current offense, probation services must refer the case to the district attorney's children's court attorney (not to be confused with CYFD's children's court attorney, who handles abuse and neglect cases). §32A-2-7(E)-(F).

33.5 Formal Actions

33.5.1 Commencement of Case

A formal delinquency proceeding is begun by the filing of a petition in children's court. The petition alleging delinquency is filed by the children's court attorney who, after consulting

with probation services, has determined and endorsed on the petition that the filing of the petition is in the best interest of the public and the child. §32A-2-8.

The parents of the child may be joined as parties to the delinquency action and, if the child is adjudicated a delinquent, may be ordered to submit to counseling or participate in any probation or other treatment program ordered by the court. §32A-2-28. If not joined as parties, parents must be given notice of the filing of the petition. Rule 10-211(D).

Practice Note: It would be helpful to coordinate, to the extent possible, any treatment programs required of the child or the parents as a result of a delinquency proceeding and the treatment plan adopted in the abuse or neglect case. Efforts should be made to avoid situations in which the parents or the child or both are being subjected to different, duplicative, or possibly conflicting requirements or programs.

A child involved in a formal delinquency proceeding is entitled to counsel and will have a public defender appointed if the child's parent, guardian, or custodian is unable or unwilling to pay for an attorney. Rule 10-223. As noted above, a guardian ad litem appointed for a child in an abuse or neglect proceeding may not simultaneously serve as the child's legal counsel in delinquency proceedings. §32A-1-7(I). No similar rule prevents a youth attorney appointed in an abuse or neglect case from representing the same child in a delinquency proceeding. Nevertheless, a youth attorney should be alert to potential conflicts that may arise when representing a child in both kinds of cases.

In addition to counsel, the court may appoint a guardian ad litem for the child if the child does not have a parent, guardian,or custodian appearing on behalf of the child or if their interests conflict. The court will appoint a guardian, as distinct from a guardian ad litem, if the child does not have a parent or legal guardian in a position to exercise effective guardianship. §32A-2-14(J)- (K).

If the petition alleges one or more youthful offender offenses, the children's court attorney may file a notice of intent to invoke an adult sentence. Any such notice must be filed within 10 working days of the filing of the petition, although the court may extend the time for good cause shown prior to the adjudicatory hearing. §32A-2-20(A). Section 32A-2-20 and Rule 10-213 outline the procedures required. Either the court will conduct a preliminary hearing or the case will be presented to a grand jury, depending on the judicial district. Only if the indictment or bind over order includes a youthful offender offense will the case proceed as a youthful offender case for which adult sanctions are possible.

When Grand Jury Returns a No-Bill. The Court of Appeals has held that the remedy when the grand jury finds no probable cause is dismissal without prejudice. This applies to any delinquent offender offenses presented to the grand jury, as well as the youthful offender offenses. *State v. Oscar Castro H.*, 2012-NMCA-047, ¶¶5, 15, 277 P.3d 467.

The Children's Court Rules apply in delinquency cases in children's court when adult sanctions are not being sought. Rule 10-101(A)(1). If the children's court attorney has filed a notice of intent to invoke adult sanctions and the indictment or bind over order includes a

youthful offender offense, the Rules of Criminal Procedure will apply unless a specific Children's Court Rule states otherwise. Rule 10-101(A); *State v. Stephen F.*, 2006-NMSC-030, ¶¶8-9, 140 N.M. 24. (Note that this chapter of the Child Welfare Handbook concentrates primarily on cases of children alleged to be delinquent, not on youthful offender cases.)

Rule Changes Pending: The Handbook reflects the rules in effect as of June 1, 2014. At that time, the NM Supreme Court was considering new rules that would bring youthful offender proceedings within the scope of the Children's Court Rules and set forth the procedures to be followed. Be sure to check the rules currently in effect.

33.5.2 Detention Hearing

The Children's Court Rules provide that, if a child is taken into custody for a delinquent act, the petition alleging delinquency must be filed within two working days or the child must be released. Rules 10-211(C) and 10-107; §32A-2-13(A)(2); ***see*** discussion of the difference between time frames in statute and rule in §33.4 above. Not all children charged with delinquent acts may be held in detention. In 2005, the Legislature decided that children under the age of 11 may not be held in detention, but may be detained and transported for emergency mental health evaluation and care if the child "poses a substantial risk of harm to the child's self or others." §32A-2-10(C).

For children 11 and older who are detained, the court must hold a detention hearing within one working day of the following events, whichever is applicable:

- the filing the petition if the child is in detention at the time the petition is filed;
- placement of the child in detention if the respondent is placed in detention after the petition is filed;
- placement of the child in detention without a warrant for failure to comply with the conditions of release; or
- a motion of the child for release after being placed in detention pursuant to a warrant for failure to comply with conditions of release. Rule 10-225(A).

The court, upon request of any party, may permit the detention hearing to be conducted by appropriate means of electronic communication provided that all electronic hearings are recorded and preserved as part of the record, the child has legal representation present, and no pleas are taken. In addition, the court must find that:

- undue hardship will result from conducting the hearing with all parties, including the child, present in the courtroom, and
- the hardship substantially outweighs any prejudice or harm to the child that is likely to result from the hearing being conducted by electronic means. §32A-2-13(A)(3).

At the detention hearing, the court must decide whether continued detention is justified. §32A-2-13(A)(3). Unless ordered by the court under other provisions of the Delinquency Act, a child taken into custody for an alleged delinquent act may not be placed in detention

unless a detention risk assessment instrument is completed and a determination is made that the child:

- poses a substantial risk of harm to himself;
- poses a substantial risk of harm to others; or
- has demonstrated that he may leave the jurisdiction of the court. §32A-2-11(A).

If none of these criteria exist, the court will order the child released. As a condition of release, the court may order one or more of the following conditions to meet the individual needs of the child:

- place the child in the custody of a parent, guardian, or custodian or under the supervision of an agency agreeing to supervise the child;
- place restrictions on the child's travel, association, or place of abode during the period of release; or
- impose any other condition deemed reasonably necessary to assure the child's required appearance, including a condition that the child return to custody as required. Rule 10-225(C); *see also* §32A-2-13(F).

If it is determined that a child must be detained pending a court hearing, the child may be placed or detained in any of the following places:

- a licensed foster home or a home authorized to provide group care;
- a facility operated by a licensed child welfare services agency;
- a shelter-care facility provided for in the Children's Shelter Care Act, §§32A-9-1 to 32A-9-7, that is in compliance with all standards, conditions, and regulatory requirements and that will be considered a temporary placement subject to judicial review within 30 days of placement;
- a detention facility certified by CYFD for children alleged to be delinquent children;
- any other suitable facility designated by the court that meets the standards for detention facilities under state and federal law, other than a facility for the long-term care and rehabilitation of delinquent children to which children adjudicated as delinquent may be confined; or
- the child's home or place of residence, under conditions and restrictions approved by the court. §32A-2-12(A).

A child arrested and detained for a delinquent act may not be held in an adult jail or lock up unless the child is placed in a setting that is physically segregated by sight and sound from adult offenders. The child may only be held in the adult jail or lock up for up to six hours, after which the child must be placed or detained pursuant to §32A-2-12. §32A-2-4.1.

There are special provisions for a child alleged to be a youthful offender or a serious youthful offender. *See* §32A-2-12(B) (youthful offenders); §§32A-2-12(E) and 31-18-15.3 (serious youthful offenders). In the event a child is detained in a jail, the director of the jail must takes measures to provide protection to the child, who is presumed to be vulnerable to victimization by adult inmates. §32A-2-12(B)-(E).

A child who was previously incarcerated as an adult or a person over age 18 may be detained in the county jail and may not be detained in a juvenile detention facility. §32A-2-12(C). However, a child may not be transferred from a juvenile facility to a county jail solely on the basis of turning 18. §32A-2-12(D).

33.5.3 Competency

A child's competency to stand trial or participate in his or her own defense may be raised by any party at any time during a proceeding. §32A-2-21(G). However, if the child was previously found to be competent to stand trial in the proceeding, the competency issue may be redetermined only if the judge finds that there is evidence not previously submitted which raises a reasonable doubt as to the child's competency to participate. Rule 10-242(C). Upon motion and good cause shown the judge will order a mental examination of the child before making a competency determination. Rule 10-242(B). Rule 10-496A of the Children's Court Rules contains a form of order for a competency evaluation.

If the court finds the child incompetent and the child has been accused of an offense that would be a misdemeanor if the child were an adult, the court must dismiss the delinquency petition with prejudice. The judge may also recommend that the children's court attorney initiate proceedings under the Children's Mental Health and Developmental Disabilities (CMHDD) Act, §32A-2-21(G); Rule 10-242(D).

In all other cases, the court must stay the proceedings until the child is competent to stand trial, but in no case may the proceedings be stayed more than one year. If the court stays the proceedings, it may order treatment to enable the child to attain competency to stand trial and may amend the conditions of release. During the stay, the child's competency must be reviewed every 90 days. The court must dismiss the petition without prejudice if, at any time during the stay, the court finds that the child cannot be treated to competency. The case must also be dismissed without prejudice if, after one year, the child remains incompetent to stand trial and unable to participate in his or her own defense. Upon dismissal, the court may recommend proceedings under the CMHDD Act. §32A-2-21(G); Rule 10-242(D).

33.5.4 Adjudicatory Hearing

The adjudicatory hearing is the equivalent of a criminal trial in an adult case in district court. Except where the Children's Court Rules provide otherwise, the hearing is conducted in the same manner as trials are conducted under the Rules of Criminal Procedure. Rule 10-244(A).

As a general rule, if the child is in detention, the adjudicatory hearing must take place within 30 days of the petition being filed or the child being placed in detention, whichever occurs latest. Rule 10-243(A). If the child is not in detention or is released before this time limit, the adjudicatory hearing must be commenced within 120 days of the petition being served on the child. Rule 10-243(B). (The 30 and 120 days could also run from a number of other events that occur less frequently.) Rule 10-243(A) and (B). If the hearing does not take

place within this time period or within any extension of time granted under the rule, the case may be dismissed with prejudice or the court may consider other sanctions as appropriate. Rule 10-243(F).

Rule Changes Pending. The Handbook reflects the rules in effect as of June 1, 2014. At that time, the NM Supreme Court was considering changes to Rule 10-243. It is important to check the rules in effect at the time of the proceeding.

The child is entitled to a jury trial if the act is one for which an adult would have a right to a jury trial. Rule 10-245(A) provides that the trial "shall be by jury" unless the child "knowingly and voluntarily waives the right to a jury trial. *See State v. Eric M.*, 1996-NMSC-056, ¶6, 122 N.M. 436. A child facing a juvenile disposition is entitled to a six-person jury. If adult sanctions are possible, the child is entitled to a 12-person jury. §32A-2-16(A). The state does not have a right to insist on a jury trial in a delinquency case. *In the Matter of Christopher K.*, 1999-NMCA-157, ¶12, 128 N.M. 406.

The Rules of Evidence apply during the adjudication. *See* Rules 10-115 and 11-1101.

Before any statement or confession by the child may be introduced into evidence, the state must prove that the statement or confession was elicited only after a knowing, intelligent and voluntary waiver of the child's constitutional rights. §32A-2-14(D). No confessions, statements or admissions may be introduced against a child under the age of 13 at all, whether made to a person in authority or simply to a friend or neighbor. §32A-2-14(F); *State v. Jade G.*, 2007-NMSC-010, ¶16, 141 N.M. 284. There is a rebuttable presumption that any confession, statement or admission made by a child age 13 or 14 to a person in a position of authority is inadmissible. §32A-2-14(F).

Police Questioning and Consent to Search. The Delinquency Act also provides children with broader rights in the area of police questioning than adults. *Miranda* protections are triggered when a child is subject to investigatory detention, not just custodial interrogation. §32A-2-14(C); *State v. Javier M.*, 2001-NMSC-030, ¶1, 131 N.M. 1. *See also J.D.B. v. North Carolina*, 564 U.S. ___ , 131 S.Ct. 2394 (2011), in which the U.S. Supreme Court decided, by plurality decision, that the federal Constitution requires that law enforcement consider age when determining whether a child is "in custody" and entitled to *Miranda* warnings before interrogation (for instance, query whether a 13 year old would feel free to leave).

In cases decided since *Javier M.*, the Court of Appeals has refused to broaden children's rights beyond those specifically provided in the Children's Code. *State v. Carlos A.*, 2012-NMCA-069, ¶20, 284 P.3d 384. The Court of Appeals has characterized §32A-2-14 "as a very narrowly drawn statutory protection" and interpreted *Javier M.* as only protecting a child's *statements* under §32A-2-14. *State v. Candace S.*, 2012-NMCA-030, ¶27, 274 P.3d 774. A child's physical conduct in a field sobriety test (FST) is not a statement, and accordingly, §32A-2-14 does not require that a police officer advise a child of the right to decline to perform an FST. *Id.* ¶26. *See also State v. Randy J.*, 2011-NMCA-105, ¶20, 150 N.M. 683. Similarly, no legal authority requires a police officer to

advise a child of the right to deny consent to a search. *Carlos A.*, ¶20.

The Court of Appeals has also ruled that a child's consent to a blood test under the Implied Consent Act, §66-8-107(A), and blood test results are not statements subject to suppression under §32A-2-14(D). *Randy J.*, ¶¶ 23, 24, 26.

Unlike abuse and neglect proceedings, delinquency hearings are generally open to the public. However, with a finding of exceptional circumstances, the court can decide that a closed hearing is appropriate. §32A-2-16(B).

33.5.5 Time Waivers

The child, through counsel, and the children's court attorney may agree to defer adjudication of the charges on the condition that the child comply with certain restrictions on his or her behavior. The petition is dismissed if the child completes the conditions and no new charges are filed against the child during that time. §32A-2-7(G). This agreement is called a "time waiver," because the parties agree to waive the strict time limits for adjudication and disposition. Court approval is not required.

33.5.6 Consent Decrees

A consent decree is an order that suspends delinquency proceedings and continues a child under the supervision of probation services without a judgment. §32A-2-22(A).

Any time before the court enters judgment in a delinquency case, either party may move the court to suspend the proceedings and continue the child under supervision with certain agreed-upon terms and conditions. §32A-2-22(A); Rule 10-228. This motion may be filed even after adjudication. Rule 10-228.

If the child objects to a consent decree, the court will proceed to findings, adjudication, and disposition of the case. If the child does not object but the children's court attorney does, the court may, in its discretion after considering the objections, enter the consent decree. §32A-2-22(B).

The court may not require an admission as a condition of a consent decree. §32A-2-22(A); 10-227(A) (providing that the child may stand mute in response to the petition). However, the court may not grant a motion for consent decree without making certain inquiries, including determining that the motion is voluntary and ensuring that a factual basis exists for the allegations in the petition. Rule 10-227(C) and (D).

A consent decree remains in force for six months unless the child is discharged earlier by probation services or the court extends the consent decree for an additional six months, by motion of the children's court attorney filed before the original decree expires. Rule 10-228(B). No hearing is required on CYFD's application to extend probation unless the child objects, in which case the court will determine after hearing if the extension is in the best interests of the child and the public. §32A-2-22(C); Rule 10-228.

If the children's court attorney believes that the child is not fulfilling the terms of the consent decree, the attorney may file a petition to revoke it. The petition must be filed prior to discharge by probation services or expiration of the consent decree, whichever occurs earlier. Rule 10-228(D); §32A-2-22(D). Proceedings on the petition are conducted in the same manner as proceedings on petitions to revoke probation. If the court finds that the child violated the consent decree, the court may extend the period of the consent decree or make any other disposition that would have been appropriate in the original proceeding, including reinstatement of the original delinquency petition. §32A-2-22(D).

The court retains jurisdiction to hear a timely filed petition to revoke a child's consent decree after the probation period has expired. *State v. Katrina G.*, 2007-NMCA-048, 141 N.M. 501. Section 32A-2-22(E) does not impose a time limit on the children's court. Rather, Rule 10-243 (formerly Rule 10-226) governs the time limits within which the court must hear a petition to revoke a child's probation. *Id*. ¶¶12, 19.

A judge who elicits or examines information or material about a child during consent decree proceedings that would be inadmissible in a hearing on the delinquency petition may not participate in any subsequent delinquency proceedings if the child objects. This could happen if (1) the consent decree is denied and the allegations in the petition remain to be decided in a hearing where the child denies the allegations; or (2) a consent decree is granted but the delinquency petition is subsequently reinstated. §32A-2-22(F).

33.5.7 Dispositional Hearing

If the child is in detention, the dispositional hearing must begin within 30 days from the date the court concludes the adjudicatory hearing in a delinquency proceeding or trial in a youthful offender proceeding or accepts from the child an admission of the factual allegations of the petition. Rule 10-246(B). If the hearing is not begun within 30 days, unless the child has agreed to or been responsible for the delay, the child must be released from detention until the dispositional hearing can be commenced. Rule 10-246(B) permits the court to set appropriate conditions on such release.

Copies of any social, diagnostic or other predisposition reports ordered by or submitted to the court must be provided to the parties at least five days before the actual disposition or sentencing. §32A-2-17(A); Rule 10-246(A) and (B).

In the case of youthful and serious youthful offenders, pre-disposition reports are mandatory under §32A-2-17(A), as made clear by the Supreme Court and Court of Appeals. *See State v. Gutierrez*, 2011-NMSC-024, ¶¶62-66, 150 N.M. 232, and *State v. Jose S.*, 2007-NMCA-146, ¶16, 142 N.M. 829.

The court may order that a child adjudicated as a delinquent child be administered a predisposition evaluation by a professional designated by the department for purposes of diagnosis, with direction that the court be given a report indicating what disposition is most

suitable when the interests of the child and the public are considered. The preference is now for performing the evaluation in the child's community. §32A-2-17(D).

The evaluation must be completed within 15 days of the court's order. However, for good cause shown, a child may be detained for more than 15 days within a 365 day period for the evaluation. § 32A-2-17(D) and (E).

Evaluation Forms. In 2011, the Supreme Court approved a form of order for the predispositional diagnostic evaluation. The Court also approved forms for courts to use in ordering other diagnostic evaluations, as well as competency, amenability, and forensic evaluations. *See* Forms 10-496A through 10-496E.

As in an abuse or neglect case, the dispositional hearing is not subject to the Rules of Evidence. All relevant and material evidence may be received, even if it would not be competent if it were offered during the adjudicatory hearing. §32A-2-16(G); Rule 11-1101.

In 2009, the Legislature amended the Children's Code to specify that the court may consider such factors as the child's brain development, maturity, trauma history, and disability when making dispositional findings related to the child's mental health. *See* §32A-2-19(A)(3).

The court may make any number of dispositions for the supervision, care, and rehabilitation of the child, depending on the delinquent act committed by the child and the child's circumstances. §32A-2-19(B). However, the court is limited to options specifically provided for in the Children's Code. *State ex rel. CYFD v. Paul G.*, 2006-NMCA-038, ¶¶20-21, 139 N.M. 258. Options, singly or in combination, include:

- a fine;
- transfer of legal custody to CYFD. CYFD would then determine the appropriate placement, supervision and rehabilitation program for the child, considering the judge's recommendations for placement, if any. Types of commitment include:
    - a short-term commitment of one year, of which a maximum of nine months may be served in a facility and at least 90 days must be served on supervised release (note that the Children's Code was amended in 2009 to use the term "supervised release" instead of "parole");
    - a long-term commitment of no more than two years in a facility for the care and rehabilitation of adjudicated delinquent children, of which no more than 21 months may be served at the facility and at least 90 days must be served on supervised release;
    - if youthful offender felonies were committed, a commitment to age 21, unless discharged sooner, regardless of the age of the offender (*State v. Indie C.*, 2006-NMCA-014, ¶8, 139 N.M. 80);
- probation;
- restitution;
- community service; or
- denial or revocation of driving privileges. §32A-2-19(B).

Section 32A-2-19(B) does not authorize the court to impose a disposition allowing a commitment *less than* to age twenty-one, unless it is a short-term commitment of one year or a long-term commitment of no more than two years. *Paul G.*, ¶¶1, 20 (holding that the Delinquency Act does not authorize the children's court, pursuant to a plea agreement, to commit a child who has been adjudicated delinquent to the legal custody of CYFD for an indeterminate period up to the age of 18).

Before 2005, the court could impose any disposition authorized for an abused or neglected child under the Abuse and Neglect Act. The law was amended in 2005 to provide instead that the court may refer the child and family to CYFD for an abuse or neglect investigation and, if warranted, abuse or neglect proceedings. §32A-2-19(G).

Before a short-term commitment of one year expires, the court may extend the judgment for one six-month period if the court finds that the extension is necessary to safeguard the welfare of the child or the public safety. Notice and hearing are required for any such extension to take place. If a short-term commitment is extended, the mandatory 90-day supervised release must be included in the extension. §32A-2-23(D).

Before a long-term commitment of two years expires, the court may extend the judgment for additional periods of one year until the child turns 21 if necessary to safeguard the welfare of the child or the public interest. Notice and hearing are required for any such extension to take place. If a long-term commitment is extended, the mandatory 90-day supervised release must be included in the extension. §32A-2-23(E).

The court may also extend a judgment of probation for an additional period of one year until the child reaches 21, if necessary to protect the community or safeguard the child's welfare. §32A-2-23(F).

When the child is an Indian child, the Indian child's cultural needs must be considered in the dispositional judgment and reasonable access to cultural practices and traditional treatment must be provided. §32A-2-19(C).

The court may not impose consecutive commitments. *State v. Adam M.*, 2000-NMCA-049, ¶14, 129 N.M. 146. However, it may impose two separate concurrent commitments arising out of different facts at the same hearing, as long as each commitment is statutorily authorized. *State v. Jose S.*, 2005-NMCA-094, ¶11, 138 N.M. 44.

While most delinquent acts subject the child only to juvenile sanctions, the children's court may order the imposition of adult sanctions in the case of youthful offenders. §32A-2-20(A). An adult sentence is only permitted if the court finds that:

- the child is not amenable to treatment or rehabilitation as a child in available facilities; and
- the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders. ***See*** Chapter 32 on the Children's Mental Health and Developmental Disabilities Act. §32A-2-20(B).

Section 32A-2-20(D) lists several factors that must be considered when making these findings. These include consideration of "the maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability." §32A-2-20(C)(5). The statute also establishes a rebuttable presumption that a child who has previously been sentenced as an adult is not amenable to treatment or rehabilitation as a child in available facilities. §32A-2-20(D).

Rule Changes Pending. When the 2014 Handbook went to press, the NM Supreme Court was considering new Children's Court rules to govern youthful offender proceedings. The Court was also considering a new uniform jury instruction (proposed UJI 14-9005) that would include special interrogatories to assist the court in making amenability findings.

A youthful offender given an adult sentence is then treated as an adult offender and transferred to the legal custody of an agency responsible for incarceration of persons sentenced to adult sentences. §32A-2-20(E). While a judgment resulting in a juvenile disposition is not considered a conviction of crime, an adult sentence is. §32A-2-18(C).

Children over 14 who are charged with first degree murder but found guilty only of delinquent acts are subject only to the dispositions permitted for those offenses. §32A-2-20(G) and (H). If found to have committed a youthful offender offense, for example, the child must be given an amenability hearing before an adult sentence may be considered. A child found to have committed a delinquent offense is subject only to juvenile sanctions. These statutory changes effectively overrule *State v. Muniz*, 2003-NMSC-021, ¶15, 134 N.M. 152.

In 2010, the New Mexico Supreme Court issued two major decisions about youthful offender proceedings. In *State v. Jones,* the Supreme Court held that the children's court cannot approve a plea agreement in which the defendant agreed to be sentenced as an adult without first conducting an amenability hearing and making the necessary findings. A child's right to an amenability hearing cannot be waived. 2010-NMSC-012, ¶¶48-50, 148 N.M. 1. In *State v. Rudy B.,* the Court ruled that the Sixth Amendment right to jury trial does not apply to amenability determinations in youthful offender proceedings. 2010-NMSC-045, ¶59, 149 N.M. 22.

33.5.8 Revocation of Probation

Proceedings to revoke probation are governed "by the procedures, rights and duties applicable to proceedings on a delinquency petition," except that the hearing is held before the judge without a jury. To establish a violation of probation in a delinquency proceeding, the State must prove the violation beyond a reasonable doubt and must prove willful conduct on the part of the probationer. *In re Bruno R.,* 2003-NMCA-057, ¶11, 133 N.M. 566; *see also* §32A-2-24.

In *In the Matter of Aaron L.*, 2000-NMCA-024, 128 N.M. 641, the Court of Appeals held that Rule 10-224 (now Rule 10-227) applies to probation revocations as well as delinquency proceedings by virtue of §32A-2-24. "[T]he trial court had an affirmative duty under Rule 10-224(C) to ascertain whether Child's admission was supported by an adequate factual basis and whether Child's admission was knowing, intelligent, and voluntary." *Id*. ¶16. Extrajudicial admissions and confessions are not sufficient to prove beyond a reasonable doubt that a child committed delinquent acts, including violations of probation, absent other corroborating evidence. *Bruno R.*, 2003-NMCA-057, ¶17.

In *State v. Erickson K.*, 2002-NMCA-058, ¶18, 132 N.M. 258, the court held that the Rules of Evidence apply to the adjudicatory portion of a juvenile probation revocation hearing. As a result, "the children's court must take pains to maintain some separation between disputed adjudicatory issues and the dispositional matters that arise as a consequence of that adjudication." *Id*. ¶17. The Rules of Evidence do not apply to the dispositional phase. *Id.* ¶15.

33.5.9 Appeals

A child has a right to appeal a judgment under the Delinquency Act. Appeals from judgments and dispositions on petitions alleging delinquency are governed by the Rules of Appellate Procedure. §32A-1-17(A); Rule 10-251(C).

33.6 Motor Vehicle Cases

Jurisdiction over children who commit Motor Vehicle Code violations is split between children's court and the courts of limited jurisdiction (municipal, magistrate and metropolitan). The children's court has jurisdiction over the traffic offenses that are specifically listed in §32A-2-3(A)(1), such as driving while under the influence and reckless driving. If the children's court acquires jurisdiction over a child for delinquent offenses, it also acquires exclusive jurisdiction over traffic offenses alleged to have been committed by the child arising out of the same occurrence. Other traffic violations are heard by municipal, magistrate, or metropolitan court. §32A-2-29(A) and (B).

If the children's court acquires jurisdiction over traffic violations by virtue of its jurisdiction over delinquent acts arising out of the same occurrence, the court may, in its discretion, dispose of the traffic violations under the Motor Vehicle Code or municipal traffic code to the extent that the disposition neither conflicts with nor is inconsistent with the dispositional provisions of the Children's Code. §32A-2-29(D).

Only the children's court may incarcerate a child who has been found guilty of traffic offenses. §32A-2-29(F).

33.7 Confidentiality of Juvenile Records

Section 32A-2-32 provides that records pertaining to the child, including the records listed below, are confidential and may not be disclosed directly or indirectly to the public. The records that are confidential include:

- social records;
- behavioral health screenings;
- diagnostic evaluations;
- psychiatric reports;
- medical reports;
- social studies reports;
- records from local detention facilities;
- client-identifying records from facilities for the care and rehabilitation of delinquent children; and
- pre-parole or supervised release reports and supervision histories obtained by the juvenile probation office, parole officers and the juvenile public safety advisory board or in the possession of CYFD. §32A-2-32(A).

Except for mental health and developmental disabilities records, these records may be disclosed to the individuals entities listed in §32A-2-32(C). However, the agency, person, or institution receiving the information may not re-release the information without proper consent or as otherwise provided by law. §32A-2-32(A). Mental health and developmental disability records may only be disclosed pursuant to the Children's Mental Health and Developmental Disabilities Act. §32A-2-32(B). ***See*** Handbook, Chapter 32.

If disclosure of otherwise confidential records is made to the child or any other person or entity pursuant to a valid release of information signed by the child, all victim or witness identifying information must be redacted or otherwise deleted. §32A-2-32(D).

33.8 Sealing of Records

The provisions of the Delinquency Act on sealing of records were amended extensively in 2009 and the New Mexico Supreme Court has since enacted amendments to the corresponding children's court rule, Rule 10-262. The amendments to the rule are effective for all cases eligible for sealing on or after January 7, 2013.

The amended rule requires that CYFD prohibit public access to a child's files and records in its possession when the child (now an adult) has been released from court-ordered supervision or custody of CYFD, is not subject to a pending delinquency proceeding or any other order not involving legal custody or supervision, and has reached the age of 18. Once it seals its files and records, CYFD must set in motion a process by which the courts and other agencies will seal their files and records on the child. Rule 10-262(E) and (F).

When a delinquency petition does not result in an adjudication of delinquency, the children's court attorney at the conclusion of the case must present the court with a proposed sealing order in the form prescribed by the Supreme Court (Form 10-420). This order will direct CYFD and all other agencies to seal all files and records related to the delinquency proceeding. Rule 10-262(D) and (E). *See also* §32A-2-26(H).

In addition to automatic sealing, §32A-2-26 and Rule 10-262(C) continue to allow for sealing of files and records upon motion. The requirements for the motion are set out in the statute and rule.

Following the entry of a sealing order, the proceedings must be treated as if they never occurred and all index references to the matter deleted. As explained in the rule, the sealing order has the effect of vacating the findings, orders, and judgments in the case. If an inquiry about the case is made, "the court, law enforcement officers and departments and agencies shall reply, and the person may reply, to an inquiry that no record exists with respect to the person." §32A-2-26(C); Rule 10-262(G).

After the entry of a sealing order the court may permit inspection of the files and records or release of information in the records included in the sealing order only upon motion of the person who is the subject of the records and only to persons named in the motion. The court may also, in its discretion, permit inspection by a clinic, hospital, or agency that has the person under care or treatment or by other persons engaged in fact finding or research. §32A-2-26(D). After sealing, CYFD may store and use a person's records for research and reporting purposes, subject to the confidentiality provisions of §32A-2-32 and other applicable federal and state laws. §32A-2-26(I).

A finding of delinquency or conviction of a crime following the sealing of records may, in the court's discretion, be used by the court as a basis for setting aside the order. §32A-2-26(E).

CHAPTER 34

CRIMINAL ABUSE AND NEGLECT PROCEEDINGS

This chapter reviews:

- Reporting requirement for suspected child abuse and neglect.
- Statute of limitations for initiation of a criminal prosecution.
- Elements of child abuse and neglect crimes and other crimes against children.
- Evidentiary considerations.
- Usual steps in a criminal abuse or neglect case.

This chapter will discuss allegations of abuse and neglect of a child which result in a criminal prosecution against the alleged perpetrator. The chapter will lay out the various criminal offenses and their elements as well as discuss applicable case law and other matters related to criminal prosecutions where the alleged victim is a child.

34.1 Reporting Requirement

Every person, including a member of the clergy who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is abused or neglected is required to report the matter immediately to local law enforcement or CYFD. For an Indian child residing in Indian country, the report must be made to tribal law enforcement or a social service agency. §32A-4-3(A). Failure to report is a misdemeanor. §32A-4-3(F). Cross-reporting is required between law enforcement and CYFD. §32A-4-3(B).

For reporting purposes, the terms "abused" and "neglected" are defined as set forth in the Abuse and Neglect Act, §§32A-4-1 to 32A-4-34. These are the definitions that apply in civil abuse and neglect proceedings rather than in criminal cases. ***See*** Handbook §15.5.3. The definitions applicable to criminal prosecutions alleging abuse or neglect are discussed later in this chapter.

Obstruction of the reporting or investigation of alleged child abuse or neglect is a misdemeanor offense. §30-6-4. "Obstruction" is defined as knowingly inhibiting, preventing, obstructing, or intimidating another from reporting child abuse or neglect (including sexual abuse), or knowingly obstructing, delaying, interfering with, or denying access to a law enforcement officer or child protective services social worker in the

investigation of a report of child abuse or sexual abuse. §30-6-4(A) and (B).

Parental permission is not required for a child to be interviewed by law enforcement, employees of the district attorney's office, employees of CYFD, or investigative interviewers from a children's safehouse. §32A-4-5(C). However, before interviewing a child, CYFD must notify the child's parent or guardian, unless it determines that notification would adversely affect the safety of the child about whom the report has been made or compromise the investigation. §32A-4-5(F).

34.2 Statute of Limitations

The standard statute of limitations, §30-1-8, sets forth the general time requirements for initiating a criminal prosecution. A special statute of limitations for some offenses against children, §30-1-9.1, provides that, for any crime of child abuse or abandonment, criminal sexual penetration (CSP) or criminal sexual contact of a minor (CSCM), the time period for commencing prosecution does not begin to run until the victim turns 18 or "the violation" is reported to law enforcement, whichever occurs first.

In *State v. Whittington,* the Court of Appeals found that the trial court erred in dismissing a criminal prosecution for criminal sexual contact with a minor under §30-1-9.1. 2008-NMCA-063, ¶1, 144 N.M. 85. Defendant argued that an earlier CYFD investigation into allegations that defendant may have sexually abused the victim triggered the statute of limitations and that the state was time barred from prosecuting the case. Applying the rules of statutory construction, the court concluded that, under §30-1-9.1, the statute of limitations to commence a prosecution for a violation of §§30-6-1 (child abuse or abandonment), 30-9-11 (CSP) or 30-9-13 (CSCM) did not commence until the facts that form the basis for the violation were reported to a law enforcement agency. *Id.* ¶12.

34.3 Child Abuse

34.3.1 Statutory Elements

Under §30-6-1(D), "abuse of a child" consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:

- placed in a situation that may endanger the child's life or health;
- tortured, cruelly confined, or cruelly punished; or
- exposed to the inclemency of the weather.

Under the law, a defendant can be charged and convicted of child abuse based on acts on his or her part, as well as failing to act or acting without regard to the consequences. Different jury instructions are given depending on whether the defendant is alleged to have intentionally or negligently caused child abuse or to have negligently permitted abuse to occur.

Jury Instructions on Criminal Child Abuse. In *State v. Cabezuela*, 2011-NMSC-041, ¶37, 150 N.M. 654, the Supreme Court asked the UJI Committee for Criminal Cases to review the jury instructions for intentionally or negligently causing child abuse, suggesting separate jury instructions for intentional and negligent abuse. In early 2014, the Supreme Court published for comment a number of proposed changes to the uniform jury instructions (UJIs) on criminal child abuse. The UJIs in effect would be withdrawn and a series of new instructions adopted. Because such significant changes are pending as the 2014 Handbook goes to the press, the UJIs will not be described in detail in this chapter. Any citations to the UJIs are citations to the UJIs in effect in June of 2014.

The Legislature has added a specific form of child abuse relating to the exposure of a child to items relating to the manufacture of controlled substances. Evidence demonstrating that the defendant has knowingly, intentionally, or negligently allowed a child to enter or remain in a motor vehicle, building, or other premises containing chemicals and equipment used or intended for use in the manufacture of a controlled substance is deemed prima facie evidence of child abuse. §30-6-1(I). Similarly, evidence that demonstrates that a child has been knowingly and intentionally exposed to the use of methamphetamine is deemed prima facie evidence of abuse. §30-6-1(J) (added in 2009).

If abuse of a child, whether intentional or negligent, results in death or great bodily harm to the child, the crime is a first degree felony, although whoever commits intentional abuse of a child less than twelve years of age that results in death is guilty of a *first degree felony resulting in the death of a child*. The basic sentence of imprisonment for a first degree felony is 18 years but the sentence for a first degree felony resulting in the death of a child is life imprisonment. §30-6-1(H); §31-18-15(A). A person serving a life sentence under this provision is not eligible for parole until 30 years of the sentence has been served.

If the abuse did not result in death or great bodily harm, a first offense is a third degree felony, §30-6-1(E), with a basic sentence of three years. A second or subsequent offense of child abuse not resulting in death or great bodily harm is a second degree felony, §30-6-1(E), with a basic sentence of nine years. §31-18-15(A).

34.3.2 Definitions Relating to Child Abuse

Important definitions in criminal child abuse prosecutions include:

- Great bodily harm: Great bodily harm is defined as "an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body." §30-1-12(A). *See State v. Bell*, 90 N.M. 134, 138 (1977) (great bodily harm does not have to be proven by medical experts exclusively); *State v. Ortega*, 77 N.M. 312, 315 (1966) (great bodily harm is a question of fact for the jury; tattooing a victim can be great bodily harm); *State v. Hollowell*, 80 N.M. 756, 760 (Ct. App. 1969) (choking creates a high probability of death and fits within "great bodily harm").

- Intentional: In *State v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, the Supreme Court reversed the defendant mother's conviction for intentional child abuse resulting in the death of her 8-month old daughter, contrary to §30-6-1. The Court concluded that the Legislature did not intend to include within intentional child abuse other forms of abuse committed with a lesser degree of intent, specifically failure to act to prevent another from abusing the victim child. "[F]ailure to act to protect a child from abuse aligns with a negligent theory of child abuse…. This is in contrast to the defendant causing the abuse, which aligns with an active, intentional theory of child abuse." *Id*. ¶33.

- Negligence: In *Santillanes v. State*, 115 N.M. 215, 222 (1993), the Court changed the standard of negligence to one of "criminal negligence." To find that negligent child abuse occurred, the fact finder must find that the defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.

  In *State v. Magby*, 1998-NMSC-042, 126 N.M. 361, overruled on other grounds in *State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230, the Court further clarified the criminal negligence standard and concluded that the trial court's refusal to give an instruction defining "reckless disregard" was improper. This resulted in a revised jury instruction on negligently causing child abuse as follows: the defendant knew or should have known of the danger to the child, and knew or should have known that his "conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of" the child. *See* UJI 14-602 as amended in 2000.

  The *Magby* requirements were also incorporated into the instruction for negligently permitting child abuse. *See* UJI 14-603. Negligent child abuse does not require subjective knowledge of the risk. Rather, "[w]hat distinguishes civil negligence from criminal negligence is not whether the person is subjectively aware of a risk of harm . . . it is the magnitude of the risk itself." *State v. Schoonmaker*, 2008-NMSC-010, ¶43, 143 N.M. 373.

34.3.3 Case Law on Child Abuse

As the following cases illustrate, the New Mexico appellate courts have decided that certain actions fall within the ambit of child abuse, while other actions do not.

Causing or Permitting Child Abuse:

- *State v. Davis*, 2009-NMCA-067, 146 N.M. 550. Defendant was charged with intentional child abuse under the theory of cruelly punishing, torturing, or cruelly confining. The jury was instructed on both intentional and negligent child abuse, which the state admitted was in error. The verdict form did not indicate whether the jury found intentional or negligent child abuse. The Court of Appeals found that it was improper for the district court to instruct the jury that it could convict the

defendant of negligent child abuse when negligent child abuse is not a lesser-included offense of intentional child abuse. The Court noted that the jury could have concluded that defendant was guilty of negligent child abuse based on his testimony that the child's injuries were caused by his dog. The Court found that where the court submits an uncharged crime to the jury as a basis for conviction, it deprives the defendant of his due process right to notice and an opportunity to prepare a defense, unless the crime is a lesser included office. Submission of the negligent child abuse instruction resulted in fundamental error.

- *State v. Crislip*, 110 N.M. 412, 418 (Ct. App. 1990). Negligently permitting child abuse encompasses passively consenting, *i.e.* permitting abuse through inaction, as well as active consent. *See also State v. Williams*, 100 N.M. 322, 324 (Ct. App. 1983), wherein the court rejected defendant's argument that she could not be guilty of negligently permitting child abuse to occur on the basis that she "could not foresee the occurrence" because the child had old and new injuries, the defendant knew of her husband's violence and use of drugs, and she allowed child to stay in that environment. (Note that *Crislip* and *Williams* were partially overruled by *Santillanes*, discussed in §34.3.2 above, to the extent they used a civil negligence standard. 110 N.M. at 225, n.7.)

- *State v. Leal*, 104 N.M. 506, 509 (Ct. App. 1986). The child abuse statute prohibits two separate acts: causing or permitting child abuse. Since abuse will frequently occur in the privacy of the home, charging a defendant with "causing or permitting" may enable the state to prosecute where it is not clear who actually inflicted the abuse, but where the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur.

- *State v. Adams*, 89 N.M. 737, 738 (Ct. App. 1976). Failure to take action in connection with abuse can be criminal child abuse. Parents have a duty to care for their child, and knowing about abuse and doing nothing to protect the child may be child abuse. The court allowed testimony regarding child abuse syndrome as an identifiable medically recognized term involving evidence of old and new trauma, even if the particular trauma did not result in the child's death. (Note that *Adams* was partially overruled by the *Santillanes* case, discussed in §34.3.2 above, to the extent the court used a civil negligence standard. *Santillanes*, 110 N.M. at 225, n.7.)

Endangering a Child:

- *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517. Defendant shot and killed another man and, in the course of the events, fired into a house in which children were present. He appealed convictions for negligent child abuse. The Supreme Court held that the State was required to prove beyond a reasonable doubt that Defendant knew or should have known that the child victims were present in the zone of danger that he created. *Id*. ¶25. The Court found sufficient evidence to support a conviction with regard to the infant, there being testimony that the defendant was told there was a newborn baby in the house. On the other hand, the State did not present any

evidence that he had been made aware of the other child's presence. The Court reversed the conviction for negligent child abuse with regard to this other child. *Id*. ¶¶27-28.

- *State v. Chavez*, 2009-NMSC-035, 146 N.M. 434. The Supreme Court held that the evidence was insufficient to support convictions for child abuse by endangerment based on filthy living conditions. Unlike the conviction reviewed in *Jensen*, which is cited below and was based on several risk factors, the convictions in *Chavez* were based solely on filthy living conditions. The Supreme Court directed lower courts to discontinue use of "the reasonable probability or possibility" standard, which it considered too imprecise when applied. *Id*. ¶21. The Court concluded that the "likelihood" of harm occurring should no longer be the "determinative" factor. *Id.* ¶26. Rather, courts should follow the language of the Uniform Jury Instructions, and determine whether the evidence establishes that the defendant's conduct created "a substantial and foreseeable risk" of harm. *Id.* ¶22. Despite the shift in emphasis, the Court stated that the likelihood that the harm will actually occur "remains an important consideration[.]" *Id*. ¶26.

- *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462. Defendant was convicted of negligently permitting child abuse by endangerment under §30-6-1(D). She was arrested in a house where chemicals and equipment involved with methamphetamine production were found and the evidence suggested that her child lived there with her. In addition to the jury instruction for negligently permitting child abuse, the following instruction, based on what is now §30-6-1(I), was given:

  > Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance may be deemed evidence of abuse of the child.

  Defendant appealed her conviction arguing that this instruction undermined the jury's responsibility to find all of the essential elements of her charge and that there was insufficient evidence to support her conviction. The Supreme Court agreed, holding that: (1) the permissible-inference jury instruction failed to properly instruct jury that it was required to find the essential element of endangerment beyond a reasonable doubt; (2) an evidentiary presumption does not change the state's burden to establish the essential elements of the crime without reference to the presumption itself; (3) the evidence was insufficient to establish the child's presence in the home; and (4) the evidence was insufficient to establish risk of harm to child. *Id*. ¶¶13, 18, 22, 23.

- *State v. Jensen*, 2006-NMSC-045, 140 N.M. 416. Defendant was convicted of endangering a 15 year old child who frequently visited the defendant in the defendant's home, where conditions were notably unhealthy: dog vomit and feces, rotten food, and rat dropping were present throughout the house, including on the stove top, where defendant prepared food for the child. In addition, the defendant

provided the child with alcohol on a daily basis for approximately two weeks, allowing the child to become so intoxicated that he vomited on at least one occasion. Finally, the defendant provided the child with access to online pornography. The Court of Appeals overturned defendant's conviction, concluding that the 15 year old child was old enough to simply avoid the defendant and thereby protect himself from harm. The Supreme Court disagreed, emphasizing that the "child's failure to avoid Defendant does not exonerate Defendant as a matter of law" and concluding that the combination of facts—filth, provision of alcohol, and access to pornography—were sufficient to prove child endangerment. *Id.* ¶15.

- *State v. Graham*, 2005-NMSC-004, 137 N.M. 197. The presence of marijuana in the house of a drug dealer was sufficient to support a conviction of child abuse when a marijuana roach was found on the living room floor, a marijuana bud was found in a child's crib, a plastic sandwich bag with a small amount of marijuana was found on a table, and when the children were present in the immediate vicinity of the marijuana and the marijuana was accessible to them. The Supreme Court held that the evidence was sufficient to find that the defendant had placed the children "in a situation that may have endangered their life or health and did so with a reckless disregard." *Id.* ¶¶8, 14.

- *State v. McGruder*, 1997-NMSC-023, 123 N.M. 302. Defendant went to victim's home, shot the live-in boyfriend of the victim's mother in the head, and then held a gun to the mother's head, threatening to kill her. The child victim was behind the mother during the incident, crying. The child was physically uninjured but the appeals court affirmed the child abuse conviction because "[t]he jury was entitled to view such conduct as endangering either the life or health of the child." *Id.* ¶38.

- *State v. Schaaf*, 2013-NMCA-082, 308 P.3d 160. The Court of Appeals upheld the finding of child endangerment based on the presence of methamphetamines and guns in the house. The court applied *Chavez* and distinguished *Trossman*, both described above.

- *State v. Orquiz*, 2012-NMCA-080, 284 P.3d 418. Defendant was driving his vehicle with his nine year old in it when he crashed into a ditch. His child was injured in the collision. Defendant was convicted not only of DWI but also of child abuse by endangerment based on the presence of the child in the moving vehicle. Defendant appealed the child abuse conviction, arguing that the mere fact that he was driving while intoxicated, standing alone, was insufficient as a matter of law to support a conviction for child abuse by endangerment. The Court of Appeals disagreed, finding that defendant's actions placed his child inescapably within a moving zone of danger. ¶11.

- *State v. Etsitty*, 2012-NMCA-012, 270 P.3d 1277. Defendant was sitting in his pickup truck with his wife and four year old child. He was clearly drunk. While he told the officer they were loading up the vehicle to go to the store, the truck was not moving and the keys were in his hands. The Court of Appeals cited its then recent

opinion in *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, in which the defendant was sitting in the vehicle with his girlfriend and four children, keys in his hands and the car not running. " '[T]he possibility that [the d]efendant might drive is a theoretical danger – the exact type of danger our Legislature did not intend to bring within the ambit of Section 30-6-1.' " *Cotton*, ¶21. The court in *Etsitty* concluded: "[W]ithout evidence of actual driving, Defendant had not yet put the child in real peril." *Etsitty*, ¶11. The evidence was insufficient to support a conviction for child abuse by endangerment.

- *State v. Gonzales*, 2011-NMCA-081, 150 N.M. 494, *aff'd on other grounds*, 2013-NMSC-016. Defendant drove on the interstate while severely drunk, sideswiping one car and ploughing into the rear of another. Two children were in the back seat of the car that defendant struck; one of the children died and the other received minor injuries. Defendant was convicted of negligent child abuse by endangerment. The Court of Appeals held that a discernible risk of danger to a particular child or particular children is required, and the defendant must be aware of danger to the identifiable child or children when engaging in the conduct that creates the risk of harm. A case that might otherwise be regarded as vehicular manslaughter is not punishable under the child abuse statute simply because the person killed or injured by the defendant's criminal negligence was a child. (When the Court of Appeals overturned the child abuse convictions, it also held that double jeopardy barred retrial of the defendant for vehicular homicide. The State applied for certiorari only on the double jeopardy determination.) *Cf. State v. Melendrez*, 2014-NMCA-062, (distinguishing *Gonzales* because there was evidence that Defendant, who drove into a group of children trick or treating, was actually or constructively aware of the presence of children).

- *State v. Clemonts*, 2006-NMCA-031, 139 N.M. 147. Defendant led police on a low-speed chase, then ran from his car and had to be subdued by a police officer. The Court of Appeals held that the misdemeanor traffic offenses the defendant committed did not pose a substantial risk to the children's lives or health as passengers in his car. The children were not in any direct line of danger, so there was no child abuse. *Id.* ¶17.

- *State v. Watchman*, 2005-NMCA-125, 138 N.M. 488. Defendant's conviction for negligent child abuse was supported by sufficient evidence that the defendant acted with reckless disregard for the safety of her 21 month- old child when she left the child unattended in an unlocked pickup truck for at least 30 minutes, the child had easy access to numerous bottles of hard liquor left in the truck, the truck was parked at a crowded bar on a Saturday night, and defendant drove to the bar in an intoxicated condition with the child in the truck. *See also State v. Castaneda*, 2001-NMCA-052, ¶¶21, 22, 130 N.M. 679 (upholding a conviction of criminally negligent child abuse when the defendant drove in an intoxicated condition with her children in the car).

- *State v. Trujillo*, 2002-NMCA-100, 132 N.M. 649. Defendant's eight year old daughter saw him hitting her mother but was ordered back to her room: "Get your

little f---ing ass back to bed because I don't want to have you see me kill your mother." The Court of Appeals reversed defendant's conviction for child abuse, determining that there was insufficient evidence of a reasonable probability or possibility that the daughter's emotional or physical health was endangered. *Id.* ¶20. The court distinguished *Ungarten* and *McGruder* as being cases in which the children were situated directly in the line of physical danger from a lethal weapon, which was pointed in their direction during a heated exchange. *Trujillo,* ¶16.

- *State v. Ungarten*, 115 N.M. 607, 609-10 (Ct. App. 1993). Defendant, a neighbor of the child victim, gestured toward the victim with a knife, waving the knife in a threatening manner. The child was not physically harmed. A child does not have to suffer a physical injury for the defendant to be convicted of child abuse. The court opined that the Legislature's intent was to require "a reasonable probability or possibility" that the child would be endangered.

- *State v. Roybal*, 115 N.M. 27, 34 (Ct. App. 1992). Child abuse was not proven where defendant was involved in a drug transaction approximately 10 to 15 feet away from a vehicle where the defendant's daughter was sitting. The transaction was observed by armed police officers who intervened. The court found that the child was not put in danger and therefore the charge was not supported by substantial evidence.

Who May Commit Child Abuse:

- *State v. Reed*, 2005-NMSC-031, 138 N.M. 365. Defendant, who was 18 years old, shot and killed his 14 year old friend. The Supreme Court held that the Legislature has not indicated that the statute for negligent child abuse resulting in death is restricted to persons having a special relationship with the child, such as a parent or guardian. *Id.* ¶50. Therefore, it rejected defendant's argument that as a friend and contemporary of the deceased he could not be convicted of negligent child abuse resulting in death.

- *State v. Lujan*, 103 N.M. 667, 670-71 (Ct. App. 1985). Defendant and his companions harassed victim's parents outside a store and then followed them in their vehicle. During the pursuit, someone from defendant's vehicle threw beer bottles and cans into the victim's pickup, one of which struck a seven month old infant in the head. Defendant then hit the victim's car, forcing it to stop. The passengers in defendant's vehicle attacked the child's parents. For the defendant to be convicted of child abuse, he does not have to be a parent of the child. *See also State v. Fulton*, 99 N.M. 348 (Ct. App. 1983) (stepfather guilty of child abuse towards stepchildren).

Conduct That Is Not Criminal:

- *State v. Juan*, 2010-NMSC-041, ¶27, 148 N.M. 747. Defendant was charged and convicted of child abuse resulting in death of a child under 12. She appealed her conviction partially on the ground that the trial court refused to give a jury instruction on the lesser included offense of simple child abuse not resulting in death. The Court

found that the conduct on which defendant based her request for a jury instruction--yanking a baby's pants off in a rough manner causing him to fall backward and hit his head against a carpeted floor--posed at best a minimal and remote risk of harm. As claimed by the state, it was also "separate and distinct from the charged conduct and thus not within the scope of a lesser included offense." *Id.* ¶22.

- *State v. Mondragon*, 2008-NMCA-157, ¶¶12-13, 145 N.M. 574. The state alleged that the defendant inflicted injuries on the mother, which resulted in injuries to the fetus. The child was born alive but died two days later and defendant was charged with child abuse resulting in death under §30-6-1(E). Relying on its decision in *State v. Martinez*, 2006-NMCA-068, ¶¶7-8,139 N.M. 741, the Court of Appeals held that the statute requires that the child abuse be inflicted on a child and that a fetus is not a child. *Martinez* involved a case in which the state prosecuted a mother for child abuse when the mother used cocaine during her pregnancy. The Court of Appeals held that the Legislature did not intend for a viable fetus to be included within the statutory definition of a child for the purposes of the child abuse statute.

- *State v. Lefevre*, 2005-NMCA-101, 138 N.M. 174. Defendant was prosecuted for battery for using physical force to discipline his child. The Court of Appeals held that a parent has a privilege to use moderate or reasonable physical force, without criminal liability, when engaged in the discipline of his or her child. Discipline involves controlling behavior and correcting misbehavior for the betterment and welfare of the child. *Id.* ¶16. An isolated instance of such force that results in nothing more than transient pain or temporary marks or bruises is protected under this parental discipline privilege. *Id.* ¶19.

34.4 Child Abandonment

Under §30-6-1(B), the statutory elements of "abandonment of a child" are:

- a parent, guardian, or custodian of the child
- intentionally leaving or abandoning the child
- under circumstances whereby the child may or does suffer neglect.

"Neglect" means that a child is without proper parental care and control of subsistence, education, medical, or other care or control necessary for the child's well-being because of:

- the faults or habits of the child's parents, guardian, or custodian; or
- their neglect or refusal to provide these when able to do so. §30-6-1(A)(2).

If child abandonment results in death or great bodily harm to the child, the crime is a second degree felony, punishable by nine years imprisonment. §31-18-15(A). If it does not result in death or great bodily harm, the crime is a misdemeanor. §30-6-1(B); §31-18-15(A).

A parent, guardian, or custodian leaving an infant less than 90 days old at a safe havens site in compliance with the Safe Haven for Infants Act may not be prosecuted for abandonment

of a child, so long as the infant is left in a condition that would not constitute abandonment under §30-6-1. §24-22-3(A); *see also* §30-6-1(C) and (K). (The Safe Haven Act, when passed in 2001, allowed infants to be left at hospitals. The law was amended in 2013 to expand safe haven sites to include fire stations and law enforcement agencies that have staff on-site at the time an infant is left. *See* §§24-22-2 and 23-22-3.)

34.5 Sexual Abuse

34.5.1 Criminal Sexual Penetration

Under §30-9-11(A), the statutory elements of criminal sexual penetration are:

- unlawfully and intentionally causing a person
- to engage in sexual intercourse, cunnilingus, fellatio, or anal intercourse, or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

Criminal sexual penetration in the first degree is a first-degree felony that consists of all criminal sexual penetration perpetrated on a child under 13 years of age or by the use of force or coercion that results in great bodily harm or great mental anguish to the victim. §30-9-11(D). The basic sentence of imprisonment is 18 years. §31-18-15(A).

A first degree felony, aggravated criminal sexual penetration is all criminal sexual penetration perpetrated on a child under 13 years of age with an intent to kill or with a depraved mind regardless of human life. §30-9-11(C) (as amended in 2009). The offense carries a sentence of life imprisonment. §31-18-15(A).

Second degree criminal sexual penetration is an offense perpetrated on a child age 13 to 18 by the use of force or coercion. §30-9-11(E). For second degree criminal sexual penetration, where the victim is a child who is 13 to 18 years of age, the defendant must be sentenced to a minimum term of three years, which may not be suspended or deferred. §30-9-11(E).

Jury Instructions on Unlawfulness in CSP II Felony Cases. In *State v. Stevens*, 2014-NMSC-011, 323 P.3d 901, a woman was convicted of, among other things, two counts of CSP II-felony under §30-9-11(E) for directing her 13 year old daughter to perform oral sex on her adult boyfriend after injecting methamphetamine with her. The woman appealed these convictions on the ground that the jury was not instructed that the state had to prove that the sexual activity occurring during the commission of a felony was itself unlawful. *Id*. ¶12. Although it affirmed her convictions, the Supreme Court found the jury instructions to be inadequate, disagreeing with a line of Court of Appeals cases holding that an unlawfulness instruction is unnecessary "where the victim supplied with drugs by a defendant is in fact a child below the age of consent." *Id*. ¶¶21, 40, 58 (citation omitted). The Court clarified the law, holding "that when a CSP II charge is based on the commission of a felony, it must be a felony that is committed against the victim of, and that assists in the accomplishment of, sexual penetration perpetrated by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent." *Id*. ¶39.

The Supreme Court asked the UJI Committee for Criminal Cases to recommend changes to the jury instructions to clarify the elements of criminal sexual penetration during the commission of a felony. *Id*. ¶40.

Third degree criminal sexual penetration consists of all criminal sexual penetration perpetrated through the use of force or coercion which is not otherwise specified in §30-9-11. §30-9-11(F).

Fourth degree criminal sexual penetration consists of:

- all criminal sexual penetration either not previously defined under §30-9-11 and
- perpetrated on a child 13 to 16 years of age when the perpetrator is at least 18 years of age and is at least four years older than the child and not the child's spouse;

or

- perpetrated on a child 13 to 18 years of age, when the perpetrator is either
    - a licensed or unlicensed school employee;
    - a school contract employee;
    - a school health services provider; or
    - a school volunteer; and
- who is at least 18 years of age and at least four years older than the child; and
- not the child's spouse; and
- learns while performing services in or for the school that the child is a student. §30-9-11(G)(1)-(2).

In all cases, the state must prove that the penetration was unlawful. *See State v. Stevens,* 2014-NMSC-011, ¶23, 323 P.3d 901. Criminal sexual penetration does not include medically indicated procedures, §30-9-11(B), or reasonable parental care. *See State v. Osborne*, 111 N.M. 654, 658 (1991), and the discussion of unlawfulness in §34.5.2 below. In prosecutions for criminal sexual penetration, the testimony of the victim need not be corroborated and the lack of corroboration has no bearing on the weight that the fact finder gives to the testimony. *State v. Nichols*, 2006-NMCA-017, ¶10, 139 N.M. 72.

Note that the definition of "sexual intercourse," as used in the jury instructions for criminal sexual penetration, includes penetration of the vulva. UJI 14-982; *see State v. Tafoya*, 2010-NMCA-010, ¶¶47, 51-52, 147 N.M. 602 (rejecting defendant's contention that penetration of the vulva amounts only to criminal sexual contact of a minor, not criminal sexual penetration). Fellatio only requires that the mouth or tongue touch the penis, not that the penis enter the mouth of the other person. Furthermore, cunnilingus does not require that the tongue go inside or penetrate the vagina, only that the female sex organ be touched on the edge or inside with the lips or tongue. UJI 14-982; s*ee State v. Orona*, 97 N.M. 232, 235 (1982).

34.5.2 Criminal Sexual Contact of a Minor

Under §30-9-13(A), the statutory elements of criminal sexual contact of a minor (CSCM) are:

- the unlawful and intentional touching of or applying force to the intimate parts of a minor, or
- the unlawful and intentional causing of a minor to touch one's intimate parts.

"Intimate parts" means the primary genital area, groin, buttocks, anus or breast. *Id*. "Primary genital area" is defined in Criminal UJI 14-981.

Second degree criminal sexual contact of a minor consists of all criminal sexual contact of the unclothed intimate parts of a minor perpetrated:

- on a child under 13 years of age, or
- on a child 13 to 18 years of age when:
    - the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit; or
    - the perpetrator uses force or coercion that results in personal injury to the child; or
    - the perpetrator uses force or coercion and is aided or abetted by one or more persons; or
    - the perpetrator is armed with a deadly weapon. §30-9-13(B).

Anyone convicted of second degree criminal sexual contact against a child must be sentenced to a minimum term of imprisonment of three years, which may not be suspended or deferred. *Id*.

Third degree criminal sexual contact of a minor consists of all criminal sexual contact of a minor when either:

- The minor is under age 13; or
- The minor is age 13 to 18 and the perpetrator:
    - is in a position of authority over the minor and uses this authority to coerce the minor to submit. *See State v. Orosco*, 113 N.M. 780, 786-787 (1992); *State v. Gardner*, 2003-NMCA-107, ¶22, 134 N.M. 294; *State v. Trevino*, 113 N.M. 804, 806-807 (Ct. App. 1991);
    - uses force or coercion that results in personal injury to the child;
    - uses force or coercion and is aided or abetted by one or more persons; or
    - is armed with a deadly weapon. §30-9-13(C).

A person is in a "position of authority" if that person "is a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child." §30-9-10(E). In *State v. Haskins*, the Court of Appeals held that a massage therapist may be found to be in a position of authority for

purposes of satisfying the elements of CSCM. 2008-NMCA-086, ¶9, 144 N.M. 287.

"Force or coercion" is defined in §30-9-10(A) to mean:

- the use of physical force or physical violence;
- the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;
- the use of threats, including threats of physical punishment, kidnapping, extortion, or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;
- the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep, or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act; or
- the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.

Physical or verbal resistance of the victim is **not** an element of force or coercion. §30-9-10(A) (emphasis added).

Criminal sexual contact in the third degree is a third degree felony for a sexual offense against a child, for which the basic sentence of imprisonment is six years. §30-9-13(C); §31-18-15(A).

Criminal sexual contact of a minor in the fourth degree includes all criminal sexual contact that is not defined above. It occurs when:

- the child is age 13 to 18; and
- the criminal sexual contact is perpetrated with force or coercion. §30-9-13(D). Force or coercion is defined in §30-9-10(A) (***see*** above) and does not require as an element of the crime that the victim physically or verbally resisted.

Criminal sexual contact of a minor in the fourth degree also occurs when:

- the child is age 13 to 18;
- the perpetrator is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider, or a school volunteer; and
- the perpetrator is at least 18 years of age and is at least four years older than the child, and not the spouse of the child; and
- the perpetrator learns that the child is a student in a school while performing services in or for a school. §30-9-13(D).

The basic sentence for fourth degree criminal sexual contact of a minor is 18 months imprisonment. §31-18-15(A).

The state is required to prove unlawfulness as an element of the offense of criminal sexual contact of a minor. *State v. Osborne*, 111 N.M. 654, 661 (1991). For the touching to have been unlawful, it must have been done with the intent to arouse or gratify sexual desire or otherwise to intrude upon the bodily integrity or personal safety of the victim. If the touching was for purposes of reasonable medical care or nonabusive parental or custodial care, it is not unlawful. *Osborne*, 111 N.M. at 660-661. The court in *State v. Gardner*, 2003-NMCA-107, ¶24, 134 N.M. 294, reiterated that the desire to obtain sexual gratification was not necessary; the defendant may have intended otherwise to intrude on the victim's bodily integrity.

No law enforcement officer, prosecuting attorney, or other government official may ask or require an adult, youth, or child victim of a sexual offense set forth in §§30-9-11 through 30-9-13 to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense. Also, the victim's refusal to submit to such an examination may not prevent the investigation, charging, or prosecution. §30-9-17.1.

34.5.3 Aggravated Indecent Exposure

Under §30-9-14.3(A), the elements of aggravated indecent exposure on a minor are:

- knowingly and intentionally exposing
- the primary genital area
- to public view
- in a lewd and lascivious manner
- with the intent to threaten or intimidate another person
- while committing one or more enumerated acts or criminal offenses, including exposure to a child under age 18, criminal sexual penetration, or child abuse.

"Primary genital area" means the mons pubis, penis, testicles, mons veneris, vulva, or vagina. §30-9-14.3(B).

Aggravated indecent exposure is a fourth degree felony, §30-9-14.3(C), punishable by a basic sentence of 18 months imprisonment. §31-18-15(A). In addition to that sentence, the court must order the offender to participate in and complete a program of professional counseling at his or her own expense. §30-9-14.3(D).

34.5.4 Incest

Under §30-10-3, the elements of incest are:

- knowingly intermarrying or having sexual intercourse
- with persons with the following degrees of consanguinity: parents, children, grandparents, and grandchildren of every degree, whole and half brothers and sisters, uncles, aunts, nieces, or nephews.

Incest is a third degree felony. §30-10-3. Note that the statute only criminalizes sexual intercourse, not other sexual penetrations or contacts, and with blood parents, not stepparents.

34.5.5 Sexual Exploitation of Children

Under the Sexual Exploitation of Children Act, several different types of activity can constitute sexual exploitation of children:

- Possession of Medium. The elements of this fourth degree felony are:
  - intentionally possessing
  - any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act
  - knowing or having reason to know that the medium depicts a prohibited sexual act or simulation of a sexual act, and
  - knowing or having reason to know that one or more of the participants in the act is under age 18. §30-6A-3(A).

- Distribution of Medium. The elements of this third degree felony are:
  - intentionally distributing
  - any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act
  - knowing or having reason to know that the medium depicts a prohibited sexual act or simulation, and
  - knowing or having reason to know that one or more of the participants in the act is under age 18. §30-6A-3(B).

- Causing/Permitting Minor to Engage in Act. The elements of this felony are:
  - intentionally causing or permitting
  - a child under eight
  - to engage in any prohibited sexual act or simulation of such an act
  - knowing, having reason to know, or intending that
  - the act may be recorded in any obscene visual or print medium, or performed publicly.

  This crime is a third degree felony unless it is perpetrated on a child under age 13, in which event it is a second degree felony. §30-6A-3(C).

- Manufacture of Medium. The elements of this second degree felony are:
  - intentionally manufacturing
  - any obscene visual or print medium
  - depicting any prohibited sexual act or simulation of such an act
  - if one or more of the participants in the act is a child under 18. §30-6A-3(D).

Two additional crimes were added to §30-6A-3 in 2007 to prohibit the manufacture or distribution of obscene visual or print medium depicting any prohibited sexual act or

simulation if the perpetrator knows or has a reason to know that a real child under the age of 18 who is not a participant is depicted as a participant.

Section 30-6A-2 defines the key terms used in the foregoing crimes as follows:

- "Manufacture" means the production, processing, copying by any means, printing, packaging or repackaging of any visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in the act is under eighteen. §30-6A-2(D).

  In *State v. Smith*, the Court of Appeals held that the copying of pornographic digital images of children to a portable storage device creates a new digital copy of the prohibited image sufficient to constitute manufacturing under §30-6A-2. 2009-NMCA-028, ¶15, 145 N.M. 757.

- "Obscene" means any material when the content, if taken as a whole:
  - appeals to a prurient interest in sex, as determined by the average person applying contemporary community standards;
  - portrays a prohibited sexual act in a patently offensive way; and
  - lacks serious literary, artistic, political or scientific value. §30-6A-2(E).

  In *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, the Court of Appeals considered whether photographs of children in various states of undress were obscene under §30-6A-2 and concluded that only intolerable sexually explicit material could be deemed obscene without violating Article II, Section 17, the free speech provision of the New Mexico Constitution. Applying this standard, the court concluded that photographs of nude children engaged in typical childhood activities without showing the children's genitals or pubic area were not obscene.

  The New Mexico Supreme Court discussed *Rendleman* at length in *State v. Myers (Myers II)*, 2009-NMSC-016, 146 N.M. 128. *Myers II* involved a defendant convicted of seven counts of sexual exploitation of children in violation of §30-6A-3(D) for covertly videotaping minor female victims using the bathroom. The Supreme Court concluded that, while material must do more than depict a naked child to violate contemporary community standards, it does not necessarily have to be identifiable as hard-core child pornography to be obscene under §30-6A-2(E).

  According to the Court in *Myers II*, child pornography is distinguishable from adult pornography, only a subset of which is obscene under the standard set forth in the *Miller v. California*, 413 U.S. 15 (1973), the U.S. Supreme Court case establishing the test for whether material is obscene and not protected under the First Amendment. *Myers II*, ¶39. The Court concluded that substantial evidence existed to support the trial court's finding that the images appeal to a prurient interest in sex and portray a prohibited sexual act in a patently offensive way, and that the trial court could reasonably have found beyond a reasonable doubt that the images are obscene under §30-6A-2(E). *Id.* ¶40.

The Supreme Court has also decided *Myers III* in which, among other things, it clarified but confirmed its holding in *Myers II*. *State v. Myers*, 2011-NMSC-028, ¶¶29-36, 150 N.M. 1. It is important to read the two decisions together.

- "Performed publicly" means performed in a place that is open to or used by the public. §30-6A-2(C).

- "Prohibited sexual act" means: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadomasochistic abuse for the purpose of sexual stimulation; or (5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation.

  In *Myers II*, the Supreme Court disagreed with *Rendleman's* use of an objective standard to evaluate whether material is "for purpose of sexual stimulation" under §30-6A-2(A)(5). *Myers II*, 2009-NMSC-016, ¶32.. The Court adopted a more subjective standard, which examines the defendant's actual intent in distributing, possessing or manufacturing the images, to determine whether the material fulfills the "purpose of sexual stimulation" element. *Id.* ¶32. This includes consideration of extrinsic evidence of the defendant's intent, such as the circumstances under which the materials at issue were prepared, the location where photographs were found, and the presence or absence of other pornographic materials. *Id.* When the Supreme Court reviewed the Court of Appeals' decision on remand from *Myers II*, it revisited and clarified its view of *Rendleman* and its holding in *Myers II*. *Myers III*, 2011-NMSC-028, ¶¶29-36.. As noted above, it is important to read the two *Myers* decisions together.

- "Visual or print medium" means: (1) any film, photograph, negative, slide, computer diskette, videotape, videodisc, or computer or electronically generated imagery; or (2) any book, magazine, or other form of publication or photographic reproduction containing or incorporating film, photograph, negative, slide, computer diskette, videotape, videodisc, or any computer generated or electronically generated imagery. §30-6A-2(B).

  In *State v. Olsson*, 2014-NMSC-012, 324 P.3d 1230, the Supreme Court addressed the crime of possession in situations in which various media have been used to store any number of images. One of the defendants, for example, argued that he possessed a "computer diskette" and that the unit of prosecution should be defined by the medium, not the number of acts the medium depicts. *Id*. ¶17. In a 4-1 decision, the Court held that the Legislature had not clearly defined the unit of prosecution for possession of child pornography under §30-6A-3(A) and ultimately applied the rule of lenity to hold that the defendants could only be charged with one count of possession. In so holding, the Court observed that significant and rapid technological developments have occurred since §30-6A-3(A) was last amended in 2001 and respectfully recommended that the Legislature revise the statute to reflect modern advances in technology and clarify the intended unit of prosecution. *Id*. ¶45.

34.5.6 Child Solicitation by Electronic Communication Device

Under §30-37-3.2(A), the offense of "child solicitation by electronic communication device" consists of an individual knowingly and intentionally soliciting a child under 16 years of age, by means of an electronic communication device:

- to engage in sexual intercourse, sexual contact, or in a sexual or obscene performance, or
- to engage in any other sexual contact when the perpetrator is at least four years older than the child.

"Electronic communication device" is defined as a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment, or any other device that can produce an electronically generated image, message, or signal. §30-37-3.2(F). Those charged with this offense cannot use as a defense that the alleged intended victim was a law enforcement officer posing as a child. §30-37-3.2(D).

Child solicitation by electronic communication device is a fourth degree felony if the child is at least thirteen years of age but under sixteen and a third degree felony if the child is under thirteen. §30-37-3.2(B). The crime is committed in this state if an electronic communication device transmission either originates or is received in this state. §30-37-3.2(E).

34.6 Evidence (*See also Handbook Chapter 27)*

34.6.1 Abuse and Neglect Reports

The contents of a report of child abuse or neglect required by §32A-4-3 of the Children's Code and related facts may not be excluded from evidence on the grounds that the matter may be the subject of a physician-patient privilege or similar privilege or rule against disclosure. §32A-4-5(A).

34.6.2 Limitations on Privileged Communications

Under Rule11-504(D)(4) of the Rules of Evidence, as amended in 2013, there is no privilege for communications relevant to any information that a doctor, psychotherapist, state or nationally licensed mental-health therapist, or patient is required by law to report to a public employee or agency. Under Rule 11-505(D)(1), there is no privilege in proceedings in which one spouse is charged with a crime against a child of either spouse.

34.6.3 Information from Civil Abuse or Neglect Case

All records or information concerning a party to a civil abuse or neglect proceeding that are in the possession of the court or CYFD are confidential, although they are open to inspection by the district attorney unless use immunity has been granted under §32A-4-11. §32A-4-33(A) and (B)(8).

Use immunity prohibits the district attorney in a criminal proceeding from obtaining records, documents, or other physical objects produced by an immunized respondent in an abuse and neglect proceeding in children's court, when production of those items was compelled by a court order. §32A-4-11(B). Additionally, use immunity prevents the district attorney from obtaining a respondent's in-court testimony, as well as respondent's statements made during the course of court-ordered psychological evaluation or treatment. §32A-4-11(A) and (C). Information otherwise available is not subject to use immunity.

Because use immunity orders may not be granted after the fact, any statements made by respondents either in treatment, for evaluation or in court prior to the entry of the immunity order are not covered by the order. Furthermore, use immunity "shall attach only to those statements made during the course of the actual evaluation or treatment and specifically does not attach to statements made to other department employees, agents or other representatives in the course of the investigation of alleged child abuse or neglect." §32A-4-11(C).

The Children's Court Rules authorize the children's court to grant use immunity, not only for the respondent in the abuse or neglect proceeding, but to any person who has been or may be called to testify or to produce a record or other object in that proceeding. Rule 10-341(A). However, it is critical that the district attorney be served with a copy of the application for immunity and notice of hearing on the application. Rule 10-341(B). A grant of use immunity means that the children's court can compel a person to testify or produce a record, document or other object in the civil abuse or neglect proceeding notwithstanding the person's privilege against self-incrimination, except as provided in Rule 11-413 of the Rules of Evidence. Rule 10-341(C).

34.6.4 Videotaped Depositions of Alleged Child Victims

In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, the district court may, for a good cause shown, order a videotaped deposition of any alleged victim who is under 16 to be used in lieu of direct testimony at trial. The deposition must be videotaped in the judge's chambers and the judge, district attorney, defendant, and his or her attorney(s) must be present. As with all witnesses, the alleged victim will be examined and cross-examined under Rule 11-611. §30-9-17.

Under Rule 5-504 of the Rules of Criminal Procedure for the District Court:

- The person seeking the videotaped deposition must show that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm.
- The deposition may be admitted into evidence as an additional exception to the hearsay rule if:
    - the child will be unable to testify without suffering unreasonable and unnecessary mental or emotional harm;
    - the deposition was presided over by a district judge and defendant was present and represented by counsel or waived counsel; and

- the defendant was given an adequate opportunity to cross-examine the child, subject to such protection as the judge deems necessary.

Rule 5-504 provides that the deposition may also be used for any of the reasons set forth in Rule 5-503(N). However, Rule 5-503 was rewritten in 2000 and no longer contains Paragraph N. (Former Paragraph N allowed use of the deposition if the witness was unavailable as defined in Rule 11-804, the witness gave inconsistent testimony at the trial or hearing, or the deposition was otherwise admissible.)

The relevant case law includes:

- *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79**.** The defendant challenged the district court's admission of a deposition tape without making findings of fact or otherwise weighing his right of confrontation against the potential harm that would result from a face to face encounter with the victim. The Court of Appeals found that defendant implicitly waived his right to confront the child witnesses against him when he did not file a response to the state's motion for a videotaped deposition, did not object when the videotaped deposition was taken or admitted as evidence, and when he relied on the deposition tape in his opening and closing arguments.

- *State v. Fairweather*, 116 N.M. 456 (1993). In a prosecution for sexual abuse, the trial court did not abuse its discretion in allowing testimony by depositions taped outside the defendant's presence and then shown to the jury. The judge had made requisite findings that the individualized harm which would otherwise result to the child victims outweighed the defendant's right to face-to-face confrontation with his accusers.

- *State v. Benny E.*, 110 N.M. 237 (Ct. App. 1990). Child defendant's confrontation rights were violated when the alleged child victim was permitted to testify at trial in judge's chambers with only counsel and judge present and the accused child watched on video monitor located in another room. The procedure was invalid because no particularized findings of special harm to victim, supported by substantial evidence, were made.

- *State v. Tafoya*, 108 N.M. 1 (Ct. App. 1988). Videotaped depositions of victims taken while defendant was required to remain outside the room in which the testimony given was not a violation of Confrontation Clause and was consistent with §30-9-17.

- ***See also*** §34.6.5 below, discussing *State v. Ruiz*, 2001-NMCA-97, 131 N.M. 241, and the committee commentary to Rule 5-504.

Videotapes are subject to a protective order of the court in order to protect the privacy of the victim. §30-9-17(E).

A law passed in 2011 also provides for alternative methods of providing child testimony. The Uniform Child Witness Protective Measures Act is similar to Rule 5-504 but is not limited to sexual abuse cases. Under the Uniform Act, the court may allow a child witness under the age of 16 to testify by videotaped deposition in a criminal proceeding upon a showing that the child witness may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. §§38-6A-1 – 38-6A-9 (effective July 1, 2012). As of June 2014, the Supreme Court had not adopted rules in connection with the Act.

34.6.5 Psychological Evaluations of Victims

Every person is competent to be a witness unless the Rules of Evidence provide otherwise. Rule 11-601.

Under §30-9-18, if the crime charged is criminal sexual penetration or criminal sexual contact of a minor and the alleged victim is under 13, the court may hold an evidentiary hearing to determine whether to order a psychological evaluation of the alleged victim on the issue of competency as a witness. If the court determines that the child's competency is in sufficient doubt that the court requires expert assistance, then the court may order a psychological evaluation. To justify an evaluation for challenging the child's credibility, the defendant must show a compelling reason for the evaluation. In order for a compelling reason to exist, the probative value of the evidence reasonably likely to be obtained from the examination must outweigh the prejudicial effect of such evidence and the witness's right of privacy. *State v. Casillas,* 2009-NMCA-034, ¶33, 145 N.M. 783.

If an evaluation is granted:

- it must be conducted by only one psychologist or psychiatrist;
- the court must select the evaluator;
- the evaluator may be used by either or both parties; and
- if the victim has been evaluated on competency during an investigation by a psychologist or psychiatrist selected in whole or in part by law enforcement, the psychological evaluation must be conducted by a psychologist or psychiatrist selected by the court upon recommendation of the defense. §30-9-18.

Although no other provision in the law expressly allows the defendant to obtain a psychological evaluation of the alleged victim, courts have found that a psychological evaluation is warranted when the victim's mental anguish is put in issue by the state. For example, in *State v. Garcia*, 94 N.M. 583, 586-87 (Ct. App. 1980), the defendant was entitled to an evaluation of the victim because mental anguish was alleged as an essential element of the crime of criminal sexual penetration by the use of force or coercion that results in mental anguish as the personal injury.

Similarly, the Court of Appeals held that the state placed the child's mental state at issue when it requested a videotaped deposition because testifying would cause the child unreasonable mental anguish. *State v. Ruiz,* 2001-NMCA-97, ¶38, 131 N.M. 241. Although the appellate court did not hold that a psychological evaluation was required under the

circumstances, it remanded to allow the trial court to determine whether to order the psychological evaluation. *Id.* ¶40.

According to the Committee Commentary to Rule 5-504 (videotaped deposition rule), the committee was requested in 1988 to consider amendments to the rule that would have limited psychological evaluations. The committee was of the opinion that "in the rare case that a psychological examination is necessary to show good cause [for a videotaped deposition], the trial judge should appoint an independent psychiatrist or psychologist to examine the child and report to the court. No other examination should be required."

34.6.6 Expert Witness Testimony

Under Rule 11-702, the prerequisites for admission of expert witness testimony are that:

- the witness is qualified as an expert by knowledge, skill, experience, training, or education; and
- scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

If a witness is qualified as an expert, the witness may testify in the form of an opinion or otherwise. Rule 11-702.

Case law further clarifies these requirements:

- *State v. Alberico*, 116 N.M. 156 (1993), sets forth the standards for admitting expert testimony in child abuse cases.
    - Expert post traumatic stress disorder (PTSD) testimony must be scientifically valid, probative, and assist the trier of fact.
    - PTSD testimony is admissible if it is provided by a properly qualified mental health professional who testifies on the issue of whether the victim's PTSD symptoms are consistent with sexual abuse.
    - Improper PTSD testimony includes direct evidence of the victim's credibility, direct evidence of the perpetrator's identity, testimony that sexual abuse caused the victim's PTSD symptoms, testimony identifying or equating PTSD with RTS (rape trauma syndrome), and testimony offered to explain the victim's post-incident behavior where the defendant did not raise the issue.

- *State v. Lucero*, 116 N.M. 450 (1993), which followed *Alberico*, emphasized that three forms of expert testimony are prohibited: (1) the expert may not comment directly on the victim's credibility; (2) the expert may not identify the perpetrator; and (3) the expert may not testify that the victim's PTSD symptoms were caused by sexual abuse. However, the prosecution should be allowed to inquire into these prohibited areas if the defense opens the door to such testimony.

Confrontation Clause and Hearsay

Confrontation Clause Considerations

Under the Confrontation Clauses of the 6th Amendment to the U.S. Constitution (applied to states through the 14th Amendment) and Article II, Section 14 of the New Mexico Constitution, criminal defendants have a right to cross-examine witnesses against them. This right may be compromised when a hearsay statement is admitted into evidence without the declarant being available for cross-examination. Consequently, the U.S. Supreme Court has ruled that when hearsay evidence offered against a criminal defendant is testimonial and the declarant is not available to testify, the federal Confrontation Clause prohibits admission of the evidence unless the defendant had a prior opportunity to cross-examine the declarant. *See Crawford v. Washington*, 541 U.S. 36 (2004).

The Supreme Court stated in *Crawford* that the "core class" of testimonial statements requiring the opportunity for cross-examination may include ex parte in-court testimony (or its functional equivalent) and extra-judicial statements contained in formalized testimonial materials. 541 U.S. at 51-52. Examples may include:

- affidavits;
- depositions;
- statements made while in police custody;
- statements made in response to police interrogation;
- confessions;
- prior testimony at a preliminary hearing, before a grand jury or during a former trial;
- similar pretrial statements that declarants would reasonably expect to be used in a prosecution; and
- statements made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for use at a later trial.

Since *Crawford*, New Mexico's appellate courts have held hearsay evidence to be testimonial under the *Crawford* decision in a number of cases. *See, e.g., State v. Walters,*; 2007-NMSC-050, 142 N.M. 644; *State v. Romero*, 2007-NMSC-013, 141 N.M. 403; *State v. Forbes*, 2005-NMSC-27, 138 N.M. 264; *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309; *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348; *State v. Henderson*, 2006-NMCA-059, 139 N.M. 595; and *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404.

In four of these cases, the appellate courts held that admission of an unavailable accomplice's statement violated the defendant's confrontation rights because the statements were made while in police custody. According to the courts, statements made during a custodial interview fall "squarely within the class of 'testimonial' evidence" described by *Crawford*. *Johnson*¸ 2004-NMSC-029, ¶7; *see also Forbes*, 2005-NMSC-027, ¶13; *Alvarez-Lopez*, 2004-NMSC-030, ¶24; and *Duarte*, 2004-NMCA-117, ¶13. Similarly, in a trial of multiple defendants, the statements made by the various defendants to the police were testimonial: "[t]he interrogation of the codefendants constituted an effort by the police to 'prove past events potentially relevant to later criminal prosecution.' " *Walters*, 2007-NMSC-050, ¶23.

The preliminary hearing testimony of an unavailable witness is also considered testimonial. *State v. Henderson*, 2006-NMCA-059, ¶14, 139 N.M. 595. However, in *Henderson*, the court held that introduction of the testimonial evidence did not violate the Confrontation Clause because the defendant had a prior opportunity to cross-examine the statement being offered into evidence at trial. *Id*. ¶16.

The U.S. Supreme Court held in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009), that certificates signed by state laboratory analysts which stated that a seized substance was cocaine were "testimonial" and inadmissible under *Crawford*. Following *Melendez*, the New Mexico Supreme Court decided in the *Bullcoming* case that a blood alcohol content report was testimonial. *State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487. However, the analyst who prepared the report had not testified at trial. The Court held that this did not bar admission of the report because "the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation." *Id*. ¶1. The U.S. Supreme Court, in a plurality decision, reversed. Rejecting the "mere scrivener" rationale, the Court held that it was violation of the Confrontation Clause to have a surrogate provide testimony as to what the original analyst did or observed. *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2716 (2011).

The New Mexico Supreme Court has found that observations from an autopsy report are testimonial statements subject to the Confrontation Clause. In *State v. Navarette*, 2013-NMSC-003, ¶1, 294 P.3d 435, the Court held that the *Crawford* line of cases precluded a forensic pathologist from relating subjective observations recorded in an autopsy report (the report itself was not admitted into evidence) as a basis for the pathologist's trial opinions, when the pathologist neither participated in nor observed the autopsy performed on the decedent. On the other hand, the Court held in *State. v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, that the Confrontation Clause was not violated even though the doctor who prepared the autopsy report did not testify, because the testifying pathologist supervised the autopsy and had first-hand knowledge of the procedure and findings of the doctor conducting the autopsy. The testifying doctor was also testifying as to her own opinion. *Cabezuela*, ¶52.

A number of cases have considered whether statements made at the scene of a crime are testimonial. The U.S. Supreme Court in *Davis v. Washington*, 547 U.S. 813 (2006), held that statements made in the course of a 911 call were not testimonial since the primary purpose of the police operator's questioning was to enable the police to provide emergency assistance. Similarly, the Court in *Michigan v. Bryant*, 131 S.Ct. 1143, 1147 (2011), held that statements made by a shooting victim to police while he was lying on the ground in severe distress waiting for medical attention were not testimonial. Again, the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. 131 S.Ct. at 1166-67.

The New Mexico courts have followed suit. The Supreme Court applied the "context-specific inquiry" established in *Michigan v. Bryant* to hold that statements made to the 911

operator and a deputy at the scene by a victim in considerable pain were nontestimonial. *State v. Largo*, 2012-NMSC-015, ¶¶1, 21, 278 P.3d 532. As in *Bryant*, the victim was shot, the location of the shooter was unknown, and the interrogation was quick, unstructured, and located in the location where the victim was found. *Largo*, ¶14. In an earlier case, the Court of Appeals held that statements given spontaneously and recorded on video while police were securing a scene were nontestimonial. *State v. Gutierrez*, 2011-NMCA-088, ¶¶14-16, 150 N.M. 505.

Keep in mind that *Crawford* and its progeny do not apply in civil cases, including cases under the Abuse and Neglect Act in children's court. *See In the Matter of Pamela A.G.*, 2006-NMSC-019, ¶12, 139 N.M. 482.

Hearsay in Criminal Child Abuse and Neglect Cases

In *State v. Ortega*, 2008-NMCA-001, 143 N.M. 261, the New Mexico Court of Appeals applied *Crawford* to exclude hearsay statements made by a child victim to a nurse of the sexual assault nurse examiner program (SANE) during an examination in a criminal child abuse and neglect case. The court concluded that the primary purpose of the SANE interview was evidence gathering, not medical diagnosis or treatment, making any resulting statements testimonial and inadmissible under *Crawford*. Based on this conclusion, the court further reasoned that, if the purpose of the interview is forensic, then any resulting statements are not made for purposes of medical diagnosis or treatment under Rule 11-803(D) (now Rule 11-803(4)).

In *State v. Mendez*, 2010-NMSC-044, 148 N.M. 761, a case concerning only the hearsay exception in Rule 11-803(D) and not implicating the Confrontation Clause (declarant was available to testify), the New Mexico Supreme Court overruled *Ortega* to the extent that *Ortega* discussed the admissibility of hearsay statements under Rule 11-803(D) (now Rule 11-803(4)). The Court did not overrule *Ortega*'s discussion of the constitutional issues. *Mendez*, ¶40.

In *Mendez*, the Court noted that the court in *Ortega* improperly aligned its Rule 11-803(D) admissibility analysis with its Confrontation Clause analysis, changing the fundamental approach to analyzing statements under Rule 11-803(D) (now Rule 11-803(4)), at least with regard to statements made to SANE nurses, and improperly shifting the inquiry away from the trustworthiness of the statement. *Mendez*, ¶¶27, 40.

The Court interpreted *Ortega* and its progeny (including *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, and the Court of Appeals opinion in *Mendez*) as standing for the proposition that under Rule 11-803(D) (now Rule 11-803(4)), courts must categorically exclude all statements made during the course of an encounter, the primary purpose of which is not medical, regardless of whether any individual statement might be for a valid medical purpose. They would exclude statements made to a SANE nurse because of the overall forensic aspect of the SANE examination. *Mendez*, ¶24. According to the Supreme Court, these cases focus on the overall purpose of the encounter, instead of the trustworthiness of

each statement, which oversimplifies the Rule 11-803(D) (now Rule 11-803(4)) inquiry. *Id.* ¶¶24-33.

The Court pointed out that the hearsay rule and the Confrontation Clause are not co-extensive and must remain distinct. It outlined the differences between the Confrontation Clause analysis, which focuses on the purposes of and circumstances surrounding the examination in order to guarantee the accused in a criminal trial the right to be confronted with the witnesses against him regardless of how trustworthy the out of court statement may appear to be, and the Rule 11-803 analysis, which focuses on the trustworthiness of the individual statement and ensuring that the jury is not exposed to unreliable evidence. *Id.* ¶¶ 27-28. "Surrounding circumstances are certainly relevant, but the focus must center on the individual statement." *Id.* ¶31.

The Court held that statements made by a child to a SANE nurse may fall under the Rule 11-803(D) (now Rule 11-803(4)) hearsay exception. To determine admissibility of a statement made to a SANE nurse under Rule 11-803(D), "[t]he trial court must carefully parse each statement made to a SANE nurse to determine whether the statement is sufficiently trustworthy, focusing on the declarant's motivation to seek medical care and whether a medical provider could have reasonably relied on the statement for diagnosing or treating the declarant." *Id*. ¶43. The Court went on to illustrate examples of statements that could be deemed admissible under the proper analysis. *Id*. ¶¶47-54.

Applying *Mendez,* the Court of Appeals in *State v. Skinner* found that victim statements during a SANE exam that involve the identification of the abuser may be admissible under Rule 11-803(D) (now Rule 11-803(4)), where the identity of the abuser is pertinent to psychological treatment or where treatment involves separating the victim from the abuser. *State v. Skinner*, 2011-NMCA-070, ¶¶18-19, 150 N.M. 26.

In *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, the Court of Appeals upheld the trial court's decision to admit into evidence out-of-court statements made to parents and medical professionals by a three year old too young to recall anything at trial. The trial court ruled the statements to the parents admissible under the present sense impression exception to the hearsay rule and under the catch-all exception. The appellate court concluded that the statements to the parents were not sufficiently contemporaneous to warrant admission under the present sense impression exception, but that admission of the statements under the catch-all exception in Rule 11-804(B)(5). (Due to a 2007 amendment to the Rules of Evidence, the "catch-all" exception is now referred to as the "residual" exception and is codified in Rule 11-807.)

With respect to the statements made to medical personnel, the defendant in *Massengill* argued that the statements identifying him as the perpetrator were taken for law enforcement purposes and were not "reasonably pertinent to diagnosis or treatment," as required by Rule 11-803(D) (now Rule 11-803(4)). The Court of Appeals disagreed. The medical providers in question provided a plausible rationale for their need to obtain the information and the trial court did not abuse its discretion in admitting the statements. *Id.* ¶¶20-21.

Massengill also involved challenges based on the Confrontation Clause but the Court's discussion is not described here because the opinion predates *Crawford* and its progeny.

In State v. Casaus, 1996-NMCA-031, 121 N.M. 481, the Court of Appeals limited the admission of a prior consistent statement under Rule 11-801(D)(1)(b), relying on *Tome* v. *U.S. (Tome I)*, 513 U.S. 150 (1995). The Court held that, to be admitted, the statement must have been made prior to the improper influence or motive. The State introduced a videotaped interview of the victim (the safehouse videotape) to rebut the charge that she fabricated the molestation because she was angry at her uncle and wanted more attention from her mother. The court admitted the videotape as a prior consistent statement to rehabilitate the victim's testimony. However, the motive to lie came two weeks before the interview. Because the prior consistent statement (the videotape) did not pre-date the improper influence or motive, it was inadmissible under Rule 11-801(D) (now Rule 11-801(4)). 1996-NMCA-031, ¶¶19-20.

Consider this example: Child Sara tells her teacher on Monday that her father molested her. On Tuesday, the father punishes Sara. On Wednesday, Sara tells the school counselor that her father molested her. The statement made by Sara on Monday would be admissible because it was made prior to the improper motive, *i.e*. Sara being angry with her father for punishing her. The statement Sara made on Wednesday would not be admissible because it was made after the basis for the improper motive arose.

34.6.8 Prior Acts and Convictions

Rule 11-404(B) provides that evidence of a crime, wrong, or other act, while inadmissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character, may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. For the testimony to be admissible under Rule 11-404(B), it must be "relevant to a disputed issue other than the defendant's character, and [the court] must determine that the prejudicial effect of the evidence does not outweigh its probative value." *State v. Beachum*, 96 N.M. 566, 567-68 (Ct. App. 1981), cited in *Ervin*, discussed below. In *State v. Serna*, the Supreme Court held that any evidence of convictions permitted to be admitted by a particular statute must also be admissible under the Rules of Evidence. 2013-NMSC-033, ¶1, 305 P.3d 936.

In *State v. Sena*, the New Mexico Supreme Court held that the state may prove that defendant's touching was "unlawful" under the statute on sexual penetration of a minor by showing that "defendant's behavior was done to arouse or gratify sexual desire." 2008-NMSC-053, ¶13, 144 N.M. 821 (citations omitted). While grooming evidence -- in this case, evidence that defendant had walked around naked in front of Child, showed her a pornographic video, showed her his wife's thong underwear, and showered naked with her -- cannot be offered to show defendant's propensity to act improperly, it may be offered as proof of defendant's unlawful intent. *Id.* ¶¶14, 21. The Court also rejected Defendant's challenge to the admission of evidence based on Rule 11-403 (authorizing exclusion of relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice). *Id.* ¶16.

In *State v. Ervin***,** 2008-NMCA-16, 143 N.M. 493, 500, a CSCM/CSPM case, the Court of Appeals found that testimony by the child's grandmother that the defendant intimidated the child was permissible to show why the child might succumb to the defendant and was not mere propensity evidence.

34.6.9 Rape Shield Laws and Right of Confrontation

Rule 11-412(A) provides that evidence offered to prove that a victim engaged in other sexual behavior or evidence offered to prove a victim's sexual predisposition are inadmissible in a civil or criminal proceeding involving alleged sexual misconduct. However, under Rule 11-412(B), the court may admit evidence of the victim's past sexual conduct that is material and relevant to the case when the inflammatory or prejudicial nature does not outweigh its probative value.

The purpose of Rule 11-412 (formerly Rule 11-413) and §30-9-16, otherwise referred to as New Mexico's rape shield statute, are "to emphasize the general irrelevance of a victim's sexual history, not to remove relevant evidence from the jury's consideration." *State v. Stephen F.*, 2008-NMSC-037, ¶7, 144 N.M. 360 (citations omitted). While the rape shield law and rule aim at protecting a victim's privacy, the Sixth Amendment right of confrontation acts as a limitation on that protection. If application of the rape shield law or rule in a particular case would conflict with the defendant's confrontation rights and prevent a full and fair defense, the statute and rule must yield to the defendant's right of confrontation. The opinion in *Stephen F.* sets forth the standards for this type of analysis in some detail.

34.7 Case Process

34.7.1 Usual Steps in Prosecution

The usual steps of a criminal child abuse or neglect prosecution include:

- Report to CYFD or law enforcement.
- Cross-report to the other agency.
- Coordinated investigation.
- Possible safehouse interview.
- Arrest/search warrants.
- Screening by District Attorney's Office.
- Obtain records from CYFD.
- Obtain records from victim's treatment providers.
- Dismiss or pre-indictment plea or indict.
- Grand jury or preliminary hearing.
- If pre-indictment plea, plea before the court, then sentencing.
- If indicted, then arraignment.
- Discovery process - interviewing witnesses, motions, hearings.

- Plea, dismiss, or prepare for trial.
- Videotaped deposition.
- Trial.
- Sentencing.
- Appeal from trial.
- Post-conviction proceedings - *i.e.*, habeas corpus.

34.7.2 Victims' Rights

The Victims of Crime Act, §§31-26-1 through 31-26-16, protects the rights of victims and imposes requirements on prosecutors and judges to enforce those rights. Child abuse and abandonment and criminal sexual offenses are among the criminal offenses to which the Act applies. §31-26-3. Under the Act, a child victim's parent or grandparent may exercise the victim's rights, unless they are accused of committing the crimes against the child. §31-26-7(C). In that case, the court may appoint a victim's representative for the child. Under §31-26-10.1, the court must inquire at hearings whether a victim (or victim's representative) is present for the purposes of making a statement. If the victim is not present, the court must inquire on the record whether an attempt has been made to notify the victim. If the prosecutor cannot verify that an attempt was made, the court must either reschedule the hearing or continue with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement.

34.7.3 Sentencing Issues

If the court chooses to suspend or defer sentencing for a conviction of any crime that is not a first degree felony, the court may order conditions of probation that are reasonably related to the defendant's rehabilitation and that are relevant to the offense for which probation was granted. In *State v. Garcia*, 2005-NMCA-065, ¶13, 137 N.M. 583, the Court of Appeals held that the district court could prohibit the defendant from having contact with all minors, including his own daughters, subject to modification by further court order. The defendant had pled guilty to several counts of criminal sexual contact of a minor, one of his daughters. The defendant argued that this condition worked to effectively terminate his parental rights without the due process protections of the termination of parental rights proceedings. The court held that this probation condition was reasonably related to achieving the sentencing goal of deterring defendant from engaging in similar criminal conduct again.

Under §31-20-5.2(A), when a defendant is convicted of a sex offense listed in §31-20-5.2(F) and the court defers imposition of a sentence or suspends all or a portion of a sentence, the court is required to impose an indeterminate period of supervised probation between five and twenty years. There is a process set out for periodic review of the terms and conditions of the supervised probation. §31-20-5.2(B).

Sex offenders are required to register with the county sheriff under §29-11A-4(B) of the Sex Offender Registration and Notification Act. The Supreme Court has held that the trial court does not have authority under SORNA to stay registration requirements pending appeal. *State v. Myers (Myers III)*, 2011-NMSC-028, ¶45, 150 P.3d 1.

CHAPTER 35

PHYSICAL, MENTAL AND EMOTIONAL CONDITION OF CHILD

This chapter covers:

- Child development considerations, including stages, adaptation and attachment.
- Prevalence and nature of neglect.
- Developmental effects of maltreatment by age group, including signs of neglect, physical abuse and sexual abuse, as compared to normal development.
- Risk factors for abuse and neglect, for both parents and children.
- Medical and psychological considerations.
- Importance of timeliness in intervention and treatment.

35.1 Developmental Considerations

35.1.1 Stages of Development

Human beings develop in predictable stages along the life span. Models of child development emphasize different aspects of growth, but all recognize adaptation and attachment as basic principles that guide development. Development is marked by "milestones" that involve mastery of skills, such as learning to walk. Erik Erikson viewed the developmental process as a series of psychosocial stages with specific tasks to be mastered.

- Infancy (0 to 18 months): Trust vs. Mistrust
- Toddlerhood (18 months to 3 years): Autonomy vs. Shame and Doubt
- Preschool (3 to 6 years): Initiative vs. Guilt
- Middle Childhood (6 to 11 years): Industry vs. Inferiority
- Adolescence (11 to 21 years): Identity vs. Role Confusion
- Young Adulthood: Intimacy vs. Isolation
- Adulthood: Generativity vs. Stagnation
- Old Age: Ego Integrity vs. Despair

35.1.2 Adaptation

People are continually adapting to their environment. This process maintains the integrity of the person and allows forward development. Development results from interaction between a person and his or her environment.

Regression refers to a reversion to an earlier or less mature feeling or behavior. In normal development, children may regress when overwhelmed with the demands of a new skill or other form of stress. The temporary loss of skills is a healthy defense that helps the child regroup and move forward. In conditions of unusual stress such as parental maltreatment, the developmental tasks of the stage in which the stress occurs are not completely mastered. Developmental stages may be delayed, distorted, arrested or missed. The infant or child then limps forward in a psychological sense, and may be increasingly handicapped compared to his or her peers.

Early maltreatment and chronic neglect or abuse lead to more permanent changes in attitude and behavior as the child adapts to deviant parenting.

35.1.3 Importance of Attachment

Attachment refers to the psychological bond that develops between the helpless infant and a care-giving adult, normally the mother. Infants have a survival need to attach. Child maltreatment results primarily not from the infant's failure but from his or her parents' inability to provide the empathic care that fosters normal attachment.

Attachment is the most important developmental task of the first years of life. Healthy attachment to a reliable and nurturing caregiver lays the foundation for all personality development.

Failure or distortions of attachment constitute a profound early loss, psychologically similar to that experienced with death or other separation. This experience of loss is not a discrete event but a process of adaptation.

Children under five years in age are extremely vulnerable to prolonged separation from the primary attachment figure, the highest risk being between six months and four years in age. All humans respond to loss with characteristic feelings and behaviors. Protest (severe distress and searching behavior) is followed by despair (grieving with little hope of mother's return, withdrawn, subdued behavior) and then detachment (baby renews interest in the environment). Although this "recovery" serves an obvious adaptive function, the underlying insults are often not relieved.

Loss creates feelings of sadness, rage, fear, shame and guilt. Changes in the self-concept are seen, as the child experiences helplessness and rage at his or her inability to control life events, and a sense of badness and worthlessness develops. This response is seen both in well-attached babies who are separated from attachment figures and in those traumatized by the "psychological absence" resulting from neglect or physical or sexual abuse. It is seen in

all ages when loss occurs.

Attachment patterns, once developed, tend to persist. They are initially the property of the relationship. Later, the pattern of attachment and the personality features that accompany it become a property of the child and resistant to change. The pattern or its derivatives are imposed on other relationships. There is substantial research demonstrating that the quality of attachment is systematically related to the quality of caregiving, that anxious attachment at 12 months remains so at 6 years, and that poor attachment is related to difficulties with learning, peer relationships, mood and behavior at 6 years and beyond. These basic patterns are firmly established by the third year of life.

Patterns change only if experiences change. Factors associated with improvement in attachment are the availability of suitable substitute care; a less chaotic lifestyle; and sometimes, a more robust infant. Studies of resilience have shown that a lasting supportive relationship with one person (friend, teacher, relative, therapist) before the age of 12 may ameliorate the damaging effects of maltreatment. In general, however, for children who remain with parents, early stimulation programs and later efforts to remedy delays are not successful if deviant family relationships are not addressed.

The psychological components of neglect, physical and sexual abuse are the real trauma, causing the most damaging effects of maltreatment. Of these, the parent's emotional unavailability and the message that the child is worthless, unrewarding, unloved and valuable only in meeting someone else's needs form the core of psychological harm.

Most maltreated children have some positive attachment to their parents. The terms unhealthy, insecure or anxious attachment do not denote a clinical diagnosis of Reactive Attachment Disorder, which refers to a severe disturbance in social relatedness. In its 2002 position papers, the *American Professional Society on the Abuse of Children* noted "misuse and overuse" of the Reactive Attachment Disorder diagnosis. The fifth edition of the APA Diagnostic and Statistical Manual is expected to clarify the diagnosis.

35.2 Prevalence and "The Neglect of Neglect"

Although neglect is the most significant and damaging form of child maltreatment it is unaccountably "neglected" in our consideration of harm to children. It is therefore highlighted here and discussed in a broader, more clinical sense than as legally defined. The statistics suffer from various problems of data collection and are provided here as a broad picture of incidence.

35.2.1 Statistics

In the United States, about one-third of reports of maltreatment made each year are substantiated. The incidence of child maltreatment increased substantially and significantly between 1986 and 1996, when the Third National Incidence Study of Abuse and Neglect was published. An estimated 2,800,000 children were maltreated in 1997. Neglect is the most commonly reported and substantiated form of child maltreatment. Nationally, about 56% of

reports involve neglect; 12% sexual abuse; and 25% physical abuse. Neglect is a secondary concern in another 20% of cases.

Neglect kills more children: 55% of child homicide is the result of neglect, 45% the result of physical abuse. In 1997, there were an estimated 1,200 child homicides due to maltreatment nationally, more than 3/4 of the deaths to children under age 4. Sadly, while 50% of slain adults know their murderer, 99% of children do. In one-third of the deaths from neglect, social services had contact with the family, and in an even greater percentage of deaths, a medical professional had seen the family.

35.2.2 Nature of Neglect

Neglect occurs when the child's basic needs for nurturance, protection and appropriate stimulation go unmet. It is always present in other forms of maltreatment. The child's caretaker "either deliberately or by extraordinary inattentiveness" allows a child to suffer and/or fails to provide the essential ingredients for developing the child's physical, intellectual or emotional capacities (Cantwell).

Normal or "good enough" parents provide physical well-being (adequate food, clothing, shelter and heath care) and a sense of being valued and loved (healthy attachment). They provide protection, buffering the infant from excessive noise and discomfort, childproofing the toddler's environment, and helping older children select appropriate, safe friends and activities. Parents provide appropriate stimulation by talking and playing with their infants, providing developmentally appropriate activities and contact outside the family, and teaching the personal and social skills to function in society.

Neglect can be thought of as an environment of emotional deprivation punctuated by periods of high stimulation. Neglectful parents typically have a poor understanding of developmental needs and unrealistic expectations of their children's capacity. Parental behavior is inconsistent and unpredictable and the home is often disorganized, if not chaotic. The parent confuses his or her emotional or sexual needs with the child's and uses the child to satisfy those needs. A parent who feels lonely wakes the infant for company; a parent who is not hungry does not respond to an infant's cry for food.

When the needs of parent and child coincide, the child may receive wonderful attention and praise. This explains, in part, the desire of abused children to return to their parents' care. Infants and young children are helpless and dependent on adults and accept their treatment as normal. They may form secure attachments to siblings. Most parents have some positive qualities that provide feelings of worth. Moreover, parents may take excellent physical care of a child who is being sexually exploited or physically abused. They may be responsive to certain needs, such as intellectual curiosity, but unable to tolerate others, such as the child's independence. These distorting, subtle aspects of neglect and abuse lead to disbelief by adults who might help such children.

It is the cumulative effect of neglect that harms children. Prevention and early intervention are crucial because the earlier and more lasting the maltreatment, the more it is integrated into the child's personality. Repeated referrals to human services help document chronic neglect and may lead to eventual substantiation.

Substantial research evidence supports the view that even "mild" neglect has devastating long-term effects. For example, neglected children report that the threat of abandonment they experienced was more painful than their physical or sexual abuse. A history of early severe neglect without severe physical abuse may be found in teens or young adults who show violent or criminal behavior.

35.3 Developmental Effects of Maltreatment

Children's experience of maltreatment varies in degree and circumstance. Abuse may occur only occasionally, or daily. It may begin as prenatal neglect or at a later point in childhood when the family is under unusual stress. One severe abusive episode may produce traumatic stress symptoms, while less severe ongoing episodes may be mitigated by the support of one caring parent. A child's fear and confusion at occasional attack will shift to a more permanent change in the personality when abuse is ongoing and chronic. Positive qualities in the parent may reduce the effects of maltreatment.

Of maltreating perpetrators, 75% are parents and another 10% are relatives. Maximum risk of maltreatment is found in the middle childhood years, 6 - 11, except for sexual abuse, which rises at age 3 and remains constant during childhood. About 80% of perpetrators are under 40 and almost 65% are female. However, men perpetrate most sexual abuse and women most physical neglect. Girls face three times the risk of sexual abuse than boys; boys are at somewhat greater risk of physical injury and significantly greater risk of emotional neglect. Fatalities are about equal by sex. No race differences were found in the national incidence studies.

The following section describes typical responses of children to normal, neglectful, physically abusive and sexually abusive parenting at each developmental stage. These responses are discussed in terms of the effects on the inner life of the child as well as symptoms and behaviors. As noted earlier, most children experience several kinds of maltreatment and many of the sections below apply to all maltreatment. The stages presented are consistent with Greenspan and Erikson's work.

35.3.1 Birth to 10 Months

Normal

The first months of baby's life are devoted to homeostasis (self-regulation and interest in the world) through a relationship of reciprocal interactions that help the baby differentiate his or her feelings and need states. Through this relationship, the baby develops "basic confidence" (Benedek) that the world is positive.

Through sensitive care, the baby develops an attachment to a primary figure by about 7 months. Trust and the capacity for empathy and intimacy develop out of the "basic confidence" provided in the mother-infant experience. The beginning capacity for love helps the baby manage aggressive impulses (Fraiberg).

The parental figure provides a protective buffer for the helpless infant. The mother is the main representation and interpreter of external reality for the infant. She is the model that the infant imitates and recreates. Thus, parental care provides working internal models of self and other.

In healthy attachment, one expects to see pleasure in reunion; the use of the parent as a secure base for exploration; an active approach to life; active seeking of the parent when separated; and nurturing themes in play. Parent-child interaction is marked by eye contact, spontaneity, affectionate exchanges and contingent responses. Parents are emotionally available and do not severely interfere with, control or ignore the child. Parents have developmentally appropriate expectations. They anticipate danger and appropriately supervise.

Neglect

Infants are at special risk for abuse and neglect because of their relative isolation, small size, lack of verbal skills and total dependence on a caretaker.

Lack of empathic caregiving undermines the development of self-regulation and basic trust that allow normal babies to show interest in the world. The neglected baby is not free to observe and learn without worrying about basic necessities. When the parent's lack of care conveys that the child is unloved and worthless, the child's sense of self and other is damaged. When there is no protective buffer against the world, the infant is overwhelmed.

Pathological infant defenses appear in the first 18 months. They serve to remove pain from consciousness. These include disorganization (screaming) and an exhausted "cut off" state, freezing, panic states with fighting, transformation of affects (giddy or ghoulish laughter) and turning aggression against the self (hurting self with no evidence of pain).

Failure or distortions of the attachment relationship take characteristic forms, which are apparent by 12 months. These unhealthy or insecure attachment patterns foreshadow later personality characteristics. Three pathological forms of attachment have been identified. Anxious avoidant babies are precociously independent and do not use the mother as a secure base for exploration. Proximity to and contact with her are minimal and they show little reaction to her presence or absence. Anxious ambivalent/resistant babies resist contact in reunion, yet are clingy, unable to be comforted and unable to explore the environment. They have difficulty at separation. Other babies show a disorganized/disoriented pattern, having no organized strategy for managing the distress of separation. They may be apprehensive, helpless, depressed, shift between approach and avoidance, "freeze" and have lowered psychomotor behavior.

Studies of adult attachment patterns suggest that infantile disorganized attachment is the product of severe psychosocial problems in the parent. Furthermore, infantile disorganized attachment appears to be associated with the oppositional, conduct, and other externalizing disorders of childhood, as well as with adult violent attachments.

Infant neglect may cause delays in development, mental retardation, growth failure and death. Delays in cognitive, motor, language and social skills appear early in neglected children. Neglected infants are often listless and unresponsive, or disorganized. For example, infants whose bottles are always propped do not receive the sensory stimulation (being held, regarded, talked to, smiled at) that promotes bonding, hand-eye coordination, perceptual skills and reciprocal communication. Language is the most important accomplishment of the child under 5. The silent infant with normal hearing should alert professionals to possible neglect.

Organic disease accounts for only 10 - 15% of Failure to Thrive (FTT). Non-Organic Failure to Thrive (NO-FTT) signals severe neglect that can cause chronic growth disorders, mental deficiency and death by starvation. Such infants typically recover when hospitalized and fed intravenously, and waste again when returned to their parents. Growth chart curves (height, weight, head circumference, weight-to-height ratio), observation of feeding and careful history establish the diagnosis. Mothers of NO-FTT infants are often depressed, have eating disorders or strange food beliefs and live in chaotic conditions. Their infants may have behavioral and neurological problems that make them difficult to care for.

Growth chart patterns may also signal periods of less severe neglect. For example, the growth chart of one infant whose mother periodically took him to follow a rock band paralleled the concert tours.

Diagnosis of Sudden Infant Death Syndrome (SIDS) should be based on autopsy and a full investigation. It is very difficult to distinguish SIDS from suffocation, strangling or overlying. Multiple SIDS deaths in the family may point to infanticide.

A death scene investigation should be conducted in all child deaths and performed by investigators knowledgeable in causes of nonaccidental injury and death due to parental neglect.

Physical Abuse

Physical abuse may cause permanent injury to the maturing central nervous system, resulting in mental retardation, neurological damage, blindness or death. The most common cause of death and maiming in children under 2 is head trauma. This is caused by shaking or shaking and then throwing the child (Shaken Baby Syndrome), or by direct blows to the head. These result in severe injury to the eye, brain and spinal cord. One-third of children with head injury are seen for vomiting and fever. Abuse is not diagnosed and 80% are reinjured. Although perpetrators often claim that they shook the child just a little, the biomechanics of injury indicate that in most cases the baby was shaken with great force in rage, and thrown at the end. Falls rarely cause severe injury or are fatal.

The second most common cause of fatalities is abdominal injuries caused by a penetrating blow by the fist or foot. Half of children with abdominal injuries die. Injuries to the stomach, bowel, liver and pancreas are most likely to be non-accidental.

Other typical physical abuses to infants are skeletal injuries, spinal fractures, bruises, burns, bite marks, genital and anal tears and injuries to the mouth. These are discussed in following sections.

The physical attack often has a precipitating or triggering event, but commonly is the result of a series of stresses that have led to a crisis unrelated to the child. Along with this crisis, the parent was typically abused or neglected in childhood, has little outside support, and perceives the child as unsatisfactory. In infancy and toddlerhood, typical triggers associated with particular kinds of injuries are:

- Inconsolable crying: shaking.
- Toilet accidents and soiled diaper: scalding burns of feet and buttocks.
- Refusing to eat: forced feeding resulting in oral injury and choking to death.

Children perceived as deficient are at higher risk of abuse. Physical deficits such as chronic medical illness, mental deficits such as retardation and developmental delay, and psychosocial deficits such as difficult temperament and hyperactivity place children at risk.

Sexual Abuse

Infants are victims of vaginal, anal and oral penetration, and also may be used to satisfy the sexual needs of older people in more subtle ways. Deliberate blows, bites, burns or other trauma to the genitals are sexual abuses.

As with all childhood sexual abuse, physical evidence may be absent. Most abuse is discovered rather than disclosed, by sexually transmitted diseases and other medical symptoms or discovery by a third party. Preverbal children express their pain and fear through nonspecific behaviors, such as crying, and disruption of feeding, toileting and sleep, and sometimes avoidance reactions to the perpetrator or those who resemble him.

35.3.2 11 to 24 Months

Normal

The baby becomes more organized, interacting in a complex emotionally and socially relevant manner, and forms inner (symbolic) representations. Walking and talking promote the baby's independence and initiative. She or he becomes able to use symbols to express wishes and thoughts, and to cope with anxiety.

Neglect

Delays are often noticed by the pediatrician or daycare staff. Language is the most common area of delay, probably because it emerges out of the feeling of connection and the wish to communicate.

Parents are responsible for raising children who meet societal expectations for age-appropriate behavior. Neglectful parents provide an inconsistent and often chaotic lack of routine, so that toileting and self-feeding skills are not mastered. In severe neglect the children often have a feral quality.

Maltreating parents typically have a poor understanding of development and inappropriate expectations, and do not provide developmentally appropriate learning experiences. Neglecting parents expect that a child should be able to sit passively or may shut the child away for long periods. A "wall of No!s" discourages activity, exploration and responsiveness on all levels. Gross and fine motor skills may be delayed, as these children often sit or lie quietly for long periods rather than engage in the normal rough-and-tumble, noisy play of agemates. Other children respond with "out-of-control" or erratic behaviors and inattention that may be misdiagnosed as hyperactivity. The complaint that the child "gets into everything" is a clue to over-restriction.

Parents who describe their little ones as "friends" or equals expect the child to use adult judgment and to learn after being told once. Such parents often express pride in raising independent, self-sufficient children and emphasize their precocious maturity and helpfulness.

Proper supervision requires a normal attention span, level of comprehension and sense of responsibility and empathy for the child's needs. The failure to supervise small children may cause injuries because of the unrealistic expectations of parents and their difficulty learning from experience. They may continue to place the child in dangerous situations despite previous falls from a bed or down the stairs. Working parents may provide inappropriate babysitters or expect children under 12 to supervise little ones for long periods. Neglect of supervision by an at-home parent may be due to substance abuse, chronic mental or physical illness, low intellect, immaturity or lack of empathy.

Some children show disturbance only in certain areas such as curiosity, feeding, aggression or need for affection, reflecting a parent's difficulty with these feelings and behaviors.

Physical Abuse

Head and abdominal injuries continue to be leading causes of fatalities and serious neurological damage in this age group.

Child abuse fractures include transverse fractures from direct forces, twisting, pulling and compression of the long bones of the arms and legs. Elevation of the membrane lining the bones is pathognomonic of child abuse in infants after 6 months of age. Multiple fractures in

different stages of healing, spiral (or torsion) fractures in a child who is not walking, back and side rib fractures are all suspicious. Unexplained fractures in the long bones warrant investigation for subdural hematoma. Fractures can be dated by their specific stages of healing. Skeletal surveys are essential in children under 2, and recommended for children under 5, to rule out a pattern of past injuries.

About 15-30% of burns are abusive. These have characteristic distribution and appearance such as stocking or glove distribution; immersion burns (child dipped in scalding water); no splash marks; and pattern burns (cigarette). Abusive burns are often reported as "unwitnessed" or caused by siblings, and require more advanced motor skills than the child possesses. They are often associated with toilet training.

Inflicted skin injuries and bruising have recognized patterns. These recognizable injuries and bruises point to inflicted abuses: slap, pinch and grab marks; belt or strap, electric cord and bizarre shaped marks from specific objects; pinnae bruising from brushes; gag and ligature marks from being tied; bite marks; pulled hair; and cleft of mouth bruising from forced feeding. Bruising can be dated inexactly by color.

Parents may explain recurrent injuries and accidents as due to the child's being "accident prone," clumsy or hyperactive.

Sexual Abuse

Sexual abuse of toddlers may be violent and acute or ongoing.

35.3.3 2 to 4 Years

Normal

The toddler and preschool child will spend the years until age 4 consolidating skills. The following abilities develop during these years of consolidation:

- Relate to people and things in a balanced manner across a variety of emotions.
- Shift easily between reality and fantasy.
- Regulate mood.
- Accept limits and be self-limiting while feeling good about himself.
- Attend and concentrate.

Neglect

These children appear at HeadStart, daycare or preschool unprepared to learn and relate to others. By this age, the effects of early neglect or abuse are compounded by parental difficulties in coping with the child's assertion of self, growing independence and assertion, and sexual curiosity. Most maltreating parents have problems at the point they had problems in their own childhoods. For many, this occurred in the early years. Moreover, the independence of the 2 - 4 year old creates a crisis of abandonment and rejection for

vulnerable parents who expected the baby to meet their needs for love.

Small children typically present with symptoms that reflect their deviant parenting experiences. These cluster around symptoms of internalization (depression, withdrawal, clinginess, poor self esteem) and externalization (impulsivity, aggression, hyperarousal).

Maltreated children show a diminished "often tragically low self esteem." Because their own internal sensations, needs and wishes are not validated, they fail to develop an integrated sense of self. They learn to accept whatever care is available and believe it is normal. Often they learn only at school, or when removed to foster care, that other children receive care that does not hurt, frighten or anger.

Such children develop an external orientation, scanning the environment for cues and guidance and disregarding their own sensations and needs. They are often referred to as a great help or a comfort to their parent, and take on unusual responsibilities. The precociously responsible toddler has learned to anticipate mother's needs for comfort, help with the baby, cleaning or laundry. In this way, he or she hopes to gain mother's attention and avoid punishment.

The inconsistency, disorganization or frank chaos of their home lives is reflected in their poor self-regulation and difficulty relating to others, and in their play themes and drawings. The hyper-aggressive toddler disorganized by rage mirrors his or her chaotic lifestyle.

Physical Abuse

In addition to the signs of neglect, these children may present with symptoms of traumatic stress: hyper-alertness, heightened startle responses and flinching. Scanning helps the battered child anticipate his parents' moods so as to avoid a blow. Depression may show as irritability or sadness. Aggressiveness, "temper" and defiance are heightened.

Physically abusive parents are overly harsh and hold their children to age-inappropriate standards of self-control with little guidance or instruction. They show little empathy for the child's pain and fear, just as they received little from their parents. Such parents seem to feel that had they been perfect, they would not have been neglected and abused. They may deny or minimize their own parents' maltreatment as necessary, having internalized their high standards while resenting parental demands and control.

Sexual Abuse

The incidence of molestation rises at age 3 and remains consistent during childhood. The molesting parent distorts his or her responsibility to socialize, protect and nurture his or her child. Incest families are typically socially isolated and abusive, creating multiple distortions in family life. The secrecy of incest and the common failure of the mother to see and protect are especially damaging aspects of incest. Many incest victims harbor greater anger at the nonprotecting mother than at the perpetrator. The normal curiosity of children under 4 about their bodies and gender differences is exploited. Children may begin to be sexually groomed

for later abuses that will be blamed on the child.

The definition of love as sexual exploitation creates enormous pain and confusion for the child. Genital and anal regions of prepubertal children are extremely sensitive, and great pain and discomfort are inflicted on the child by digital and penile fondling and penetration. Extremely violent sexual attacks can result in permanent injury and death. Children this age heal quickly from lesser injuries, which may confound the diagnosis of past or chronic molestation.

35.3.4 4 to 6 Years

Normal

Preschool children accelerate motor, language and social skills in an increasingly wider context, building on previous mastery and promoting initiative and confidence. This is a period of egocentrism, expansive fantasy and magical thinking. Awareness of gender differences becomes more apparent, and a clearer gender identity is formed through special interest in the opposite-sexed parent. Relationships with adults and children outside the family increase.

Neglect

The poor self-esteem and confidence of these children worsen as they have more contact with same age peers and other adults and compare themselves to more fortunate children. Delays continue to undermine new learning and achievement. Neglected children are rejected by peers and adults for their unkempt appearance and "wild" unsocialized behaviors.

Physical Abuse

These children show guilt, fear, anger and depression. Physically abused preschoolers, told the abuse was due to their misbehavior or failure to meet expectations, often feel responsible for the abuse. Guilt may be easier to bear than the anxiety of unpredictable and uncontrollable attacks by their caretakers. The egocentric thinking of preschoolers increases guilt and fears of retaliation or abandonment by parents. Anger and aggression are heightened in these children. Depression may be due to poor attachment and the accompanying sense of abandonment and worthlessness. A child may be lethargic and withdrawn, have many aches and pains, or be irritable and agitated in depression. Children this age can be suicidal.

Munchausen's Disorder by Proxy is a rare disorder with high morbidity and mortality. Recurrent medical symptoms are falsified or induced by the parent, who often is unusually attentive to his or her child, has a medical background and becomes deeply involved with medical staff during his or her child's hospitalizations. These parents, mostly mothers, seek attention for themselves through the child's illness. They are often personality disordered and may have been similarly abused as children. A parent may suffocate the child to mimic breathing disorders, put ground glass in the formula to produce blood in the stool, or inject

saliva in the intravenous line to produce infection. Laboratory tests may show suspicious sources of induced illness and hidden video cameras may expose the parent's actions. The children are often medically ill, fearful and emotionally disturbed.

Sexual Abuse

These children also show guilt and fear about their abuse and the results of disclosure. Suppressed anger and depressive equivalents are also seen.

35.3.5 6 to 11 Years

Normal

This stage is marked by an industrious focus on acquiring broader conceptual, motor, language and social skills. The ability to reason and improved physical skill appear during these years. The child moves more fully into the world beyond the family, and develops a wider variety of relationships with peers and adults. A minority of children may begin puberty at 8 (girls) or 9 (boys).

The child of 8 is able to reason in terms of cause and effect. Expectations for learning, social behavior and conduct are more complex and the mastery of rules becomes important. A rather rigid conscience and morality develops, with a clear sense of right and wrong. The mastery of basic academic skills and the ability to attend and concentrate contribute to these achievements.

Neglect

Tragically, for maltreated children, emotional and developmental disturbances both result from and contribute to further maltreatment. By middle childhood impulsiveness, aggressiveness, hyperactivity and learning problems become more prominent, especially in boys. Identification with the aggressor instead of with the helpless victim serves an adaptive --if often malignant--purpose. Some children develop positive strengths in taking an aggressive, assertive stance. These children miss important academic and social experiences that contribute to healthy self-esteem and interest in learning during middle childhood. Their "chip on the shoulder" negativity and inferiority alienate them from others and undermine the later tasks of adolescence.

Some effects may not appear until later developmental stages of adolescence and adulthood, when the emotionally deprived adult revisits his or her own maltreatment on his or her children and partners.

Children with severe symptoms of overarousal, anxiety, depression and impulsive or aggressive behavior may need medication as an adjunct to treatment.

These children show the symptoms of neglect. Battered children may laugh or refuse to cry or admit pain in an effort to master physical abuse. Often, they are unable to cry or really

enjoy themselves and show other constriction of feeling. Deficient empathy for others may make them callous and destructive, especially to smaller children and animals. Sexual attacks on other children, drug and alcohol abuse and other antisocial behaviors may be seen.

It is of note that adult serial killers show a cardinal childhood triad of disturbed behaviors symptomatic of rage, anxiety and lack of empathy: fire-setting, bed-wetting and animal torture.

Sexual Abuse

As with other forms of maltreatment, the nature, course and severity of sexual abuse may differ widely. Each child and family must be assessed carefully.

Most children are "traumatically sexualized," showing both aversive and overvalued feelings about sex, sexualized behaviors as well as avoidance of sex, and sexual identity disturbance. Children feel stigmatized, guilty and responsible for the abuse and/or the consequences of disclosure. These lead to a host of self-destructive behaviors that seem designed to invite punishment. These children feel betrayed and unable to trust. This trauma is expressed in behaviors such as relationships of avoidance, manipulation, reenactment through involvement with exploitative and damaging partners, and angry, acting out behaviors. Finally, powerlessness creates a sense of vulnerability and a desire to control or prevail. Such victims may identify with the perpetrator, acting out aggressively and exploitatively, or may express their vulnerability in avoidant and run away behaviors, anxiety disorders and revictimization.

The secrecy, threat of disclosure, conflict about causing family breakup and disturbed relationships of incest create complex problems. Around age 8, the child may begin to comprehend that the sexual abuse is abnormal and wrong. By this time, she or he is implicated in the abuse, confused about her or his contribution to it and isolated from mother and siblings. At school, the child is increasingly isolated by his or her "secret" and precocious sexual knowledge. Intergenerational incest families are particularly malignant, as the child is exposed to multiple perpetrators in a chaotic, neglectful, and often battering environment.

Sexualized behaviors are a specific symptom of molestation. Victims of sexual abuse may show behavior changes and nonspecific symptoms of fears, regression, social withdrawal, anxiety and panic, unusual anger or aggression, crying, inattention and academic failure, self-destructiveness and sleep problems.

Sexually abused children show associated medical conditions, such as:

- "Generally unhealthy kids."
- Chronic pain syndromes--headaches, abdominal, leg and hip, genital or anal pain.
- Eating and swallowing difficulties.
- Acute genital or anal pain, bleeding, lesions, redness, discharge, or bruises.
- Recurrent vaginal and urinary tract infection.

- Enuresis.
- Encopresis.
- Sexually transmitted diseases.
- Eating disorders.

As with other forms of maltreatment, protective factors may mitigate the effects of sexual abuse.

35.3.6 10 to 21 Years

Adolescence is divided conceptually into early, middle and late stages corresponding approximately to ages 10 - 14, 14 - 18 and 18 - 21. Children may be precocious or delayed in progress through these stages.

Normal

Adolescents gradually emancipate from their parents and form an adult identity. One's sense of self as unique and separate, sexual preference, intellectual concept of the world, lifestyle and choice of work are typically formed by early adulthood.

Early adolescents focus on the changes of puberty and making close friendships with same-sex peers. They compare themselves to agemates and worry about inadequacies. They are able to think more abstractly and begin a symbolic movement away from home.

Middle adolescents have an increasing need for independence and turn to peers for personal standards of behavior. Maturation of cognitive abilities, productive fantasy and altruism mark this period. Sexual and romantic feelings predominate and non-parental role models become important.

Late adolescents complete the final changes of puberty, and the face and body take on an adult form. A secure, acceptable body image, gender role and sexual preference are adopted. Emancipation from the parents is resolved and the adolescent assumes mature relationships and an adult lifestyle.

Neglect

By adolescence, signs of developing personality and mood disorders are evident. Early failures or disorders of attachment are associated with later depression, with each subsequent loss triggering unresolved grief. Antisocial, borderline and other personality disorders are highly associated with early maltreatment and loss. Parenting, sexual identity, autonomy and the capacity for intimacy are undermined by these experiences.

Suicide is the second or third most common cause of death among adolescents and young adults. Most childhood suicides point to serious emotional neglect.

The symptoms described in earlier sections are seen in more extreme form in adolescence.

The crisis of the need for love becomes acute in the teen years as peer acceptance, dating and planning for the future become significant. In their search for love, children may be exploited by more powerful peers and adults. Acting out and self-destructive behaviors increase as the adolescent uses his greater strength and physical independence to distance himself from a depriving and painful home.

Physical Abuse

In addition to previously described symptoms, battered children may show increased running away, delinquency, substance abuse and violence. These troubled children invite rejection and disapproval from peers and adults.

Sexual Abuse

Teens develop eating disorders, weight changes, end up pregnant, engage in prostitution and delinquency, run away, engage in substance abuse, attempt suicide and develop hysteroid symptoms in response to sexual abuse. Self-harming behaviors, such as scratching, cutting and overdosing on medication and drugs, are also related to sexual abuse.

Some proportion of male victims of molestation commit sexual offenses. About 90-95% of sexual abuse is committed by males, and about 20% of all sexual offenses are committed by adolescents. Moreover, 60% of adult male sex offenders report that they began offending in adolescence. Studies of these boys and their parents suggest a high incidence of childhood neglect and abuse. Their mothers tend to be depressed and "psychologically absent," and ignore, deny and minimize their sons' offenses.

It is critical to understand that most sexual abuse is not disclosed. Many childhood victims never disclose until adulthood, if then. For this reason, and because of the harm caused by childhood abuses, it is recommended that all mental health interviews include inquiry about childhood sexual abuse and rape.

Recent studies show that disclosure at all ages is piecemeal and prolonged. Children may disclose additional perpetrators only when asked. Often, full disclosure is not obtained until the child has developed a sense of safety and has been able to work through his or her confused feelings and damaged sense of self and others. Children's silence is typically obtained by direct or indirect threat. Common threats are that the child will be killed, beaten or otherwise physically punished; that the child will be taken to jail or foster care and never see the family again; that the perpetrator will stop loving the child; and that mother or father will leave them, be jailed or have a breakdown. Often times, threats are backed up by ongoing physical abuse and other harsh punishments. Many children are cowed into silence without direct threat simply by the overpowering size of the perpetrator. Although the concrete thinking of young or intellectually deficient children may prevent them from verbally disclosing their abuse because they have been threatened not to tell, these children will often be able to show their abuses in drawings or play.

Retractions are not uncommon, especially in victims of chronic, incestuous or multiple perpetrator abuse. These children are first victimized when they are too young to comprehend the wrongness of the behavior. By the time they disclose or are discovered, they meet disbelief, blaming, rejection and multiple disruptions to themselves and their family. Most face direct or indirect pressure to retract the allegation. Victims with PTSD may have lost memory or detail for the events and present with many symptoms that undermine their credibility.

Childhood victims of sexual abuse are at risk for serious emotional and health problems such as mood and anxiety disorder, difficulty with intimacy, substance abuse and sexual dysfunction. Victims of multiple perpetrators tend to experience even more debilitating symptoms and are two-to-four times more likely to be sexually revictimized as adults.

It is not uncommon for children to be abused by more than one perpetrator. Such children tend to be abused at an earlier age and by a family member when compared with children victimized by one perpetrator. Violence and substance abuse are more common in families with multiple perpetrators. Parental failure to protect exposes children to more perpetrators over time, and the emotional deprivation experienced by children in such families increases vulnerability to manipulation by perpetrators. Research suggests that victims of multiple perpetrators may have more difficulty with psychological recovery because of increased shame and self-blame.

A normal medical examination neither confirms nor rules out sexual abuse. Many forms of sexual abuse such as fondling, oral sex and child pornography do not leave physical evidence. Semen is often absent because of delayed disclosure and the variety of ways perpetrators conceal contact. Young children may heal quickly from penetration injuries with little or no scarring.

35.3.7 Adulthood

Normal

Well-functioning adults are able to form meaningful relationships, work productively and live within the broad constraints of acceptable social conduct. They enjoy pleasures without a crushing sense of guilt and express impulses without being exploitative or violent. They are comfortable with and accepting of themselves.

35.4 Risk Factors for Abuse and Neglect

35.4.1 Parental Risk Factors

It is estimated that about 20% of abused children grow up to be abusive parents, but nearly all abusive parents have a childhood history of maltreatment. Parents who had poor attachments with their parents are unable to develop healthy relationships with their children and to provide empathic care.

A history of maltreatment increases the potential for multiple psychosocial problems. Such parents experience chronic stress, both internally and in their environment. They typically have a history of childhood physical and/or sexual abuse and neglect, inconsistent care, or parental loss. Some may have experienced a non-normative sexual environment or a sexualized mode of relating. Because of their experiences as children, they are prone to substance abuse, depression, isolation, poverty, unemployment, marital discord and adolescent and adult violence and criminal behavior.

Maltreating parents have poor self-esteem, are depressed and apathetic with little capacity for pleasure. They are distrustful and socially isolated with limited support. They are unable to express emotions or tolerate intimacy and although needy, are guarded and superficial in relationships. Thinking and judgment are distorted. They are impulsive, have poor problem solving skills and do not learn from experience or take responsibility for themselves.

Because abusive parents are needy, but unable to reach out for pleasure or support, they look to their children for love. As psychiatrist Brandt Steele points out, the parent brings three disparate attitudes to each parenting task:

- Healthy desire to do something good.
- Longing that the child fill the parent's emptiness and relieve his or her low self-esteem.
- Punitive demand that the child respond correctly.

Such parents have harsh, authoritarian consciences based on their own experiences of criticism and rejection by their own parents, and later experiences of failure. When the infant or child fails to meet their expectations, resists or does not respond to the parents' efforts, the vulnerable parent feels criticized and inferior. This stirs up the frustration of his or her need for love, and anger builds. A sense of guilt, helplessness, panic and finally anger precipitate the attack.

35.4.2 Child Risk Factors

Children perceived as deficient and unsatisfying are at higher risk of abuse. For example, children are at increased risk if they have physical deficits, such as chronic medical illness; mental deficits, such as retardation and developmental delay; or psychosocial deficits, such as difficult temperament and hyperactivity.

Sometimes children are targeted because they resemble a love partner who abandoned the parent or are perceived as having the bad temper of an abusive father. Distorted and fantasied perceptions of the child may cause blurring of the parent's boundaries, as hated or feared qualities in themselves or others are attributed to the child.

35.5 Medical Considerations

Medical workers have a critical role and opportunity for prevention and early intervention. They see families for pre- and post-natal care and well-baby checks. They observe mother's

response at birth and in the neonatal period, and treat children for injuries and illnesses. Hospital staff see the more difficult child protective services cases, more physical and sexual abuse and severe neglect, and more moderately or severely injured children.

About 20% of mothers do not bond immediately but do so at a later time. Clues to poor bonding are a lack of interest in the baby, a "stoic" attitude, disappointment with the baby's gender, disparaging comments ("He looks like an ape"), feeding disturbances (a mother may water down formula to avoid diaper changes) and growth chart discrepancies over time.

When a child has been abused, medical staff need to assess the risk of returning the child home. A child returned home with a minor injury can be severely injured or killed. Careful attention to detail and thorough documentation of all interviews, observations and interventions are critical.

Carole Jenny notes these signs of non-accidental trauma:

- Injury unexplained by the history given.
- Delay in seeking care (several hours to days or longer).
- Changing, evolving or inconsistent history.
- Blaming siblings or small children for the injury.
- Inappropriate affect of caretakers.
- Noncomplaining child with serious injury.
- "Trigger event" precipitating loss of control by caretakers.

Who reports the injury (and who does not) and why they are reporting may be significant. Abusive parents delay seeking help to avoid detection. They may attempt to treat the injury at home or simply ignore the child's pain. Many such children have learned not to express pain and often are unable to cry.

A careful social history of the parents should be obtained by a skilled social worker. This may provide clues to current stresses and a history of childhood abuse. The parents' response to the child's injury, admission to the hospital and involvement of CYFD should be carefully noted.

A history of previous injuries should be taken and the child's pediatric records obtained. Increasing severity of injury over time from the limbs to the trunk to the head indicates a high risk of future, fatal injury.

Young children, relatives and other involved people should not be used as interpreters during interviews. Children should be interviewed privately away from caretakers. The interviewer should be honest about the purpose, non-leading and calm.

The ability to identify abuse is absolutely dependent upon the belief that it can occur and that anyone can potentially abuse a child. Attention to "gut feelings" and taking time to consider rather than explain away discrepancies are essential. Medical people do not need to prove maltreatment, but simply report suspected abuse and neglect.

Medical workers may fail to recognize abuse and want to avoid involvement in the legal and child protective systems. They may be unfamiliar with the child maltreatment literature and not recognize maltreatment. They may be reluctant to "accuse" especially middle and upper class clients, to lose patients or office time, or be involved with attorneys.

Conclusive statements such as "mother appropriately grieving" or "positive attachment" should be avoided. Abusive parents may cry from guilt for having injured or killed the child or from fear of imprisonment. Many sociopaths test as anxious in jail because they are concerned about prison time, not because they are suffering remorse. Some abusive parents feel remorse immediately after their loss of control and seek immediate help. Abused children may smile and greet their parents and say they want to go home with them, and infants may accept comfort for reasons other than positive attachment. Small children fear abandonment. Children are dependent on their parents and often do not realize that their maltreatment is abnormal. Many abused children receive moments of high, positive stimulation when their parents are feeling good. Some children receive special attention only when they are injured and in pain. Careful evaluation of the relationship needs to be made.

A death scene investigation should be conducted in all child deaths and performed by investigators knowledgeable in causes of nonaccidental injury and death due to parental neglect. An autopsy should be performed in all unexplained child deaths.

35.6 Psychological Considerations

Children enter foster care with high rates of emotional problems and developmental delays. Perhaps one-third of these children meet criteria for posttraumatic stress disorder (PTSD) and depression. High proportions of children diagnosed with PTSD have histories of severe neglect.

In children, PTSD develops in response to exposure to extreme stress (acute, episodic or chronic) and becomes persistent. The condition is characterized by feelings of intense fear, helplessness and/or horror; symptoms of re-experiencing the events; avoidance of stimuli associated with the trauma and general numbing; and heightened arousal. Related symptoms include persistent sadness; sleep difficulties and nightmares; poor concentration and forgetfulness; nervousness; fears of dying before adulthood; constant watchfulness; and traumatic reenactment in play.

The instability of foster care and sometimes multiple foster placements repeat the experiences of instability and inconsistent care of the parental home. In addition to the losses and abandonment experienced in maltreatment, foster children lose family and familiar environment (school, neighborhood, friends). They must adapt to a host of new people: social workers, doctors, mental health workers, medical or psychiatric hospital staff, residential treatment staff, attorneys and foster families, as well as new neighborhoods, schools and friends.

Infants may show significant calming and improvement in mood upon removal from their parents, attesting both to their poor care and to the infant's strong survival need to attach.

The ambivalence about parents felt by older children is very complex, and children need help in sorting through their feelings.

Enormously challenged by severely disturbed maltreated children, some social workers, foster parents and adoptive parents have turned to "holding therapies," which involve restraint or the purposeful infliction of pain on children as a means of evoking a strong emotional response. The American Professional Society on the Abuse of Children has criticized the use of certain of these therapies, sometimes described as "corrective" or "intensive" "attachment therapies," noting in its 2002 position papers that such therapies are counter to the attachment theory developed by Bowlby and Ainsworth.

Abused and neglected children benefit most from treatment that helps them meet critical developmental milestones. Most children and adolescents are not capable of grieving the multiple losses of maltreatment, and do not benefit from talking therapy until later developmental stages, when new understanding can be integrated into the sense of self. Instead, they benefit more from efforts to stabilize the family, reduce anxiety and fear, contain antisocial and violent behavior, and improve the child's ability to learn, make friends, and experience a normal range of feeling. Group counseling for sexually abused children is of benefit, reducing the sense of stigma and improving coping skills.

35.7 Importance of Timeliness

Children do not have years to wait for their parents to change. They need and deserve consistent, safe and loving care in order to recover from their maltreatment and develop normally. Many children are not identified until preschool or elementary school after many years of damage. Careful assessment of family needs, prompt adjudication and disposition and speedy resolution of the permanency plan are in children's best interests.

About 10% of maltreating parents will be unable to ever provide adequate care. These ten percent include the parent with a delusional psychosis about the child, aggressive sociopaths, sadistic parents who torture their children, and fanatics with irrational religious or other justification for their abuses.

Parents who have had earlier children removed or their rights terminated also pose high risk. The capacities of parents with serious mental illness, personality disorder or mental retardation need to be carefully assessed.

Positive qualities in the attachment relationship and motivation to attend visits and otherwise comply with the treatment plan are strengths that suggest a fair or good prognosis. Creative treatment plans can provide needed support and encouragement in the early stages of intervention. Focusing on primary, current problems is more effective than requiring multiple simultaneous therapies for substance abuse, domestic violence, anger management, sexual abuse, parenting and so on. For example, substance dependence or ongoing violence must be addressed before other therapies will have impact. Multiple therapists confound the goal of developing trust, duplicate efforts, and encourage manipulation by savvy clients.

All young children should receive developmental evaluations and recommended therapies, a full medical examination, and indicated treatment. Psychiatric consultation for differential diagnosis of neuropsychiatric disorders and medication may be needed for some children. Psychological evaluation of parents and child provides a comprehensive assessment of functioning, treatment and placement needs. Family assessments examine quality of attachment and may reveal the factors in the parents' childhoods that led to maltreatment, as well as the specific cause and nature of abusive incidents. Substance abuse should be evaluated when problems with drugs, medication or alcohol are known or suspected. Without primary substance abuse treatment (sobriety or moderation training), other interventions are likely to be of limited effectiveness.

Siblings often go unnoticed, although they may suffer from the same conditions as the target child. Siblings should be interviewed and receive appropriate help. Siblings of sexual abuse victims should have medical examinations, as they are at increased risk for molestation.

It is difficult to engage maltreating parents in treatment. They are typically distrustful, unable to express their feelings and needs verbally, depressed and unmotivated, and extremely needy. Many neglectful mothers feel they need to choose between their child and their partner. Focusing on building trust and coping with current stresses is most helpful. Later, work on childhood issues may be possible. Parenting education alone may be of limited value, as the maltreatment is caused by unconscious or habitual attitudes and behaviors.

Prompt assessment and treatment planning allows CYFD to gauge parental motivation for change. Even resistant parents should be expected to attend all visits, evaluations and treatment sessions scheduled.

35.8 References

This chapter of the Handbook was authored by Elizabeth Dinsmore, Ph.D. Dr. Dinsmore offers the following information about the authors she cites and recommends certain readings and websites.

35.8.1 Authors of Source Material

- Terese Benedek was an analyst who contributed to the understanding of early attachment.
- Hendrika A. Cantwell, M.D. is Clinical Professor Emerita, Department of Pediatrics, School of Medicine, University of Colorado Health Sciences Center, Denver. She has written extensively on neglect.
- Kathleen Coulborn-Faller is Faculty Director of the Civitas Child and Family Program, Director of the Family Assessment Clinic and Principal Investigator for the Interdisciplinary Training Program at the University of Michigan.
- Erik Erikson, M.D. was a psychiatrist and important developmental theorist.

- Selma Fraiberg was a child psychoanalyst whose clinical and theoretical insights on early mental representation and work with troubled parents enriched understanding of maltreatment.
- Stanley I. Greenspan, M.D. is a founder of the National Center for Clinical Infant Programs. An expert in infancy and early childhood, he is Clinical Professor of Psychiatry and Pediatrics at George Washington University Medical School and a Supervising Child Psychoanalyst at the Washington Psychoanalytic Institute.
- Carole Jenny, M.D., M.B.A. is director of the Child Protection Program at Hasbro Children's Hospital in Providence, Rhode Island, and professor of pediatrics at Brown University Medical School. She formerly directed the child abuse program at Children's Hospital, University of Colorado Medical School, Denver, Colorado.
- Brandt F. Steele, M.D., psychiatrist, was with the C. Henry Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect, Denver. He wrote widely on the intergenerational transmission of child abuse and neglect and work with maltreating parents.
- Alan L. Stroufe, Ph.D. is William Harris Professor of Child Development, University of Minnesota
- D.W. Winnicott was a child analyst and Object Relations theorist who contributed to understanding of early development.

35.8.2 Recommended Reading

- Helfer, M.E., Kempe, Ruth S. and Krugman, Richard D. (1997). The Battered Child, 5th ed. Chicago: University of Chicago Press.
- Kempe, Ruth S. and Kempe, C. Henry (1978). Child Abuse. Cambridge: Harvard University Press.
- Kuehnle, Kathryn (2003). Child Sexual Abuse Evaluations. In Irving B. Weiner (Editor-in-Chief), & Alan M. Goldstein (Vol. Ed.), Handbook of Psychology: Volume 11. Forensic Psychology (pp.437-460). Hoboken, NJ: Wiley.
- Meloy, J. Reid (2003). Pathologies of Attachment, Violence, and Criminality. In Irving B. Weiner (Editor-in-Chief), & Alan M. Goldstein (Vol. Ed.), Handbook of Psychology: Volume 11. Forensic Psychology (pp.509-526). Hoboken, NJ: Wiley.

35.8.3 Other Recommended Sources

- The American Professional Society on the Abuse of Children, www.apsac.org
- International Society for Prevention of Child Abuse and Neglect, www.ispcan.org
- National Association of Counsel for Children, www.nacc.org

CHAPTER 36

PHYSICAL, MENTAL AND EMOTIONAL CONDITION OF PARENTS

This chapter covers the causes, manifestations, treatments and accommodations of the following conditions that may affect parents, with resulting consequences for their children:

- Domestic violence.
- Substance abuse.
- Mental illness.
- Physical disabilities.

36.1 Introduction

Society asks a great deal from children's court judges. The community expects them to balance increasing legal complexities with frequently conflicting arguments about a child's best interests. The court often weighs medical, psychological, and social information to produce decisions that are, at times, dissatisfactory to all the parties.

This chapter focuses on parents and four of the family-bound issues that can confront the court: domestic violence, substance abuse, psychological dysfunction, and physical disabilities. The selection of these issues emerges from research over the last 20 years that has identified several core behaviors, attitudes, and attributes that relate strongly with positive child development.

This review makes several assumptions about parenting basics. Early emotional attachments between infants and their primary caretaker, usually the mother, have profound results on child functioning at subsequent developmental stages (Calkins & Fox, 1992; Greenberg, Speltz & DeKlyen, 1993). The sensitive attunement and accurate targeting in response to the infant's cues form secure early attachments. Picking up on cues such as cry pitch, head turns, eye focus shifts, smiles, and frowns becomes difficult to impossible when the caretaker is impaired by domestic violence, mental illness, substance abuse, or certain physical or developmental disabilities (Susman-Stillman, Kalkoske, Egeland, & Waldman, 1996).

The child is the complementary player in this complex interaction. In order to respond to the cues of the parent, the child must be at ease and enjoy a sense of safety. Substance abuse, domestic violence, or mental illness can disrupt this interaction and establish a negative pattern of attachment that carries into future adjustment and relationships.

At subsequent developmental stages, the parent needs to be there to provide structure, safety, support, limits, and guidance as the child explores the world and develops the cognitive structures and emotional regulation required for successful adaptation. Competent parenting demands sensitivity and responsiveness. Parents work with their children to develop self-efficacy and the sense of mastery. Healthy children with attentive caretakers learn how to minimize risk, solve problems, and diminish the effects of negative experiences.

It is not difficult to understand how domestic violence, substance abuse, mental illness, and some physical disabilities can limit these basic parenting competencies.

36.2 Domestic Violence

36.2.1 Domestic Violence and Children

Five key issues emerge in the consideration of children exposed to domestic violence: child abuse, child observation of violence, child abduction, separation violence, and the trauma bond.

Child Abuse. Estimates differ, but at least half of all battering men also abuse their children (Pagelow, 1990). Child abuse increases and becomes more severe, as does the abuse of the battered partner (Bowker, Arbitel, & McFerron, 1988). When the wife is the victim, she is more likely to abuse her children than is the non-battered woman (Walker, 2000). The court should not hesitate to demand information about child abuse when domestic violence has been identified.

Child Observation of Violence. Most children – as many as 90% - in violent homes witness one parent battering the other (Pagelow, 1990; Walker, 2000). Bancroft & Silverman (2002) cite research to suggest that some fathers batter strategically in view of their children as a means of instilling fear and control. Children who have only witnessed violence are difficult to distinguish clinically from battered children. They are just as likely as battered children to present with physical and emotional symptoms such as eating and sleeping problems, depression, and anxiety (Jaffe, Wolfe, & Wilson, 1990).

Child Abduction. Batterers use custodial access to the children as a means of extending the physical violence and exerting fear and control. Many victims flee with their children to escape the violence. Law suits alleging custodial interference can be a tactic that the batterer uses after separation.

Separation Violence. More than 75% of the visits to emergency rooms by domestic violence victims occur after separation; half the homicides of battered women happened after divorce or separation (Walker, 2000). Leaving the battering partner does not necessarily stop the abuse. The court can play a special role in ensuring safety to the victim and the child following separation.

Trauma Bond. A 15 year-old girl, missing from her Utah home for 9 months, is found with her abductors just a few miles from her neighborhood; the public asks why she did not run

away or call the police. FBI hostage negotiators do not bargain with victims because of a phenomenon known as the "Stockholm Syndrome," where the victim takes on the cause of the kidnapper. Freud (1979) identified identification with the aggressor as a way to explain why victims do not contest the harm done to them by the perpetrator. These are collectively and more accurately described as trauma bonds.

Domestic violence victims – partners and children – frequently harbor intense, ambivalent, and positive connections with their assailants. Therefore, the children's court judge cannot rely solely on the preferences children state when asked with whom they want to live. The assessment of a trauma bond can only be performed by a specially trained mental health professional. The court might consider such an assessment if: 1) the child exhibits physical or emotional symptoms of abuse without evidence against one of the parents; 2) the child has had repeated unsuccessful placements with one parent and still asks to return to that parent; or 3) if one parent maintains that only he or she can properly care for the child.

36.2.2 Custody, Visitation and Parental Rights

The child welfare system – and the courts - can have profound effects on children in families where there is domestic violence. The goal should be to make decisions based on current and adequate knowledge of the complex dynamics of domestic violence. This includes the special issues that battered parents and their children face. Such decisions may also take into account the unintended negative consequences that well-meaning laws and child welfare stakeholders may bring with them.

Whether in an abuse or neglect case or in disputes between parents, there may be questions about the effect of domestic violence on custody and visitation. Many states have laws requiring that the court consider domestic violence when making child custody and visitation decisions. The American Bar Association (Davidson, 1994) urges the court to adopt a presumption against giving the child to the domestic violence perpetrator. The assumption here is that batterers frequently exhibit a pattern of control extending beyond the physical assault, and they may use the custody process itself to enforce control over their partners.

A potential dilemma for the court arises when the battering partner presents as more cooperative with a joint custody plan and the victim appears uncooperative. This occurs when the battered mother is trying everything to keep the children away from the abusive partner; she may present as "unreasonable" in her efforts. The court may want to consider exceptions to joint custody preferences for cases involving domestic violence. Similarly, the court needs to be aware of domestic violence control dynamics when the batterer instigates aggressive interstate custody litigation. The victim may flee the state with the child to avoid harm, and the batterer then sues under a child kidnapping statute. These laws and the enforcing courts should consider exempting parents who flee in response to domestic violence.

The assumption, both in the law and in child welfare practice, is that the child benefits from ongoing contact with both parents. However, the court needs to consider the safety needs of both the battered parent and the child when establishing visitation orders. The court can order

supervised visitation, when available. For the best interests of the child, the court can decide to deny visitation when it finds that a safe visit is not possible.

Another consideration to be addressed here is any proposed termination of the victim's (usually the mother) parental rights because she failed to protect the child. In such cases, the court must fully investigate the true nature of the potential harm to the child. For example, exposure to domestic violence does not always constitute child abuse. Critical to such an investigation is the victim's willingness and ability to prevent such exposure in the future. Once again, the court must make difficult decisions based on the law and the information before it.

36.2.3 Suggestions for Consideration

Foremost in the mind of the court and the child welfare system should be the child's immediate safety. Close in priority should be the treatment and recovery of the child victim. Treatment for victims and families, including the battering parent, can begin once the safety issues have been addressed. The varied dynamics driving and contributing to domestic violence are complex, and the strategies for helping the batterer must take into account the multi-determined forces that manifest in assaultive behavior. No one treatment approach can adequately explain or intervene successfully with all batterers.

The outcome research on the treatment of abusers is neither conclusive nor pessimistic. What has emerged consistently is that treatment can be successful, but it must include a comprehensive approach including careful assessment, individual and group therapy, and immediate responses to and consequences for recidivism. One of the most telling findings from abuser research is that outcomes improve in communities with a strong coordinated response. Abuser interventions appear to have cumulative effects. So, the offender who is arrested, prosecuted, put on probation, sentenced to community service, and ordered to therapy tends to have better treatment outcomes than the offender who is repeatedly warned, or just referred to therapy, or just put on a work detail (Green & Babcock, 2001).

36.3 Substance Abuse

36.3.1 Critical Factors

Three critical factors come into play when the child welfare system and the children's court face the issue of substance abusing caretakers. The first is the impact that drugs and alcohol have on the caretaker's behavior. The second is the effect that drugs and alcohol have on the environment where parenting takes place. The third is the complex interaction between the caretaker's own early history of abuse and neglect, and its cumulative negative impacts on parenting and caretaking behavior. These factors combine to produce impaired parenting and child maltreatment in most of the substance abusing families that come to the attention of the child welfare system (Grice *et al.*, 1995). The more impairment in each of these areas that a caretaker brings to parenting, the more likely it is that the caretaker will abuse, and the more serious will be the impact on the developing child.

36.3.2 Impact on Caretaker Behavior

An exhaustive review of current biological, chemical, and physiological studies on the results that alcohol and different drugs have on behavior is beyond the scope of this chapter. It is necessary to point out, though, that abusive use and dependence on alcohol and drugs usually cause impairments in the human organism that have concrete - and usually negative outcomes – on caretaking capacity. Alcohol and drugs eventually take over the life of the substance abuser. The child's needs for attention and nurturance quickly come second to the abuser's need for the substance. Long-term use results in mind and mood altering distortions in personality development. The abuser's psychosocial development appears truncated to the observer, as if the addict stopped maturing while an adolescent.

People grow and develop in a complex interaction between their biology and their environment. The healthy development of cognitive schemas – the mental constructs that help us make sense of the world – requires flexibility and positive stimulation. The long-term substance abuser has missed opportunities to incorporate information and experiences in a normative manner. Social relationships based on drug dealing and exploitation distort incoming information. The resulting self-absorption, distrust, and deception inhibit the growth of the healthy give-and-take characteristic of adaptive interpersonal interaction.

Substance abusers live chaotic and unpredictable lives. As parents, they are generally unable to bring structure, dependability, and consistency to caretaking. Absent, too, are the problem solving, stress management, and coping skills that effective parenting demands. As children, many adult substance abusers did not learn effective models for coping with life's day-to-day stressors. The result is a parenting style marred by rigidity, inconsistency, harsh physical and verbal punishment, and emotional reactivity.

36.3.3 Effect on the Social Environment

Adaptive and healthy psychosocial functioning depends on the interaction of the child, the caretakers, and the social environment (Bronfenbrenner, 1979; Lerner, 1991; Sameroff, 1993). Substance abusing caretakers lead isolated lives, focused more on feeding the addiction than on nurturing the family. Substance abuse substantially diminishes the ability to establish and maintain even the most minimal relationship (Bell & Legow, 1996).

Isolation and poor social skills can lead to abuse and neglect (Gelles, 1989; Straus & Gelles, 1986). The isolated mother, poorly attached in her own right, seeks attention and nurturance from her child. When the child fails to satisfy the parent's emotional needs, the "reward" is hostility, rejection, punishment, and the withdrawal of whatever meager emotional and physical caring had been available. This situation compounds the effects of poverty, especially when already limited resources are diverted to drug purchases, with the resultant increase in potential for child abuse and neglect, domestic violence, and parental mental illness (Kilpatrick, Acierno, Resnick, Saunders, & Best, 1997; Trickette, Aber, Carlson, & Cicchetti, 1991).

36.3.4 Abuse and Neglect Suffered by Substance Abuser as a Child

Depending on the study, upwards of 75% of substance abusing parents were abused, neglected, or sexually assaulted as children (Grice, Brady, Dunstan, Malcolm, & Kilpatrick, 1995). People who were sexually abused in childhood frequently develop symptoms of posttraumatic stress disorders (PTSD) along with patterns of substance abuse. Epstein, et al (1998) summarized the research pointing to substance abuse as being self-medication to manage the PTSD effects. Interviews with over 3000 women found twice as many PTSD symptoms in subjects who reported child sexual abuse; also double was the incidence of alcohol abuse. Neglect experienced early in life along with physical and sexual abuse has been linked repeatedly to subsequent substance abuse in adult life (Boyd, 1993; Grice, et al, 1995; Pribor & Dinwiddie, 1992).

36.3.5 Suggestions for Consideration

The foregoing is the legacy of substance abuse, visited on generation after generation until the most effective set of interventions are applied. Without effective intervention, substance abuse and the resulting child maltreatment are likely to continue. All three factors have to be addressed: the impact on caretaker behavior; environmental effects; and the caretaker's history of abuse and neglect. Interventions addressing only one of these factors are not likely to improve parenting.

When seen as the complex interaction of these three factors, the court can insist on the assessments and interventions that work. In relation to child welfare and children's court issues, drug courts have shown some of the best outcomes. This is most likely due to their emphasis on coordinated approaches and immediate follow-up. As noted, single focused interventions seldom treat with the comprehensive attention needed to address this problem. Absent the availability of a drug court program, abusing parents who are substance abusers will require at least multifaceted interventions, case management, a progressive system of rewards, and immediate penalties.

36.4 Mental Illness

36.4.1 Effect on Caretaking Function

Domestic violence and substance abuse frequently occur along with a range of diagnosable mental illnesses. In the child welfare system, however, the most critical aspect of a mental illness is the extent to which an individual's illness or psychopathology interferes with the ability and capacity to parent. It is not the diagnosis or the kind of mental illness; it is the way that diagnosis presents itself in the care of the child. There is no one diagnosis that can be used to justify removal of a child or termination of someone's parental rights. The key is how that caretaker's illness manifests in basic social and caretaking functions. The goal is to provide for the child's physical, emotional, and medical concerns.

There is no doubt that mental illness in parents and caretakers can represent a risk for the children in the family. It should also be noted that the children of the mentally ill have a higher risk for developing mental illnesses. When both parents are mentally ill, the chance is even greater that the child might become mentally ill (American Academy of Child & Adolescent Psychiatry, 1999). Genetic predispositions and high correlations between parent and child illness have been identified with the following diagnoses: bi-polar disorder; attention deficit hyperactivity disorder (ADHD); schizophrenia; substance abuse; and depression.

The immediate impact on the child, though, is the often chaotic and unpredictable family environment that frequently accompanies psychiatric illness. A mentally ill parent or partner can put stress on the relationship and affect the parenting abilities of the couple. There is frequently confusion about family roles, with the children taking on many adult responsibilities, including the care of the mentally disabled parent. Poverty and limited access to resources make the situation even more difficult. The woman with serious mental illness is susceptible to multiple stressors that can complicate contraception, pregnancy, childbirth, and parenting.

36.4.2 Special Challenges Faced by Parent in Treatment

The parent with serious mental illness faces additional challenges in coming to grips with a child welfare or court-ordered treatment plan. The demands of obtaining treatment and supports for themselves and their children bring with them increased challenges and stresses. There may not be alternative childcare, and limited financial resources are now stretched to include additional transportation, missed work, the multiple demands of meeting the requirements of the treatment plan, and the fear that their life with their children may be coming to an end.

36.4.3 Suggestions for Consideration

It is critical for the court and the child welfare system to recognize the impact upon the child when the parent has a mental illness. This recognition encompasses the following needs that children in this situation present: mandatory reporting; accurate identification of the special issues involved; the response and interventions of the child welfare system; special protections and services for the child of the mentally ill parent; the nature of risk factors and protections for these children; and targeted services for the family and the child's greater environment.

When making its determinations, the court and the child welfare system must look at a parent's history, diagnosis, treatment compliance, and functioning level. This is an area where the overall child welfare system is comfortable and at least minimally resourced. It is within the capacity of most child welfare systems to order medical and psychological work-ups, home studies, individual and family therapy, case management, and follow-up. There is, however, a frequently occurring emphasis on the concerns of the mentally ill parent. The chief concern must be the children and how they are affected. At the same time, the child welfare system can endorse the recovery attempts of the mentally ill parent. Recovery is

based in mastery and empowerment. The child welfare system and the court can ensure that services and supports are in place to provide parents with information and tools to build their caretaking capacity.

36.5 Physical Disabilities

36.5.1 Discriminatory Treatment

Physical disabilities (e.g., a parent's blindness or physical incapacitation) are frequently joined with cognitive or developmental disabilities in discussions about child welfare system interventions. Laws that prevent people with disabilities from serving as parents have long ago disappeared. For example, the state can no longer arbitrarily sterilize the developmentally disabled. Courts, in general, have determined that the right to marry, establish a home, and raise children is protected by the 5th and 14th amendments to the United States Constitution. Popular prejudice against people with disabilities as parents, however, has endured (Gilhool & Grand, 1985; Farber, 2000; Marshak, et al, 1999).

The following factors may influence the discriminatory treatment of physically and developmentally disabled parents:

- a presumption of inevitable neglect or abuse;
- a presumption that parenting deficiencies among the disabled are irremediable;
- a presumption that a parent's deficiencies result from a disability rather than from poverty, poor housing, prejudice, social isolation, or the absence of support services;
- a presumption that the physically and developmentally disabled are equally handicapped in their ability to cope with the multitude of demands brought down upon them by the legal and social service system;
- the inadequacy of available legal services for the disabled parent facing removal of a child; or
- the perception that inter-dependent parenting is other then normal parenting. For example, if parental independence is the standard, the disabled parent who seeks help from a network and friends may be perceived as somehow inadequate.

The court and the child welfare system want to ensure that the disabled parent is not inadvertently subject to any prejudicial or discriminatory practices. Cases of child abuse or neglect requiring court intervention need to stand on their own merits, subject to the same standards that apply to similar situations where disability is not an issue. The child welfare system needs to be aware of negative community attitudes towards the disabled and examine closely allegations against the disabled parent. Child welfare professionals may need to examine their own attitudes and assumptions, and become advocates for the special needs that children with disabled parents may present.

The Americans with Disabilities Act may protect the disabled parent in the abuse or neglect proceedings to the extent that it requires the state to make reasonable accommodations so that services are available to that parent. *See State ex rel. CYFD in the Matter of John D.*, 1997-

NMCA-019, 123 N.M. 114. The state should consider ways in which it can make accommodations to allow the parent's full participation in the treatment plan, for example.

36.5.2 Suggestions for Consideration

In making child welfare determinations, a parent's skills and abilities require assessment "in context." Disabled parents live with social supports and social constraints; there is no "ideal" family. Finally, child welfare workers need to advocate with disabled parents to limit the fears among the disabled about system interventions such as the threat of child removal based solely on the disability.

From the court's point of view, the mere presence of a disability should not be the sole determinant of an individual's ability to function as an adequate parent. It might be helpful for the court to request an assessment of the areas of life affected by the disability, including housing issues, child care issues, respite, community resources and supports, transportation problems, and the availability of adaptive parenting equipment.

36.6 Making a Comprehensive Assessment

Parental ability to provide at least adequate care for children can clearly vary when the issues of domestic violence, substance abuse, mental illness, and physical and developmental disabilities enter the picture. For the children's court judge and the child welfare system, the functioning level of the caretaker is the critical element in the determination of parental capacity. Regardless of level of stress or other environmental challenges, the emotional stability of the caretaker emerges in study after study as the most significant predictor of maltreatment (Berlin & Vondra, 1999; Egeland, et al, 2002; Pianta, et al, 1989).

The caution here is that no one condition and no stand-alone diagnosis should be the basis for a decision to disrupt a family. Final decisions about a parent's ability and capacity to care for a child must attend to a comprehensive assessment of the caretaker's levels of functioning, fitness to parent across more than one variable, the special needs of each child, the availability of resources, and the caretaker's degree of compliance with court-ordered treatment plans.

36.7 References

Kenneth C. Kenney, Ph.D. wrote this chapter in 2003 and provided the following references at that time.

American Academy of Child & Adolescent Psychiatry. (1999). *Children of parents with mental illness*. Washington, DC: AACAP.

Bancroft, L., & Silverman, J.G. (2002). *The Batterer as parent: Addressing the impact of domestic violence on family dynamics*. Newbury Park, CA: Sage.

Bell, S.A., & Legow, N.E. (1996). Attachment theory as a working model for the therapist transitioning from early to later recovery substance abuse treatment. *American Journal of Drug and Alcohol Abuse, 22* (4), 533-547.

Belle, D. (1990). Poverty and women's mental health. *American Psychologist, 45* (3), 385-389.

Berlin, P.M. & Vondra, J.I. (1999). Psychological maltreatment of children. In R.T. Ammerman & M. Hersen (Eds.), *Assessment of family violence: A clinical and legal sourcebook* (2nd Edition). New York: John Wiley.

Bowker, L.H., Arbitel, M., & McFerron, J.R. (1988). On the relationship between wife beating and child abuse. In K Yllo and M Bograd (Eds). Perspectives on wife abuse. Newbury Park, CA: Sage.

Boyd, C.J. (1993). The antecedents of women's crack cocaine abuse: Family substance abuse, sexual abuse, depression, and illicit drug use. *Journal of Substance Abuse Treatment, 10*, 433-438.

Bronfenbrenner, U. (1979). *The ecology of human development: Experiments by nature and design*. Cambridge, MA: Harvard University Press.

Calkins, S.D., & Fox, N.A. (1992). The relations among infant temperament, security of attachment, and behavioral inhibition at twenty-four months. *Child Development, 63*, 1456-1472.

Davidson, H. (1994).*The impact of domestic violence on children: A report to the president of the American Bar Association*. Washington, DC: American Bar Association.

Egeland, B., Bosque, M., & Levy, A.K. (2002). Continuities and discontinuities in the intergenerational transmission of child maltreatment: Implications for breaking the cycle of abuse. In K. Browne, H. Hanks, P. Stratton, & Chameleon (Eds.), *The prediction and prevention of child abuse: A handbook* (pp.217-232). New York: John Wiley & Sons.

Epstein, J.N., Saunders, B.E., Kilpatrick, D.G., & Resnick, H.S. (1998). PTSD as a mediator between childhood rape and alcohol use in adult women. *Child Abuse & Neglect, 22* (3), 223-234.

Farber, R.S. (2000). Mothers with disabilities: In their own voice. *American Journal of Occupational Therapy, 54*, 260-268.

Freud, A. (1979). *The ego and the mechanisms of defense (revised edition)*. Cambridge, UK: International Universities Press.

Gelles, R.J. (1989). Child abuse and violence in single-parent families: Parent absence and economic deprivation. *American Journal of Orthopsychiatry, 59* (4), 492-501.

Gilhool, T.K. & Gran, J.A. (1985). Legal right of disabled parents. In S.K. Thurman (Ed.), *Children of handicapped parents*. Orlando, Florida: Academic Press.

Green, C., & Babcock, J. (2001). Does batterers' treatment work? A meta-analytic review of domestic violence treatment. *Proceedings, 7th International Family Violence Research Conference*. Portsmouth, New Hampshire.

Greenberg, M.T., Speltz, M.L., & DeKlyen, M. (1993). The role of attachment in the early development of disruptive behavior problems. *Development and Psychopathology, 5*, 191-213.

Grice, D.E., Brady, K.T., Dunstan, L.R., Malcolm, R., & Kilpatricj, D.G. (1995). Sexual and physical abuse history and post traumatic stress disorder in substance dependent individuals. *American Journal of Addictions, 4*, 297-305.

Jaffe, P., Wolfe, D.W., & Wilson, S. (1990). *Children of battered women: Issues in child develop and intervention planning*. Newbury Park, CA: Sage.

Kilpatrick, D.G., Acheron, R., Resnick, H.S., Saunders, B.E., and Best, C.L. A 2-year longitudinal analysis of the relationships between violent assault and substance use in women. *Journal of Consulting & Clinical Psychology, 65* (5): 834-47.

Lerner, R.M. (1991). Changing organism-context relations as the basic process of development: A developmental contextual perspective. *Developmental Psychology, 27* (1), 27-32.

Marshal, L.E., Seligman, M., & Prezant, F. (1999). *Disability and the family life cycle*. New York, NY: Basic Books.

Pagelow, M. (1990). Effects of domestic violence on children and their consequences for custody and visitation agreements. *Mediation Quarterly, 7*, #4. pp 45-53.

Pianta, R., Egeland, B., & Erickson, M.F. (1989). The antecedents of maltreatment: Results of the mother-child interaction project. In D. Cicchetti and V. Carlson (Eds.), *Child Maltreatment*. Cambridge: Cambridge University Press.

Pribor, E.F., & Dinwiddie, S.H. (1992). Psychiatric correlates of incest in childhood. *American Journal of Psychiatry, 149* (1), 52-56.

Sameroff, A.J. (1993). Models of development and developmental risk. In C.H. Zeanah, Jr. (Ed.), *Handbook of infant mental health* (pp.3-13). New York: Guilford.

Strauss, M.A., & Gelles, R.J. (1986). Societal change and change in family violence from 1975 to 1985 as revealed in two national surveys. *Journal of Marriage and the Family, 48*, 465-479.

Susman-Stillman, A., Kalkoske, M., Egeland, B., & Waldman, I. (1996). Infant temperament and maternal sensitivity as predictors of attachment security. *Infant Behavior and Development, 19*, 33-47.

Trickett, P.K., Aber, J.L., Carlson, V., & Cicchetti, D. (1991). Relationship of socioeconomic status to the etiology and developmental sequelae of physical child abuse. *Developmental Psychology, 22* (1), 148-158.

Walker, L.E. (2000). *The battered woman syndrome (2nd edition).* NYC: Springer Publishing Company.

CHAPTER 37

PSYCHOLOGICAL ASSESSMENTS

This chapter covers the types and purposes of psychological assessments, including:

- Psychological evaluation with a specific question to be answered.
- Neuropsychological assessment.
- Bonding or interactional study.
- Custody evaluation.
- Psychological, pre-placement or home study report.

37.1 Types of Assessments

Permanency planning for children in the state's custody has many challenges. Psychological evaluation is one tool used to identify the needs of both parents and children. The type of evaluation required (if any), the local availability of such, the quality of the evaluation done, and proper use of the information and recommendations arising from the reports are all elements which need to be considered in deciding what services children and families need.

From the psychologist's point of view, it is important to know why the individual and/or family is being referred and what it is that the evaluation audience wants to know. It is not really enough for a social worker or judge to order a "psych eval" and to have the psychologist proceed without a specific referral question. If the attorneys and permanency planning workers have not identified the specific information needed, the court can use its role in moving the process along by asking precise referral questions and requesting the kind of evaluation that addresses the questions at hand. In forensic settings, especially those that relate to permanency planning, the most likely needed types of evaluations are:

- Psychological evaluation with a specific question.
- Neuropsychological assessment.
- Bonding or interactional study.
- Custody evaluation (although these are less appropriate).
- Psychosocial, pre-placement or home study.

37.1.1 Psychological Evaluation with a Specific Question

The psychological evaluation with a specific question is the kind of evaluation on which psychologists receive the most training. Many courts and most state custodial agencies have criteria for requesting psychological evaluations. However, a review of these criteria produced few useful pointers for permanency planning. For example, whether parents are suicidal or even psychotic may not relate to their candidacy for having their child returned to them. The information can be useful, however, in determining exactly which services parents need to improve their parenting. A question about the extent to which the depression or the psychotic features are a barrier to improvement might be needed.

Another frequently cited criterion is the presence of an antisocial personality disorder. For good reason, the court needs to be cautious in returning a child to the home of a psychopath (Hare & McPherson, 1984; Harris et al, 1991; Klassen & O'Connor, 1988). The critical information to know with such parents would be whether or not they can function as responsible and consistent caretakers for their children. A single diagnosis or condition is seldom an impediment to adequate parenting. The question for the psychologist needs to be framed in terms of the relevance of the condition to the capacity to parent.

In this same category are evaluations of children. From the perspective of the psychologist, it is insufficient to determine whether the child has suffered psychological harm as a result of physical or sexual abuse or neglect. The question to be asked is whether the child is exhibiting any symptoms or behaviors that would require a level of care which the parent or other caretaker may not be able to provide. In deciding on a permanency plan, the question must focus on the interaction between the child's needs and the parent's ability.

Sometimes the psychologist is asked to estimate the intelligence (IQ) of a parent or child, or to determine the existence of a developmental disability. The existence of low intelligence cannot be used by itself to decide on custody or permanency. It is important to know whether or not a parent can be trained to recognize developmental milestones in a child and respond as needed. The question for the evaluation would be whether or not the parent has such capacity or can be trained to competence and how best to do that. If a child is failing in school and the parent is not responsive, it may be that the parent cannot provide the stimulation or limit-setting which the child requires. This would be especially relevant if the child's evaluation demonstrates the capacity for normal intelligence.

The final reason to request a psychological evaluation would be to establish a differential diagnosis or to argue a disputed diagnosis. In this case, the question would be to determine if there was evidence in the psychological profile to support an alternative explanation of the subject's behavior or symptoms.

37.1.2 Neuropsychological Assessment

Neuropsychological assessments help specify behavioral deficits and strengths, and they can propose detailed training programs for motor, sensory and cognitive deficits. These assessments are most useful in planning the remediation of impairments, and they should

only be requested following other assessments. If only a neurological assessment can be obtained, then the referral questions must be specific.

37.1.3 Bonding or Interactional Study

The purpose of a bonding study is to determine whether a bond or attachment exists between a parent and a child and what, if any, steps can be taken to improve a deficient bond. This kind of study is frequently confused with a custody evaluation, or it is seen as a part of either a custody or psychological assessment. Instead, a bonding study should stand alone and be requested because it makes a unique contribution. The bonding issue in permanency planning is the extent to which the parent is capable of caring for the child from the perspective of bonding and attachment (Ainsworth, et al, 1978). The bonding study draws data from observation, from social and interpersonal reports, and from cognitive and emotional assessments (Bowlby, 1946; 1953; 1960; 1969; 1973; 1980; 1984). The bonding study moves in two directions. One track is the child's bonding issues with the parent. The other track comprises the bonding and attachment issues of the parent. At times, the child can bond and the parent cannot. The parents, usually because of their own bonding and attachment issues, cannot respond or bond adequately with the child (Zeanah & Zeanah, 1989).

Most relevant to permanency planning is the fact that bonding and attachment can be assessed and described. The assessment of bonding and attachment can rest on psychological tests and a growing body of research that demonstrates the connection between specific variables and the existence of a bond (Clark, 1985; Grossman & Schwan, 1986; Jernberg & Booth, 1979; Main & Westen, 1981; Waters, 1985). It is also becoming clear in the research that the absence or unhealthy quality of a bond correlates highly with the incidence of neglect, and that it is more difficult to treat the neglectful parent than it is to rehabilitate the parent who abuses a child (Hare, 1980; 1984; Sroufe, 1985). At the same time, a child can have a strong bond to an abusing parent, in which case the abuse bond needs to be distinguished from the normally occurring nurturing bond (James, 5 1994; Meloy, 1997; Symonds, 1984). The request for a bonding study needs to address these questions specifically.

Bonding studies may be useful at the beginning of a case in which there are concerns about a parent/child connection because specific, prescriptive recommendations can be made to improve or support such relationship in the face of the separation which occurs when a child is in foster care.

37.1.4 Custody Evaluation

Traditionally, courts may ask a psychologist to consult about a private custody dispute, where the parties have failed to resolve the custody issue between themselves. The outcome is usually some form of shared custody. The psychological literature contains hundreds of references about the conduct of custody evaluations, although there is relatively little about the use of this type of evaluation in permanency planning. A custody evaluation is rarely used in an abuse and neglect cases but, if it is, the referring agency should be extremely

specific about the information needed and ask the proposed professional if it is the most appropriate type of evaluation. At a minimum, the following issues should be included:

- Mental and physical health of the parties involved;
- Interactions and interrelationships of the child with the parents and other family and important people in the child's life;
- Age and sex of the child;
- Child's wishes about the custodian; and
- Child's adjustment to home, school and community.

37.1.5 Psychosocial, Pre-Placement or Home Study Report

Psychosocial evaluations provide a general history of a child and a family. Usually produced by social workers or juvenile justice personnel, the psychosocial evaluation historically has been used to evaluate the home environment or to assess the treatment needs of the child and the family at the outset of a case. In adoptions and foster care situations, the psychosocial takes the form of the home study or pre-placement report. This evaluation focuses on both the home and the family's ability to take care of a child. In permanency planning, the psychosocial evaluation looks at child and family treatment needs and the family's readiness to provide for the child. The primary evaluation question in a permanency planning matter relates to the factors that contributed to the abuse or neglect that originally brought the family to the attention of the authorities. Psychosocial evaluations assess medical and mental health histories, previous legal and treatment involvement, housing, recreation, school and community factors, family constellation, discipline and parenting skills.

Most mental health professionals have some training in the conduct of psychosocial evaluations. For many aspects of permanency planning, the psychosocial evaluation can provide satisfactory information to the foster care agency or the court. Decisions about who may perform these evaluations should be based on training and supervision rather than on professional affiliation. Although a high degree of specific training is required, it is usually possible to assign these evaluations to a class of mental health care providers with appropriate training but whose time is less expensive than, for example, that of the psychologist. In addition to training, however, there should be competent supervision of the people doing the evaluations. This should include professional review of the reports before they are submitted to the court.

37.2 References

Kenneth C. Kenney, Ph.D., provided most of the text for this chapter and offered the following references:

- Meloy, J. Reid. (1997). *Violent Attachments.* New Jersey: Jason Aronson, Inc.
- Ainsworth, M.; Blehar, M., Waters, E., Wall, S. (1978). *Patterns of Attachment: A Psychological Study of the Strange Situation.* New York; Wiley.

- Bowlby, J. (1946). *Forty-Four Juvenile Thieves: Their Character and Home Life.* London: Bailliere, Tyndall, and Cox.
- Bowlby, J. (1953). Some Pathological Processes Set in Train by Early Mother - Child Separation. *Journal of Mental Science 39: 350-373.*
- Bowlby, J. (1960). Separation Anxiety. *International Journal of Psycho-Analysis 41: 89-111.*
- Bowlby J. (1969). Attachment and Loss. Volume I, *Attachment.* New York: Basic Books.
- Bowlby J. (1973). Attachment and Loss. Volume II, *Separation, Anxiety, and Anger.* New York: Basic Books.
- Bowlby J. (1980). Attachment and Loss. Volume III, *Loss, Sadness, and Depression.* New York: Basic Books.
- Bowlby J. (1984). Violence in the Family as a Disorder of the Attachment and Care Giving Systems. *American Journal of Psychoanalysis 44:* 9-27.
- Di Maio, V. J. M. (1985). *Gun Shot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques.* New York: Elsvier.
- Geberth, V. J. (1990). *Practical Homicide Investigation: Tactics, procedures, and Forensic Techniques.* 2nd ed. New York: Elsvier.
- Grossmann, K., Schwan, A. (1986). Capturing the Wider View of Attachment: A Reanalysis of Ainsworth's Strange Situation. In *Measuring Emotions in Infants and Children,* Volume II, ed. C. Izard P. Read, pp. 23-64. New York: Cambridge University Press.
- Hare, R. (1980). A Research Scale for the Assessment of Psychopathy in Criminal Populations. *Personality and Individual Differences 1: 111-117.*
- Hare, R. (1991). The Hare Psychopathy Check List Revised. New York: Multi-Health Systems, Inc.
- Hare, R., McPherson, L. (1984). Violent and Aggressive Behavior by Criminal Psychopaths. *International Journal of Law and Psychiatry* 7: 35-50.
- Harris, G., Rice, M., Cormier, C. (1991). Psychopathy and Violent Recidivism. *Law and Human Behavior 15:* 625-637.
- Klassen, D., O'Connor, W. (1988). A Prospective Study of Predictors of Violence in Adult Male Mental Health Admissions. *Law and Human Behavior* 12: *143-158.*
- Main, M., Westen, D. (1981). The Quality of the Toddler's Relationship to Mother and to Father Related to Conflict Behavior and the Readiness to Establish New Relationships. *Child Development 52: 932-940.*
- Sroufe, L. (1985). Attachment Classification from the Prospective of Infant Caregiver Relationships and Infant Temperament. *Child Development 56: 1-14.*
- Symonds, M. (1984). Discussion of "Violence in the Family as a Disorder of the Attachment and Care Giving Systems." *American Journal of Psychoanalysis 44: 29-31.*
- Waters, E., Deane, K. (1985). Defining and Assessing Individual Differences in Attachment Relationships: Q-Methodology and the Organization of Behavior in Infancy and Early Childhood. In *Growing Points in Attachment Theory and Research.* Monograph of the Society for Research in Child Development Serial 209, ed. l. Bretherton E. Waters, pp. 41-65. Chicago: University of Chicago Press.

- Zeanah, C. Zeanah, P. (1989). Intergenerational Transmission of Maltreatment: Insights from Attachment Theory and Research. *Psychiatry 52: 17-196.*

CHAPTER 38

FEDERAL LAWS AFFECTING STATE PROCEEDINGS

Federal law has played a major role in the development of state law and policy on child abuse and neglect. This chapter describes such federal legislation as:

- Child Abuse Prevention and Treatment Act of 1974.
- Adoption Assistance and Child Welfare Act of 1980.
- Adoption and Safe Families Act of 1997.
- Foster Care Independence Act.
- Multiethnic Placement Act.
- Safe and Timely Interstate Placement of Foster Children Act of 2006.
- Fostering Connections to Success and Increasing Adoption Act of 2008.
- Uninterrupted Scholars Act.
- Court Improvement Program.
- Child and Family Service Reviews.

The Indian Child Welfare Act is outlined at length in Chapter 39.

38.1 Introduction

Since 1974, federal law has played a major role in the development of state law and policy on child abuse and neglect proceedings. Some laws, such as the Indian Child Welfare Act, discussed in Chapter 39, apply directly to state court proceedings. Most of the laws in this area affect the states because they grant or deny federal funds depending on the state's compliance with certain conditions.

The federal law on child abuse and neglect is found primarily in Title IV-B and Title IV-E of the Social Security Act. Title VI-B and Title IV-E offer funds to the states for family preservation and support services, child welfare services, state administrative costs in administering child welfare programs, foster care payments, and adoption subsidies. Approximately fifty percent of the funds used to support children in foster care in New Mexico is federal money which, under the legislation passed by Congress over the past 35 years, is available only if the state meets eligibility requirements. Similarly, these funds can be withdrawn if requirements are not met.

The Children, Youth and Families Department (CYFD) submits plans and reports to the federal Children's Bureau on a regular basis. These provide an excellent overview of CYFD's initiatives and services in the area of child welfare. The New Mexico FFYs 2010 –

2014 Child & Family Services Plan, for example, can be reviewed on the CYFD website, http://www.cyfd.org, under Publications.

38.2 Child Abuse Prevention and Treatment Act

Congress began to take an active role in the child welfare system with the adoption of the Child Abuse Prevention and Treatment Act of 1974 (CAPTA), P.L. 93-247, 88 Stat. 4, 42 U.S.C. §§5101–5107. The Act created the National Center on Child Abuse and Neglect, authorized financial assistance to public agencies and private nonprofit agencies for demonstration programs designed to prevent, identify, and treat child abuse and neglect, and provided for grants to states to assist the states in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.

CAPTA has been amended a number of times over the years and was reauthorized in December 2010. It contains a number of requirements that states must meet as a condition of receiving funds under the Act. States are, for example, required to provide for the reporting of abuse or neglect, immunity for persons reporting abuse or neglect, prompt investigation of reports, and methods for preserving confidentiality of records. The Act also requires that states establish citizen review panels, the requirements for which are outlined in the law, and that provisions be in place requiring that guardians ad litem, who have received training appropriate to the role, be appointed to represent children in abuse and neglect proceedings. In the 2010 reauthorization, Congress added the requirement that this training include training on early childhood and child and adolescent development. Under CAPTA, fingerprinting and criminal background record checks are required for prospective foster and adoptive parents and for other adults living in the household. 42 U.S.C. §5106a(b)(2).

When CAPTA was passed, it required that state programs assisted under Title IV-B of the Social Security Act, which was adopted in 1968, meet these same conditions. This requirement remains in effect. Title IV-B, which provides funding for child welfare services and, since 1993, family preservation and family support services, continues to be subject to the conditions listed in CAPTA. 42 U.S.C. §5106a(b)(2)(E). (Title IV-B is found in 42 U.S.C. §§621-629i.)

38.3 Adoption Assistance and Child Welfare Act

While CAPTA brought some attention to the prevention and treatment of child abuse and neglect, less attention was being paid to the child's long-term need for permanency. It became apparent that children were drifting from foster home to foster home. The Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 94 Stat. 500, 42 U.S.C. §§670-676 (and amending §§620-628), was the next major effort to address the needs of children who suffered from abuse or neglect. The Act was intended to protect children when they were in foster care, to shorten the time children spent in foster care and to encourage permanency planning for children through the reunification of families when possible and termination of parental rights and adoption when not.

P.L. 96-272 established Title IV-E of the Social Security Act, which makes federal financial assistance available to states with foster care systems that meet the Act's requirements. In particular, Title IV-E provided for federal participation in foster care maintenance payments, as well as subsidies for the adoption of children with special needs. The Act also provided for the withdrawal or reduction of financial assistance from states that did not comply with federal requirements. *See* 42 U.S.C. §§670-676.

For a state to be eligible for payments under the Act, it had to have a state plan in place. The plan had to provide that, in each case, reasonable efforts would be made (1) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (2) to make it possible for the child to return to his home. The plan also had to provide for the development of a case plan for each child receiving foster care maintenance payments, as well as for a case review system for the child. As part of the case review system, the status of the child had to be reviewed by a court at least every six months and the child had to be assured of a dispositional hearing by the court no later than 18 months after the original placement, and periodically thereafter.

Besides having a state plan in place, the state could only make foster care maintenance payments with respect to any given child if the removal from the home was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of the child. The court also had to find that reasonable efforts to maintain the child in the home or, after removal, to return the child home were made.

These Title IV-E provisions and requirements remain in place today, with a number of additions and modifications made by the Adoption and Safe Families Act in 1997, the Fostering Connections to Success and Increasing Adoptions Act in 2008, and other legislation. One of the most significant changes made by ASFA has to do with permanency. Before 1997, there was a requirement for a dispositional hearing no later than 18 months after the original placement. Now, a permanency hearing must be held within 12 months of the date the child is considered to have entered foster care and at least every 12 months thereafter. A permanency plan must be determined at this hearing. ***See*** §38.4 below.

38.4 Adoption and Safe Families Act

The Adoption and Safe Families Act (ASFA), P.L. 105-89, 111 Stat. 2115, amending 42 U.S.C. §§671-675, was passed in 1997 to improve the safety of children and to promote adoption and other permanent homes for children who need them, as well as to continue to support families. Stating that the child's health and safety were of paramount concern, the law made changes in and clarified some of the policies established under the Adoption Assistance and Child Welfare Act of 1980. It contained a wide range of provisions, from reauthorization of existing programs to providing adoption incentives for states.

ASFA regulations were announced by the U.S. Health and Human Services Department on January 25, 2000, and went into effect on March 27. States had 12 months in which to meet some of the requirements, but most had to be met right away. *See* 65 F.R. 4020 (January 25,

2000), amending 45 C.F.R. Parts 1355, 1356, and 1357. This chapter will focus on the provisions of the ASFA regulations that affect judicial abuse and neglect proceedings.

A state must meet certain requirements in order to comply with foster care program provisions of the Title IV-E state plan or to be eligible to receive federal financial participation for foster care maintenance payments. While some requirements affect state plan compliance alone, others affect the child's eligibility for Title IV-E foster care payments.

- **Reasonable Efforts Generally.** The state must make reasonable efforts to:
  - maintain the family unit and prevent the unnecessary removal of a child from his or her home, as long as the child's safety is assured;
  - effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child); and
  - make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible. 45 C.F.R. §1356.21(b).

- **"Contrary to Welfare" Determination in First Court Ruling.** A child's removal from the home must be the result of a judicial determination that continuation in the home would be contrary to the welfare of the child, or that placement outside the home would be in the best interest of the child. This determination must be made in the first court ruling that sanctions (even temporarily) the removal of the child from the home. If this "contrary to the welfare" determination is not made in the first court ruling, the child is not eligible for Title IV-E foster care payments for the duration of that stay in foster care. The omission cannot be remedied. 45 C.F.R. §1356.21(c).

- **Reasonable Efforts to Prevent Removal.** When a child is removed from his or her home, a judicial determination as to whether reasonable efforts were made, or were not required, to prevent removal must be made no later than 60 days from the date the child is removed from his home. If this determination is not made, the child is not eligible for Title IV-E foster care payments for the duration of that stay in foster care. 45 C.F.R. §1356.21(b)(1).

- **Reasonable Efforts Not Required.** Reasonable efforts to prevent removal or to reunify the family are not required where the state agency has obtained a judicial determination that such efforts are not required because:
  - The parent has subjected the child to aggravated circumstances (as defined in state law);
  - The parent has been convicted of murder or voluntary manslaughter of another child of the parent, aiding or abetting, attempting, conspiring or soliciting to commit murder or voluntary manslaughter, or a felony assault that results in serious bodily injury to the child or to another child of the parent; or
  - Parental rights have been terminated involuntarily with respect to a sibling. 45 C.F.R. §1356.21(b)(3).

- **Foster Care Placement; Limit on Court Role**. To satisfy the requirements for a case plan for each child (***see*** §38.3 on P.L. 96-272), the state agency must promulgate policy materials and instructions for use by staff to determine the appropriateness and necessity for the foster care placement of the child. Federal financial participation in foster care payments is not available when a court orders a placement with a specific foster care provider. 45 C.F.R. §1356.21(g).

- **Permanency Hearing; Deadline.** Previously, the Adoption Assistance and Child Welfare Act required that states hold dispositional hearings within 18 months after placement of a child in foster care. ASFA repeals this provision and establishes a permanency planning hearing. This hearing must occur within 12 months of the date a child "is considered to have entered foster care," or within 30 days of a judicial determination that reasonable efforts to reunify the child and family are not required. A child "is considered to have entered foster care" on the earlier of the date of the first judicial finding of abuse or neglect or the date that is 60 days after the child is removed from the home. 45 C.F.R. §1355.20(a).

- **Permanency Plan Set at Hearing.** The court must determine the permanency plan, or goal, for the child at the permanency hearing. 45 C.F.R. §§1355.20 and 1356.21(h). (This hearing to determine the permanency plan does not have to be the "permanency hearing" described in state law. Under ASFA, the court can hold a hearing on the permanency plan any time, which must be at least every 12 months.)

- **Permissible plans.** Permissible permanency plans, or goals, under ASFA are:
    - reunification;
    - adoption;
    - legal guardianship;
    - placement permanently with a fit and willing relative; or
    - another planned permanent living arrangement, but only if the state agency has documented to the court a compelling reason why none of the other options would be in the child's best interest. 45 C.F.R. §1355.20

- **Reasonable Efforts to Finalize Plan.** The state agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement). This determination must be made within 12 months of the date the child is considered to have entered foster care, and at least once every 12 months thereafter while the child is in foster care. If the determination is not made, the child becomes ineligible for Title IV-E payments after the end of the 12th month following the date he or she is considered to have entered foster care, and remains ineligible until such a determination is made. 45 C.F.R. §1356.21(b)(2).

- **TPR Required; Deadline for Filing.** The state must file or join in a petition to terminate parental rights if the child has been in foster care for 15 of the most recent

22 months. The petition must be filed by the end of the child's 15th month in foster care. 45 C.F.R. §1356.21(i)(1)(i).

This 15 month period runs from the date on which the child is considered to have entered foster care, that is, the date on which the child was adjudicated an abused or neglected child or the date 60 days after the child was removed from the home, whichever comes first. 45 C.F.R. §1355.20(a). When a child experiences multiple exits from and entries into foster care during the 22 month period, the state must use a cumulative method of calculation and must not include trial home visits or runaway episodes in calculating the 15 months. 45 C.F.R §1356.21(i)(1)(i)(B) and (C).

- **TPR Within 60 days of Felony Determination.** If the parent has been convicted of one of the felonies listed in the regulations, the petition to terminate must be filed within 60 days of a judicial determination that reasonable efforts to reunify the child and parent are not required. 45 C.F.R. §1356.21(i)(1)(iii)

- **TPR Within 60 days of Abandoned Infant Determination.** If a child is determined by the court to be an "abandoned infant" (as defined by state law), the petition to terminate must be filed within 60 days of the judicial determination that the infant is abandoned. 45 C.F.R. §1356.21(i)(1)(ii).

- **Exceptions to TPR Requirement.** The state agency may elect not to file for TPR at 15 months if:
    - at the agency's option, the child is being cared for by a relative;
    - the agency has documented in the case plan (which must be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the individual child, or
    - the agency has not provided to the family services that the state deems necessary for the safe return of the child to the home, when reasonable efforts to reunify the family are required. 45 C.F.R. §1356.21(i)(2).

- **Compelling Reasons.** Compelling reasons for determining that filing for TPR would not be in the best interests of the child include but are not limited to:
    - Adoption is not the appropriate permanency goal for the child; or
    - No grounds to file a petition to terminate parental rights exist; or
    - The child is an unaccompanied refugee minor as defined in certain federal regulations; or
    - There are international legal obligations or compelling foreign policy reasons that would preclude terminating parental rights. 45 C.F.R. §1356.21(i)(2)(ii).

  (The New Mexico Children's Code does not use the term "compelling reasons" in its list of reasons for not filing for TPR but the list was intended to serve the same purpose. *See* §32A-4-29(G).)

- **Recruiting Adoptive Family Begins at Filing for TPR**. When the state files a petition to terminate parental rights, it must concurrently begin to recruit, identify,

process and approve a qualified adoptive family on behalf of the child, regardless of age. 45 C.F.R. §1356.21(i)(3).

- **Specific Findings on "Contrary to Welfare" and "Reasonable Efforts" Required.** Judicial determinations that remaining in the home would be contrary to the welfare of the child and that reasonable efforts were made to prevent removal and to finalize the permanency plan in effect, as well as judicial determinations that reasonable efforts are not required, must be:
    - explicitly documented;
    - made on a case-by-case basis; and
    - stated in the court order.

  A transcript of the court proceeding is the only other documentation that will be accepted to verify that these determinations have been made. Affidavits, *nunc pro tunc* orders, and references to state law are not acceptable. 45 C.F.R. §1356.21(d).

38.5 Foster Care Independence Act

The Foster Care Independence Act, P.L. 106-169 (also known as the Chafee Act), was signed into law on December 14, 1999, creating the John H. Chafee Foster Care Independence Program, which is run through the states under Title IV-E. An Independent Living program that helped older foster children earn high school diplomas, participate in vocational training or education, and learn daily living skills such as budgeting, career planning, and securing housing and employment existed before the Chafee Act was passed but it focused on youth under the age of 18. The Chafee Act doubled the annual appropriations to the states for the program and requires that a portion of the funds be used for assistance to young people ages 18 to 21 who exit foster care. The intent is to provide states with funding for programs that provide financial, housing, counseling, employment, education, and other support and services to former foster care recipients to complement their own efforts to achieve self-sufficiency. 42 U.S.C. §677.

The Promoting Safe and Stable Families Amendments of 2001, P.L. 107-133, 115 Stat. 2413, enacted in January 2002, authorize vouchers for "education and training, including postsecondary training and education, to youths who have aged out of foster care." *See* 42 U.S.C. §677(a)(6), added in 2002. Among other things, the law provides that states may allow youths participating in the voucher program on the date they turn 21 to remain eligible until they turn 23, as long as they are enrolled in a postsecondary education or training program and are making satisfactory progress toward completion of the program. Vouchers may not exceed the lesser of $5,000 per year or the total cost of attendance. 42 U.S.C. §677(i). (The extent to which the state receives these funds depends on actual congressional appropriations from year to year, as well as on the manner in which funds are distributed or allocated to the states.)

38.6 Multiethnic Placement Act

The Howard M. Metzenbaum Multiethnic Placement Act, P.L. 103-382, 108 Stat. 4056, was adopted in 1994 and modified in 1996 by the interethnic adoption provisions of the Small Business Job Protection Act, P.L. 104-188, 110 Stat. 1903. The Multiethnic Placement Act (MEPA) was passed to promote the best interests of children by: (1) decreasing the length of time that children wait to be adopted; (2) preventing discrimination in the placement of children on the basis of race, color, or national origin; and (3) facilitating the identification and recruitment of foster and adoptive families that can meet children's needs. MEPA, as amended, is found in 42 U.S.C. §§622(b)(7), 671(a)(18) and 1996b.

The Act amended the requirements for states to meet in order to receive Title IV-B funding. The state's plan for child welfare services must provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom foster and adoptive homes are needed. 42 U.S.C. §622(b)(7).

The state's plan for foster care and adoption assistance under Title IV-E must also comply with MEPA. The plan must provide that neither the state nor any other entity in the state that receives funds from the federal government and is involved in adoption or foster care placements may discriminate on the basis of the race, color, or national origin of the adoptive or foster parent, or of the child. 42 U.S.C. §671(a)(18).

The 1996 legislation amended the civil rights laws to prohibit persons and governments involved in adoption or foster care placements from:

- denying to any individual the opportunity to become an adoptive or foster parent on the basis of race, color, or national origin of the individual or of the child; or
- delaying or denying the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child.

However, this law is not to be construed to affect the application of the Indian Child Welfare Act. 42 U.S.C. §1996b(3).

38.7 Safe and Timely Interstate Placement of Foster Children Act of 2006

The Safe and Timely Interstate Placement of Foster Children Act was enacted July 3, 2006 to encourage the "safe and expedited placement of children into safe, permanent homes across State lines." P.L. 109-239, §2, 120 Stat. 508. The Act amends Titles IV-B and IV-E in a number of ways intended to improve the orderly and timely interstate placement of children. It also requires that the court determine at permanency hearings whether a child's out-of-state placement continues to be appropriate and in the children's best interest. 42 U.S.C. §675(5)(C).

This legislation also includes a number of provisions unrelated to interstate placement. One is that the state provide for a child's health and education records to be provided to the child at no cost when the child leaves foster care by reason of having attained the age of majority. 42 U.S.C. §675(5)(D). Another is that, as a condition of receiving federal Court Improvement Project dollars (***see*** §38.10 below), the highest court in the state must have a rule that foster parents, pre-adoptive parents and relative caregivers are notified of proceedings respecting the child. 42 U.S.C. §629h(b). This relates to the Title IV-E requirement that the state have a procedure for assuring that foster parents, pre-adoptive parents, and relative caregivers are provided notice of, and a right to be heard in the proceedings. 42 U.S.C. §675(5)(G). Federal guidelines interpret the word "proceedings" to mean permanency hearings and periodic judicial reviews. *See* Program Instruction ACYF-CB-PI-07-03, which can be found on the Children's Bureau website, http://www.acf.hhs.gov/programs/cb.

38.8 Child and Family Services Improvement Act of 2006

The Child and Family Services Improvement Act, P.L. 109-288, enacted September 28, 2006 reauthorizes the Promoting Safe and Stable Families program for another five years. The legislation also makes a number of changes to Titles IV-B and IV-E, including the following:

- The state's case review system must include procedural safeguards to assure that in any permanency hearing with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court consult, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child. 42 U.S.C. §675(5)(C). (Federal guidelines interpret this requirement to permit the child's views to be reported by, for example, the child's GAL or attorney. Child Welfare Policy Manual §8.3C.2c (10/17/07).)

- The state must put into place procedures for the child welfare system to respond to disasters. 42 U.S.C. §622(b)(16).

- State plans for child welfare services must describe standards for the content and frequency of caseworker visits with children in foster care that, at a minimum, ensure that children are visited on a monthly basis and that the visits focus on issues pertinent to case planning and service delivery to ensure the children's safety, permanency, and well-being**.** 42 U.S.C. §622(b)(17).

38.9 Fostering Connections to Success and Increasing Adoptions Act

The Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections"), P.L. 110-351, 122 Stat. 3949, was enacted in September of 2008. The legislation amends Titles IV-B and IV-E of the Social Security Act to connect and support relative caregivers, improve outcomes for children in foster care, provide for tribal foster care and adoption access, improve incentives for adoption, and for other purposes. The Act primarily amends 42 U.S.C. §§671-676, or Title IV-E.

As with Title IV-E generally, the requirements in Fostering Connections are conditions for receiving federal foster care dollars. The Act:

- Requires the state agency to exercise due diligence to identify and provide notice to all adult relatives of a child within 30 days after the child is removed from the home.

- Requires the state agency to help youth develop a transition plan during the 90-day period right before a youth exits from care. The plan must address housing, insurance, education, mentoring, employment and other matters and it must be developed with the youth and parties identified by the youth. (In New Mexico, the Children's Code provides for this transition plan to be adopted at the first hearing after the youth's 17th birthday. *See* §32A-4-25.2.)

- Requires state agencies to improve educational stability for children in foster care by coordinating with schools to ensure that children remain in the school they were attending when they went into foster care. If staying in that school would not be in the child's best interest, the state must ensure that the child is enrolled immediately in a new school with all of the child's educational records provided to the new school. The state must also ensure that children are in school or have completed high school.

- Requires states to develop, in coordination with the state Medicaid agency, pediatricians and other experts, a plan for the ongoing oversight and coordination of health care services for children in foster care.

- Requires states to make reasonable efforts to place siblings together, unless doing so would be contrary to the safety or well-being of any of the siblings. If siblings are not placed together, reasonable efforts must be made to provide frequent visitation or other interaction, unless it would be contrary to the sibling's safety or well-being. (In New Mexico, these findings must be included in the order issued by the children's court judge at disposition. *See* §32A-4-22(A)(10).)

Fostering Connections also provides for certain state and tribal options. The Act allows states and tribes that meet certain qualifications, whether they be matching requirements or changes in law or otherwise, to use Title IV-E dollars for new purposes. The Act:

- Allows tribes and tribal consortia to directly access and administer Title IV-E funds by submitting plans and meeting a number of other conditions. The Act also allows a tribe that runs its own IV-E program to apply to access Chafee funds (***see*** §38.5 above).

- Expands the availability of federal Title VI-E training dollars to cover training of court personnel, attorneys, guardians ad litem, and court appointed special advocates. Availability of these funds is contingent upon state matching dollars.

- Allows states to provide care and support for youth in foster care beyond their 18th birthday if the youth is in school, employed, or incapable of doing these activities due

to a medical condition. It also allows for youth to stay in foster care up to age 21 and allows states to extend adoption assistance on behalf of youth ages 19, 20, or 21. This is a decision that the state makes.

- Gives the states the option to use federal Title IV-E funds for guardianship payments for children raised by relative caregivers. These funds would be for children for whom return home and adoption are ruled out and who likely would otherwise remain in foster care until they aged out of the system.

- Enhances incentives to promote adoption of children from foster care and includes other provisions for supporting adoption.

A number of these options are of interest to New Mexico, and the tribal options are of great interest to a number of the tribes in New Mexico, with the Navajo Nation receiving approval to administer its own Title IV-E program effective October 1, 2014.

One of the challenges that governments face in taking advantage of the opportunities in Fostering Connections is that they generally require matching dollars. It is also challenging, and not always feasible, to marshal the resources and change local laws and policies as necessary to exercise the different options.

38.10 Uninterrupted Scholars Act

A short but important piece of legislation, signed by the President early in 2013, is the Uninterrupted Scholars Act, P.L. 112-278, 126 Stat. 2480, amending 20 U.S.C. §1232g. Difficulty in accessing a child's school records has made it hard for state child welfare agencies to provide educational stability to children in foster care, despite the emphasis on education in Fostering Connections (***see*** §38.9 above) and related state laws. The Uninterrupted Scholars Act amends the Family Educational Rights and Privacy Act (FERPA) to give child welfare agencies access to a child's educational records without the prior written consent of the parents.

38.11 Court Improvement Program

The Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, provided for grants to state courts to assess and improve the handling of proceedings relating to foster care and adoption. These grants were intended to enable courts:

- to conduct assessments of the role, responsibilities, and effectiveness of state courts in carrying out state laws requiring proceedings that implement Title IV-B and IV-E, that determine the advisability or appropriateness of foster care placement, that determine whether to terminate parental rights, and that determine whether to approve the adoption or other permanent placement of a child; and
- to implement changes deemed necessary as a result of the assessments.

In 2006, Congress added two new grant programs. One grant is for improved data collection to ensure that the safety, permanency, and well-being needs of children are met in a timely and complete manner. The other is for the training of judges, attorneys and other legal personnel in child welfare cases, including cross-training with the child welfare agency. 42 U.S.C. §629h.

The Child and Family Services Improvement and Innovation Act, P.L. 112-34, enacted in 2011, has extended the authorization for the state court improvement grants through federal fiscal year 2016. The Act also, for the first time, allocated funds for the creation of a tribal court improvement program.

The New Mexico Court Improvement Project was made possible by the Omnibus Budget Reconciliation Act. Grant money was first awarded to the New Mexico Administrative Office of the Courts, on behalf of the Supreme Court, in 1995. The Court Improvement Project continues to receive federal funds to implement and evaluate its ongoing initiatives and is now receiving training and data grants as well as the basic grant that it has been receiving since the inception of the program.

38.12 Child and Family Service Reviews

In 1994, Congress amended the Social Security Act to authorize the U.S. Department of Health and Human Services (HHS) to review state child and family service programs to ensure conformity with the requirements of Titles IV-B and IV E. In 2000, the HHS published a rule to establish a new approach to monitoring state programs. Under the rule, states are assessed for substantial conformity with certain federal requirements for child protective, foster care, adoption, family preservation and family support, and independent living services. The Children's Bureau within HHS administers the review system, which is known as the Child and Family Service Reviews, or CFSRs.

The CFSRs look at the extent to which the states are achieving the following outcomes for families and children receiving services:

Safety

- Children are, first and foremost, protected from abuse and neglect.
- Children are safely maintained in their homes whenever possible and appropriate.

Permanency

- Children have permanency and stability in their living situations.
- The continuity of family relationships and connections is preserved for families.

Well-Being

- Families have enhanced capacity to provide for their children's needs.
- Children receive appropriate services to meet their educational needs.
- Children receive adequate services to meet their physical and mental health needs.

Each CFSR is a two-stage process consisting of a statewide assessment and an onsite review. At the end of the onsite review, states determined not to have achieved substantial conformity in all the areas assessed must develop and implement a Program Improvement Plan, or PIP, addressing the areas of nonconformity. States that do not achieve their required improvements face financial penalties. (This information was excerpted from the Child and Family Services Reviews Fact Sheet, available at http://www.acf.hhs.gov/programs/cb.)

The first round of CFSRs was completed nationally in 2004 and the second round in 2010. New Mexico was one of the first states reviewed in the second round, and in June 2010 became the first state in the country to successfully implement and complete work under its PIP. In March 2014, the Children's Bureau announced the initiation of the next round of reviews. *See* http://www.acf.hhs.gov/programs/cb/resource/cfsr-technical-bulletin-7.
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CHAPTER 39

INDIAN CHILDREN AND ICWA

This chapter covers:

- Purpose of the Indian Child Welfare Act (ICWA).
- Specific ICWA provisions, including scope, applicability, exceptions, jurisdiction, procedural and evidentiary requirements, and full faith and credit.
- ICWA placement preferences for foster care and adoption.
- Relationship of ICWA and ASFA.
- Federal and state case law.

39.1 Overview of the Indian Child Welfare Act (ICWA)

39.1.1 Purpose

The Indian Child Welfare Act (ICWA) was enacted in 1978 to:

> [p]rotect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.... 25 U.S.C. §1902.

ICWA protects the interests of both Indian children and tribes. In the context of child welfare law, protecting the interests of a tribe in its children is unique. While the rights of parents, grandparents, stepparents, and foster parents have been statutorily protected, ICWA was the first statute to protect a group's interests in a child. The Act can be found at P.L. 95-608, 92 Stat. 3069, 25 U.S.C. §§1901-1923.

Congress enacted ICWA as a result of several studies finding "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. §1901(4). Depending upon the state, the rates were from three to

eight times the number of other children being removed, either temporarily or permanently. The numbers were particularly disproportionate given that the Native population at that time was less than 1% of the population of the United States.

39.1.2 Summary of Requirements

Some of the key aspects of ICWA include:

- Exclusive tribal jurisdiction or concurrent jurisdiction as the two options for cases involving Indian children, depending on residence or domicile:
    - Exclusive tribal jurisdiction for member Indian children residing or domiciled within the reservation or who are wards of the tribal court regardless of domicile; and
    - Concurrent jurisdiction with the state, but with a preference for tribal jurisdiction, when an Indian child is not residing or domiciled on the reservation.

Domicile. The U.S. Supreme Court has decided on a uniform federal standard for domicile under ICWA. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. One acquires a "domicile of origin" at birth and that domicile continues until a new one, a "domicile of choice," is acquired. A minor's domicile is determined by that of the parents. In the case of an illegitimate child, this has traditionally meant the mother's domicile. On occasion, under these principles, a child's domicile of origin will be in a place the child has never been. 460 U.S. at 49.

- Definition of "best interest of the child," broadened to incorporate protection of the Indian child's cultural and tribal identity, preferably within the jurisdiction of the child's tribe.
- Stringent standards of evidence, more strict than most state standards, for the removal of children from their families.
- Procedural and substantive protections.
- Specified placement preferences, which cannot be waived without strong evidence, for voluntary and involuntary foster care placements and adoptions.

39.1.3 ICWA and the Children's Code

The New Mexico Children's Code has been amended over the years to ensure that each child's cultural heritage is protected and that cases involving Indian children comply with ICWA. There are specific references to Indian children throughout the Code and, in some instances, the Code's requirements are more stringent that those found in the federal act. State laws that set a higher standard of protection govern over the provisions in ICWA; similarly, if the standard in ICWA is higher, then the federal law prevails. 25 U.S.C. §1921.

39.2 Specific ICWA Provisions

39.2.1 Scope

ICWA is directed toward states. It is not binding upon tribes, but without tribal cooperation states may find it difficult to comply with the statute. For example, tribes can affirm a child's eligibility for or membership in the tribe or recommend placements that comply with ICWA. Since tribes are not subject to ICWA constraints, they can and have adopted laws that allow placements that differ from ICWA's placement preferences.

39.2.2 Applicability

ICWA applies when the following prerequisites are met:

- The child is an Indian child, defined as an unmarried person under 18 who is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. §1903(4). If the child is a member of or eligible for membership in more than one tribe, the tribe with which the child has the more significant contacts is considered to be the child's tribe. 25 U.S.C. §1903(5). The term "Indian tribe" is defined as a federally recognized Indian tribe. 25 U.S.C. §1903(8).
- The case is a child custody proceeding, defined as foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. 25 U.S.C. §1903(1).

The child's tribe or tribes must be contacted to determine whether the child is eligible for membership in or is a member of that tribe. State courts do not make independent determinations about a child's eligibility for membership in a particular tribe; that is the tribe's responsibility. Tribes set their own membership criteria, which differ from tribe to tribe.

New Mexico Law. whenever a child is placed in CYFD's custody, the Children's Code requires CYFD to investigate whether the child is eligible for enrollment as a member of an Indian tribe. If CYFD learns that a child is eligible for enrollment, CYFD must pursue enrollment on the child's behalf. §32A-4-22(I). This actually goes beyond the requirements of ICWA. 25 U.S.C. §1921.

In *State ex. rel. CYFD v. Marsalee P.*, the Court of Appeals held that the district court erred in terminating parental rights without ensuring that the department had complied with its obligation under §32A-4-22(I). The district court had an "affirmative obligation to make sure that the requirements of the Abuse and Neglect Act are followed prior to the termination of something as fundamental as the parental rights to a child." 2013-NMCA-062, ¶25, 302 P.3d 761.

39.2.3 Exceptions

Certain activities are not generally covered by ICWA, but may trigger ICWA at some point:

- Delinquency. Delinquency is not covered by ICWA. 25 U.S.C. §1903(1). If, however, the delinquency proceeding may or does lead to removal of a child from home to foster care, ICWA applies. There is no New Mexico case law on this provision.

- Custody Disputes. Custody disputes in the course of divorce proceedings are not covered by ICWA. 25 U.S.C. §1903(1). ICWA also does not address custody disputes between non-married parents, and the majority of non-New Mexico cases have held that ICWA does not apply to such disputes. There is no New Mexico case law on this provision.

- Emergency Removal. While emergency removal from the home does not require a placement that complies with ICWA's enumerated preferences, 25 U.S.C. §1922, it may lead to a foster care placement that is longer in term. A suggested practice would be to place the child according to ICWA's preferences from the beginning of the removal. There is no New Mexico case law on this issue.

- Mental Health Placement. It is not clear how ICWA affects placement for mental health treatment in an institution. The few authorities that have addressed this point seem to agree that ICWA is not applicable unless it leads to foster care placement, as opposed to placement in an institution. There is no New Mexico case law on this issue.

- Cultural Identification. Some children may not meet ICWA's definition of "Indian child" yet may identify culturally as Indian. Although the following categories of children do not fall within ICWA's definition of "Indian," the court may wish to recognize their cultural heritage and afford them the same treatment and protection as Indian children:
    - Members or children of members of Canadian, Mexican, South or Central American tribes;
    - Native Hawaiians;
    - Those who have a large blood quantum from several federally-recognized tribes, but in an amount insufficient for membership in any one tribe; and
    - Those who have a sufficient blood quantum required by tribal law, but do not meet other requirements for membership, such as residency.

39.2.4 Jurisdiction

Exclusive Tribal Jurisdiction

A tribe has exclusive jurisdiction over an Indian child who resides or is domiciled within its reservation, even when the child is temporarily off the reservation. The tribe also has

exclusive jurisdiction over an Indian child who is a ward of the tribal court, regardless of the child's residence or domicile. 25 U.S.C. §1911(a). An out-of-wedlock child takes the domicile of his or her mother at the time of birth; when a child whose mother is a tribal resident is removed from the reservation by a family member and placed for adoption, the child remains within the exclusive jurisdiction of the tribe. *In the Matter of the Adoption of a Baby Child*, 102 N.M. 735 (Ct. App. 1985). *See also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

Where a tribal court has exclusive jurisdiction, but somehow the child is in the state's jurisdiction, the case should be transferred without delay, even if the parent objects. Parental wishes do not support a state court's refusal to transfer where the tribe has exclusive jurisdiction over the child. *Mississippi Band*, 490 U.S. at 53. There may be occasions, however, when a tribe is not prepared to receive the child. A solution in these cases may be to enter into a specific agreement with the tribe to provide for the orderly transfer of jurisdiction on a case-by-case basis or for concurrent jurisdiction. 25 U.S.C. §1919.

Concurrent Jurisdiction

Tribes and states have concurrent jurisdiction in a foster care placement or termination of parental rights case when the Indian child is not domiciled or residing on a reservation. Yet ICWA requires the state court, in the absence of good cause to the contrary, to transfer these proceedings to the tribal court upon petition of a parent, tribe or the Indian custodian (defined as an Indian person with legal custody of the child under tribal law or custom, state law, or parental authorization). 25 U.S.C. §1911(b). Transfer is prohibited if the tribe or either parent objects, regardless of whether the objecting parent is Indian or non-Indian. *Compare*, Children's Code §32A-1-9.

The decision to transfer is based on the circumstances and evidence of each case, but the preference is to transfer. The Bureau of Indian Affairs' Guidelines for State Courts; Indian Child Custody Proceedings may assist the court in determining when to transfer. *In the Matter of the Guardianship of Ashley Elizabeth R.*, 116 N.M. 416, 419 (Ct. App. 1993). Whether a tribal court is not convenient under the doctrine of *forum non conveniens* is determined by the facts of each case and the party opposing transfer has the burden of establishing that good cause exists to not transfer. *In the Matter of the Termination of Parental Rights of Wayne R.N.*, 107 N.M. 341, 343-344 (Ct. App. 1988); *In the Matter of the Termination of Parental Rights of Laurie R.*, 107 N.M. 529, 533 (Ct. App. 1988); *In the Matter of the Guardianship of Ashley Elizabeth R*, above.

BIA Guidelines. In 1979, the Bureau of Indian Affairs published an extensive set of guidelines to assist state courts in understanding and implementing the Indian Child Welfare Act. Published in the Federal Register at 45 Fed. Reg. 67584, the Guidelines can be found at: https://tribalstate.nmcourts.gov/index.php/indian-child-welfare-act.html.

The Department of the Interior is undertaking a series of listening sessions in 2014 to determine whether the Guidelines are still effective for guiding state courts in ICWA cases or if they need to be updated.

The BIA Guidelines provide some examples of "good cause." Good cause exists if the tribe does not have a tribal court to which the case can be transferred, or where the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing, or where the Indian child is over 12 years of age and objects to the transfer. BIA Guidelines, §C.3.

Findings Required. In the case of an Indian child who is the subject of an abuse or neglect proceeding in New Mexico, it is critical that the parties present evidence early in the proceeding demonstrating the residence or domicile of the child, and that they request findings of fact on the issue. This will allow the court to determine whether it has jurisdiction over the matter and what standards should apply if there is ever a request to transfer the matter to tribal court. *State ex rel. CYFD in the Matter of Andrea Lynn M.*, 2000-NMCA-079, 10 P.3d 191.

39.2.5 Notice Requirements

Under ICWA, there is a distinction between voluntary and involuntary placement. ICWA only requires notice in cases involving involuntary placement in foster care or termination of parental rights. The party seeking placement or TPR must notify the child's parent or Indian custodian and the tribe of the pending proceedings and the right to intervene. Notification must take place by registered mail with return receipt requested. No proceeding may be held until at least 10 days after receipt of notice; an additional 20 days may be granted. 25 U.S.C. §1912(a).

ICWA Notice Form. In April 2014, the New Mexico Supreme Court published a proposed form of notice to be used in ICWA cases. Counsel should check the status of this form if it appears that a case might involve an Indian child: https://nmsupremecourt.nmcourts.gov.

ICWA does not contain similar notice provisions for voluntary placement but the New Mexico Children's Code does. It requires that the Indian tribe be notified in abuse, neglect, *or adoption* proceedings. §32A-1-14(B).

39.2.6 Intervention

In a foster care placement or termination of parental rights proceeding in state court, the Indian custodian and the tribe have the right to intervene at any point, including on appeal. 25 U.S.C. §1911(c); *In the Matter of the Adoption of Begay*, 107 N.M. 810, 812 (Ct. App. 1988). *Compare*, Children's Code §32A-4-27, Rule 10-122. Other parties may intervene as allowed by state law and rule.

The requirement that the state give notice to the tribe of its right to intervene in a state court proceeding attaches even when there is just a possibility that the child may be an Indian child. If the identity of the tribe cannot be determined, notice is given to the Secretary of the Interior. 25 U.S.C. §1912(a). *Compare* Children's Code §§32A-1-14, 32A-4-6(C), 32A-4-29(C), 32A-4-32(D), 32A-5-16(C), 32A-5-27(D)

39.2.7 Right to Counsel

An indigent parent or Indian custodian has the right to court-appointed counsel in any removal, placement, or termination proceeding. The court in its discretion may appoint counsel for the child upon a finding that appointment is in the best interest of the child. 25 U.S.C. §1912(b). In New Mexico, the court automatically appoints an attorney for the child. §32A-4-10(C). For children under 14 years of age, the court appoints an attorney guardian ad litem. For children 14 and older, the court appoints an attorney who represents the child in the same manner as an adult is represented by counsel; the client directs the representation. §32A-4-10(C).

39.2.8 Services and Programs for an Indian Family

Before a party may seek a foster care placement of, or termination of parental rights to, an Indian child, the party must make "active efforts...to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and demonstrate that these efforts were unsuccessful. 25 U.S.C. §1912(d). The court must have proof that active efforts were made. *Compare* with the reasonable efforts requirements under state law and ASFA; ***see*** Handbook §§3.2 and 38.4.

A number of non-New Mexico cases have held that if the family resists the efforts or refuses to cooperate, or the evidence shows that efforts would be useless, the requirement for active efforts has been met. There is now a judicial opinion in New Mexico addressing this type of situation. In *State ex rel. CYFD v. Arthur C.*, 2011-NMCA-022, 149 N.M. 472, the father challenged the termination of parental rights in part on the grounds that CYFD did not engage in active efforts. The Court of Appeals reviewed at length the evidence favorable to the decision and held that there was sufficient evidence for the district court to find beyond a reasonable doubt that CYFD engaged in active efforts to provide remedial services and rehabilitative programs. *Id*. ¶¶41-45.

The record indicates that CYFD repeatedly and persistently made active efforts to provide the services and rehabilitative programs to prevent the family's break up. Father sporadically engaged in the provided services and programs, demonstrating his capability but unwillingness to participate in the remedial and rehabilitative programs and services provided by CYFD. *Id*. ¶45.

In *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, 149 N.M. 315, the New Mexico Supreme Court considered a situation in which CYFD argued that the ex parte custody order and affidavit supporting it sufficed to demonstrate active efforts. The Court did not focus on whether the efforts described were sufficient but rather concluded that the court must address the question of active efforts at adjudication, when the parent has due process protections. The children's court cannot rely on a finding in the ex parte custody order to meet the requirements of 25 U.S.C. §1912(d). *Id*. ¶¶32, 37.

39.2.9 Evidentiary Requirements

Each party to a foster care placement or termination of parental rights proceeding has the right to examine the reports and other documents on which any decision of the court is based. 25 U.S.C. §1912(c).

In *State ex rel. v. Marlene C.*, 2011-NMSC-005, 149 N.M. 315, the Supreme Court addressed when and how a district court in an abuse and neglect proceeding must make the two factual findings required by 25 U.S.C. §1912(d) and (e):

> **Section 1912(d):** Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved successful.
>
> **Section 1912(e):** No foster care placement may be ordered in such proceedings in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The Court decided that the adjudicatory hearing is the best procedural stage in which to make these findings because it incorporates procedural due process protections and a stringent standard of proof that parallel those required by ICWA. *Id.* ¶36.

While the standard of proof at the adjudicatory hearing is clear and convincing, the standard for termination of parental rights in an ICWA case is beyond a reasonable doubt:

> **Section 1912(f):** No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The beyond a reasonable doubt standard for cases involving Indian children is also spelled out in the Children's Code, at §32A-4-29(I). In *State ex rel. CYFD v. Arthur C.*, 2011-NMCA-022, ¶¶28-40, 149 N.M. 472, the Court of Appeals upheld the trial court's decision that evidence beyond a reasonable doubt supported termination in that case.

It is important to note that ICWA requires that the evidence for both foster care placement and termination of parental rights include testimony by qualified expert witnesses. See 25 U.S.C. §1912(e)and (f), above. The BIA Guidelines may assist in determining who may testify as a qualified expert witness. While ICWA refers to expert witnesses in the plural, one qualified witness is sufficient. As a general rule, the witness should have some knowledge of tribal culture, preferably that of the child's tribe. BIA Guidelines, §§D.3 and

D.4. Under BIA regulations, the Secretary of the Interior or designee will assist in identifying qualified expert witnesses upon request. 25 C.F.R. §23.81.

39.2.10 Voluntary Foster Care or TPR (Relinquishment)

For voluntary foster care placement or termination of parental rights, the parent or Indian custodian's consent must be:

- in writing;
- given at least 10 days after the birth of the child;
- recorded before a judge of a court of competent jurisdiction; and
- accompanied by that judge's certificate that the terms and consequences of the consent were fully explained and fully understood by the parent or Indian custodian and interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. §1913(a).

A parent or Indian custodian may withdraw consent to a voluntary foster care placement at any time, at which point the child must be returned to the parent or custodian. 25 U.S.C. §1913(b). Consent to termination of parental rights or adoptive placement may be withdrawn prior to entry of the final decree of termination or adoption, at which point the child must be returned to the parent or custodian. 25 U.S.C. §1913(c). The parent may withdraw consent to an adoption within two years after the entry of a decree on the grounds of fraud or duress. If the court finds fraud or duress was used to obtain the consent, the decree must be vacated and the child returned to the parent. 25 U.S.C. §1913(d).

39.2.11 Full Faith and Credit

The state court is required to give full faith and credit to tribal child custody proceedings. ICWA requires that full faith and credit be given to tribal judicial proceedings involving custody of an Indian child, but only to the extent that the tribe affords full faith and credit to the state judicial proceedings. 25 U.S.C. §1911(d). Under New Mexico law, tribal judgments must be afforded full faith and credit without any requirement of reciprocity. *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 363 (1975); *Halwood v. Cowboy Auto Sales*, 1997-NMCA-098, ¶2, 124 N.M. 77.

The New Mexico Children's Code requires that a tribal court order pertaining to an Indian child in an action under the Children's Code be recognized and enforced by the district court for the judicial district in which the tribal court is located. A tribal court order that accesses state resources should be recognized and enforced pursuant to intergovernmental agreements entered into by the tribe and CYFD or another state agency. The tribal court, as the court of original jurisdiction, retains jurisdiction and authority over the child. §32A-1-8(E).

39.3 ICWA Placement Preferences

ICWA's enumerated placement preferences for foster care placement and adoption apply in both involuntary and voluntary placements. While requiring compliance with the preferences

for voluntary placements has been controversial because it undercuts the rights of a parent to determine who may adopt the child, the preferences are intended to protect the child's Indian identity and cultural heritage and recognize the tribe's interests in its children. ICWA allows deviation from the preferences only if "good cause to the contrary" is shown. The prevailing social and cultural standards of the parent's Indian community are to be applied in meeting the preferences. 25 U.S.C. §1915(d). The record of placement must show the efforts made to comply with the preferences and must be made available to the child's tribe or the Secretary of the Interior on request. 25 U.S.C. §1915(e). *Compare,* Children's Code §§32A-4-9, 32A-5-5.

Good Cause. Examples of good cause to modify preferences are found in the BIA Guidelines. Good cause may be based, for example, on the request of the biological parents or the child when the child is of sufficient age, extraordinary physical or emotion needs of the child as established by expert testimony, or the unavailability of suitable families for placement, after diligent search. BIA Guidelines, §F.3.

39.3.1 Foster Care Preferences

ICWA requires that foster care or pre-adoptive placement be in the least restrictive setting that most approximates a family and in which any special needs of the child can be met. The child must be placed within reasonable proximity to home. Absent good cause to the contrary, preference in foster care or pre-adoptive placement must be given to:

- a member of the Indian child's extended family;
- a foster home licensed, approved, or specified by the Indian child's tribe;
- an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs. 25 U.S.C. §1915(b).

39.3.2 Adoption Preferences

Absent good cause to the contrary, preference in adoptive placement must be given to:

- a member of the child's extended family;
- other members of the child's tribe; or
- other Indian families. 25 U.S.C. §1915(a).

39.3.3 Tribal Role in Preferences

Tribes may establish different orders of preferences by resolution as long as the placement is the least restrictive setting appropriate to the needs of the child. 25 U.S.C. §1915(c). The state court should determine if the child's tribe has established different preferences and, if so, comply with them rather than with ICWA's preferences. Even if the tribe has adopted

different preferences, the state court probably may deviate from them if good cause is proved.

39.3.4 Parent or Child Preferences

While ICWA allows the court to consider the Indian child's or parent's wishes for placement, these preferences are not binding. 25 U.S.C. §1915(c). While the court may give weight to a parent's wish to remain anonymous in applying the placement preferences, how much weight a court should accord the parent's wish is unclear, especially when faced with the child's right to cultural heritage or identity. The answer depends on the circumstances of the case, but the court can be guided by ICWA's primary purpose of protecting the rights of children and tribes.

39.4 ICWA and Title IV-E

The Adoption and Safe Families Act does not change or lessen the state's responsibility to comply with ICWA. At the same time, ASFA requirements apply to Indian tribes and Indian children receiving or eligible for Title IV-E funds.

Until the Fostering Connections to Success and Increasing Adoptions Act was passed by Congress in 2008, Indian tribes could only gain access to Title IV-E funds on behalf of Title IV-E eligible children through agreements with the states and had to operate within the parameters of the state plan. Under Fostering Connections, the tribes can now apply for approval from the federal Administration for Children and Families (ACF) to operate their own Title IV-E programs directly.

An information memorandum was issued by ACF in October 2008 to explain the tribal option. *See* http://www.acf.hhs.gov/programs/cb/resource/im0803. In January 2012, ACF issued an interim final rule amending federal regulations to incorporate the tribal option and setting forth the requirements and procedures to be followed. *See* 77 Fed. Reg. 896. In June 2014, the Navajo Nation was pleased to announce that the Nation has been approved to begin administering its own Title IV-E program effective October 1, 2014.

See Handbook Chapter 38 for more information on federal child welfare laws like ASFA and Fostering Connections.

39.5 Case Law

Following is a selected, annotated list of cases, most of which involve ICWA.

39.5.1 Federal Cases

- *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).
  This case involved a child who was 1.2% Cherokee. Before the child was born, the mother and the Cherokee father broke up and the father wrote by text message that he

relinquished his parental rights. Mother decided to put the child up for adoption. About four months after the child's birth, the adoptive parents served the biological father with notice of the pending adoption. This was the first notification they had provided; he signed papers saying that he accepted service and consented to the adoption. The next day he contacted a lawyer. In the adoption proceedings, he stated that he did not consent to the adoption and sought custody. The South Carolina Supreme Court held that ICWA applied and that the adoptive parents had not met the standards set forth in §1912(d) and §1912(f) of the Act.

The U.S. Supreme Court, in a sharply divided 5-4 decision, held that 25 U.S.C. §1912(f) – which bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child – does not apply when the Indian parent never had custody of the child. Similarly, §1912(d) – which conditions involuntary termination on a showing that active efforts have been made to provide remedial services to prevent the breakup of the Indian family – does not apply when the child has never been in the Indian parent's legal or physical custody. "[T]he 'breakup of the Indian family' has long since occurred."

The Court also held that placement preferences in §1915(a) did not apply because no one besides the Adoptive Couple sought to adopt the child. The Indian father was not covered by this section of ICWA because he was not seeking to adopt the child. Rather, he was seeking custody as the biological father of the child.

- *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).
  "Domicile" should be defined not by state law, but by a uniform federal law with uniform nationwide application. Minors cannot form the requisite intent to establish domicile, which is determined by that of their parents, and an illegitimate child's domicile is that of his or her mother, even when the child has not been physically present in the parents' or mother's domicile.

  The legislative history of ICWA clearly shows that Congress perceived that state courts were partly responsible for the problems that ICWA was intended to correct, and a reading of the entire statute reveals this intent. Even where an Indian child's parent attempts to circumvent the application of ICWA, such attempt cannot be used to undermine tribal jurisdiction because the Act is concerned both with the interests of children and those of their family and with the impact on the tribe of large numbers of Indian children being adopted by non-Indians. The demonstrated negative impact on children being placed outside their culture is a reason to supplant the wishes of parents. The legislative history of the Act, as well as the language of the Act, clearly indicates that the legislation covers voluntary as well as involuntary removal of Indian children.

- *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996).
  While ICWA provides minimum federal standards in state proceedings, it does not divest states of traditional jurisdiction over Indian children, even though ICWA

provides that any court of competent jurisdiction is authorized to consider challenges to foster care placements and terminations of parental rights. The *Younger* abstention doctrine requires that state appellate remedies be exhausted in light of the traditional state interest in family relations, unless the state proceeding is motivated by a desire to harass or bad faith, the challenged statute flagrantly violates express constitutional prohibitions in every clause and paragraph, or extraordinary circumstances exist involving great and immediate irreparable injury to the federal plaintiff.

- *Comanche Indian Tribe of Oklahoma v. Hovis*, 53 F.3d 298 (10th Cir. 1995).
  The tribe could not relitigate a dispute concerning jurisdiction to decide child custody after the state court determined it retained jurisdiction.

- *Roman-Nose v. N.M. Dept. of Human Services*, 967 F.2d 435 (10th Cir. 1992).
  The federal district court has subject matter jurisdiction under ICWA, 25 U.S.C. §1914.

- *Kickapoo Tribe of Oklahoma v. Rader*, 822 F.2d 1493 (10th Cir. 1987).
  The tribe's failure to appeal from a state court decision finding that ICWA did not apply to an adoption proceeding precluded a collateral attack on the state order in federal district court under Oklahoma's doctrine of res judicata.

- *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985).
  The doctrine of res judicata precluded the tribe from relitigating a Kansas judgment allowing the adoption by a non-Indian couple of a child who the tribe claimed was subject to ICWA.

39.5.2 New Mexico Cases

- *State ex rel. CYFD v. Marlene C.*, 2011-NMSC-005, 149 N.M. 315.
  A parent or custodian's consent to temporary custody does not transform an involuntary proceeding into a voluntary one to which 42 U.S.C. §1913 applies. The proceeding remains an involuntary one and the findings required by 42 U.S.C. §1912(d) and (e) must be made. Specifically they must be made at adjudication, which incorporates procedural due process protections. Findings and stipulations at the ex parte custody and ten-day custody hearings do not suffice to meet the requirements of §1912(d) and (e).

- *State ex rel. CYFD v. Marsalee P.*, 2013-NMCA-062, 302 P.3d 761.
  The Court of Appeals held that ICWA did not apply because the mother and children were not enrolled in the Navajo Nation, although they were eligible to be enrolled. The Court pointed out that there is a difference between being a member of an Indian tribe and being eligible for membership. ICWA only applies if the child is a member of a tribe or is the child of a member of a tribe.

  However, the Court was concerned that CYFD had not met its obligation under §32A-4-22(I) of the New Mexico Children's Code to pursue enrollment on behalf of

the children in the case. The Court reversed a judgment terminating the mother's parental rights because the department had not fulfilled its obligation under the statute. "We hold that the district court erred by terminating Mother's parental rights before it ensured that the Department fully complied with Section 32A-4-22(I). The district court has an affirmative obligation to make sure that the requirements of the Abuse and Neglect Act are followed prior to the termination of something as fundamental as the parental rights to a child."

- *State ex rel. CYFD v. Arthur C.*, 2011-NMCA-022, 149 N.M. 472.
  The father challenged the children's court findings that the evidence supported termination of parental rights beyond a reasonable doubt and that CYFD engaged in active efforts to provide remedial services and rehabilitative programs to prevent the family's break up, as required by ICWA. The Court of Appeals found sufficient evidence to support the lower court's findings in these regards. Another issue in the case was not an ICWA one, namely whether, under the Children's Court Rules in effect at the time, the case had to be dismissed for failure to commence the adjudication within 60 days. The Court upheld the lower court's decision not to dismiss.

- *State ex rel. CYFD in the Matter of Andrea Lynn M.*, 2000-NMCA-079, 129 N.M. 512.
  The case was transferred from state court to Navajo tribal court over the father's objection. The Court of Appeals affirmed, but pointed out that none of the parties presented evidence demonstrating the residence or domicile of the child, nor were findings of fact on residence and domicile requested. The lack of evidence on residence or domicile made it impossible to determine whether the transfer provisions of 25 U.S.C. §1911(b) applied. Also, once proper jurisdiction has attached, a court cannot subsequently be divested of its jurisdiction by the actions of the parties.

- *State ex rel. HSD in the Matter of Megan S.*, 1996-NMCA-048, 121 N.M. 609.
  Orders and documents of the tribal court, while not technically authenticated, should have been admitted into evidence and considered at a show cause hearing for contempt for failure to return children to New Mexico foster care after a tribal court asserted jurisdiction under ICWA and placed the children in the emergency custody of the Cherokee Nation.

  The state children's court had concurrent jurisdiction with the tribal court when the children and mother were domiciled in New Mexico. It retained such jurisdiction after the mother moved her domicile to the Cherokee Nation during the pendency of the proceedings. Even if the children's court erred when it refused to transfer the proceeding to tribal court, such error is corrected by appeal or writ and did not cause the children's court to lose concurrent jurisdiction or prevent the court from punishing a violation of its order. Neither full faith and credit nor comity requires recognition of an attempt by one court to abate or stay proceedings in a different court.

- *In the Matter of the Guardianship of Ashley Elizabeth R.*, 116 N.M. 416 (Ct. App. 1993).
  Once a proceeding is determined to be an ICWA-defined foster care proceeding, it must be transferred to tribal court unless good cause to not transfer is proved. The Bureau of Indian Affairs' *Guidelines for State Courts; Indian Child Custody Proceedings* set out four circumstances under which good cause not to transfer may exist and these are not met in this case. The court's reasons for not transferring the case may be good reasons to appoint petitioners as guardians, but they do not constitute good cause to not transfer the case to tribal court.

- *In the Matter of the Adoption of Begay*, 107 N.M. 810 (Ct. App. 1988).
  The tribe may intervene on appeal even when it did not seek intervention in the lower court. Also, §1914 of ICWA allows a parent or guardian or the tribe to challenge a state court order, and it does not require the three to join in challenging the order.

- *In the Matter of the Termination of Parental Rights of Laurie R.*, 107 N.M.529 (Ct. App. 1988).
  The trial court's denial of a request to transfer a termination proceeding to tribal court was not an abuse of discretion where the mother's oral request was made after trial had begun and the tribe had waived its right to participate in the proceeding. Evidence supporting the termination complied with the higher standards required by ICWA.

- *In the Matter of the Termination of Parental Rights of Wayne R.N.*, 107 N.M. 341 (Ct. App. 1988).
  The determination by a state court whether to transfer an ICWA case is made on a case-by-case basis, depending on the circumstances. The party opposing the transfer has the burden of establishing that good cause to not transfer exists. The trial court is to consider practical factors that make trial easy, expeditious, and inexpensive when determining whether the doctrine of *forum non conveniens* should be invoked. In this state court case, evidence supporting the termination complied with the higher standards required by ICWA.

- *In the Matter of the Adoption of a Baby Child*, 102 N.M. 735 (Ct. App. 1985).
  An out-of-wedlock child takes the domicile of his or her mother at the time of birth. Since the mother was a resident of her reservation at pertinent times, as well as being a member of a tribe, jurisdiction over the adoption proceedings was exclusive in the tribal court. The state children's court lacked jurisdiction.

39.6 References

The New Mexico Administrative Office of the Courts, on behalf of the Tribal-State Judicial Consortium, has developed a website with links to a number of important resources. These include the full text of the Indian Child Welfare Act, the Bureau of Indian Affairs' regulations on ICWA, and the BIA Guidelines. Also posted on the website is a judicial

benchcard developed by the Consortium specifically for the use of state court judges in New Mexico. See https://tribalstate.nmcourts.gov/index.php/indian-child-welfare-act.html.

The Native American Rights Fund has published a detailed handbook on ICWA. Titled *A Practical Guide to the Indian Child Welfare Act*, the handbook is available on-line without charge at http://www.narf.org/icwa/. Hard copies may be purchased at the same site.

APPENDIX A

ACRONYMS

ACF	Administration for Children and Families, U.S. Health and Human Services Department
ADA	Americans with Disabilities Act
ASFA	Adoption and Safe Families Act of 1997
BIA	Bureau of Indian Affairs
CAPTA	Child Abuse Prevention and Treatment Act of 1974
CASA	Court Appointed Special Advocate
CCA	Children's Court Attorney
CFR	Code of Federal Regulations
CMHDD Act	Children's Mental Health and Developmental Disabilities Act
CRB	Citizen Review Board
CFSR	Court and Family Service Review
CYFD	New Mexico Children, Youth and Families Department
FCM	Family Centered Meeting
FERPA	Family Educational Rights and Privacy Act
FINCOS	Families in Need of Court-Ordered Services
GAL	Guardian ad Litem
ICWA	Indian Child Welfare Act
IV-B	Title IV-B of the Social Security Act
IV-E	Title IV-E of the Social Security Act, added by the Adoption Assistance and Child Welfare Act of 1980
JPO	Juvenile Probation Officer
KGA	Kinship Guardianship Act
MEPA	Multiethnic Placement Act of 1994
NCJFCJ	National Council of Family and Juvenile Court Judges
PIP	Program Improvement Plan
P.L. 96-272	Adoption Assistance and Child Welfare Act of 1980
PPLA	Planned Permanent Living Arrangement
PS	Protective Services
RA	Respondent's Attorney
SCI	State Central Intake, CYFD
SIJS	Special Immigrant Juvenile Status
TPR	Termination of Parental Rights
YA	Attorney for Child 14 or Older, or Youth Attorney

APPENDIX B

GLOSSARY

SELECTED STATUTORY DEFINITIONS

Abandonment includes instances when the parent, without justifiable cause:

(1) left the child without provision for the child's identification for a period of fourteen days; or

(2) left the child with others, including the other parent or an agency, without provision for support and without communication for a period of:

(a) three months if the child was under six years of age at the commencement of the three-month period; or

(b) six months if the child was over six years of age at the commencement of the six-month period. §32A-4-2.

Abused child means a child:

(1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian;

(2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian or custodian;

(3) who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian;

(4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health; or

(5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child. §32A-4-2.

Acknowledged father, under the Adoption Act, means a father who:

(1) acknowledges paternity of the adoptee (i.e., the person who is the subject of an adoption petition) pursuant to the putative father registry, as provided for in §32A-5-20;

(2) is named, with his consent, as the adoptee's father on the adoptee's birth certificate;

(3) is obligated to support the adoptee under a written voluntary promise or pursuant to a court order; or

(4) has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee, as follows:

(a) for an adoptee under six months old at the time of placement,

- Has initiated an action to establish paternity;
- Is living with the adoptee at the time the adoption petition is filed;
- Has lived with the mother a minimum of 90 days during the 280 day period prior to birth or placement of the adoptee;
- Has lived with the adoptee within the 90 days immediately preceding the adoptive placement;

- Has provided reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee's birth in accordance with his means and when not prevented from doing so by the person or agency having lawful custody of the adoptee or the adoptee's mother;
- Has continuously paid child support in at least the amount provided in §40-4-11.1, the child support guidelines, or has brought current any delinquent child support payments; or
- Any other factor the court deems necessary to establish a custodial, personal or financial relationship with the adoptee; or

(b) for an adoptee over six months at the time of placement:

- Has initiated an action to establish paternity;
- Has lived with the adoptee within the 90 days before the placement;
- Has continuously paid child support in at least the amount provided in §40-4-11.1, the child support guidelines, since the adoptee's birth or is making reasonable efforts to bring del inquent payments current;
- Has contact with the adoptee on a monthly basis when physically and financially able and when not prevented by the person or agency with lawful custody;
- Has regular communcation with the adoptee or with the person or agency having care or custody of the adoptee, when physically and financially unable to visit the adoptee and when not prevented from doing so by the person or agency with lawful custody. §32A-5-3.

Adult means a person who is 18 years of age or older. §32A-1-4.

Aggravated circumstances include those circumstances in which the parent, guardian or custodian has:

(1) attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child's sibling;

(2) attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;

(3) attempted, conspired to subject or has subjected the child to torture, chronic abuse or sexual abuse; or

(4) had his parental rights over a sibling of the child terminated involuntarily. §32A-4-2.

Alleged father means an individual whom the biological mother has identified as the biological father, but the individual has not acknowledged paternity or registered with the putative father registry, as provided for in §32A-5-20. §32A-5-3.

Child means a person who is less than 18 years old. §32A-1-4.

Court appointed special advocate or **CASA** means a person appointed as a CASA, pursuant to the provisions of the Children's Court Rules, who assists the court in determining the best interests of the child by investigating the case and submitting a report to the court. §32A-1-4.

Custodian means an adult with whom the child lives who is not a parent or guardian. §32A-1-4.

Department, or **CYFD**, means the Children, Youth and Families Department, unless otherwise specified. §32A-1-4.

Disproportionate minority contact means the involvement of a racial or ethic group with the criminal or juvenile justice system at a proportion either higher or lower than that group's proportion in the general population. §32A-1-4 (added in 2009).

Foster parent means a person, including a relative of the child, licensed or certified by the department or a child placement agency to provide care for children in the custody of the department or agency. §32A-1-4.

Great bodily harm means an injury to a person that creates a high probability of death, that causes serious disfigurement or that results in permanent or protracted loss or impairment of the function of any member or organ of the body. §32A-4-2.

Guardian means a person appointed as a guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law. §32A-1-4.

Guardian ad litem or **GAL** means an attorney appointed by the children's court to represent and protect the best interests of the child in a court proceeding; provided that no party or employee or representative of a party to the proceeding shall be appointed to serve as a guardian ad litem. §32A-1-4.

Indian child means an unmarried person who is:
(1) less than 18 years old;
(2) a member of an Indian tribe or is eligible for membership in an Indian tribe; and
(3) the biological child of a member of an Indian tribe. §32A-1-4.

Indian child's tribe means:
(1) the Indian tribe in which an Indian child is a member or eligible for membership; or
(2) in the case of an Indian child who is a member or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts. §32A-1-4.

Indian tribe means a federally recognized Indian tribe, community or group pursuant to 25 U.S.C. §1903(1). §32A-1-4.

Legal custody means a legal status created by order of the court or other court of competent jurisdiction or by operation of statute that vests in a person, department or agency the right to determine where and with whom a child shall live; the right and duty to protect,

train and discipline the child and to provide the child with food, shelter, personal care, education and ordinary and emergency medical care; the right to consent to major medical, psychiatric, psychological and surgical treatment and to the administration of legally prescribed psychotropic medications pursuant to the Children's Mental Health and Developmental Disabilities Act; and the right to consent to the child's enlistment in the armed forces of the United States. §32A-1-4.

Neglected child means a child:

(1) who has been abandoned by the child's parent, guardian or custodian;

(2) who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, guardian or custodian or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them;

(3) who has been physically or sexually abused, when the child's parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;

(4) whose parent, guardian or custodian is unable to discharge his responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity; or

(5) who has been placed for care or adoption in violation of the law; provided that nothing in the Children's Code shall be construed to imply that a child who is being provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof is for that reason alone a neglected child within the meaning of the Children's Code; and further provided that no child shall be denied the protection afforded to all children under the Children's Code. §32A-4-2.

Parent or **parents** includes a biological or adoptive parent if the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child. §32A-1-4.

Permanency plan means a determination by the court that the child's interest will be served best by:

(1) reunification;

(2) placement for adoption after the parents' rights have been relinquished or terminated or after a motion has been filed to terminate parental rights;

(3) placement with a person who will be the child's permanent guardian;

(4) placement in the legal custody of the department with the child placed in the home of a fit and willing relative; or

(5) placement in the legal custody of the department under a planned permanent living arrangement. §32A-1-4.

Physical abuse includes but is not limited to any case in which the child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling or death and:

(1) there is not a justifiable explanation for the condition or death;
(2) the explanation given for the condition is at variance with the degree or nature of the condition;
(3) the explanation given for the death is at variance with the nature of the death; or
(4) circumstances indicate that the condition or death may not be the product of an accidental occurrence. §32A-4-2

Preadoptive parent means a person with whom a child has been placed for adoption. §32A-1-4.

Presumed father means:
(1) the husband of the biological mother at the time the adoptee was born;
(2) an individual who was married to the mother and either the adoptee was born during the term of the marriage or the adoptee was born within 300 days after the marriage was terminated by death, annulment, declaration of invalidity or divorce; or
(3) before the adoptee's birth, an individual who attempted to marry the adoptee's biological mother by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid and if the attempted marriage:
(a) could be declared invalid only by a court, the adoptee was born during the attempted marriage or within 300 days after its termination by death, annulment, declaration of invalidity or divorce; or
(b) is invalid without a court order, the adoptee was born within 300 days after the termination of cohabitation. §32A-5-3.

Protective Supervision means the right to visit the child in the home where the child is residing, inspect the home, transport the child to court-ordered diagnostic examinations and evaluations and obtain information and records concerning the child. §32A-1-4(S).

Reunification means either a return of the child to the parent or to the home from which the child was removed or a return to the noncustodial parent. §32A-1-4

Sexual abuse includes but is not limited to criminal sexual contact, incest or criminal sexual penetration, as those acts are defined by state law. §32A-4-2.

Sexual exploitation includes but is not limited to:
(1) allowing, permitting or encouraging a child to engage in prostitution;
(2) allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or
(3) filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law. §32A-4-2.

Transition plan means an individualized written plan for a child, based on the unique needs of the child, that outline all appropriate services to be provided to the child to increase independent living skills. The plan must also include responsibilities of the child, and any

other party as appropriate, to enable the chld to be self-sufficient upon emancipation. §32A-4-2 (added in 2009).

Tribal court means:
(1) a court established and operated pursuant to a code or custom of an Indian tribe; or
(2) any administrative body of an Indian tribe that is vested with judicial authority. §32A-1-4.

Tribal court order means a document issued by a tribal court that is signed by an appropriate authority, including a judge, governor or tribal council member, and that orders an action that is within the tribal court's jurisdiction. §32A-1-4.

APPENDIX C

TABLE OF STATUTES

Abuse and Neglect Act, NMSA 1978, Chapter 32A, Article 4, §32A-4-1 *et seq*.

Adoption Act, NMSA 1978, Chapter 32A, Article 5, §32A-5-1 *et seq.*

Adoption and Safe Families Act of 1997 (ASFA), Pub. L. 105-89, 111 Stat. 2115, amending 42 U.S.C. §§671-675.

Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat. 500, 42 U.S.C. §§670-676 and amending §§620-628.

Americans with Disabilities Act (ADA), 42 U.S.C. §12131-12134.

Child Abuse Prevention and Treatment Act of 1974 (CAPTA), Pub. L. 93-247, 88 Stat. 4, 42 U.S.C. §§5101-5107.

Child and Family Services Improvement Act of 2006, Pub. L. 109-288.

Child Placement Agency Licensing Act, NMSA 1978, Chapter 40, Article 7A, §40-7A-1 *et seq*.

Children's Code, NMSA 1978, Chapter 32A, §32A-1-1 *et seq*.

Children's Mental Health and Developmental Disabilities Act, NMSA 1978, Chapter 32A, Article 6, §32A-6A-1 *et seq*.

Children's Shelter Care Act, NMSA 1978, Chapter 32A, Article 9, §32A-9-1 *et seq*.

Children, Youth and Families Department Act, NMSA 1978, Chapter 9, Article 2A, §9-2A-1 *et seq*.

Criminal Code, NMSA 1978, Chapter 30, §30-1-1 *et seq*.

Criminal Sentencing Act, NMSA 1978, Chapter 31, Article 18, §31-18-12 *et seq*.

Delinquency Act, NMSA 1978, Chapter 32A, Article 2, §32A-2-1 *et seq*.

Emancipation of Minors Act, NMSA 1978, Chapter 32A, Article 21, §32A-21-1 *et seq*.

Families in Need of Court-Ordered Services Act, NMSA 1978, Chapter 32A, Article 3B, §32A-3B-1 *et seq*.

Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g.

Foster Care Independence Act, Pub. L. 106-169, 42 U.S.C. §§677-679c.

Foster Care System Student Tuition Waiver, 2014 N.M. Laws, ch. 62 (Senate Bill 206).

Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. 110-351, 122 Stat. 3949, amending 42 U.S.C. §§671-676, among others.

Indian Child Welfare Act of 1978 (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. §§1901-1923.

Interstate Compact on the Placement of Children, NMSA 1978, Chapter 32A, Article 11, §32A-11-1 *et seq*.

Juvenile Public Safety Advisory Board Act, NMSA 1978, Chapter 32A, Article 7A, §32A-7A-1 *et seq*.

Multiethnic Placement Act (MEPA), Pub. L. 103-382, 108 Stat. 4056, amended by Pub.L. 104-188, 110 Stat. 1903, 42 U.S.C. §§622(b)(7), 671(a)(18) and 1996b.

Safe and Timely Interstate Placement of Foster Children Act, Pub. L. 109-239, 120 Stat. 508.

Safe Haven for Infants Act, NMSA 1978, Chapter 24, Article 22, §24-22-1 *et seq*.

Sex Offender Registration and Notification Act (SORNA), NMSA 1978, Chapter 29, Article 11A, §29-11A-1 *et seq*.

Sexual Exploitation of Children Act, NMSA 1978, Chapter 30, Article 6A, §30-6A-1 *et seq*.

Sexual Offenses, NMSA 1978, Chapter 30, Article 9, §30-9-1 *et seq*.

Trials, NMSA 1978 Chapter 38, Article 4, Parties, §38-4-1 *et seq*.

Uniform Child Witness Protective Measures Act, NMSA 1978, Chapter 38, Article 6A, §38-6A-1 *et seq*.

Uninterrupted Scholars Act, Pub. L. 112-278, 126 Stat. 2480, amending 20 U.S.C. §1232g.

Victims of Crime Act, NMSA 1978, Chapter 31, Article 26, §31-26-1 *et seq*.

APPENDIX D

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