CHAPTER 32A
Children's Code

ANNOTATIONS

Compiler's notes. — Laws 1993, ch. 77 revised the 1972 Children's Code by repealing and recompiling the former sections and enacting new sections compiled by that act throughout Chapter 32 NMSA 1978. However, in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under the previous Children's Code, the sections as enacted or recompiled by Chapter 77 of Laws 1993 have been recompiled to Chapter 32A NMSA 1978. The legislatively assigned Article and Section numbers have been retained. Citations to decisions under prior law have been included whenever possible. For the 1972 Children's Code, as amended, *see* the 1992 NMSA 1978 on New Mexico One Source of Law DVD.

ARTICLE 1
General Provisions

ANNOTATIONS

Compiler's notes. — Sections 32A-1-1 to 32A-1-20 NMSA 1978 were originally enacted as 32-1-1 to 32-1-19 NMSA 1978 by Laws 1993, ch. 77, §§ 10 to 29. The sections as enacted by Chapter 77 of Laws 1993 have been recompiled to Chapter 32A NMSA 1978 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been included whenever possible.

32A-1-1. Short title.

Chapter 32A NMSA 1978 may be cited as the "Children's Code".

History: 1978 Comp., § 32A-1-1, enacted by Laws 1993, ch. 77, § 10; 1995, ch. 206, § 1.

ANNOTATIONS

Cross references. — For authority to administer social services for children in the social services division of the human services department, *see* 9-8-13 NMSA 1978.

For sexually oriented material harmful to minors, *see* 30-37-1 NMSA 1978.

For the Uniform Child Custody Jurisdiction Act, *see* 40-10-1 NMSA 1978.

For the Uniform Child-Custody Jurisdiction and Enforcement Act, *see* 40-10A-101 NMSA 1978.

For the Kinship Guardianship Act, *see* 40-10B-1 NMSA 1978.

For the Children's Court Rules, *see* 10-101 NMRA.

The 1995 amendment, effective July 1, 1995, substituted "Chapter 32A" for "Chapter 32".

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-1 NMSA 1978 have been included in the annotations to this section.

Termination of benefits pending hearing. — Combination of benefits received under the Aid to Families with Dependent Children program, during the time the children are in foster care pending an adjudicatory hearing to determine whether the children are being abused or neglected and should remain in the custody of the Social Services Division, is prohibited until after a full adjudicatory hearing and final judicial decision that the children must be removed from the home. Kramer v. New Mexico Human Servs. Dep't, 114 N.M. 479, 840 P.2d 1245 (Ct. App. 1992).

Applicability of Children's Code to residents of federal enclave. — The state could exercise its jurisdiction and apply the provisions of the Children's Code to those who reside on a federal military enclave because, in those areas where the federal government has no laws or regulations, there is no interference by the state when it asserts jurisdiction; in such cases, there would be no need for the federal government to relinquish its jurisdiction as provided in 19-2-2 NMSA 1978. State ex rel. Children, Youth & Families Dep't v. Debbie F., 120 N.M. 665, 905 P.2d 205 (Ct. App. 1995).

Violation of grade court. — The Children’s Code authorizes the children’s court to order detention for violation of grade court. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Repeals and supersedes provisions of Delinquent Children's Act. — The Children's Code repeals and supersedes many of the provisions of the Delinquent Children's Act, cited as 13-8-1 through 13-8-73, 1953 Comp. 1972 Op. Att'y Gen. No. 72-27.

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation," see 9 N.M.L. Rev. 45 (1978-79).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

For comment, "The Right to Be Present: Should It Apply to the Involuntary Civil Commitment Hearing," see 17 N.M.L. Rev. 165 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Authority of court to order juvenile delinquent incarcerated in adult penal institution, 95 A.L.R.3d 568.

Failure of state or local government to protect child abuse victim as violation of federal constitutional right, 79 A.L.R. Fed. 514.

32A-1-2. Short title; scope.

A. Chapter 32 [32A], Article 1 NMSA 1978 may be cited as the "Children's Code General Provisions Act".

B. The provisions of the Children's Code General Provisions Act apply to Chapter 32 [32A] NMSA 1978:

(1) unless the context otherwise requires; and

(2) subject to additional definitions contained in Chapter 32 [32A], Articles 2 through 6 NMSA 1978.

History: 1978 Comp., § 32A-1-2, enacted by Laws 1993, ch. 77, § 11.

32A-1-3. Purpose of act.

The Children's Code shall be interpreted and construed to effectuate the following legislative purposes:

A. first to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of the Children's Code and then to preserve the unity of the family whenever possible. A child's health and safety shall be the paramount concern. Permanent separation of a child from the child's family, however, would especially be considered when the child or another child of the parent has suffered permanent or severe injury or repeated abuse. It is the intent of the legislature that, to the maximum extent possible, children in New Mexico shall be reared as members of a family unit;

B. to provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced;

C. to provide a continuum of services for children and their families, from prevention to treatment, considering whenever possible prevention, diversion and early intervention, particularly in the schools;

D. to provide children with services that are sensitive to their cultural needs;

E. to reduce overrepresentation of minority children and families in the juvenile justice, family services and abuse and neglect systems through early intervention, linkages to community support services and the elimination of discrimination;

F. to provide for the cooperation and coordination of the civil and criminal systems for investigation, intervention and disposition of cases, to minimize interagency conflicts and to enhance the coordinated response of all agencies to achieve the best interests of a child victim; and

G. to provide continuity for children and families appearing before the children's court by assuring that, whenever possible, a single judge hears all successive cases or proceedings involving a child or family.

History: 1978 Comp., § 32A-1-3, enacted by Laws 1993, ch. 77, § 12; 1999, ch. 77, § 1; 2009, ch. 239, § 6.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, in Subsection A added the second sentence and in the next-to-last sentence inserted "or another child of the parent has".

The 2009 amendment, effective July 1, 2009, added Subsection E.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-2 NMSA 1978 have been included in the annotations to this section.

Intent of code. — The Children's Code is intended to protect children from the consequences of their own acts so long as it is "consistent with the protection of the public interest," and it establishes a system of treatment, care and rehabilitation for children who have committed either "delinquent acts" or who are neglected or in need of supervision. State v. Favela, 91 N.M. 476, 576 P.2d 282 (1978), overruled on other grounds State v. Pitts, 103 N.M. 778, 714 P.2d 582 (1986).

The Children's Code has as its central focus children who are alleged to be delinquent, in need of supervision, abused, or neglected. In re Lupe C., 112 N.M. 116, 812 P.2d 365 (Ct. App. 1991).

With respect to neglected children, the legislative purposes contained in the Children's Code emphasize a legislative objective of keeping the family together whenever possible, separating the child from his parents and family only when necessary for his welfare, and providing services to assist the child and the family. In re Lupe C., 112 N.M. 116, 812 P.2d 365 (Ct. App. 1991).

Best interests of children is paramount consideration. — Parents do not have an absolute right to their children, for any right is secondary to the best interests and welfare of the children. In re Samantha D., 106 N.M. 184, 740 P.2d 1168 (Ct. App. 1987).

Proceedings to further stated purposes and policies. — The court is expected to conduct children's court proceedings in a manner that will further the purposes and policies stated in this section. State v. Doe, 97 N.M. 263, 639 P.2d 72 (Ct. App. 1981), cert. denied, 457 U.S. 1136, 102 S. Ct. 2965, 73 L. Ed. 2d 1354 (1982).

Children's Code must be read in entirety and each section interpreted so as to correlate as faultlessly as possible with all other sections, in order that the ends sought to be accomplished by the legislature shall not be thwarted. State v. Doe, 95 N.M. 88, 619 P.2d 192 (Ct. App. 1980).

Parents' right to custody not absolute. — Parents have a natural and legal right to custody of their children. This right is prima facie and not an absolute right. This right, however, must yield when the best interests and welfare of the child are at issue. Roberts v. Staples, 79 N.M. 298, 442 P.2d 788 (1968).

Placement with one other than minor's parent. — The court did not violate the spirit and intent of the Children's Code by placing a 16-year-old girl in the custody of a woman who had helped to rear her and had been found to be a positive influence over her where the child felt compelled to run away from her mother's household and would in all likelihood continue to refuse to live with her mother since the children's court is vested with a broad discretion in hearing and deciding matters under it. In re Doe, 88 N.M. 505, 542 P.2d 1195 (Ct. App. 1975).

Committal to youth authority in best interests of child. — Since the evidence revealed that a child committing involuntary manslaughter had engaged in other violent behavior, the children's court could have reasonably determined that transferring the custody of the child to the youth authority was consistent with the child's best interests, the interests of the child's family, and the interests of the public. State v. Cody R., 113 N.M. 140, 823 P.2d 940 (Ct. App.), cert. denied, 113 N.M. 23, 821 P.2d 1060 (1991).

Subject of act adequately expressed in title. — Since the "subject" of the act is children and that subject is clearly expressed, a provision within the act authorizing a change in the custody of a neglected child is a detail provided for accomplishing the legislative purpose of protecting children and such detail need not be set forth in the title of the bill to comply with the requirement of N.M. Const., art. IV, § 16, that the subject of every bill be clearly expressed in its title. State ex rel. Health & Social Servs. Dep't v. Natural Father, 93 N.M. 222, 598 P.2d 1182 (Ct. App. 1979).

Right to be treated as child is a statutory, not a constitutional, right. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

Same constitutional standards apply to juveniles as to adults. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967).

Law reviews. — For comment on Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968), see 9 Nat. Resources J. 310 (1969).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

For note, "Children's Code - Neglect - State ex rel. Health & Social Services Department v. Natural Father," see 12 N.M.L. Rev. 505 (1982).

32A-1-4. Definitions.

As used in the Children's Code:

A. "adult" means a person who is eighteen years of age or older;

B. "child" means a person who is less than eighteen years old;

C. "court", when used without further qualification, means the children's court division of the district court and includes the judge, special master or commissioner appointed pursuant to the provisions of the Children's Code or supreme court rule;

D. "court-appointed special advocate" or "CASA" means a person appointed as a CASA, pursuant to the provisions of the Children's Court Rules [10-101 NMRA], who assists the court in determining the best interests of the child by investigating the case and submitting a report to the court;

E. "custodian" means an adult with whom the child lives who is not a parent or guardian of the child;

F. "department" means the children, youth and families department, unless otherwise specified;

G. "disproportionate minority contact" means the involvement of a racial or ethnic group with the criminal or juvenile justice system at a proportion either higher or lower than that group's proportion in the general population;

H. "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;

I. "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;

J. "guardian ad litem" 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;

K. "Indian child" means an unmarried person who is:

(1) less than eighteen 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;

L. "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;

M. "Indian tribe" means a federally recognized Indian tribe, community or group pursuant to 25 U.S.C. Section 1903(1);

N. "judge", when used without further qualification, means the judge of the court;

O. "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 [32A-6A-1 NMSA 1978]; and the right to consent to the child's enlistment in the armed forces of the United States;

P. "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;

Q. "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;

R. "person" means an individual or any other form of entity recognized by law;

S. "preadoptive parent" means a person with whom a child has been placed for adoption;

T. "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;

U. "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;

V. "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;

W. "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; and

X. "tribunal" means any judicial forum other than the court.

History: 1978 Comp., § 32A-1-4, enacted by Laws 1993, ch. 77, § 13; 1995, ch. 206, § 2; 1999, ch. 77, § 2; 2003, ch. 225, § 1; 2005, ch. 189, § 1; 2009, ch. 239, § 7.

ANNOTATIONS

Cross references. — For the Children's Court Rules, *see* 10-101 NMRA.

The 1995 amendment, effective July 1, 1995, in Subsection G, inserted "or certified" following "licensed"; in Subsection N, inserted "department" preceding "or agency" and the language beginning "the right to" and ending "Disabilities Act;"; in Subsection O, substituted "biological" for "natural"; added Subsections Q and R; and redesignated former Subsection Q as Subsection S.

The 1999 amendment, effective July 1, 1999, deleted "but is not necessarily limited in either number or kind to" at the end of Subsection I; in Subsection O, inserted the language beginning "if the biological" to the end of the first sentence and added the second sentence; and added Subsections P and R, and redesignated the subsequent subsections accordingly.

The 2003 amendment, effective July 1, 2003, substituted "a person" for "an individual" in Subsections A and B; deleted "and Forms" following "Children's Court Rules" in Subsection D; substituted "a person" for "any persons" following "residential facility or" in Subsection E; substituted "A person" for "An individual" preceding "granted legal custody" in Subsection N; substituted "with the child placed in the home of a fit and willing relative" for "until the child reaches the age of majority, unless the child is emancipated, pursuant to the Emancipation of Minors Act" in Paragraph P(4); deleted "that meets the department's definition of long-term foster care" at the end of Paragraph P(5).

The 2005 amendment, effective June 17, 2005, defined "custodian" in Subsection E to mean an adult with whom a child lives who is not a parent or guardian of the child; defined "guardian" in Subsection H to mean a person appointed as a guardian by a court, Indian tribal authority or a person with parental power of attorney; deleted the definition of "guardianship" in former Subsection I; added the definition of "Indian tribe" in Subsection L; provided in Subsection N that "legal custody" includes a legal status created by operation of statute and includes the right and duty to provide personal care of a child; deleted from the former provisions in Subsection N that the rights and duties

of legal custody were subject to the rights of the guardian of the child and that required a person granted legal custody to exercise the custodial rights personally; deleted the former provision in Subsection O that a parent retains the duties of guardianship and legal custody of a child; defined "permanency plan" in Subsection P to include a determination that a child's interest will be served best by a reunification or placement with a person who will be the child's permanent guardian; added the definition of "protective supervision" in Subsection S; and added the definition of "reunification" in Subsection T.

The 2009 amendment, effective July 1, 2009, added Subsection G.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-3 NMSA 1978 have been included in the annotations to this section.

Stepfather as "custodian". — A stepfather meets the definition of "custodian" for purposes of the court's subject matter jurisdiction over him in a proceeding on a petition alleging abuse or neglect of a child. State ex rel. Children, Youth & Families Dep't (In re Candice Y.), 2000-NMCA-035, 128 N.M. 813, 999 P.2d 1045.

Human services department not "person". — State health and social services (now human services) department was not a "person" within the meaning of the Children's Code. Thus, the department need not be made a party to nor was its presence required in any action filed pursuant to the Children's Code where it may be ordered to assume certain responsibilities pursuant to the Children's Code. In re Doe, 88 N.M. 632, 545 P.2d 491 (Ct. App. 1975).

Ex parte conduct rule inapplicable to guardians ad litem. — Rule 16-402 NMRA of the Rules of Professional Conduct does not prohibit guardians ad litem from communicating ex parte with department of children, youth and families social workers; although attorneys, guardians ad litem do not have typical attorney-client relationships with children, and are therefore not bound by that rule. State ex rel. Children, Youth & Families Dep't v. George F., 1998-NMCA-119, 125 N.M. 597, 964 P.2d 158.

"Legal custody" continues until terminated by appropriate authority. — A parent has a legal right to the custody of his child unless that right had been terminated, however temporarily, by appropriate authority. State v. Sanders, 96 N.M. 138, 628 P.2d 1134 (Ct. App. 1981).

A parent's legal right to custody of a child does not end until entry of, and the giving of notice of, a judgment in compliance with Rule 62(a), N.M.R. Child. Ct. (now 10-350

NMRA), requiring a signed written judgment and disposition. State v. Sanders, 96 N.M. 138, 628 P.2d 1134 (Ct. App. 1981).

Age references are to years of age, not mental age. — The numerous references to age in the Children's Code are references to years of age, not mental age. State v. Doe, 97 N.M. 598, 642 P.2d 201 (Ct. App. 1982).

Law reviews. — For comment, "Navajo Grandparents - ‘Parent’ or ‘Stranger’ - A Child Custody Determination," see 9 N.M.L. Rev. 187 (1978-79).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

32A-1-5. Children's court established as division of district court; transfer.

A. There is established in the district court for each county a division to be known as the children's court. The district court of each judicial district shall designate one or more district judges to sit as judge of the children's court.

B. The supreme court shall adopt rules of procedure not in conflict with the Children's Code governing proceedings in the children's court, including rules and procedures for juries.

C. If, in a criminal action, it appears to a court other than the children's court division of the district court that jurisdiction is properly within the children's court division, the other court shall transfer the matter to the children's court division. Upon transfer, the children's court division obtains jurisdiction over the matter for proceedings in accordance with the provisions of the Children's Code.

History: 1978 Comp., § 32A-1-5, enacted by Laws 1993, ch. 77, § 14.

ANNOTATIONS

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-4 NMSA 1978 have been included in the annotations to this section.

No constitutional violation. — Since the 1921 Juvenile Court Law was applicable only to special statutory proceedings set up therein, it did not abrogate the jurisdiction of district courts over minors and therefore was not in violation of N.M. Const., art. VI, § 13. In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943).

Division created. — The Juvenile (now Children's) Code created a division of the district court. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Court not inferior to district court. — The N.M. Const., art. VI, § 1, authorizing creation of inferior courts did not require that jurisdiction of district courts over juveniles, provided in N.M. Const., art. VI, § 13, be transferred to courts inferior to district courts; the juvenile court (now children's court) created in 1955 was not a court inferior to the district court but rather a division of the district court and was constitutionally created. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Jurisdiction of court. — A condition of probation in a criminal sexual contact case, prohibiting defendant from having direct or indirect contact with all children under the age of 18, including the victim of his crimes, did not amount to a "de facto" termination of parental rights, necessitating jurisdiction within the children's court. State v. Garcia, 2005-NMCA-065, 137 N.M. 583, 113 P.3d 406.

Right to disqualify judge. — The fact that the Juvenile (now Children's) Code created special procedures and special handling for minors accused of criminal offenses, and no provision is made in the Juvenile (now Children's) Code for the disqualification of a juvenile (now children's court) judge, does not mean that the provisions of 38-3-9 NMSA 1978 are inapplicable to juvenile (now children's) court proceedings. The juvenile (now children's court) judge is none other than the district judge serving in another division of the district court and the juvenile is a party to the action or proceeding and entitled to exercise the right of disqualification given her by 38-3-9 NMSA 1978. Frazier v. Stanley, 83 N.M. 719, 497 P.2d 230 (1972).

When judge not proper respondent in habeas corpus proceeding. — Juvenile (now children's) court justice is not the proper party in habeas corpus proceeding since only the person having the physical custody of a petitioner (here the sheriff), and who is able to produce him in court, may properly be named as respondent in the habeas corpus proceeding. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 1 et seq.

Family court jurisdiction to hear contract claims, 46 A.L.R.5th 735.

43 C.J.S. Infants § 6.

32A-1-6. Children's court attorney.

A. The "office of children's court attorney" is established in each judicial district. Except as provided by Subsection C, D or E of this section, each district attorney is the ex-officio children's court attorney for the judicial district of the district attorney.

B. Except as provided by Subsection C, D or E of this section, the children's court attorney may represent the state in any matter arising under the Children's Code when the state is the petitioner or complainant. The children's court attorney shall represent the petitioner in matters arising under the Children's Code when, in the discretion of the judge, the matter presents legal complexities requiring representation by the children's court attorney, whether or not the state is petitioner or complainant, but not in those matters when there is a conflict of interest between the petitioner or complainant and the state. A petitioner or complainant may be represented by counsel in any matter arising under the Children's Code.

C. In cases involving civil abuse or civil neglect and the periodic review of their dispositions, the attorney selected by and representing the department is the children's court attorney. The attorney selected by and representing the department shall provide the district attorney of the appropriate judicial district with a copy of any abuse or neglect petition filed in that judicial district. Upon the request of the district attorney, the attorney selected by and representing the department shall provide the district attorney with reports, investigations and pleadings relating to any abuse or neglect petition.

D. In cases involving families in need of court-ordered services, the periodic review of their dispositions and voluntary placements, the attorney selected by and representing the department is the children's court attorney. The attorney selected by and representing the department shall provide the district attorney of the appropriate judicial district with a copy of any family in need of court-ordered services petition filed in that judicial district. Upon the request of the district attorney, the attorney selected by and representing the department shall provide the district attorney with reports, investigations and pleadings relating to any family in need of court-ordered services petition.

E. In cases involving a child subject to the provisions of the Children's Mental Health and Developmental Disabilities Act [32A-6-1 NMSA 1978] that also involves civil abuse, civil neglect or a family in need of court-ordered services, the attorney selected by and representing the department is the children's court attorney. In cases involving a child subject to the provisions of the Children's Mental Health and Developmental Disabilities Act that does not also involve civil abuse, civil neglect or a family in need of court-ordered services, the district attorney is the ex-officio children's court attorney.

F. In those counties where the children's court attorney has sufficient staff and the workload requires it, the children's court attorney may delegate children's court functions to a staff attorney.

History: 1978 Comp., § 32A-1-6, enacted by Laws 1993, ch. 77, § 15; 1995, ch. 206, § 3; 2005, ch. 189, § 2.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "or E" following "D" and made minor stylistic changes in Subsections A and B; in Subsection C, substituted "with a copy of any abuse or neglect petition" for "reports, investigations and pleadings related to charges of abuse and neglect" and added the last sentence; in Subsection D, substituted the language at the end beginning "with a copy" for "reports, investigations and pleadings related to charges of abuse and neglect filed in that judicial district"; added Subsection E; and redesignated former Subsection E as Subsection F.

The 2005 amendment, effective June 17, 2005, added the phrase "court-ordered" in Subsection D.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-5 NMSA 1978 have been included in the annotations to this section.

Judge's interference with children's court attorney not permitted. — A judge is without authority to direct the juvenile probation office to refrain from referring juvenile cases to the district attorney without the judge's prior written consent, or to relieve the district attorney as children's court attorney and to appoint private attorneys to act and to be compensated out of the district attorney's budget, and to do so constitutes bad faith, malicious abuse of judicial power and willful misconduct in office. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Attorney has authority to execute affidavit of disqualification of judge. — The power and duty of the children's court attorney to represent the state necessarily includes the authority to execute an affidavit of disqualification of a judge when the disqualification is done on behalf of the state. Smith v. Martinez, 96 N.M. 440, 631 P.2d 1308 (1981).

District attorneys' pay. — The legal basis for continuing to pay district attorneys at their pre-Children's Code rate is found in N.M. Const., art. IV, § 27. 1972 Op. Att'y Gen. No. 72-45.

32A-1-7. Guardian ad litem; powers and duties.

A. A guardian ad litem shall zealously represent the child's best interests in the proceeding for which the guardian ad litem has been appointed and in any subsequent appeals.

B. Unless excused by a court, a guardian ad litem appointed to represent a child's best interests shall continue the representation in any subsequent appeals.

C. Any party may petition the court for an order to remove a guardian ad litem on the grounds that the guardian ad litem has a conflict of interest or is unwilling or unable to zealously represent the child's best interests.

D. After consultation with the child, a guardian ad litem shall convey the child's declared position to the court at every hearing.

E. Unless a child's circumstances render the following duties and responsibilities unreasonable, a guardian ad litem shall:

(1) meet with and interview the child prior to custody hearings, adjudicatory hearings, dispositional hearings, judicial reviews and any other hearings scheduled in accordance with the provisions of the Children's Code;

(2) communicate with health care, mental health care and other professionals involved with the child's case;

(3) review medical and psychological reports relating to the child and the respondents;

(4) contact the child prior to any proposed change in the child's placement;

(5) contact the child after changes in the child's placement;

(6) attend local substitute care review board hearings concerning the child and if unable to attend the hearings, forward to the board a letter setting forth the child's status during the period since the last local substitute care review board review and include an assessment of the department's permanency and treatment plans;

(7) report to the court on the child's adjustment to placement, the department's and respondent's compliance with prior court orders and treatment plans and the child's degree of participation during visitations; and

(8) represent and protect the cultural needs of the child.

F. A guardian ad litem may retain separate counsel to represent the child in a tort action on a contingency fee basis or any other cause of action in proceedings that are outside the jurisdiction of the children's court. When a guardian ad litem retains separate counsel to represent the child, the guardian ad litem shall provide the court with written notice within ten days of retaining the separate counsel. A guardian ad litem shall not retain or subsequently obtain any pecuniary interest in an action filed on behalf of the child outside of the jurisdiction of the children's court.

G. In the event of a change of venue, the originating guardian ad litem shall remain on the case until a new guardian ad litem is appointed by the court in the new venue

and the new guardian ad litem has communicated with and received all pertinent information from the former guardian ad litem.

H. A guardian ad litem shall receive notices, pleadings or other documents required to be provided to or served upon a party. A guardian ad litem may file motions and other pleadings and take other actions consistent with the guardian ad litem's powers and duties.

I. A guardian ad litem shall not serve concurrently as both the child's delinquency attorney and guardian ad litem.

History: 1978 Comp., § 32A-1-7, enacted by Laws 1993, ch. 77, § 16; 1995, ch. 206, § 4; 2005, ch. 189, § 3.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "with respect to matters arising pursuant to the provisions of the Children's Code" in Subsection A; added Subsections C and F and redesignated the remaining subsections accordingly; in Subsection E, inserted "or any other cause of action" following "fee basis" and added the last sentence; and made minor stylistic changes throughout the section.

The 2005 amendment, effective June 17, 2005, provided in Subsection A that a guardian ad litem shall represent a child in a proceeding for which the guardian has been appointed and in subsequent appeals; provided in Subsection B that unless excused by a court, a guardian ad litem shall continue the representation in subsequent appeals; provided in Subsection D that a guardian ad litem shall convey the child's declared position to the court at every hearing; provided in Subsection E that unless a child's circumstances render the prescribed duties and responsibilities unreasonable, the guardian ad litem shall perform the prescribed duties and responsibilities in Subsection E; added Subsection H to provide that a guardian ad litem shall receive documents required to be provided or served on a party and may file motions and pleadings and take actions consistent with the guardian's powers and duties; and added Subsection I to provide that a guardian ad litem shall not serve concurrently as a child's delinquency attorney and guardian ad litem.

Guardian ad litem's dual role. — A guardian ad litem has the dual role of representing the child's best interests, while also presenting the child's position to the court when reasonable and appropriate, even if the child's position conflicts with what the guardian ad litem thinks should be done. State ex rel. Children, Youth & Families Dep't v. Esperanza M., 1998-NMCA-039, 124 N.M. 735, 955 P.2d 204; State ex rel. Children, Youth & Families Dep't (In re Candice Y.), 2000-NMCA-035, 128 N.M. 813, 999 P.2d 1045.

Attorney's dual relationship with child—as guardian ad litem during abuse and neglect proceedings, and then as her defense attorney during delinquency

proceedings—has potential to become actual, active conflict of interest, and requires, when acting as defense attorney, that counsel adopt child's viewpoint and zealously represent child's wishes, whether or not counsel necessarily agrees that those wishes represent child's best interests State v. Joanna V., 2004-NMSC-024, 136 N.M. 40, 94 P.3d 783.

Ex parte conduct rule inapplicable to guardians ad litem. — Rule 16-402 of the Rules of Professional Conduct does not prohibit guardians ad litem from communicating ex parte with department of children, youth and families social workers; although attorneys, guardians ad litem do not have typical attorney-client relationships with children, and are therefore not bound by that rule. State ex rel. Children, Youth & Families Dep't v. George F., 1998-NMCA-119, 125 N.M. 597, 964 P.2d 158.

32A-1-7.1. Child's attorney; powers and duties.

A. An attorney shall represent a child in a proceeding for which the attorney has been retained or appointed. The 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.

B. Unless excused by a court, an attorney appointed to represent a child shall represent the child in any subsequent appeals.

C. An attorney representing a child in a proceeding pursuant to the Abuse and Neglect Act [32A-4-1 NMSA 1978] may retain separate counsel to represent the child in a tort action on a contingency fee basis or any other cause of action in proceedings that are outside the jurisdiction of the children's court. When a child's attorney retains separate counsel to represent the child, the attorney shall provide the court with written notice within ten days of retaining the separate counsel. The child's attorney shall not retain or subsequently obtain any pecuniary interest in an action filed on behalf of the child outside of the jurisdiction of the children's court.

History: Laws 2005, ch. 189, § 10.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 189 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-1-8. Jurisdiction of the court; tribal court jurisdiction.

A. The court has exclusive original jurisdiction of all proceedings under the Children's Code in which a person is eighteen years of age or older and was a child at the time the alleged act in question was committed or is a child alleged to be:

(1) a delinquent child;

(2) a child of a family in need of court-ordered services or a child in need of services pursuant to the Family in Need of Court-Ordered Services Act [32A-3B-1 NMSA 1978];

(3) a neglected child;

(4) an abused child;

(5) a child subject to adoption; or

(6) a child subject to placement for a developmental disability or a mental disorder.

B. The court has exclusive original jurisdiction to emancipate a minor.

C. During abuse or neglect proceedings in which New Mexico is the home state, pursuant to the provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978], the court shall have jurisdiction over both parents to determine the best interest of the child and to decide all matters incident to the court proceedings.

D. Nothing in this section shall be construed to in any way abridge the rights of any Indian tribe to exercise jurisdiction over child custody matters as defined by and in accordance with the federal Indian Child Welfare Act of 1978.

E. A tribal court order pertaining to an Indian child in an action under the Children's Code shall be recognized and enforced by the district court for the judicial district in which the tribal court is located. A tribal court order pertaining to an Indian child that accesses state resources shall be recognized and enforced pursuant to the provisions of intergovernmental agreements entered into by the Indian child's tribe and the department or another state agency. An Indian child residing on or off a reservation, as a citizen of this state, shall have the same right to services that are available to other children of the state, pursuant to intergovernmental agreements. The cost of the services provided to an Indian child shall be determined and provided for in the same manner as services are made available to other children of the state, utilizing tribal, state and federal funds and pursuant to intergovernmental agreements. The tribal court, as the court of original jurisdiction, shall retain jurisdiction and authority over the Indian child.

F. The court may acquire jurisdiction over a Motor Vehicle Code [66-1-1 NMSA 1978] or municipal traffic code violation as set forth in Section 32A-2-29 NMSA 1978.

History: 1978 Comp., § 32A-1-8, enacted by Laws 1993, ch. 77, § 17; 1995, ch. 206, § 5; 1999, ch. 46, § 1; 1999, ch. 78, § 1; 2005, ch. 189, § 4; 2009, ch. 239, § 8.

ANNOTATIONS

Cross references. — For the Uniform Child-Custody Jurisdiction and Enforcement Act, *see* 40-10A-101 NMSA 1978.

For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901 et seq.

The 1995 amendment, effective July 1, 1995, added "tribal court jurisdiction" to the section heading; in Subsection B, deleted "under other laws which will be controlled by provisions of the other laws without regard to provisions of the Children's Code"; in Subsection C, deleted "children's" preceding "court"; and added Subsection E.

The 1999 amendment, effective July 1, 1999, in Subsection E, deleted "that is not subject to the provisions of the Children's Mental Health and Developmental Disabilities Act and" following "Indian child" in the second sentence, and added the last three sentences. Laws 1999, ch. 46, § 1, effective July 1, 1999, enacted identical amendments to this section. The section was set out as amended by Laws 1999, ch. 78, § 1. *See* 12-1-8 NMSA 1978.

The 2005 amendment, effective June 17, 2005, provided in Subsection A that the court has jurisdiction of a child in need of court-ordered services or in need of services pursuant to the Family in Need of Services Act.

The 2009 amendment, effective July 1, 2009, added Subsection F.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-9 NMSA 1978 have been included in the annotations to this section.

Children's court is empowered to enter injunction conducive to purposes of Children's Code. State v. Echols, 99 N.M. 517, 660 P.2d 607 (Ct. App. 1983).

District court has jurisdiction in guardianship, paternity and parental rights disputes. — The district court, whether or not sitting as children's court, has jurisdiction over disputes concerning guardianship, paternity and termination of parental rights. Thatcher v. Arnall, 94 N.M. 306, 610 P.2d 193 (1980).

Section 40-10-15A(1) NMSA 1978 is in pari materia with this section because both deal with jurisdiction of the children's court; and, being in pari materia, they are to be construed together, if possible, to give effect to the provisions of both statutes. The construction that this section gives the children's court the exclusive jurisdiction to act

and that 40-10-15A(1) NMSA 1978 limits when that authority is to be exercised, gives effect to both statutes. State ex rel. Department of Human Servs. v. Avinger, 104 N.M. 355, 721 P.2d 781 (Ct. App. 1985), aff'd, 104 N.M. 255, 720 P.2d 290 (1986).

Section 40-10-15A NMSA 1978 limits the court's exercise of jurisdiction in a "neglected child" proceeding if that proceeding could result in the modification of another state's custody decree if the other state has not given up jurisdiction. State ex rel. Department of Human Servs. v. Avinger, 104 N.M. 255, 720 P.2d 290 (1986).

Subsection B of former 32-1-9 NMSA 1978 did not limit district court's jurisdiction. — The words "exclusive original jurisdiction" used in Subsection B of former 32-1-9 NMSA 1978 were not intended to limit or abrogate the jurisdiction of the district court. Thatcher v. Arnall, 94 N.M. 306, 610 P.2d 193 (1980).

Neglect proceeding is not bar to termination proceeding. — A prior proceeding concerned with the fact of neglect is not a jurisdictional bar to a later, separate termination proceeding. State ex rel. Human Servs. Dep't v. Levario, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Jurisdiction to be affirmatively established when defendant's minority at issue. — Exclusive original jurisdiction over juveniles under 18 years of age is vested in the children's court and where the minority of the defendant appears during the course of the trial, the jurisdiction of the trial court must, at that point, be affirmatively established. Trujillo v. Cox, 75 N.M. 257, 403 P.2d 696 (1965).

Jurisdiction over persons contributing to delinquency of minor. — Insofar as the juvenile law purported to confer "exclusive original jurisdiction" on juvenile (now children's) courts over persons contributing to the delinquency of juveniles it was invalid since the constitution vested sole and exclusive jurisdiction for the trial of all felony cases in the district courts. State v. McKinley, 53 N.M. 106, 202 P.2d 964 (1949).

Age references are to years of age, not mental age. — The numerous references to age in the Children's Code are references to years of age, not mental age. State v. Doe, 97 N.M. 598, 642 P.2d 201 (Ct. App. 1982).

Effect of petition alleging child in need of supervision. — A child in need of supervision means a child in need of care or rehabilitation, and where the petition alleged that the child was in need of supervision, there was no merit to the claim that the petition was jurisdictionally deficient. In re Doe, 88 N.M. 505, 542 P.2d 1195 (Ct. App. 1975).

Vested with sole jurisdiction. — The sole jurisdiction over juveniles in the state of New Mexico has been vested in the juvenile (now children's) court. 1959-60 Op. Att'y Gen. No. 59-131.

Jurisdiction of other courts. — There is no limitation in the Children's Code providing that only children's courts may issue subpoenas to children. Therefore, if a witness fails to appear as ordered, the court with jurisdiction over the case may issue a bench warrant for that witness' arrest, whether or not that witness is a child. 1989 Op. Att'y Gen. No. 89-14.

Being found within county without more, held not to suffice. — Juveniles who are merely found within a county in which a particular juvenile (now children's) court has jurisdiction, but who are not otherwise within the provisions of the code, may not be held. For a child under 18 years of age to be within the provisions of the Juvenile (now Children's) Code so as to permit him to be taken into custody and lawfully held requires that the juvenile shall have fallen into one of the following situations: (1) violated a law of the state or ordinance or regulation of a political subdivision of the state; (2) has by habitual disobedience of parental or other authority become habitually disobedient, wayward or uncontrollable; (3) is habitually truant from home or school; and (4) habitually deports himself in a manner to injure or endanger the morals, health or welfare of himself or others. 1959-60 Op. Att'y Gen. No. 59-52.

Juvenile to be cited to children's court by police officer. — No town or city police officer may knowingly cite a juvenile offender into any court other than the juvenile (now children's) court; and if a juvenile is mistakenly cited into any other court, the case must be transferred to the juvenile (now children's) court. That court may, in its discretion, allow the juvenile to be treated as an adult, and taken before another court of competent jurisdiction, but all cases of traffic violations by juveniles must first be submitted to the juvenile (now children's) court, as that court has exclusive original jurisdiction. 1959-60 Op. Att'y Gen. No. 60-199.

Apprehension for violation of state law or prohibited habitual conduct. — The Juvenile (now Children's) Code does not authorize the apprehension and holding of juveniles unless a state law is violated or the juvenile is charged with habitual conduct specifically prohibited. 1959-60 Op. Att'y Gen. No. 59-52.

Allegation of habitual conduct by officer. — It is a practical impossibility for an apprehending officer to truthfully allege habitual conduct in the case of a runaway, except, of course, where the juvenile's past record is, in fact, known and can be presented. 1959-60 Op. Att'y Gen. No. 59-52.

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For comment, "Navajo Grandparents - ‘Parent’ or ‘Stranger’ - A Child Custody Determination," see 9 N.M.L. Rev. 187 (1978-79).

For article, "Children's Waiver of Miranda Rights and the Supreme Court's Decisions in Parham, Bellotti, and Fare," see 10 N.M.L. Rev. 379 (1980).

For article, "Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders", see 34 N.M.L. Rev. 381 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 36 et seq.

Marriage as affecting jurisdiction of juvenile court over delinquent or dependent children, 14 A.L.R.2d 336.

Civil or criminal nature of proceedings, 43 A.L.R.2d 1128.

Homicide by juvenile as within jurisdiction of juvenile court, 48 A.L.R.2d 663.

Age of child at time of alleged offense or delinquency, or at time legal proceedings are commenced, as criterion of jurisdiction of juvenile court, 89 A.L.R.2d 506.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 A.L.R.4th 985.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 A.L.R.4th 786.

43 C.J.S. Infants § 6.

32A-1-9. Venue and transfer.

A. Proceedings in the court under the provisions of the Children's Code shall begin in the county where the child resides. If delinquency is alleged, the proceeding may also be begun in the county where the act constituting the alleged delinquent act occurred or in the county in which the child is detained. Neglect, abuse, family in need of court-ordered services or mental health proceedings may also begin in the county where the child is present when the proceeding is commenced.

B. The venue for proceedings under other laws will be determined by the venue provisions of the other laws. If the other laws contain no venue provisions, then the venue and transfer provisions of Subsections A and C of this section apply.

C. If a proceeding is begun in a court for a county other than the county in which the child resides, that court, on its own motion or on the motion of a party made at any time prior to disposition of the proceeding, may transfer the proceeding to the court for the county of the child's residence for such further proceedings as the receiving court

deems proper. A like transfer may be made if the residence of the child changes during or after the proceeding. Certified copies of all legal and social records pertaining to the proceeding shall accompany the case on transfer.

D. In neglect, abuse, family in need of court-ordered services or adoption proceedings for the placement of an Indian child, the court shall, in the absence of good cause to the contrary, transfer the proceeding to the jurisdiction of the Indian child's tribe upon the petition of the Indian child's parent, the Indian child's guardian or the Indian child's tribe. The transfer shall be barred if there is an objection to the transfer by a parent of the Indian child or the Indian child's tribe.

History: 1978 Comp., § 32A-1-9, enacted by Laws 1993, ch. 77, § 18; 1999, ch. 196, § 1; 2005, ch. 189, § 5.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, inserted "or after" in the second sentence of Subsection C, in Subsection D, inserted "Indian" preceding "child's parents" in the first sentence, and "Indian" preceding "child or" in the third sentence.

The 2005 amendment, effective June 17, 2005, changed "custodian" to "guardian" in Subsection D.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-13 NMSA 1978 have been included in the annotations to this section.

Intent of section. — The legislature intended to create a mechanism which would allow both the children's court and the district court to exercise full subject matter jurisdiction in criminal matters. State v. Garcia, 93 N.M. 51, 596 P.2d 264 (1979).

District court was required to send matter to children's court if defendant was not adult when the offense charged allegedly was committed. State v. Doe, 95 N.M. 88, 619 P.2d 192 (Ct. App. 1980).

Traffic offenses not deemed delinquent acts. — Municipal and magistrate courts can exercise jurisdiction over children for traffic offenses which are not designated delinquent acts under the Children's Code. 1972 Op. Att'y Gen. No. 72-32.

Extradition of juveniles from another state. — See 1973 Op. Att'y Gen. No. 73-14.

Remand from state district court to children's court. — On habeas corpus petitions by state prisoners, the federal courts are concerned only with basic constitutional questions, and whether a juvenile under New Mexico law is entitled to a remand from the state district court to the juvenile (now children's) court because of defects in the

waiver of jurisdiction presents a procedural question ordinarily to be determined by the New Mexico courts. Salazar v. Rodriguez, 371 F.2d 726 (10th Cir. 1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Jurisdiction of another court over child as affected by assumption of jurisdiction by juvenile court, 11 A.L.R. 147, 78 A.L.R. 317, 146 A.L.R. 1153.

Authority of court to order juvenile delinquent incarcerated in adult penal institution, 95 A.L.R.3d 568.

32A-1-10. Petition; who may sign.

A. A petition initiating proceedings pursuant to the provisions of Chapter 32 [32A], Article 2, 3B, 4 or 6 NMSA 1978 shall be signed by the children's court attorney.

B. An affidavit for an ex-parte custody order may be signed by any person who has knowledge of the facts alleged or is informed of them and believes that they are true.

History: 1978 Comp., § 32A-1-10, enacted by Laws 1993, ch. 77, § 19.

ANNOTATIONS

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-18 NMSA 1978 have been included in the annotations to this section.

Petition held insufficient. — The district court erred in applying the provisions of the Probate Code to appellees' application for guardianship and in adjudicating the child to be neglected under procedural provisions outside the provisions of the Children's Code, because the petition alleging neglect, seeking removal of the child from the mother's custody and the appointment of guardians did not comply with the provisions of former 32-1-17 and 32-1-18 NMSA 1978. In re Lupe C., 112 N.M. 116, 812 P.2d 365 (Ct. App. 1991).

32A-1-11. Petition; form and content.

A petition initiating proceedings pursuant to the provisions of Chapter 32A, Article 2, 3B, 4 or 6 NMSA 1978 shall be entitled, "In the Matter of ....., a child", and shall set forth with specificity:

A. the facts necessary to invoke the jurisdiction of the court;

B. if violation of a criminal statute or other law or ordinance is alleged, the citation to the appropriate law;

C. the name, birth date and residence address of the child;

D. the name and residence address of the parents, guardian, custodian or spouse, if any, of the child; and if no parent, guardian, custodian or spouse, if any, resides or can be found within the state or if a residence address is unknown, the name of any known adult relative residing within the state or, if there be none, the known adult relative residing nearest to the court;

E. whether the child is in custody or detention pursuant to the Delinquency Act [32A-2-1 NMSA 1978] and, if so, the place of custody or detention and the time the child was taken into custody;

F. whether the child is an Indian child; and

G. if any of the matters required to be set forth by this section are not known, a statement of those matters and the fact that they are not known.

History: 1978 Comp., § 32A-1-11, enacted by Laws 1993, ch. 77, § 20; 2005, ch. 189, § 6.

ANNOTATIONS

Cross references. — For the Supreme Court approved form, *see* Children's Court Rule 10-101 NMRA.

The 2005 amendment, effective June 17, 2005, provided in Subsection E that a petition shall set forth whether the child is in custody or detention pursuant to the Delinquency Act and the place of custody or detention.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-19 NMSA 1978 have been included in the annotations to this section.

Neglect proceeding without final judgment does not bar termination proceeding. — Since neglect proceedings do not result in a final judgment on the merits, the department is not barred under the "judgments" rule from later bringing termination proceedings. State ex rel. Human Servs. Dep't v. Levario, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Petition held insufficient. — Petition alleging that child had committed a delinquent act but not alleging that the child was in need of care or rehabilitation was insufficient to confer jurisdiction upon the children's court, since delinquency requires a showing that both elements exist. In re Doe, 87 N.M. 170, 531 P.2d 218 (Ct. App. 1975).

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 36 et seq.

43 C.J.S. Infants §§ 93, 99.

32A-1-12. Summons; issuance and content; waiver of service.

A. After a petition has been filed, summonses shall be issued and served pursuant to children's court rule.

B. The summons shall require the persons to whom directed to appear personally before the court at the time fixed by the summons to answer the allegations of the petition. The summons shall advise the parties of their right to counsel under the Children's Code and shall have attached to it a copy of the petition.

C. The court may endorse upon the summons an order directing the parent, guardian, custodian or other person having the physical custody or control of the child to bring the child to the hearing.

D. If it appears from any sworn statement presented to the court that the child needs to be placed in detention, the judge may endorse on the summons an order that an officer serving the summons shall at once take the child into custody and take the child to the place of detention designated by the court, subject, however, to all of the provisions of the Children's Code relating to detention criteria and post-detention proceedings and the rights of the child in regard thereto.

E. A party other than the child may waive service of summons by written stipulation or by voluntary appearance at the hearing. If the child is present at the hearing, the child's counsel, with the consent of the parent, guardian or custodian, may waive service of summons in the child's behalf.

History: 1978 Comp., § 32A-1-12, enacted by Laws 1993, ch. 77, § 21; 1995, ch. 206, § 6.

ANNOTATIONS

Cross references. — For rule governing summons in the Children's Court, *see* 10-104 NMRA.

The 1995 amendment, effective July 1, 1995, in Subsection A, substituted "and served pursuant to children's court rule" for specific directions for proper service.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-20 NMSA 1978 have been included in the annotations to this section.

Age reference is to years of age, not mental age. — The numerous references to age in the Children's Code are references to years of age, not mental age. State v. Doe, 97 N.M. 598, 642 P.2d 201 (Ct. App. 1982).

Children's court attorney provides notice. — A fair implication from the Children's Code's structure and language, especially in light of the customary practice of law, is that the children's court attorney who files the petition bears the burden of providing notice to the parties. Martinez v. Mafchir, 35 F.3d 1486 (10th Cir. 1994).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 36 et seq.

43 C.J.S. Infants §§ 93, 99.

32A-1-13. Summons; service.

A. If a party to be served with a summons can be found within the state, the summons shall be served upon the party as provided by the Rules of Civil Procedure for the District Courts at least forty-eight hours before the hearing, except that for a child party to an action pursuant to the Abuse and Neglect Act [32A-2-1 NMSA 1978], service shall be on the child's guardian ad litem or attorney and not personally pursuant to children's court rule.

B. If a party to be served is within the state and cannot be found but the party's address is known, service of the summons may be made by mailing a copy of the summons to the party by certified mail at least fifteen days before the hearing.

C. If after reasonable effort a party to be served cannot be found, or address ascertained, within or without the state, the court may order service of the summons by publication in accordance with the provisions of Rule 1-004 of the Rules of Civil Procedure for the District Courts, in which event the hearing shall not be less than five days after the date of last publication.

D. The court may authorize the payment from court funds of the costs of service and of necessary travel expenses incurred by persons summoned or otherwise required to appear at the hearing.

History: 1978 Comp., § 32A-1-13, enacted by Laws 1993, ch. 77, § 22; 1995, ch. 206, § 7; 2005, ch. 189, § 7.

ANNOTATIONS

Cross references. — For process and service, *see* Rules 1-004 and 1-005 NMRA.

For process and service in the Children's Court, *see* Rules 10-104 to 10-105.2 NMRA.

The 1995 amendment, effective July 1, 1995, added the proviso at the end of Subsection A beginning "except that".

The 2005 amendment, effective June 17, 2005, changed the statutory reference to the Abuse and Neglect Act and required service to be made on the child's guardian ad litem and attorney in Subsection A.

Children's court attorney provides notice. — A fair implication from the Children's Code's structure and language, especially in light of the customary practice of law, is that the children's court attorney who files the petition bears the burden of providing notice to the parties. Martinez v. Mafchir, 35 F.3d 1486 (10th Cir. 1994).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Service of process, 90 A.L.R.2d 293.

32A-1-14. Notice to Indian tribes.

A. In a case involving a family in need of court-ordered services, if the child is an Indian child, the Indian child's tribe shall be notified when the petition is filed. The form of the notice shall comply with the provisions of the federal Indian Child Welfare Act of 1978.

B. In abuse, neglect or adoption proceedings, if the child is an Indian child, the Indian child's tribe shall be notified. The form of the notice shall comply with the provisions of the federal Indian Child Welfare Act of 1978.

History: 1978 Comp., § 32A-1-14, enacted by Laws 1993, ch. 77, § 23; 2005, ch. 189, § 8.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 2005 amendment, effective June 17, 2005, changed "services" to "court-ordered services" in Subsection A.

32A-1-15. Release or delivery from custody.

In all cases begun pursuant to the provisions of the Children's Code, when a child is taken into custody, the child shall be released to the child's parent, guardian or

custodian in accordance with the conditions and time limits set forth in the Children's Court Rules and Forms.

History: 1978 Comp., § 32A-1-15, enacted by Laws 1993, ch. 77, § 24.

ANNOTATIONS

Cross references. — For the Children's Court Rules, *see* Rule 10-101 NMRA.

32A-1-16. Basic rights.

A. A child subject to the provisions of the Children's Code is entitled to the same basic rights as an adult, except as otherwise provided in the Children's Code.

B. A person afforded rights under the Children's Code shall be advised of those rights at that person's first appearance before the court on a petition under the Children's Code.

History: 1978 Comp., § 32A-1-16, enacted by Laws 1993, ch. 77, § 25.

ANNOTATIONS

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-27 NMSA 1978 have been included in the annotations to this section.

Child's right to counsel is the right to have counsel present at any proceeding when the child is a participant; the right to counsel does not extend to a probation officer's conference with another probation officer, law enforcement officers or the other children involved. State v. Doe, 91 N.M. 232, 572 P.2d 960 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1978).

The policy behind Rule 22(d), N.M.R. Child. Ct. (now 10-204 NMRA), is that every child has the right to be represented by an attorney and that a child is not capable of making a knowing and intelligent waiver of that right. State v. Doe, 95 N.M. 302, 621 P.2d 519 (Ct. App. 1980).

Statements made before advised by counsel inadmissible. — Where the statements of the defendant, a child, show he believed in the truth of statements witnesses made to the police, the defendant's statements were made to the police after the police took him into custody and at a time when he was not advised by counsel, and under this section the statements were inadmissible. State v. Doe, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

Right not applicable to volunteered statements or statements not requiring Miranda warnings, such as answers to threshold questioning. Doe v. State, 100 N.M. 579, 673 P.2d 1312 (1984).

Children's court's failure to appoint guardian not jurisdictional. — In a proceeding to terminate a minor mother's parental rights, the failure of the children's court to appoint a guardian ad litem for the mother did not deprive the court of jurisdiction since the court appointed counsel to represent her pursuant to Rule 1-017C NMRA. State ex rel. Children, Youth & Families Dep't v. Lilli L., 1996-NMCA-014, 121 N.M. 376, 911 P.2d 884.

Fourth amendment applicable to proceedings. — United States Const., amend. IV, rights of persons to be secure against unreasonable searches and seizures, has been expressly applied to juvenile proceedings in this state. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975); State v. Doe, 93 N.M. 143, 597 P.2d 1183 (Ct. App. 1979).

Children require opportunity to be heard. — Since the children's court made a dispositional ruling without giving the attorney for the children an opportunity to be heard, and since the attorney nevertheless sought to speak on behalf of the children, but the children's court interrupted and effectively denied the children the opportunity to be heard, the portions of the judgments committing each of the children to the department of corrections (now corrections department) were vacated to afford the children an opportunity to be heard before a new dispositional judgment is to be entered. State v. Doe, 90 N.M. 404, 564 P.2d 207 (Ct. App. 1977).

A child has the right to address the children's court before disposition; the children's court should offer a child the opportunity to address the court before pronouncing sentence. State v. Ricky G., 110 N.M. 646, 798 P.2d 596 (Ct. App. 1990).

Court has discretionary power to accept or refuse admission by child, and so it is not an abuse of discretion to refuse to accept the admission when the consequence of such an acceptance would foreclose transfer. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

Prior inconsistent statement not admissible for impeachment. — In a delinquency proceeding, the state was prohibited from introducing for impeachment purposes a prior inconsistent statement made by a youth the night of his arrest. State v. Santiago Rene O., 113 N.M. 148, 823 P.2d 948 (Ct. App. 1991).

No reversal where court fails to advise of rights. — Although the court has a statutory obligation to advise children before it of their rights under the Children's Code and other laws at each separate appearance, that obligation must be read in light of the legislative purposes expressed in the code, and since the child did not claim any prejudice nor claim that he was not otherwise advised by his attorney of his constitutional or other legal rights, the appellate court would not reverse a commitment

order for failure of the trial court to advise the child of his rights. In re Doe, 88 N.M. 481, 542 P.2d 61 (Ct. App. 1975).

Waiver of right must be done intelligently. — Waiver of a right created by the constitution, a statute or a court-promulgated rule must be done intelligently and knowingly if the right is to be denied the one claiming it. State ex rel. Department of Human Servs. v. Perlman, 96 N.M. 779, 635 P.2d 588 (Ct. App. 1981).

Admission of child's statement is reversible error. — Admission of statements made by a child under age 15 against that child at a hearing to adjudicate delinquency is reversible error. State v. Jonathan M., 109 N.M. 789, 791 P.2d 64 (1990).

Right to disqualify judge. — The disqualification statute (38-3-9 NMSA 1978) applies to children's court proceedings, and a party to a children's court proceeding is entitled to disqualify the children's court judge. Smith v. Martinez, 96 N.M. 440, 631 P.2d 1308 (1981).

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Children's Waiver of Miranda Rights and the Supreme Court's Decisions in Parham, Bellotti, and Fare," see 10 N.M.L. Rev. 379 (1980).

For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

For note, "Children's Code - Neglect - State ex rel. Health & Social Services Department v. Natural Father," see 12 N.M.L. Rev. 505 (1982).

For comment, "The Right to Be Present: Should It Apply to the Involuntary Civil Commitment Hearing," see 17 N.M.L. Rev. 165 (1987).

For note, "Criminal Procedure - The Fifth Amendment Privilege Against Self-Incrimination Applies to Juveniles in Court-Ordered Psychological Evaluations: State v. Christopher P.," see 23 N.M.L. Rev. 305 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 75 et seq.

Duty to advise accused as to right to assistance of counsel, 3 A.L.R.2d 1003.

Right to and appointment of counsel in juvenile court proceedings, 60 A.L.R.2d 691, 25 A.L.R.4th 1072.

Jury trial in juvenile court delinquency proceedings, right to, 100 A.L.R.2d 1241.

Bail: right to bail in proceedings in juvenile courts, 53 A.L.R.3d 848.

Applicability of double jeopardy to juvenile court proceedings, 5 A.L.R.4th 234.

Right of juvenile court defendant to be represented during court proceedings by parent, 11 A.L.R.4th 719.

Validity and efficacy of minor's waiver of right to counsel - modern cases, 25 A.L.R.4th 1072.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions-post-Connelly cases, 48 A.L.R.5th 555.

43 C.J.S. Infants § 96.

32A-1-17. Appeals.

A. Any party may appeal from a judgment of the court to the court of appeals in the manner provided by law. The appeal shall be heard by the court of appeals upon the files, records and transcript of the evidence of the court. Absent an order of the appellate court, files and records that are required to be kept confidential and closed to the public, pursuant to any provision of the Children's Code shall be kept confidential and closed to the public on appeal.

B. The appeal to the court of appeals does not stay the judgment appealed from, but the court of appeals may order a stay upon application and hearing consistent with the provisions of the Children's Code if suitable provision is made for the care and custody of the child. If the order appealed from grants the legal custody of the child to or withholds it from one or more of the parties to the appeal, the appeal shall be heard at the earliest practicable time.

C. If the court of appeals does not dismiss the petition and order the child released, it shall affirm the court's judgment or it shall modify the court's judgment and remand the child to the jurisdiction of the court for disposition consistent with the appellate court's decision on the appeal. Any party may appeal to the supreme court in the manner provided by law.

D. A child who has filed notice of appeal shall be furnished a transcript of the proceedings, or as much of it as is requested, without cost upon the filing of an affidavit that the child or the person who is legally responsible for the care and support of the child is financially unable to purchase the transcript.

E. Appeals from the court to the court of appeals shall proceed in accordance with time limits to be established by the supreme court.

F. Appeals from a tribal court order shall proceed pursuant to tribal law to an appropriate tribal court.

History: 1978 Comp., § 32A-1-16, enacted by Laws 1993, ch. 77, § 26; 1995, ch. 22, § 1; 1995, ch. 206, § 8; 1999, ch. 195, § 1.

ANNOTATIONS

Cross references. — For appeals from the Children's Court, *see* the Rules of Appellate Procedure, 12-101 NMRA.

The 1995 amendment, effective July 1, 1995, deleted "children's" preceding "court" in Subsections A, C, and E and added Subsection F. Laws 1995, ch. 22, § 1, effective June 16, 1995, also amended this section. The section was set out as amended by Laws 1995, ch. 206, § 8. *See* 12-1-8 NMSA 1978.

The 1999 amendment, effective July 1, 1999, in Subsection A rewrote the last sentence, which formerly read "The name of the child shall not appear in the record on appeal".

Section 39-3-3 NMSA 1978 governs interlocutory appeals of suppression of evidence orders from a children’s court. State v. Jade G., 2007-NMSC-010, 141 N.M. 284, 154 P.3d 659.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-39 NMSA 1978 have been included in the annotations to this section.

While appeal of abuse and neglect adjudication is pending, the children's court has jurisdiction to take further action in the case. State ex rel. Children, Youth & Families Dept. v. Frank G., 2005-NMCA-026, 137 N.M. 137, 108 P.3d 543, cert. granted, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

Subsection A allows any party to appeal as provided by law. State v. Jade G., 2005-NMCA-019, 137 N.M. 128, 108 P.3d 534, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

State has right to appeal judgments of the children's court. State v. Doe, 92 N.M. 354, 588 P.2d 555 (Ct. App. 1978), cert. denied, 92 N.M. 353, 588 P.2d 554 (1979).

Standing to appeal. — The children, youth and families department has standing to appeal the judgment of disposition of a child that is placed in its custody. State ex rel. CYFD v. Paul G., 2006-NMCA-038, 139 N.M. 258, 131 P.3d 108.

Right to court-appointed counsel. — Mother had a right to court-appointed counsel on appeal of a decision terminating her parental rights and counsel had an obligation to

present her issues in accordance with the guidelines set forth in *State v. Franklin*, 78 N.M. 127, 428 P.2d 982 (1967). State ex rel. Children, Youth & Families Dep't v. Alice P., 1999-NMCA-098, 127 N.M. 664, 986 P.2d 460, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

State questioning legal sufficiency of its own pleadings. — The state's appeal of the children's court order continuing a child on probation and granting her equal custody to one not a parent presented the anomalous situation of the state questioning the legal sufficiency of its own pleadings, but it would be entertained since proceedings concerning the custody of minors are not adversary, and the court therein is not merely an arbiter but an advocate seeking to protect the welfare and interests of the minor. In re Doe, 88 N.M. 505, 542 P.2d 1195 (Ct. App. 1975).

Clerk of court of appeals deletes child's name. — The clerk of the court of appeals is directed to delete the child's name from all records in this court and substitute the fictitious name of "John Doe." In re Doe, 85 N.M. 691, 516 P.2d 201 (Ct. App. 1973).

Stay from prosecution should be granted in appeal from order transferring juvenile to district court to stand trial as an adult. State v. Greg R., 104 N.M. 778, 727 P.2d 86 (Ct. App. 1986).

Effect of no application for stay of transfer order. — An order transferring a juvenile from the children's court to the district court is a "judgment"; thus, having failed to request a stay, the defendant waives any impediment to the state's obtaining a grand jury indictment of the defendant pending appeal of the order. State v. Hovey, 106 N.M. 300, 742 P.2d 512 (1987).

Issue of parental rights to be raised by parent. — The state, prosecuting the probation revocation petition of a child in need of supervision, can appropriately challenge the custody arrangements made by the court, but since those custody arrangements and thus their effect on parental rights are of limited duration, the issue of parental rights is one to be raised by the parent and not by the state; a violation of due process can be urged only by those who can show an impairment of their rights in the application of the statute to them. In re Doe, 88 N.M. 505, 542 P.2d 1195 (Ct. App. 1975).

Court's discretion not to be disturbed absent showing of abuse. — Exercise of the court's discretion should not be disturbed on appeal in the absence of a showing of manifest abuse. In re Doe, 88 N.M. 505, 542 P.2d 1195 (Ct. App. 1975).

Supreme court review on appeal or writ of error. — A proceeding under act relating to dependent and neglected children was not a special proceeding, but was a civil action, and the judgment therein was reviewable in the supreme court on appeal or writ of error. Blanchard v. State ex rel. Wallace, 30 N.M. 459, 238 P. 1004 (1925).

Transfer order may be summarily affirmed. — Summary affirmance was due on order transferring a juvenile from children's court to be tried as an adult even though juvenile filed a timely memorandum in opposition to affirmance, and though continuing to contest summary disposition, he provided no reasons why the summary disposition should not be made. State v. Greg R., 104 N.M. 778, 727 P.2d 86 (Ct. App. 1986).

Supreme court without jurisdiction to review interlocutory order. — Where in an adoption proceeding based upon written consent of the parents to the adoption of their infant child, the trial court granted the parents' motion to withdraw their previous consent, and at the same time retained jurisdiction to declare the child found to be a dependent and neglected child, a ward of the court, and place it under the control and direction of New Mexico department of public welfare (now human services department), leaving temporary custody of the child with the adoptive parents pending further order of the court, the order was interlocutory in nature and the supreme court was without jurisdiction to review it. In re Helms, 59 N.M. 177, 281 P.2d 140 (1955).

Review of best interests determination. — The best interests determination of the children's court attorney is subject to judicial review by the children's court and by the New Mexico court of appeals. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

Exhibits on appeal. — Where a child sexual abuse victim had difficulty expressing herself about the offense, a stick figure drawing made by the court together with the victim's testimony, was evidence considered by the children's court in formulating its decision and was properly included in the record on appeal. State v. Benny E., 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

Release of child's name. — A law enforcement agency is not prohibited from releasing to the public the names of juveniles who have been arrested for criminal acts and the charges for which they were arrested. 1987 Op. Att'y Gen. No. 87-29.

Law reviews. — For comment, "Poteet v. Roswell Daily Record, Inc.: Balancing First Amendment Free Press Rights Against a Juvenile Victim's Right to Privacy," see 10 N.M.L. Rev. 185 (1979-1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 118 et seq.

43 C.J.S. Infants § 101.

32A-1-18. Procedural matters.

A. 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 motion

and proceed to hear and determine the additional or other issues, findings or remedies as though originally properly sought.

B. Upon application of a party, the court shall issue, and upon its own motion the court may issue, subpoenas requiring attendance and testimony of witnesses and the production of records, documents or other tangible objects at any hearing.

C. Subject to the laws relating to the procedures therefor and the limitations thereon, the 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.

D. In any proceeding under the Children's Code, either on motion of a party or on the court's own motion, the court may make an order restraining the conduct of any party over whom the court has obtained jurisdiction if:

(1) 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

(2) due notice of the motion and the grounds therefor and an opportunity to be heard thereon have been given to the person against whom the order is directed.

E. In any proceeding under the Children's Code, the court may allow a party or witness to the proceeding to participate by the use of electronic communications, consistent with the rights of all parties to the proceeding and pursuant to rules promulgated by the supreme court.

History: 1978 Comp., § 32A-1-18, enacted by Laws 1993, ch. 77, § 27; 1995, ch. 206, § 9.

ANNOTATIONS

Cross references. — For subpoenas in the Children's Court, *see* 10-109 NMRA.

The 1995 amendment, effective July 1, 1995, deleted "provided all necessary parties consent" following "petition or motion and" in Subsection A, substituted "the judgment of disposition made" for "any order of the court" in Paragraph (1) of Subsection D, and added Subsection E.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-40 NMSA 1978 have been included in the annotations to this section.

Children's court is empowered to enter injunction conducive to purposes of Children's Code. State v. Echols, 99 N.M. 517, 660 P.2d 607 (Ct. App. 1983).

Children's court had statutory authority to order therapy for a child, even though the court found that the child was neither abused nor neglected, where the facts indicated that the case itself caused a need for the child to require counseling. State ex rel. Department of Human Servs. v. Patrick R., 105 N.M. 133, 729 P.2d 1387 (Ct. App. 1986).

Incarceration of child in need of supervision for contempt. — There is no authority to incarcerate children in need of supervision for a probation violation after a finding of three violations of probation. State v. Julia S., 104 N.M. 222, 719 P.2d 449 (Ct. App. 1986).

Accommodation availability rests with administrators. — Availability of accommodations in state institution is made the controlling factor in determining admissions, and this question rests solely with the administrators and not with the court. That the court may punish for contempt is not open to question; but, in view of what is later said, it is without authority to proceed against the administrators. Carter v. Montoya, 75 N.M. 730, 410 P.2d 951 (1966).

Testimony by electronic communication. — Court should consider the following functions related to a witness' personal appearance in determining whether the allowance of testimony via electronic communication falls within due process standards: assists the trier of fact in evaluating the witness' credibility by allowing his or her demeanor to be observed first-hand; helps establish the identity of the witness; impresses upon the witness the seriousness of the occasion; assures that the witness is not being coached or influenced during testimony; assures that the witness is not referring to documents improperly; and provides for the right of confrontation. State ex rel. Children, Youth & Families Dep't v. Anne McD., 2000-NMCA-020, 128 N.M. 618, 995 P.2d 1060.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Court's power to punish for contempt a child within the age group subject to jurisdiction of juvenile court, 77 A.L.R.2d 1004.

Interference with enforcement of judgment in criminal or juvenile delinquent case as contempt, 8 A.L.R.3d 657.

Lack of notice to contemnor at time of contemptuous conduct of possible criminal contempt sanctions as affecting prosecution for contempt in federal court, 76 A.L.R. Fed. 797.

32A-1-19. Court costs and expenses.

A. The following expenses shall be a charge upon the funds of the court upon their certification by the court:

(1) reasonable compensation for services and related expenses for counsel appointed by the court;

(2) reasonable compensation for services and related expenses of a guardian ad litem or a child's attorney appointed by the court; and

(3) the expenses of service of summonses, notices, subpoenas, traveling expenses of witnesses and other like expenses incurred in any proceeding under the Children's Code.

B. The court may order the parent or other person legally obligated to care for and support a child to pay all or part of the costs and expenses pursuant to Subsection A of this section when:

(1) the child has been found to be a delinquent child, a child of a family in need of court-ordered services, an abused or neglected child or a child with a mental illness or a developmental disability;

(2) the parent or other person legally obligated to care for and support a child is given notice and a hearing to determine the parent or person's financial ability to pay the costs and expenses; and

(3) the court finds that the parent or person is able to pay all or part of the costs and expenses.

Unless otherwise ordered, payment shall be made to the court for remittance to those to whom compensation is due or, if costs and expenses have been paid by the court, to the court for remittance to the state. The court may prescribe the manner of payment.

C. Whenever legal custody of an adjudicated child is vested in someone other than the child's parents, including an agency, institution or department of this state, if the court, after notice to the parents or other persons legally obligated to support the child and after a hearing, finds that the parents or other legally obligated persons are financially able to pay all or part of the costs and expenses of the support and treatment, the court may order the parents or other legally obligated persons to pay to the custodian in the manner the court directs a reasonable sum that will cover all or part of the expenses of the support and treatment of the child subsequent to the entry of the custody order. The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment. If the parents or other legally obligated persons willfully fail or refuse to pay the sum ordered, the court may proceed with contempt charges and the order for payment may be filed and if filed shall have the effect of a civil judgment.

History: 1978 Comp., § 32A-1-19, enacted by Laws 1993, ch. 77, § 28; 2005, ch. 189, § 9.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, provided in Subsection A that the fees of a child's attorney shall be a charge upon the funds of the court.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-41 NMSA 1978 have been included in the annotations to this section.

Assessment of deposition costs. — The children's court cannot assess deposition costs against the human services department in a child abuse and neglect proceeding. State ex rel. Human Servs. Dep't v. Judy H., 105 N.M. 678, 735 P.2d 1184 (Ct. App. 1987).

Guardian ad litem not entitled to attorney fees. — Guardian ad litem for a child appointed by the children's court in an abuse and neglect proceeding was not entitled to attorneys fees since the court did not request payment and since the Children, Youth, and Families Department was not a "person" who could be required to pay attorney fees under this section. T.B. ex rel. Cubra v. State ex rel. Children, Youth & Families Dep't, 1996-NMCA-035, 121 N.M. 465, 913 P.2d 272.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Attorneys' fees awards in parent-nonparent child custody case, 45 A.L.R.4th 212.

32A-1-20. Purchase of care from private agency by public agency.

When the legal custody of a child is vested in a public agency under the provisions of the Children's Code, the public agency may transfer physical custody of the child to an appropriate private agency and may purchase care and treatment from the private agency if the private agency submits periodic reports to the public agency covering the care and treatment the child is receiving and the child's responses to that care and treatment. These reports shall be made as frequently as the public agency deems necessary, but not less often than once each six months for each child. The private agency shall also afford an opportunity for a representative of the public agency to examine or consult with the child as frequently as the public agency deems necessary.

History: 1978 Comp., § 32A-1-20, enacted by Laws 1993, ch. 77, § 29.

32A-1-21. Runaway child; law enforcement; permitted acts.

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, without permission, left the home or residence lawfully prescribed for the child and the parent, guardian or custodian believes the child has run away, a law enforcement agent may help the parent, guardian or custodian locate the child and:

A. return the child to the parent, guardian or custodian unless safety concerns are present;

B. hold the child for up to six hours if the parent, guardian or custodian cannot be located; provided, however, that no child shall be placed in a secured setting pursuant to this section; or

C. after the six hours has expired, follow the procedures outlined in Section 32A-3B-3 NMSA 1978.

History: Laws 2007, ch. 185, § 2; 2009, ch. 239, § 9.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, in Subsection B, after “cannot be located”, added the remainder of the sentence.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

ARTICLE 2
Delinquency

ANNOTATIONS

Compiler's notes. — Sections 32A-2-1 to 32A-2-32 NMSA 1978 were enacted as 32-2-1 to 32-2-32 NMSA 1978 by Laws 1993, ch. 77, §§ 30 to 61.

32A-2-1. Short title.

Chapter 32A, Article 2 NMSA 1978 may be cited as the "Delinquency Act".

History: 1978 Comp., § 32A-2-1, enacted by Laws 1993, ch. 77, § 30; 2007, ch. 19, § 1.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, changed Chapter "32" to Chapter "32A".

32A-2-2. Purpose of act.

The purpose of the Delinquency Act is:

A. consistent with the protection of the public interest, to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions to the extent of the child's age, education, mental and physical condition, background and all other relevant factors, and to provide a program of supervision, care and rehabilitation, including rehabilitative restitution by the child to the victims of the child's delinquent act to the extent that the child is reasonably able to do so;

B. to provide effective deterrents to acts of juvenile delinquency, including an emphasis on community-based alternatives;

C. to strengthen families and to successfully reintegrate children into homes and communities;

D. to foster and encourage collaboration between government agencies and communities with regard to juvenile justice policies and procedures;

E. to develop juvenile justice policies and procedures that are supported by data;

F. to develop objective risk assessment instruments to be used for admission to juvenile detention centers;

G. to encourage efficient processing of cases;

H. to develop community-based alternatives to detention;

I. to eliminate or reduce disparities based upon race or gender;

J. to improve conditions of confinement in juvenile detention centers; and

K. to achieve reductions in the number of warrants issued, the number of probation violations and the number of youth awaiting placements.

History: 1978 Comp., § 32A-2-2, enacted by Laws 1993, ch. 77, § 31; 2003, ch. 225, § 2; 2007, ch. 19, § 2.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, added Subsection C.

The 2007 amendment, effective June 15, 2007, added Subsections D through K.

Rules governing applicable proceedings. — Reading the Children's Code and the Children's Court Rules together, the overall scheme contemplates that, while the Rules of Criminal Procedure govern the adjudicatory proceedings in youthful offender cases,

the Children's Court Rules govern all dispositional proceedings for all youthful offenders. State v. Stephen F., 2005-NMCA-048, 137 N.M. 409, 112 P.3d 270, cert. granted, 2005-NMCERT-004, 137 N.M. 455, 112 P.3d 1112.

Application of section eliminated. — The express language "notwithstanding any other provision to the contrary" in the first sentence of 32A-2-14 F NMSA 1978 is construed to eliminate the application of this section to show legislative intent to balance accountability with protection of children. State v. Jade G., 2005-NMCA-019, 137 N.M. 128, 108 P.3d 534, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Meeting section goals. — Where child's interim detention served the specific purposes of holding child accountable, providing supervision, ensuring for his health and physical safety, providing a deterrent and acting in a manner consistent with the public interest, it was an attempt to meet the goals set forth in this section as part of an overall disposition effort. State v. Wacey C., 2004-NMCA-029, 135 N.M. 186, 86 P.3d 611.

32A-2-3. Definitions.

As used in the Delinquency Act:

A. "delinquent act" means an act committed by a child that would be designated as a crime under the law if committed by an adult, including the following offenses:

(1) any of the following offenses pursuant to municipal traffic codes or the Motor Vehicle Code [66-1-1 NMSA 1978]:

(a) driving while under the influence of intoxicating liquor or drugs;

(b) failure to stop in the event of an accident causing death, personal injury or damage to property;

(c) unlawful taking of a vehicle or motor vehicle;

(d) receiving or transferring of a stolen vehicle or motor vehicle;

(e) homicide by vehicle;

(f) injuring or tampering with a vehicle;

(g) altering or changing of an engine number or other vehicle identification numbers;

(h) altering or forging of a driver's license or permit or any making of a fictitious license or permit;

(i) reckless driving;

(j) driving with a suspended or revoked license; or

(k) an offense punishable as a felony;

(2) buying, attempting to buy, receiving, possessing or being served any alcoholic liquor or being present in a licensed liquor establishment, other than a restaurant or a licensed retail liquor establishment, except in the presence of the child's parent, guardian, custodian or adult spouse. As used in this paragraph, "restaurant" means an establishment where meals are prepared and served primarily for on-premises consumption and that has a dining room, a kitchen and the employees necessary for preparing, cooking and serving meals. "Restaurant" does not include an establishment, as defined in regulations promulgated by the director of the special investigations division of the department of public safety, that serves only hamburgers, sandwiches, salads and other fast foods;

(3) a violation of Section 30-29-2 NMSA 1978, regarding the illegal use of a glue, aerosol spray product or other chemical substance;

(4) a violation of the Controlled Substances Act [30-31-1 NMSA 1978];

(5) escape from the custody of a law enforcement officer or a juvenile probation or parole officer or from any placement made by the department by a child who has been adjudicated a delinquent child;

(6) a violation of Section 30-15-1.1 NMSA 1978 regarding unauthorized graffiti on personal or real property; or

(7) a violation of an order of protection issued pursuant to the provisions of the Family Violence Protection Act [40-13-1 NMSA 1978];

B. "delinquent child" means a child who has committed a delinquent act;

C. "delinquent offender" means a delinquent child who is subject to juvenile sanctions only and who is not a youthful offender or a serious youthful offender;

D. "detention facility" means a place where a child may be detained under the Children's Code [32A-1-1 NMSA 1978] pending court hearing and does not include a facility for the care and rehabilitation of an adjudicated delinquent child;

E. "felony" means an act that would be a felony if committed by an adult;

F. "misdemeanor" means an act that would be a misdemeanor or petty misdemeanor if committed by an adult;

G. "restitution" means financial reimbursement by the child to the victim or community service imposed by the court and is limited to easily ascertainable damages for injury to or loss of property, actual expenses incurred for medical, psychiatric and psychological treatment for injury to a person and lost wages resulting from physical injury, which are a direct and proximate result of a delinquent act. "Restitution" does not include reimbursement for damages for mental anguish, pain and suffering or other intangible losses. As used in this subsection, "victim" means a person who is injured or suffers damage of any kind by an act that is the subject of a complaint or referral to law enforcement officers or juvenile probation authorities. Nothing contained in this definition limits or replaces the provisions of Subsections A and B of Section 32A-2-27 NMSA 1978;

H. "serious youthful offender" means an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder. A "serious youthful offender" is not a delinquent child as defined pursuant to the provisions of this section;

I. "supervised release" means the release of a juvenile, whose term of commitment has not expired, from a facility for the care and rehabilitation of adjudicated delinquent children, with specified conditions to protect public safety and promote successful transition and reintegration into the community. A juvenile on supervised release is subject to monitoring by the department until the term of commitment has expired, and may be returned to custody for violating conditions of release; and

J. "youthful offender" means a delinquent child subject to adult or juvenile sanctions who is:

(1) fourteen to eighteen years of age at the time of the offense and who is adjudicated for at least one of the following offenses:

(a) second degree murder, as provided in Section 30-2-1 NMSA 1978;

(b) assault with intent to commit a violent felony, as provided in Section 30-3-3 NMSA 1978;

(c) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(d) aggravated battery, as provided in Subsection C of Section 30-3-5 NMSA 1978;

(e) aggravated battery against a household member, as provided in Subsection C of Section 30-3-16 NMSA 1978;

(f) aggravated battery upon a peace officer, as provided in Subsection C of Section 30-22-25 NMSA 1978;

(g) shooting at a dwelling or occupied building or shooting at or from a motor vehicle, as provided in Section 30-3-8 NMSA 1978;

(h) dangerous use of explosives, as provided in Section 30-7-5 NMSA 1978;

(i) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978;

(j) robbery, as provided in Section 30-16-2 NMSA 1978;

(k) aggravated burglary, as provided in Section 30-16-4 NMSA 1978;

(l) aggravated arson, as provided in Section 30-17-6 NMSA 1978; or

(m) abuse of a child that results in great bodily harm or death to the child, as provided in Section 30-6-1 NMSA 1978;

(2) fourteen to eighteen years of age at the time of the offense, who is adjudicated for any felony offense and who has had three prior, separate felony adjudications within a three-year time period immediately preceding the instant offense. The felony adjudications relied upon as prior adjudications shall not have arisen out of the same transaction or occurrence or series of events related in time and location. Successful completion of consent decrees are not considered a prior adjudication for the purposes of this paragraph; or

(3) fourteen years of age and who is adjudicated for first degree murder, as provided in Section 30-2-1 NMSA 1978.

History: 1978 Comp., § 32A-2-3, enacted by Laws 1993, ch. 77, § 32; 1995, ch. 204, § 2; 1995, ch. 205, § 2; 1995, ch. 206, § 10; 1996, ch. 85, § 2; 2003, ch. 225, § 3; 2005, ch. 189, § 11; 2009, ch. 239, § 10.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, inserted "felony" preceding "violation" in Paragraph (3) of Subsection A; substituted "32A-2-27" for "32-2-27" in Subsection G; substituted "three-year" for "two-year" preceding "time period" in Paragraph (2) of Subsection I; and made minor stylistic changes throughout the section. Laws 1995, ch. 204, § 2 and Laws 1995, ch. 205, § 2 also amended this section. The section was set out as amended by Laws 1995, ch. 206, § 10. *See* 12-1-8 NMSA 1978.

The 1996 amendment, effective July 1, 1996, deleted "but not limited to" in the introductory language of Subsection A and added Paragraph A(7); substituted "fifteen to eighteen" "for sixteen or seventeen" in Subsection H; substituted "fourteen" for "fifteen" at the beginning of Paragraphs I(1), (2) and (3); added Subparagraph I(1)(e) and

redesignated the following subparagraphs accordingly; deleted "which results in great bodily harm to another person" preceding "was provided" in Subparagraph I(1)(f); added Subparagraph I(1)(l); and made stylistic changes throughout the section.

The 2003 amendment, effective July 1, 2003, added "an offense" at the beginning of Paragraph A(1); deleted "any" at the beginning of Subparagraphs A(1)(a) to (h); in Paragraph A(2), substituted "an establishment" for "establishments" preceding "as defined in", substituted "serves" for "serve" following "public safety, that"; added Paragraph A(8); and substituted "a" for "any" or "an" for "any" throughout the section.

The 2005 amendment, effective June 17, 2005, deleted former Subsection A(3), which provided that a delinquent act included a felony violations of Section 17-1-1 through 17-5-9 NMSA 1978 and regulations adopted by the state game commission; and defined "youthful offender" in Subsection I to include a delinquent child fourteen to eighteen years of age and who is adjudicated for aggravated battery against a household member.

The 2009 amendment, effective July 1, 2009, in Paragraph (1) of Subsection A, at the beginning of the sentence, deleted "an offense" and added "any of the following offenses"; and added Subsection I

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-3 NMSA 1978 have been included in the annotations to this section.

Commitment to age 21. — Section 32A-2-19 B(1)(c) NMSA 1978 does not say that commitment to age 21 is authorized only for children who fit the definition of youthful offenders as set forth in Subsection I of this section. State v. Indie C., 2006-NMCA-014, 139 N.M. 80, 128 P.3d 508, cert. denied, 2006-NMCERT-001, 139 N.M. 273, 131 P.3d 660

Delinquency Act does not define or describe "complaint". State v. Jade G., 2005-NMCA-019, 137 N.M. 128, 108 P.3d 534, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Legislature intended to create three categories of juvenile offenders subject to varying degrees of accountability. State v. Stephen F., 2005-NMCA-048, 137 N.M. 409, 112 P.3d 270, cert. granted, 2005-NMCERT-004, 137 N.M. 455, 112 P.3d 1112.

"Serious youthful offender". — This section clearly expresses a legislative intent to treat those children charged with first degree murder differently than other children,

even if ultimately those children are not found guilty on the first degree murder charge. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

The legislature intended to treat children charged with first degree murder as adults, not as delinquent children. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

The right to be treated as a child is a statutory, not a constitutional, right. Therefore, it is within the purview of the legislature to decide that children initially accused of first degree murder, even if found not guilty of that charge, may be sentenced as adults for other crimes. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

Conviction of crime necessary prerequisite to determination of delinquency. — It is a fundamental right of a party to be convicted of a crime, which is a necessary prerequisite to a determination of delinquency, based upon evidence of the elements of the crime, and in a prosecution for a violation of 30-31-23 NMSA 1978, the state must prove that the respondents had knowledge of the presence and character of the item possessed; a degree of furtiveness on the parts of juvenile respondents, in doing their smoking and passing a pipe around between buildings while changing classes, in light of a school regulation prohibiting the smoking of tobacco, was not conduct sufficient to imply that the smokers knew the character of the substance they were using. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Curfew ordinance not within definition. — A village curfew ordinance forbidding any juvenile under the age of 18 years to be upon the streets between certain hours unless accompanied by a parent or guardian does not come within the purview of the definition of a delinquent act since the ordinance relates only to juveniles under the age of 18 years. In re Doe, 87 N.M. 466, 535 P.2d 1092 (Ct. App. 1975), rev'd on other grounds sub nom. State v. Doe, 88 N.M. 137, 537 P.2d 1399 (1975).

Magistrate and municipal court jurisdiction. — It appears that municipal and magistrate courts can exercise jurisdiction over children for traffic offenses which are not designated delinquent acts under the Children's Code. 1972 Op. Att'y Gen. No. 72-32.

Sentencing as adult for unlisted crime. — A juvenile who is adjudicated for any of the offenses listed under Subsection I of this section may be subject to adult sanctions under 32A-2-20 NMSA 1978 for any other offense in the same case. State v. Montano, 120 N.M. 218, 900 P.2d 967 (Ct. App. 1995).

Prosecution as youthful offender for misdemeanor aggravated battery. — There is no incongruity or injustice in the legislature's decision to include misdemeanor aggravated battery in the list of offenses in Subsection I, or to exclude manslaughter and certain sexual assaults therefrom; therefore, prosecution of a juvenile as a youthful offender for misdemeanor aggravated battery was proper. State v. Michael S., 120 N.M. 617, 904 P.2d 595 (Ct. App. 1995).

Allegation of delinquency sufficient. — Petition was not jurisdictionally defective for failure to allege that defendant was in need of care or rehabilitation since it alleged defendant was a delinquent child, which was defined to mean a child who has committed a delinquent act and is in need of care or rehabilitation. Doe v. State, 88 N.M. 627, 545 P.2d 93 (Ct. App. 1976).

Probation order void without finding of need of care. — The children's court order which placed a child on probation without a finding that the child was in need of care or rehabilitation was unauthorized and void; probation is authorized for a child found to be delinquent, and a child is not delinquent unless in need of care or rehabilitation. State v. Doe, 90 N.M. 249, 561 P.2d 948 (Ct. App. 1977).

If no finding of delinquency, then no diagnostic evaluation. — Although a child was found to have committed delinquent acts, there was no finding that the child was in need of care or rehabilitation, or a finding that the child was a delinquent child, and thus the children's court lacked authority to order a diagnostic evaluation. State v. Doe, 90 N.M. 249, 561 P.2d 948 (Ct. App. 1977).

Delinquent child allegation improper where charge for possession of liquor. — The act of possession of alcoholic beverages with which a 16-year-old child was charged could be characterized as a delinquent act and the allegation of delinquent child seemed proper, since an adult between the ages of 18 and 21 may under certain circumstances be guilty of a crime when in possession of alcoholic beverages. However, it cannot apply to any minor under the age of 18 under the Children's Code since the children's court has exclusive jurisdiction of any illegal act committed by a child under the age of 18 and it is not considered a crime, unless there is a specific exception made in the code itself. State v. Doe, 88 N.M. 137, 537 P.2d 1399 (1975).

Probable cause of possession of alcohol. — Probable cause to believe that a child wrongfully possessed or consumed alcohol sufficient to justify an arrest and warrantless search was not shown by the fact that the child's friend smelled of alcohol, or by the child's admission that he consumed a beer outside of the officer's presence. State v. Tywayne, 1997-NMCA-015, 123 N.M. 42, 933 P.2d 251.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules", see 6 N.M.L. Rev. 331 (1976).

32A-2-4. Detention facilities; standards; reports; appeals.

A. The department shall promulgate updated standards for all detention facilities, including standards for site, design, construction, equipment, care, program, personnel and clinical services. The department shall certify as approved all detention facilities in the state meeting the standards promulgated. The department may establish by rule appropriate procedures for provisional certification and the waiving of any of its standards for facilities in existence at the time of the adoption of the standards, except that it shall not allow waiver of any standard pertaining to adequate health and safety

protection of the residents and staff of the facility. No child shall be detained in a detention facility unless it is certified as approved by the department, except as otherwise provided in Chapter 32A, Article 2 NMSA 1978.

B. The department shall inspect all detention facilities in the state at least once each twelve months and shall require those reports it deems necessary from detention facilities in a form and containing the information determined by the department. If as the result of an inspection a certified detention facility is determined as failing to meet the required standards, its certification is subject to revocation or refusal for renewal by the department.

C. The department shall promulgate rules establishing procedures that provide for prior notice and public hearings on detention facilities' standards adoption and changes. The department shall also promulgate rules establishing procedures for facility certification, renewal of certification, refusal to renew certification and revocation of certification. The procedures adopted on these matters shall provide for adequate prior notice of intended action by the department, opportunity for the aggrieved person to have an administrative hearing and written notification of the administrative decision. Rules promulgated under this subsection shall not be effective unless filed in accordance with the State Rules Act [14-4-1 NMSA 1978].

D. Any person aggrieved by an administrative decision of the department rendered under the provisions of this section may petition for the review of the administrative decision by appealing to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

E. After January 1, 1994, no state or county detention facility shall hold juveniles sentenced by a federal court, unless the facility meets state standards promulgated by the department.

F. A juvenile detention facility certified by the department shall comply with the daily reporting requirement for children in detention, including reports on the length of stay for each child. This information shall be reported as required by the department.

History: 1978 Comp., § 32A-2-4, enacted by Laws 1993, ch. 77, § 33; 1998, ch. 55, § 42; 1999, ch. 265, § 44; 2009, ch. 239, § 11.

ANNOTATIONS

The 1998 amendment, effective September 1, 1998, in the section heading, inserted "; appeals"; in Subsection A, substituted "Chapter 32A, Article 2 NMSA 1978" for "this article"; in Subsection C, substituted "facilities'" for "facilities"; and rewrote Subsection D.

The 1999 amendment, effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection D.

The 2009 amendment, effective July 1, 2009, added Subsection F.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-6 NMSA 1978 have been included in the annotations to this section.

Legislative intent. — The provisions are clear - no child shall be detained in a detention facility unless it has met all standards and is certified as approved by the youth authority (now children, youth and families department). To be so certified and approved, a detention facility must provide detained children with complete sight and sound segregation from adult inmates. A waiver of these requirements by the child and his parents would not relieve the youth authority (now children, youth and families department) of its statutory duty to enforce its certification standards as required by law. 1990 Op. Att'y Gen. No. 90-16.

Child in need of supervision may not be held in jail. — A child alleged to be delinquent or in need of supervision, and the child's parents, cannot sign a waiver which would allow the child to be detained pending final adjudication in a local jail facility with total sight and only partial sound segregation from adult jail detainees. 1990 Op. Att'y Gen. No. 90-16.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 58 et seq.

32A-2-4.1. Adult jails and lockups used as temporary holding facilities; reports.

A. A child arrested and detained for an alleged delinquent act may be temporarily held in an adult jail or lockup for no longer than six hours. A child who is detained in an adult jail or lockup shall be placed in a setting that is physically segregated by sight and sound from adult offenders. After six hours, the child may be placed or detained pursuant to the provisions of Section 32A-2-12 NMSA 1978.

B. An adult jail or lockup used as a temporary holding facility for alleged delinquent offenders shall file an annual report regarding its compliance with federal requirements. The juvenile justice advisory committee and the department shall determine the format of the annual reports.

History: 1978 Comp., § 32A-2-4.1, as enacted by Laws 2009, ch. 239, § 12.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-2-5. Juvenile probation and parole services; establishment; juvenile probation and parole officers; powers and duties.

A. Juvenile probation and parole services shall be provided by the department.

B. To carry out the objectives and provisions of the Delinquency Act, but subject to its limitations, the department has the power and duty to:

(1) receive and examine complaints and allegations that a child is a delinquent child for the purpose of considering beginning a proceeding pursuant to the provisions of the Delinquency Act;

(2) make case referrals for services as appear appropriate or desirable;

(3) make predisposition studies and assessments and submit reports and recommendations to the court;

(4) supervise and assist a child placed on probation or supervised release or under supervision by court order or by the department;

(5) give notice to any individual who has been the subject of a petition filed pursuant to the provisions of the Delinquency Act of the sealing of that individual's records in accordance with that act;

(6) informally dispose of up to three misdemeanor charges brought against a child within two years;

(7) give notice to the children's court attorney of the receipt of any felony complaint and of any recommended adjustment of such felony complaint;

(8) identify an Indian child for the purpose of contacting the Indian child's tribe in delinquency cases; and

(9) contact an Indian child's tribe to consult and exchange information for the purpose of preparing a predisposition report when commitment or placement of an

Indian child is contemplated or has been ordered and indicate in the report the name of the person contacted in the Indian child's tribe and the results of the contact.

C. A juvenile probation and parole officer does not have the powers of a law enforcement officer. A juvenile probation and parole officer may take into physical custody and place in detention, subject to application of a detention risk assessment instrument, a child who is under supervision as a delinquent child or as a youthful offender when there is reasonable cause to believe that the child has violated the conditions of the child's probation or that the child may leave the jurisdiction of the court. Taking a child into custody under this subsection is subject to and shall proceed in accordance with the provisions of the Delinquency Act relating to custody and detention procedures and criteria."

History: 1978 Comp., § 32A-2-5, enacted by Laws 1993, ch. 77, § 34; 1995, ch. 206, § 11; 2003, ch. 225, § 4; 2009, ch. 239, § 13.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, in Subsection B, substituted "informally dispose of" for "expunge" in Paragraph (6) and inserted "Indian" preceding "child's" in Paragraph (8), and in Subsection C, deleted "or parole" following "conditions of his probation" in the second sentence.

The 2003 amendment, effective July 1, 2003, in Subsection C, inserted "subject to application of a detention risk assessment instrument" following "place in detention", and inserted "or as a youthful offender" following "a delinquent child".

The 2009 amendment, effective July 1, 2009, in Subsection B, Paragraph (4), deleted "parole" and added " supervised release", and deleted "juvenile parole board" and added "department".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-7 NMSA 1978 have been included in the annotations to this section.

Juvenile may be taken into custody when a police officer or probation officer believes that the juvenile's surroundings are such as to endanger his (the juvenile's) welfare. 1961-62 Op. Att'y Gen. No. 62-107.

Police may not "pick up" juvenile probation violators on orders of probation officers. — Municipal police officers may not pick up delinquent children for suspected

probation violations pursuant to "pick up" orders issued by juvenile probation officers since such orders are not warrants, directives of a law enforcement official or valid process of the court. 1983-84 Op. Att'y Gen. No. 84-1.

Not considered policeman for social security coverage. — The primary duties of a probation officer, as evidenced by the enumeration in the statute, are to supervise and attempt to rehabilitate both minor and adult offenders when placed on probation by the court. This is not normally thought to be the duty of a policeman, therefore, a probation officer is not to be considered a policeman for purposes of social security coverage. 1959-60 Op. Att'y Gen. No. 60-223.

Authority to petition for parole extension. — Probation officer has authority to petition the court for extension of the period of parole supervision of a child where such action is necessary to safeguard the welfare of the child or the public interest. State v. Doe, 92 N.M. 589, 592 P.2d 189 (Ct. App. 1979).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 54 et seq.

43 C.J.S. Infants § 34.

32A-2-6. Transfer of jurisdiction over child from other tribunals to court.

A. If it appears to a tribunal in a criminal matter that the defendant was under the age of eighteen years at the time the offense charged was alleged to have been committed and the offense charged is a delinquent act pursuant to the provisions of the Delinquency Act, the tribunal shall promptly transfer jurisdiction of the matter and the defendant to the court together with a copy of the accusatory pleading and other papers, documents and transcripts of testimony relating to the case. The tribunal shall not transfer a serious youthful offender.

B. Upon transfer the court shall have exclusive jurisdiction over the proceedings and the defendant. The transferring tribunal shall order that the defendant promptly be taken to the court, or taken to a place of detention designated by the court, or released to the custody of a parent, guardian, custodian or other person legally responsible for the defendant to be brought before the court at a time designated by the court. Upon transfer to the court a petition shall be prepared and filed in the court in accordance with the provisions of the Delinquency Act. If the defendant is not a child at the time of transfer the court retains jurisdiction over the matter only until disposition is made by the court.

History: 1978 Comp., § 32A-2-6, enacted by Laws 1993, ch. 77, § 35.

ANNOTATIONS

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-11 NMSA 1978 have been included in the annotations to this section.

Intent of section. — The legislature in enacting former 32-1-11 and 32-1-30 NMSA 1978 intended to create a mechanism which would allow both the children's court and the district court to exercise full subject matter jurisdiction in criminal matters. State v. Garcia, 93 N.M. 51, 596 P.2d 264 (1979).

Section requires district court to send matter to children's court if defendant was not adult when the offense charged allegedly was committed. State v. Doe, 95 N.M. 88, 619 P.2d 192 (Ct. App. 1980).

Traffic offenses not deemed delinquent acts. — It appears that municipal and magistrate courts can exercise jurisdiction over children for traffic offenses which are not designated delinquent acts under the Children's Code. 1972 Op. Att'y Gen. No. 72-32.

Extradition of juveniles from another state. — See 1973 Op. Att'y Gen. No. 73-14.

Remand from state district court to children's court. — On habeas corpus petitions by state prisoners, the federal courts are concerned only with basic constitutional questions, and whether a juvenile under New Mexico law is entitled to a remand from the state district court to the juvenile (now children's) court because of defects in the waiver of jurisdiction presents a procedural question ordinarily to be determined by the New Mexico courts. Salazar v. Rodriguez, 371 F.2d 726 (10th Cir. 1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Jurisdiction of another court over child as affected by assumption of jurisdiction by juvenile court, 11 A.L.R. 147, 78 A.L.R. 317, 146 A.L.R. 1153.

Authority of court to order juvenile delinquent incarcerated in adult penal institution, 95 A.L.R.3d 568.

Juvenile's guilty or no contest plea in adult court as waiver of defects in transfer or certification proceedings, 74 A.L.R.5th 453.

32A-2-7. Complaints; referral; preliminary inquiry; notice; time waiver.

A. Complaints alleging delinquency shall be referred to probation services, which shall conduct a preliminary inquiry to determine the best interests of the child and of the public with regard to any action to be taken.

B. During the preliminary inquiry on a delinquency complaint, the matter may be referred to another appropriate agency and conferences may be conducted for the purpose of effecting adjustments or agreements that will obviate the necessity for filing a petition. At the commencement of the preliminary inquiry, the parties shall be advised of their basic rights pursuant to Section 32A-2-14 NMSA 1978, and no party may be compelled to appear at any conference, to produce any papers or to visit any place. The child shall be informed of the child's right to remain silent. The preliminary inquiry shall be completed within the time limits set forth in the Children's Court Rules.

C. Prior to a preliminary inquiry being conducted with a child who is detained, the child's parent, guardian or custodian or the child's attorney shall be given reasonable notice by the juvenile probation and parole officer and an opportunity to be present at the preliminary inquiry. If a child is not detained, the preliminary inquiry shall be conducted within thirty days of receipt of the referral from law enforcement. The thirty-day time period may be extended upon a determination by the department that an extension is necessary to conduct a thorough preliminary inquiry and that the extension is not prejudicial to the best interests of the child.

D. When a child is in detention or custody and the children's court attorney does not file a petition within the time limits authorized by the Children's Court Rules, the child shall be released immediately. If a child is not detained and a determination is made to file a petition, the petition shall be filed within sixty days of completion of the preliminary inquiry, unless a motion is granted to extend the time limit for good cause shown. If a child is not in custody or detention, a petition shall not be dismissed for failure to comply with the time limit set forth in this subsection unless there is a showing of prejudice to the child.

E. After completion of the preliminary inquiry on a delinquency complaint involving a misdemeanor, probation services may notify the children's court attorney and recommend an appropriate disposition for the case. If the child has been referred for three or more prior misdemeanors within two years of the instant offense, probation services shall notify the children's court attorney and recommend an appropriate disposition for the case.

F. Probation services shall notify the children's court attorney of the receipt of any complaint involving an act that constitutes a felony under the applicable criminal law. Probation services shall also recommend a disposition to the children's court attorney.

G. The child, through counsel, and the children's court attorney may agree, without judicial approval, to a waiver of time limitations imposed after a petition is filed. A time waiver defers adjudication of the charges. The children's court attorney may place restrictions on a child's behavior as a condition of a time waiver. If the child completes the agreed upon conditions and no new charges are filed against the child, the pending petition shall be dismissed. If the children's court attorney files a new petition against the child, the children's court attorney may proceed on both the original petition and the new

charges. The department shall become a party if probation services are requested as a condition of the time waiver.

History: 1978 Comp., § 32A-2-7, enacted by Laws 1993, ch. 77, § 36; 2005, ch. 189, § 12.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, in Subsection B, provided that in a preliminary inquiry the child shall be informed of the child's right to remain silent; added Subsection C, which provided that prior to a preliminary inquiry concerning a child who is detained, the child's parent, guardian or custodian or attorney shall be given notice by the juvenile probation and parole officer and an opportunity to be present; that if the child is not detained, the inquiry shall be conducted within thirty days after receipt of referral from law enforcement; and that the thirty day period may be extended if the extension is necessary to conduct a thorough inquiry and the extension is not prejudicial to the child; and in Subsection D, provided that if a child is not detained and a determination is made to file a petition, the petition shall be filed within sixty days after completion of the preliminary inquiry, unless a motion is granted to extend the time and that if a child is not in custody or detention, a petition shall not be dismissed for failure to comply with the time limit unless the child is prejudiced.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-14 NMSA 1978 have been included in the annotations to this section.

Legislative intent. — The legislature intended that there be prompt adjudication of cases under the Children's Code. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Purpose of preliminary inquiry is not to determine guilt or innocence, but to afford probation services insight into the need for filing a petition. State v. Doe, 91 N.M. 232, 572 P.2d 960 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

There can be valid preliminary inquiry without conference, and therefore without an initial conference involving the child, the parents and probation services. State v. Doe, 91 N.M. 232, 572 P.2d 960 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

Best interests determination involves exercise of discretion. — A best interest determination, whether by probation services, the children's court attorney, or both, involves the exercise of discretion. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

Social determination, not a legal one. — The best interests determination as to the filing of a delinquency petition is a social determination, not a legal determination. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

Habeas corpus writ additional means of bringing child before court. — The statutory remedy for bringing dependent and neglected children before the district court was not exclusive and the court could issue a writ of habeas corpus upon application by state department of public welfare (now human services department) to obtain custody of an alleged dependent and neglected child. New Mexico Dep't of Pub. Welfare v. Cromer, 52 N.M. 331, 197 P.2d 902 (1948).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 62 et seq.

Truancy as indicative of delinquency or incorrigibility, justifying commitment of infant or juvenile, 5 A.L.R.4th 1211.

Defense of infancy in juvenile delinquency proceedings, 83 A.L.R.4th 1135.

43 C.J.S. Infants §§ 93, 99.

32A-2-8. Petition; authorization to file.

A petition alleging delinquency shall not be filed in delinquency proceedings unless the children's court attorney, after consulting with probation services, has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child. The children's court attorney shall furnish legal services in connection with the authorization and preparation of the petition.

History: 1978 Comp., § 32A-2-8, enacted by Laws 1993, ch. 77, § 37.

ANNOTATIONS

Cross references. — For the filing of petitions in delinquency proceedings, *see* 10-204 NMRA.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-17 NMSA 1978 have been included in the annotations to this section.

Filing of petition sufficiently vests jurisdiction in children's court over persons alleged to have committed delinquent acts while under the age of 18, regardless of their ages at the time the charges are filed. State v. Doe, 95 N.M. 88, 619 P.2d 192 (Ct. App. 1980).

Petition complies. — A petition, signed by the children's court attorney stating that probation services has determined that the best interest of the child and the public

requires that a petition, as authorized by former 32-1-14 NMSA 1978, be filed, complied with former 32-1-17 NMSA 1978 and was sufficient to satisfy the requirement of a "finding" in Rule 22(a), N.M.R. Child. Ct. (now Rule 10-203(a)). State v. Doe, 92 N.M. 198, 585 P.2d 342 (Ct. App. 1978).

Noncompliance of petition. — The district court erred in applying the provisions of the Probate Court to appellees' application for guardianship and in adjudicating the child to be neglected under procedural provisions outside the provisions of the Children's Code, because the petition alleging neglect, seeking removal of the child from the mother's custody and the appointment of guardians did not comply with the provisions of former 32-1-18 and 32-1-17B NMSA 1978. In re Lupe C., 112 N.M. 116, 812 P.2d 365 (Ct. App. 1991).

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 52 et seq.

43 C.J.S. Infants §§ 93, 99.

32A-2-9. Taking into custody.

A child may be taken into custody:

A. pursuant to the order of the court issued because a parent, guardian or custodian fails when requested to bring the child before the court after having promised to do so when the child was delivered upon release from custody;

B. pursuant to the laws of arrest for commission of a delinquent act; or

C. by a juvenile probation and parole officer proceeding pursuant to the provisions of Section 32-2-5 [32A-2-5] NMSA 1978.

History: 1978 Comp., § 32A-2-9, enacted by Laws 1993, ch. 77, § 38.

ANNOTATIONS

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-22 NMSA 1978 have been included in the annotations to this section.

Taking into custody of juvenile is not to be termed an arrest. 1959-60 Op. Att'y Gen. No. 60-166.

Filing of petition necessary before detention. — A juvenile may not be picked up or detained without some person first having caused to be filed a petition alleging the facts causing the juvenile to come within the purview of the Juvenile (now Children's) Code, and then only upon order of the court. 1961-62 Op. Att'y Gen. No. 62-32.

Police not prevented from taking juvenile while upon school premises. — The statutes governing the duties of teachers, county boards of education, county school superintendents and the state board of education [public education department] do not impose the obligation or grant the power to prevent the police taking into custody of juveniles while upon school premises. 1959-60 Op. Att'y Gen. No. 60-166.

Officers of the police, sheriff's department or juvenile (now children's) court have authority to take children into custody while they are on school grounds for the purpose of questioning. 1959-60 Op. Att'y Gen. No. 60-166.

Circumstances where officer cannot detain juvenile. — A law enforcement officer cannot detain or pick up a juvenile while on school grounds or any where else for the purpose, for instance, of questioning concerning an offense in which the juvenile may be implicated in the absence of a warrant or circumstances or surroundings which indicate that the juvenile's welfare is endangered, or in the absence of the juvenile being found violating some statute or ordinance. 1964 Op. Att'y Gen. No. 64-56.

Police may not "pick up" juvenile probation violators on orders of probation officers. — Municipal police officers may not pick up delinquent children for suspected probation violations pursuant to "pick up" orders issued by juvenile probation officers since such orders are not warrants, directives of a law enforcement official or valid process of the court. 1983-84 Op. Att'y Gen. No. 84-1.

Detention until bond posted violates provisions. — The action of the police, acting unilaterally in detaining a child in jail for violating a city's curfew ordinance until his parents post bond, is contrary to the Children's Code. 1975 Op. Att'y Gen. No. 75-58.

Extradition of juveniles from another state. — See 1973 Op. Att'y Gen. No. 73-14.

Legal proceedings to prevent withholding of medical treatment. — The State of New Mexico has authority under state law to pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, as may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions. 1985 Op. Att'y Gen. No. 85-5.

Law reviews. — For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 62 et seq.

Power of court or other public agency to order medical treatment for child over parental objections not based on religious grounds, 97 A.L.R.3d 421.

32A-2-10. Release or delivery from custody.

A. A person taking a child into custody shall, with all reasonable speed:

(1) release the child to the child's parent, guardian or custodian or an adult authorized by the child's parent, guardian or custodian and issue verbal counsel or warning as may be appropriate;

(2) release the child to the child's parent, guardian or custodian or an adult authorized to sign on behalf of the child's parent, guardian or custodian upon written promise to bring the child before the court when requested by the court. If the parent, guardian or custodian or an adult authorized to sign on behalf of the child's parent, guardian or custodian fails, when requested, to bring the child before the court as promised, the court may order the child taken into custody and brought before the court;

(3) deliver the child to a place of detention as provided in Section 32A-2-12 NMSA 1978;

(4) deliver the child to a medical facility, if available, if the child is believed to be suffering from a serious illness that requires prompt treatment or prompt diagnosis;

(5) deliver the child to an evaluation facility, if available, if the person taking the child into custody has reasonable grounds to believe the child presents a likelihood of serious harm to the child's self or others or is suffering from some other serious mental condition or illness that requires prompt treatment or prompt diagnosis; or

(6) deliver the child to a center or organization that the court or the department recognizes as an alternative to secure detention.

B. When an alleged delinquent child is delivered to a place of detention or a center or organization recognized as an alternative to secure detention as provided in Section 32A-2-12 NMSA 1978, only a department employee or a trained county detention professional designated by the department may place the child in detention or with a center or organization recognized as an alternative to secure detention in accordance with the criteria for detention set forth in Section 32A-2-11 NMSA 1978. If the criteria for detention of an alleged delinquent child are not met, the child shall be released from custody.

C. A child under the age of eleven shall not be held in detention. If a child under the age of eleven poses a substantial risk of harm to the child's self or others, a peace officer may detain and transport that child for emergency mental health evaluation and care in accordance with Section 32A-6A-19 NMSA 1978.

D. If a child is taken into custody and is not released to the child's parent, guardian or custodian or an adult authorized by the child's parent, guardian or custodian, the person taking the child into custody shall give written notice thereof as soon as possible, and in no case later than twenty-four hours, to the child's parent, guardian or custodian or an adult authorized by the child's parent, guardian or custodian and to the court, together with a statement of the reason for taking the child into custody.

E. In all cases when a child is taken into custody, the child shall be released to the child's parent, guardian or custodian or an adult authorized by the child's parent, guardian or custodian in accordance with the conditions and time limits set forth in the Children's Court Rules [10-101 NMRA].

History: 1978 Comp., § 32A-2-10, enacted by Laws 1993, ch. 77, § 39; 2003, ch. 225, § 5; 2005, ch. 189, § 13.; 2009, ch. 239, § 14.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, substituted "Section 32A-2-12" for "Section 32-2-11" in Paragraph A(3); rewrote Subsection B; and deleted "and Forms" at the end of Subsection D.

The 2005 amendment, effective June 17, 2005, added Subsection D to provide that a child under the age of eleven shall not be held in detention and that if a child under eleven poses a risk or harm to himself or others, a peace officer may detain and transport the child for emergency mental health evaluation and care.

The 2009 amendment, effective July 1, 2009, in Paragraph (1) of Subsection A, after "guardian or custodian", added "or an adult authorized by the child’s parent, guardian or custodian"; in Paragraph (2) of Subsection A, after "guardian or custodian", added "or an adult authorized to sign on behalf of the child’s parent, guardian or custodian"; added Paragraph (6) of Subsection A; in Subsection B, after "a place of detention" added "or a center or organization recognized as an alternative to secure detention" and after "place the child in detention", added "or with a center or organization recognized as an alternative to secure detention"; in Subsection C, changed the reference from Section 32A-6-11 NMSA 1978 to Section 32A-6A-19 NMSA 1978; in Subsection D, in two places, after "guardian or custodian", added "or an adult authorized by the child’s parent, guardian or custodian"; and in Subsection E, after "guardian or custodian", added "or an adult authorized by the child’s parent, guardian or custodian".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-23 NMSA 1978 have been included in the annotations to this section.

Scope of custody. — While there appears to be no doubt that juveniles may be taken into custody for the purpose of questioning, care must be exercised as to what is done with them after the taking of custody, particularly in view of the provision of the law that a juvenile is not to be unduly detained in a prison or jail. Furthermore, in most cases, the juvenile should be released to the custody of his parent or other responsible adult until his case is to be disposed of. 1959-60 Op. Att'y Gen. No. 60-166.

No detention in absence of court order or probation determination. — In the absence of a court order, detention was not permitted by statute in the absence of the juvenile probation office's determination that it is warranted. Thus the city police, acting on their own, may not detain a child. 1975 Op. Att'y Gen. No. 75-58.

No bail or bond as of right. — Under the Juvenile (now Children's) Code, a juvenile is not entitled to bail nor is he entitled, as a matter of right, to bond on supersedeas after a determination has been made that he is a juvenile delinquent and a sentence of detention has been passed against him. Of course, so far as the question of supersedeas bond is concerned, the matter would be under the rules of the court and discretionary with the court. 1957-58 Op. Att'y Gen. No. 57-215.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Bail: right of bail in proceedings in juvenile courts, 53 A.L.R.3d 848.

32A-2-11. Criteria for detention of children.

A. Unless ordered by the court pursuant to the provisions of the Delinquency Act, a child taken into custody for an alleged delinquent act shall not be placed in detention unless a detention risk assessment instrument is completed and a determination is made that the child:

(1) poses a substantial risk of harm to himself;

(2) poses a substantial risk of harm to others; or

(3) has demonstrated that he may leave the jurisdiction of the court.

B. The criteria for detention in this section shall govern the decisions of all persons responsible for determining whether detention is appropriate prior to a detention hearing, based upon review of the detention risk assessment instrument.

C. The department shall develop and implement a detention risk assessment instrument. The department shall collect and analyze data regarding the application of the detention risk assessment instrument. On January 1, 2004, the department shall provide the legislature with a written report with respect to its collection and analysis of data regarding the application of the detention risk assessment instrument.

History: 1978 Comp., § 32A-2-11, enacted by Laws 1993, ch. 77, § 40; 2003, ch. 225, § 6.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, rewrote the section.

Detention at boys' school. — This statute does not preclude detention of a child at a boys' school pending an adjudicatory hearing on a delinquency petition; the purpose of the confinement determines whether a child is in detention or commitment at the school. State v. Anthony M., 1998-NMCA-065, 125 N.M. 149, 958 P.2d 107, cert. denied, 125 N.M. 145, 958 P.2d 103 (1998).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Authority of court to order juvenile delinquent incarcerated in adult penal institution, 95 A.L.R.3d 568.

Truancy as indicative of delinquency or incorrigibility, justifying commitment of infant or juvenile, 5 A.L.R.4th 1211.

Defense of infancy in juvenile delinquency proceedings, 83 A.L.R.4th 1135.

32A-2-12. Placement or detention.

A. A child alleged to be a delinquent child may be placed or detained, pending a court hearing, in any of the following places:

(1) a licensed foster home or a home otherwise authorized under the law to provide foster or group care;

(2) a facility operated by a licensed child welfare services agency;

(3) a shelter-care facility provided for in the Children's Shelter Care Act [32A-9-1 NMSA 1978] that is in compliance with all standards, conditions and regulatory requirements and that shall be considered a temporary placement subject to judicial review within thirty days of placement;

(4) a detention facility certified by the department for children alleged to be delinquent children;

(5) any other suitable place, other than a facility for the long-term care and rehabilitation of delinquent children to which children adjudicated as delinquent may be confined pursuant to Section 32A-2-19 NMSA 1978, designated by the court and that meets the standards for detention facilities pursuant to the Children's Code [32A-1-1 NMSA 1978] and federal law; or

(6) the child's home or place of residence, under conditions and restrictions approved by the court.

B. A child alleged to be a youthful offender may be detained, pending a court hearing, in any of the following places:

(1) a detention facility, licensed by the department, for children alleged to be delinquent children; or

(2) any other suitable place, other than a facility for the long-term care and rehabilitation of delinquent children to which children adjudicated as delinquent children may be confined pursuant to Section 32A-2-19 NMSA 1978, designated by the court and that meets the standards for detention facilities pursuant to the Children's Code and federal law.

C. A child adjudicated as a youthful offender who is violent toward staff or other residents in a detention facility may be transferred and detained, pending a court hearing, in a county jail. In the event that a child is detained in a jail, the director of the jail shall presume that the child is vulnerable to victimization by inmates within the adult population because of the child's age, and shall take measures to provide protection to the child. However, provision of protective measures shall not result in diminishing a child's civil rights to less than those existing for an incarcerated adult.

D. A child who has previously been incarcerated as an adult or a person eighteen years of age or older shall not be detained in a juvenile detention facility or a facility for the long-term care and rehabilitation of delinquent children, but may be detained in a county jail. A child shall not be transferred to a county jail solely on the basis of attaining the age of eighteen while detained in a juvenile detention facility. In the event that a child is detained in a jail, the director of the jail shall presume that the child is vulnerable to victimization by inmates within the adult population because of the child's age, and shall take measures to provide protection to the child. However, provision of protective measures shall not result in diminishing a child's civil rights to less than those existing for an incarcerated adult.

E. A child alleged to be a serious youthful offender may be detained pending a court hearing in any of the following places, prior to arraignment in metropolitan, magistrate or district court:

(1) a detention facility, licensed by the department, for children alleged to be delinquent children;

(2) any other suitable place, other than a facility for the long-term care and rehabilitation of delinquent children to which children adjudicated as delinquent children may be confined pursuant to Section 32A-2-19 NMSA 1978, designated by the court that meets the standards for detention facilities pursuant to the Children's Code and federal law; or

(3) a county jail, if a facility in Paragraph (1) or (2) of this subsection is not appropriate. In the event that a child is detained in a jail, the director of the jail shall presume that the child is vulnerable to victimization by inmates within the adult population because of the child's age and shall take measures to provide protection to the child. However, provision of protective measures shall not result in diminishing a child's civil rights to less than those existing for an incarcerated adult.

F. When a person who is eighteen years of age or older is taken into custody and transported to an adult facility on a juvenile warrant or an adult warrant or other adult charges and an outstanding juvenile warrant exists, notice shall be given to the children's court attorney and the juvenile probation and parole office in the jurisdiction where the juvenile warrant was issued within one day of the person being taken into custody. The juvenile probation and parole office shall give notice that the person has been taken into custody to the children's court judge and the attorney who represented the person in the juvenile proceeding.

G. In addition to the judicial review required by Paragraph (3) of Subsection A of this section, a child detained in an out-of-home placement pursuant to this section may request judicial review of the appropriateness of the placement.

History: 1978 Comp., § 32A-2-12, enacted by Laws 1993, ch. 77, § 41; 2003, ch. 225, § 7; 2005, ch. 189, § 14; 2009, ch. 239, § 15.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, in Paragraphs A(4) and E(2), substituted "pursuant to Section 32A-2-19" for "under Section 32-2-19" following "may be confined", substituted "pursuant to" for "under" following "for detention facilities"; added Paragraph A(5); added present Subsections B to D and redesignated former Subsection B as Subsection E; in Paragraph E(3), substituted "jail" for "facility" following "director of the", substituted "inmates" for "detainees" following "to victimization by", and substituted "provision of protective measures shall not" for "no such protective measure should" following "However".

The 2005 amendment, effective June 17, 2005, added Subsection F, which provided that when a person who is eighteen years of age or older is taken into custody and transported to an adult facility and an outstanding warranty exists, notice shall be given

to the children’s court attorney and the juvenile probation and parole officer in the jurisdiction where the warrant was issued within one day after the person is taken into custody and that the juvenile probation and parole officer shall give notice to the children's court judge and the person's attorney.

The 2009 amendment, effective July 1, 2009, in Paragraph (3) of Subsection A, after "Children’s Shelter Care Act", deleted "or a detention facility certified by the department for children alleged to be delinquent children" and added the remainder of the sentence; added Paragraph (4) of Subsection A; in Subsection D, added the second sentence; and added Subsection G.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-25 NMSA 1978 have been included in the annotations to this section.

Child in need of supervision may not be held in jail. — Under no circumstances may a child in need of supervision be held in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent children. This prohibition includes jail lock-up, drunk tanks or county jails. Every effort should be made to expedite transfer of physical custody of the child in need of supervision to a suitable shelter-care facility. 1979 Op. Att'y Gen. No. 79-8.

A child alleged to be delinquent or in need of supervision, and the child's parents, cannot sign a waiver which would allow the child to be detained pending final adjudication in a local jail facility with total sight and only partial sound segregation from adult jail detainees. 1990 Op. Att'y Gen. No. 90-16.

Detention of child until bond posted not permitted. — City police acting unilaterally may not detain a child in jail until his parents post bond. In the absence of a court order or a determination by the juvenile probation office, no detention is permitted. 1975 Op. Att'y Gen. No. 75-58.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Authority of court to order juvenile delinquent incarcerated in adult penal institution, 95 A.L.R.3d 568.

32A-2-13. Detention hearing required on detained children; probable cause determination; court determination; disposition.

A. When a child who has been taken into custody is not released but is detained:

(1) a judicial determination of probable cause shall be made by a judge or special master or magistrate within forty-eight hours, including Saturdays, Sundays and legal holidays, except for children taken into custody under an arrest warrant pursuant to the Children's Court Rules [10-101 NMRA]. A statement by a law enforcement officer, which shall include the charges, may be the basis of a probable cause determination. The probable cause determination shall be nonadversarial, may be held in the absence of the child and counsel and may be conducted by telephone. If the court finds no probable cause to believe the child committed an offense, the child shall be released;

(2) a petition shall be filed within twenty-four hours from the time the child is taken into custody, excluding Saturdays, Sundays and legal holidays, and if not filed within the stated time, the child shall be released; and

(3) a detention hearing shall be held within twenty-four hours, excluding Saturdays, Sundays and legal holidays, from the time of filing the petition to determine whether continued detention is required pursuant to the criteria established by the Children's Code [32A-1-1 NMSA 1978]. At the request of any party, the court may permit a detention hearing to be conducted by appropriate means of electronic communication; provided that all hearings conducted by electronic means shall be recorded and preserved as part of the record, the child shall have legal representation present with the child, no plea shall be allowed to be taken via electronic communication and the court finds:

(a) that undue hardship will result from conducting the hearing with all parties, including the child, present in the courtroom; and

(b) that the hardship substantially outweighs any prejudice or harm to the child that is likely to result from the hearing being conducted by electronic means.

B. The judge may appoint one or more persons to serve as special master on a full- or part-time basis for the purpose of holding detention hearings. A juvenile probation and parole officer shall not be appointed as a special master. The judge shall approve all contracts with special masters and shall fix their hourly compensation, subject to the approval of the director of the administrative office of the courts.

C. Notice of the detention hearing, either oral or written, stating the time, place and purpose of the hearing shall be given by the person designated by the court to the child's parents, guardian or custodian, if they can be found, and to the child. The department shall be provided with reasonable oral or written notification and an opportunity to be heard. At any hearing held pursuant to this subsection, the department may appear as a party.

D. At the commencement of the detention hearing, the judge or special master shall advise the parties of their basic rights provided in the Children's Code and shall appoint counsel, guardians and custodians, if appropriate.

E. If the judge or special master finds that the child's detention is appropriate under the criteria established by the Children's Code, the judge or special master shall order detention in an appropriate facility in accordance with the Children's Code.

F. If the judge or special master finds that detention of the child is not appropriate under the criteria established by the Children's Code, the judge or special master shall order the release of the child, but, in so doing, may order one or more of the following conditions to meet the individual needs of the child:

(1) place the child in the custody of a parent, guardian or custodian or under the supervision of an agency agreeing to supervise the child;

(2) place restrictions on the child's travel, association with other persons or place of abode during the period of the child's release; or

(3) impose any other condition deemed reasonably necessary and consistent with the criteria for detaining children established by the Children's Code, including a condition requiring that the child return to custody as required.

G. An order releasing a child on any conditions specified in this section may at any time be amended to impose additional or different conditions of release or to return the child to custody or detention for failure to conform to the conditions originally imposed.

H. At the detention hearing, all relevant and material evidence helpful in determining the need for detention may be admitted by the judge or special master even though it would not be admissible in a hearing on the petition.

I. If the child is not released at the detention hearing and a parent, guardian or custodian was not notified of the hearing and did not appear or waive appearance at the detention hearing, the judge or special master shall rehear the detention matter without unnecessary delay upon the filing of an affidavit stating the facts and a motion for rehearing.

J. If a child is not released at the detention hearing, the child's detention may be subsequently reviewed by the court or the court may review the child's detention in conjunction with a pretrial conference.

K. If a child is not placed within ten days after a disposition hearing, the child may be released and placed under appropriate supervision, so long as the child does not pose a flight risk or substantial risk of harm to the child's self or others.

History: 1978 Comp., § 32A-2-13, enacted by Laws 1993, ch. 77, § 42; 2003, ch. 225, § 8; 2009, ch. 239, § 16.

ANNOTATIONS

Cross references. — For probable cause determinations governing the children's court, *see* 10-508A NMRA.

The 2003 amendment, effective July 1, 2003, deleted "and Forms" following "Children's Court Rules" in Paragraph A(1); substituted "twenty-four" for "forty-eight" following "be filed within" in Paragraph A(2); inserted "to meet the individual needs of the child" at the end of Subsection F; and added Subsections J and K.

The 2009 amendment, effective July 1, 2009, in Paragraph (3) of Subsection A, added the last sentence; and added Subparagraphs (a) and (b) of Paragraph (3) of Subsection A.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Grade court. — Where the grade court conditions were laid out in the grade court order child signed and the detention sanction set out in the grade court order, by its terms, applied to violations of conditions of probation and not to conditions of release, once child accepted the conditions of release, the court had authority to order detention, based on his failure to comply with those conditions. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Subsection F(3) must be read in correlation with 32A-2-16 F and H NMSA 1978. To ignore it would leave children adjudicated but awaiting disposition without statutory protection as to what conditions may be imposed upon their release and the legislature had not intended such a result. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Children's court has authority to detain children who have been released while awaiting sentencing under this section. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Restriction on child's travel or residence. — Although the disposition was not ordered pursuant to this section, this section does support the notion that placing restrictions on a child's travel or place of residence is consistent with the Children's Code. State v. Wacey C., 2004-NMCA-029, 135 N.M. 186, 86 P.3d 611.

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

32A-2-14. Basic rights.

A. A child subject to the provisions of the Delinquency Act is entitled to the same basic rights as an adult, except as otherwise provided in the Children's Code, including rights provided by the Delinquency Act, except as otherwise provided in the Children's Code [32A-1-1 NMSA 1978].

B. If after due notice to the parent, guardian or custodian and after a hearing determining indigency, the parent, guardian or custodian is declared indigent by the court, the public defender shall represent the child. If the court finds that the parent, guardian or custodian is financially able to pay for an attorney but is unwilling to do so, the court shall order the parent, guardian or custodian to reimburse the state for public defender representation.

C. No person subject to the provisions of the Delinquency Act who is alleged or suspected of being a delinquent child shall be interrogated or questioned without first advising the child of the child's constitutional rights and securing a knowing, intelligent and voluntary waiver.

D. Before any statement or confession may be introduced at a trial or hearing when a child is alleged to be a delinquent child, the state shall prove that the statement or confession offered in evidence was elicited only after a knowing, intelligent and voluntary waiver of the child's constitutional rights was obtained.

E. In determining whether the child knowingly, intelligently and voluntarily waived the child's rights, the court shall consider the following factors:

(1) the age and education of the respondent;

(2) whether the respondent is in custody;

(3) the manner in which the respondent was advised of the respondent's rights;

(4) the length of questioning and circumstances under which the respondent was questioned;

(5) the condition of the quarters where the respondent was being kept at the time of being questioned;

(6) the time of day and the treatment of the respondent at the time of being questioned;

(7) the mental and physical condition of the respondent at the time of being questioned; and

(8) whether the respondent had the counsel of an attorney, friends or relatives at the time of being questioned.

F. Notwithstanding any other provision to the contrary, no confessions, statements or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition. There is a rebuttable presumption that any confessions, statements or admissions made by a child thirteen or fourteen years old to a person in a position of authority are inadmissible.

G. An extrajudicial admission or confession made by the child out of court is insufficient to support a finding that the child committed the delinquent acts alleged in the petition unless it is corroborated by other evidence.

H. The child and the parent, guardian or custodian of the child shall be advised by the court or its representative that the child shall be represented by counsel at all stages of the proceedings on a delinquency petition, including all post-dispositional court proceedings. If counsel is not retained for the child or if it does not appear that counsel will be retained, counsel shall be appointed for the child.

I. A child under the age of thirteen alleged or adjudicated to be a delinquent child shall not be fingerprinted or photographed for identification purposes without obtaining a court order.

J. The court, at any stage of the proceeding on a petition under the Children's Code, may appoint a guardian ad litem for a child who is a party if the child has no parent, guardian or custodian appearing on behalf of the child or if the parent's, guardian's or custodian's interests conflict with those of the child. A party to the proceeding or an employee or representative of a party shall not be appointed as guardian ad litem.

K. The court shall appoint a guardian for a child if the court determines that the child does not have a parent or a legally appointed guardian in a position to exercise effective guardianship. No officer or employee of an agency that is vested with the legal custody of the child shall be appointed guardian of the child except when parental rights have been terminated and the agency is authorized to place the child for adoption.

L. A person afforded rights under the Delinquency Act shall be advised of those rights at that person's first appearance before the court on a petition under that act.

M. A serious youthful offender who is detained prior to trial in an adult facility has a right to bail as provided under SCRA 1986, Rule 5-401. A child held in a juvenile facility designated as a place of detention prior to adjudication does not have a right to bail but may be released pursuant to the provisions of the Delinquency Act.

N. The provisions of the Delinquency Act shall not be interpreted to limit the right of a child to petition a court for a writ of habeas corpus.

History: 1978 Comp., § 32A-2-14, enacted by Laws 1993, ch. 77, § 43; 2003, ch. 225, § 9; 2009, ch. 239, § 17.

ANNOTATIONS

Cross references. — For general provisions, basic rights, *see* 32A-1-16 NMSA 1978.

For explanation of basic rights in the Children's Court, *see* 10-208B NMRA.

The 2003 amendment, effective July 1, 2003, deleted "or not" near the beginning of Paragraphs E(2) and (8) and added Subsection N.

The 2009 amendment, effective July 1, 2009, in Subsection A, after "Children's Code", added the remainder of the sentence; and in Subsection H, in the first sentence, after "delinquency petition", added the remainder of the sentence.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Admissibility of statements of a child under thirteen. — The confessions, statements, or admissions of individuals under thirteen years of age regardless of the context in which, or to whom, they were made are not admissible in a delinquency proceeding. State v. Jade G., 2007-NMSC-010, 141 N.M. 284, 154 P.3d 659.

Admissibility of fingerprints of a child under thirteen. — Where the fingerprints of a child under the age of thirteen are taken pursuant to a search warrant, before a formal petition of delinquency is filed, the protections of this section do not apply and cannot be used as the basis to exclude the child's fingerprints from evidence at the delinquency hearing. State v. Jade G., 2007-NMSC-010, 141 N.M. 284, 154 P.3d 659.

Constitutionality of Subsection F. — The rebuttable presumption that the statements and confessions of a child under 13 years are inadmissible is in accord with the legislative purpose of providing extra protection for the very young, and the provision

was not unconstitutional as applied to a 16-year-old defendant. State v. Setser, 1997-NMSC-004, 122 N.M. 794, 932 P.2d 484.

Presumption in Subsection F. — The term "rebuttable presumption," in Subsection F, is not used in exclusive reference to the factors of Subsection E; rather, it relates to admissibility, and it precludes the children's court from treating a 13 or 14-year-old child in the same manner as a child over the age of 14 or an adult. In re Francesca L., 2000-NMCA-019, 128 N.M. 673, 997 P.2d 147, holding limited by State v. Adam J., 2003-NMCA-080, 133 N.M. 815, 70 P.3d 805.

If the court is not satisfied that the rebuttable presumption of Subsection F of this section has been overcome based on the personal traits of the child, the court's inquiry is complete and the confession, statement, or admission in question is inadmissible. To the extent that In re Francesca L., 2000-NMCA-019, 128 N.M. 673, 997 P.2d 147, states to the contrary, it is overruled. State v. Adam J., 2003-NMCA-080, 133 N.M. 815, 70 P.3d 805.

Subsection F is construed to eliminate application of Subsection G of this section, which permits corroborated extrajudicial admissions and confessions. State v. Jade G., 2005-NMCA-019, 137 N.M. 128, 108 P.3d 534, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Child's statements inadminssible. — Subsection F of this section plainly forbids admission of the statements child made to relatives and neighbors regarding the shooting of her father by the child. State v. Jade G., 2005-NMCA-019, 137 N.M. 128, 108 P.3d 534, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Construction. — Subsection C is an exception to the general rule in Subsection A that children are entitled to the same basic rights as adults; therefore, this section is not a mere codification of Miranda, but was intended instead to provide children with greater statutory protection than constitutionally mandated. State v. Javier M., 2001-NMSC-030, 131 N.M. 1, 33 P.3d 1.

Waiver of *Miranda* rights. — Even though the 16-year-old defendant suffered from certain conditions and disorders that affected her cognitive abilities, there was no evidence that she lacked sufficient intelligence to understand her rights; therefore, her confession, given voluntarily after a valid waiver of her *Miranda* rights, was admissible. State v. Setser, 1997-NMSC-004, 122 N.M. 794, 932 P.2d 484.

Motion to suppress 17-year-old defendant's statement was properly denied, because, although the interrogation took place at a police station while he was in handcuffs and without a parent present, he had previous experience with the court system and had been questioned by police officers and represented by attorneys in the past, there was no evidence that he needed to be provided with a special form in order to understand his rights or knowingly waive them, and, in view of his age and eleventh-grade education, his alert condition at the time of the interrogation, and the manner in which

his rights were explained to him, he was more likely than not to understand and knowingly waive them, even without his parent present. State v. Lasner, 2000-NMSC-038, 129 N.M. 806, 14 P.3d 1282.

In evaluating the trial court's determination that 17-year-old defendant knowingly, intelligently, and voluntarily waived his constitutional rights, it is necessary to look at the totality of circumstances, giving particular emphasis to the factors listed in Subsection E. State v. Martinez, 1999-NMSC-018, 127 N.M. 207, 979 P.2d 718.

***Miranda* warning not required.** — Police officers may ask questions about needles or weapons prior to pat-down search to assure safety of officers without giving the individual *Miranda* warning. State v. Gerald B., 2006-NMCA-022, 139 N.M. 113, 129 P.3d 149.

Suppression not required. — When child volunteered that he possessed marijuana, in response to police officer's inquiry about needles during a pat-down search, child was not entitled under this section to the suppression of the statements or marijuana. State v. Gerald B., 2006-NMCA-022, 139 N.M. 113, 129 P.3d 149.

State to prove voluntariness of confession. — Whether a juvenile knowingly and voluntarily waives his constitutional rights before giving a confession is an issue distinct from the competency of the juvenile, requires the consideration of different factors, and is an issue as to which the state carries the burden of proof; if the children's court fails to make the state prove by the preponderance of the evidence that a juvenile knowingly and voluntarily waived his or her rights, a delinquency determination may be reversed. State v. Jason F., 1998-NMSC-010, 125 N.M. 111, 957 P.2d 1145.

Investigatory detention triggers statute. — A child need not be under custodial interrogation in order to trigger the protections of this section. The protections are triggered when a child is subject to an investigatory detention and therefore, prior to questioning, a child who is detained or seized and suspected of wrongdoing must be advised that he or she has the right to remain silent and that anything said can be used in any delinquency hearing. State v. Javier M., 2001-NMSC-030, 131 N.M. 1, 33 P.3d 1.

Objective standard of determining wrongdoing. — In the context of investigatory stops, determining whether a child is "suspected" of wrongdoing should be measured by an objective standard. State v. Javier M., 2001-NMSC-030, 131 N.M. 1, 33 P.3d 1.

Administrative questioning does not trigger statute. — This section does not require that officers give children constitutional warnings prior to: (1) questions pertaining to a child's age or identity; (2) general on-the-scene questioning; or (3) volunteered statements made by a child. State v. Javier M., 2001-NMSC-030, 131 N.M. 1, 33 P.3d 1.

Remedy for violation. — If during an investigatory detention, a child is not advised of the right to remain silent and warned of the consequence of waiving that right, any

statement or confession obtained as a result of the detention or seizure is inadmissible in any delinquency proceeding. State v. Javier M., 2001-NMSC-030, 131 N.M. 1, 33 P.3d 1.

Dismissal not a remedy. — There is no statutory provision for the dismissal of a delinquency petition based on a violation of any of the statutory rights granted under this section. In re Jade G., 2001-NMCA-058, 130 N.M. 687, 30 P.3d 376, cert. quashed, 132 N.M. 484, 51 P.3d 527 (2002).

Purpose of Subsection I of this section is to afford greater protection for children under 13 than to older children and adults in regard to fingerprinting. State v. Jade G., 2005-NMCA-019, 137 N.M. 128, 108 P.3d 534, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

An obvious purpose of Subsection I of this section is to require at some stage a judge's independent review of a request for a juvenile's fingerprints, to balance the accountability and protective purposes of the Delinquency Act with the protection to be afforded children under 13. State v. Jade G., 2005-NMCA-019, 137 N.M. 128, 108 P.3d 534, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Special master's refusal to rule on a juvenile's motion to suppress does not violate this rule if the children's court reviews the matter both before and after the adjudicatory hearing conducted by the special master. State v. Jason F., 1998-NMSC-010, 125 N.M. 111, 957 P.2d 1145.

Although Subsection E(8) directs courts to consider the presence or absence of an attorney, friend, or relative at the questioning, that is merely one of the factors relevant in determining the validity of a waiver of rights, and there is no statutory requirement that parents be notified about a custodial interrogation of their juvenile child. State v. Martinez, 1999-NMSC-018, 127 N.M. 207, 979 P.2d 718.

The state was not required to prove that 17-year-old defendant expressly waived his rights in order to demonstrate a constitutionally valid waiver. State v. Martinez, 1999-NMSC-018, 127 N.M. 207, 979 P.2d 718.

Law reviews. — For note, "Children's Law: Investigatory Detention of Juveniles in New Mexico: Providing Greater Protection than Miranda Rights for Children in the Area of Police Questioning - *State of New Mexico v. Javier M.*," see 32 N.M.L. Rev. 393 (2002).

32A-2-15. Time limitations on delinquency adjudicatory hearing.

The adjudicatory hearing in a delinquency proceeding shall be held in accordance with the time limits set forth in the Children's Court Rules and Forms [10-101 NMRA].

History: 1978 Comp., § 32A-2-15, enacted by Laws 1993, ch. 77, § 44.

ANNOTATIONS

Cross references. — For adjudicatory time limits in delinquency proceedings, *see* 10-226 NMRA.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-28 NMSA 1978 have been included in the annotations to this section.

Commencement of period for adjudicatory hearing in delinquency proceedings. — The time limit set forth in 10-226 NMRA for commencing an adjudicatory hearing in a delinquency proceeding if the child is not held in custody begins to run when the summons and a copy of the petition are personally served on the child, not when a copy is given to the child's attorney. State v. Jody C., 113 N.M. 80, 823 P.2d 322 (Ct. App. 1991).

Granting of continuance within trial court's discretion. — The granting of a motion for continuance is within the sound discretion of the trial court and such action will not be disturbed on review unless there is a showing of abuse of that discretion. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 62 et seq.

32A-2-16. Conduct of hearings; findings; dismissal; dispositional matters; penalty.

A. Hearings on petitions shall be conducted by the court separate from other proceedings. A jury trial on the issues of alleged delinquent acts may be demanded by the child, parent, guardian, custodian or counsel in proceedings on petitions alleging delinquency when the offense alleged would be triable by jury if committed by an adult. If a jury is demanded and the child is entitled to a jury trial, the jury's function is limited to that of trier of the factual issue of whether the child committed the alleged delinquent acts. If no jury is demanded, the hearing shall be by the court without a jury. Jury trials shall be conducted in accordance with rules promulgated under the provisions of Subsection B of Section 32A-1-5 NMSA 1978. A delinquent child facing a juvenile disposition shall be entitled to a six-member jury. If the children's court attorney has filed a motion to invoke an adult sentence, the child is entitled to a twelve-member jury. A

unanimous verdict is required for all jury trials. The proceedings shall be recorded by stenographic notes or by electronic, mechanical or other appropriate means.

B. All hearings to declare a person in contempt of court and all hearings on petitions pursuant to the provisions of the Delinquency Act shall be open to the general public, except where the court in its discretion, after a finding of exceptional circumstances, deems it appropriate to conduct a closed delinquency hearing. Only the parties, their counsel, witnesses and other persons approved by the court may be present at a closed hearing. Those other persons the court finds to have a proper interest in the case or in the work of the court may be admitted by the court to closed hearings on the condition that they refrain from divulging any information concerning the exceptional circumstances that resulted in the need for a closed hearing. Accredited representatives of the news media shall be allowed to be present at closed hearings subject to the conditions that they refrain from divulging information concerning the exceptional circumstances that resulted in the need for a closed hearing and subject to such enabling regulations as the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Delinquency Act.

C. Those persons or parties granted admission to a closed hearing who intentionally divulge information in violation of Subsection B of this section are guilty of a petty misdemeanor.

D. The court shall determine if the allegations of the petition are admitted or denied. If the allegations are denied, the court shall proceed to hear evidence on the petition. The court after hearing all of the evidence bearing on the allegations of delinquency shall make and record its findings on whether the delinquent acts subscribed to the child were committed by the child. If the court finds that the allegations of delinquency have not been established, it shall dismiss the petition and order the child released from any detention or legal custody imposed in connection with the proceedings.

E. The court shall make a finding of delinquency based on a valid admission of the allegations of the petition or on the basis of proof beyond a reasonable doubt.

F. If the court finds on the basis of a valid admission of the allegations of the petition or on the basis of proof beyond a reasonable doubt that the child is a delinquent, the court may proceed immediately or at a postponed hearing to make disposition of the case.

G. In that part of the hearings held under the Delinquency Act on dispositional issues, 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 part of the hearings on adjudicatory issues.

H. On the court's motion or that of a party, the court may continue the hearing on the petition for a reasonable time to receive reports and other evidence in connection

with disposition. The court may continue the hearing pending the receipt of the predisposition study and report if that document has not been prepared and received. During any continuances under this subsection, the court shall make an appropriate order for detention or legal custody.

History: 1978 Comp., § 32A-2-16, enacted by Laws 1993, ch. 77, § 45; 2009, ch. 239, § 18.

ANNOTATIONS

Cross references. — For sentencing for petty misdemeanors, *see* 31-19-1 NMSA 1978.

The 2009 amendment, effective July 1, 2009, in Subsection A, in the fifth sentence, changed the reference from Section 32-1-4 NMSA 1978 to Section 32A-1-5 NMSA 1978.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-31 NMSA 1978 have been included in the annotations to this section.

Purpose of proceeding to determine "delinquency" is to decide whether the accused is responsible for prohibited conduct and, when criminal, the consequences may be the same as in the case of an adult. Indeed, it is even possible that ultimately this could result in the juvenile being incarcerated in the penitentiary with adult offenders. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Criteria for detention. — This section does not require the court to consider criteria for detention before entering such an order. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Subsections F and H of this section do not permit the children’s court to wholly bypass the criteria for detention. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

No conflict with 10-229B NMRA. — There is no conflict between the time limit within which a dispositional hearing must be held under 10-229B NMRA and 32-1-31H NMSA 1978 (now Subsection H of this section) granting discretion to the children's court in a wide variety of circumstances; the rule simply states that in one specific circumstance that discretion should not be exercised to delay a hearing. In re Paul T., 118 N.M. 538, 882 P.2d 1051 (Ct. App. 1994).

Acceptance of admission by child involves accepting that the child has committed a delinquent act and accepting that the child is a delinquent child. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

Obligation to advise of rights. — Although the court has a statutory obligation to advise children before it of their rights under the Children's Code and other laws at each separate appearance, that obligation must be read in light of the legislative purposes expressed in the code, and since the child did not claim any prejudice nor claim that he was not otherwise advised by his attorney of his constitutional or other legal rights, the appellate court would not reverse a commitment order for failure of the trial court to advise the child of his rights. In re Doe, 88 N.M. 481, 542 P.2d 61 (Ct. App. 1975).

Demand requirement for jury trial is ineffective to change constitutional right to a jury trial. State v. Doe, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980).

The children's court erred in concluding that a child was not entitled to a jury trial when he failed to make a timely jury demand as provided in 10-228A NMRA; the rule can do no more than encourage a counseled decision at an early stage of the proceedings. State v. Eric M., 1996-NMSC-056, 122 N.M. 436, 925 P.2d 1198.

Child's right to waive jury trial. — The state has no right grounded in either state statute, court rule, or the state constitution to impose a right of concurrence on the right of a child to waive his jury trial. In re Christopher K., 1999-NMCA-157, 128 N.M. 406, 993 P.2d 120.

Waiver of right must be done knowingly. — Waiver of a right created by the constitution, a statute or a court-promulgated rule must be done intelligently and knowingly if the right is to be denied the one claiming it. State ex rel. Department of Human Servs. v. Perlman, 96 N.M. 779, 635 P.2d 588 (Ct. App. 1981).

Express waiver of right to jury trial required. — Where a child has a right to a trial by jury, such right may be waived, but only by an express waiver. State v. Doe, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980).

Phrase "when the offense alleged would be triable by jury if committed by an adult" means a district court offense. A child charged with a petty misdemeanor which would have been triable by jury in the magistrate court if committed by an adult was not entitled to jury trial. State v. Doe, 90 N.M. 776, 568 P.2d 612 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Same treatment as adult. — Prior to the adoption of the state's first juvenile law in 1917, a minor charged with having committed a criminal offense was handled no differently than an adult. Under the provisions of N.M. Const., art. II, § 12, which reads in part, "the right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate," he would have been entitled to have his guilt determined by a jury

before he could have been imprisoned. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

No imprisonment without jury. — At the time of the adoption of the state constitution, a juvenile could not have been imprisoned without a trial by jury. This being true, no change in terminology or procedure may be invoked whereby incarceration could be accomplished in a manner which involved denial of the right to jury trial. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Driving under the influence and violating Liquor Control Act. — Child who was charged with driving under the influence and violation of the Liquor Control Act was entitled to a jury trial, since an adult would have been entitled to a jury trial if facing two charges with the same penalties as the offenses on which the child was tried, and since the maximum possible aggregate sentence exceeded six months. State v. Benjamin C., 109 N.M. 67, 781 P.2d 795 (Ct. App. 1989).

Traffic offenses not public hearings. — Hearings for those traffic offenses which are delinquent acts, which come exclusively under the jurisdiction of the children's court, are expressly not public hearings. 1972 Op. Att'y Gen. No. 72-34.

Felony evidence not charged in petition sustains finding. — Evidence of "an act" constituting a felony, in the absence of contrary evidence, sustains a finding that a child is in need of care or rehabilitation, whether or not the felony act was charged in the petition. State v. Doe, 93 N.M. 206, 598 P.2d 1166 (Ct. App. 1979).

Conviction of crime prerequisite to determination of delinquency. — It is a fundamental right of a party to be convicted of a crime, which is a necessary prerequisite to a determination of delinquency, based upon evidence of the elements of the crime, and in a prosecution for a violation of 30-31-23 NMSA 1978, the state must prove that the respondents had knowledge of the presence and character of the item possessed; a degree of furtiveness on the parts of juvenile respondents, in doing their smoking and passing a pipe around between buildings while changing classes, in light of a school regulation prohibiting the smoking of tobacco, was not conduct sufficient to infer that the smokers knew the character of the substance they were using. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Certified statement on appeal supports conclusion of delinquency. — Since the children's court judge's original findings did not support delinquency, but a certified statement by him on appeal did contain findings that supported the judgment, the findings were sufficient to support the conclusion that the child was a delinquent. State v. Doe, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

Two aspects to determination of delinquency. — There are two aspects to the determination that a child is a delinquent child - the act which he committed and the need for care or rehabilitation. State v. Doe, 90 N.M. 249, 561 P.2d 948 (Ct. App. 1977).

On a petition alleging delinquency, the adjudicatory proceedings involve two aspects: (1) whether the child committed the delinquent act, and (2) whether the child is in need of care or rehabilitation. State v. Doe, 93 N.M. 206, 598 P.2d 1166 (Ct. App. 1979).

Standard for admissibility of evidence in adjudicatory phases of hearing is clearly different from that in the dispositional phase of the hearing. Doe v. State, 92 N.M. 74, 582 P.2d 1287 (1978).

Use of predisposition report held constitutionally impermissible. — When a predisposition report received by a judge in a juvenile delinquency case is composed primarily of hearsay evidence which would be clearly incompetent in either of the adjudicatory phases of the proceedings, and it was not shown to be "competent, material and relevant in nature," then to use such hearsay and untested evidence to determine delinquency is constitutionally impermissible as a denial of the child's constitutional right to confront and cross-examine the witnesses against him. Doe v. State, 92 N.M. 74, 582 P.2d 1287 (1978).

Evidence supporting need for rehabilitation. — Since the evidence showed that a child made an unauthorized entry of the residence of a victim at night with the intent to commit the offense of criminal sexual penetration (which is the third-degree felony of burglary) and that after entering he attempted to commit, at the least, the crime of criminal sexual penetration in the third degree (a fourth-degree felony), and there was no evidence to the contrary, the evidence of either of the felonies sustains the finding that the child is in need of care and rehabilitation. State v. Doe, 93 N.M. 206, 598 P.2d 1166 (Ct. App. 1979).

No abuse of discretion in order for committal. — Court did not abuse its discretion in ordering that a child convicted of involuntary manslaughter be committed to the custody of the youth authority (now children, youth and families departments) as there was evidence in the record to support the determination that the child had committed a delinquent act and that the child was in need of care and rehabilitation. State v. Cody R., 113 N.M. 140, 823 P.2d 940 (Ct. App.), cert. denied, 113 N.M. 23, 821 P.2d 1060 (1991).

No authority to order evaluation although child committed delinquent acts. — Although a child was found to have committed delinquent acts, there was no finding that the child was in need of care or rehabilitation, or a finding that the child was a delinquent child, and thus the children's court lacked authority to order a diagnostic evaluation. State v. Doe, 90 N.M. 249, 561 P.2d 948 (Ct. App. 1977).

Child's right to address court prior to sentencing. — A child has the right to address the children's court before disposition; the children's court should offer a child the opportunity to address the court before pronouncing sentence. State v. Ricky G., 110 N.M. 646, 798 P.2d 596 (Ct. App. 1990).

Conditions necessary to place child on probation. — The children's court can place a delinquent child on probation without finding that the child is in need of care and rehabilitation. Further, the court has discretion regarding whether to dismiss a case or place a child on probation when it has specifically found that the child is not in need of care and rehabilitation. State v. Michael R., 107 N.M. 794, 765 P.2d 767 (Ct. App. 1988).

Erroneous findings held not to require reversal. — Since there were findings that supported the judgment and findings that did not support the judgment, the erroneous findings did not require a reversal; they were unnecessary for a decision in this case. State v. Doe, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For comment, "Poteet v. Roswell Daily Record, Inc.: Balancing First Amendment Free Press Rights Against a Juvenile Victim's Right to Privacy," see 10 N.M.L. Rev. 185 (1979-1980).

For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

For comment, "The Right to Be Present: Should It Apply to the Involuntary Civil Commitment Hearing," see 17 N.M.L. Rev. 165 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 82 et seq.

Power of juvenile court to require children to testify, 151 A.L.R. 1229.

Applicability of rules of evidence in juvenile delinquency proceedings, 43 A.L.R.2d 1128.

Jury trial: right to jury trial in juvenile court delinquency proceedings, 100 A.L.R.2d 1241.

Defense of infancy in juvenile delinquency proceedings, 83 A.L.R.4th 1135.

Application of Dorszynski v. United States requiring that sentencing court make express finding of "no benefit" from treatment under Youth Corrections Act (18 USCS § 5005 et seq.), 54 A.L.R. Fed. 382.

43 C.J.S. Infants §§ 93, 96.

32A-2-17. Predisposition studies; reports and examinations.

A. After a petition has been filed and either a finding with respect to the allegations of the petition has been made or a notice of intent to admit the allegations of the petition has been filed, the court may direct that a predisposition study and report to the court be made in writing by the department or an appropriate agency designated by the court concerning the child, the family of the child, the environment of the child and any other matters relevant to the need for treatment or to appropriate disposition of the case. The following predisposition reports shall be provided to the parties and the court five days before actual disposition or sentencing:

(1) the adult probation and parole division of the corrections department shall prepare a predisposition report for a serious youthful offender;

(2) the department shall prepare a predisposition report for a serious youthful offender who is convicted of an offense other than first degree murder;

(3) the department shall prepare a predisposition report for a youthful offender concerning the youthful offender's amenability to treatment and if:

(a) the court determines that a juvenile disposition is appropriate, the department shall prepare a subsequent predisposition report; or

(b) the court makes the findings necessary to impose an adult sentence pursuant to Section 32A-2-20 NMSA 1978, the adult probation and parole division of the corrections department shall prepare a subsequent predisposition report; and

(4) the department shall prepare a predisposition report for a delinquent offender, upon the court's request.

B. Where there are indications that the child may have a mental disorder or developmental disability, the court, on motion by the children's court attorney or that of counsel for the child, may order the child to be examined at a suitable place by a physician or psychiatrist, a licensed psychologist, a licensed professional clinical counselor or a licensed independent social worker prior to a hearing on the merits of the petition. An examination made prior to the hearing or as a part of the predisposition study and report shall be conducted on an outpatient basis, unless the court finds that placement in a hospital or other appropriate facility is necessary.

C. The court, after a hearing, may order examination by a physician or psychiatrist, a licensed psychologist or a licensed professional clinical counselor or a licensed independent social worker of a parent or custodian whose ability to care for or supervise a child is an issue before the court.

D. The court may order that a child adjudicated as a delinquent child be administered a predispositional evaluation by a professional designated by the department for purposes of diagnosis, with direction that the court be given a report indicating what disposition appears most suitable when the interests of the child and the

public are considered. The evaluation shall be completed within fifteen days of the court's order and the preference shall be for performing the evaluation in the child's community.

E. If a child is detained for purposes of performing a predispositional evaluation, it shall be completed within fifteen days and in no event shall a child be detained for more than fifteen days within a three-hundred-sixty-five-day period for a predispositional evaluation, unless for good cause shown.

History: 1978 Comp., § 32A-2-17, enacted by Laws 1993, ch. 77, § 46; 1995, ch. 206, § 12; 2005, ch. 189, § 15; 2009, ch. 239, § 19.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, inserted "concerning the youthful offender's amenability to treatment and if" in Paragraph (3) of Subsection A and added Subparagraphs A(3)(a) and A(3)(b).

The 2005 amendment, effective June 17, 2005, changed "offenders" to the singular case in Subsection A and changed mental disorder and development disability from a state of being to a condition in Subsection B.

The 2009 amendment, effective July 1, 2009, in Subsection B, after "place by a physician", added "or psychiatrist" and after "licensed psychologist", added "a license professional clinical counselor"; in Subsection C, after "examination by a physician", added "or psychiatrist"; and after "psychologist or a licensed", added "professional clinical counselor or a licensed"; in Subsection D, after "delinquent child be", deleted "transferred to the facility designated by the secretary of the department for a period of not more than fifteen days within a three hundred sixty-five day time period"; added "administered a predispositional evaluation by a professional designated by the department"; and added the last sentence; deleted former Subsection E, which provided for a determination of the time when a child who was committed was to be released; and added Subsection E.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-32 NMSA 1978 have been included in the annotations to this section.

Procedure to determine amenability to treatment. — The trial court is required to request a report from the Children, Youth and Families Department on a youthful offender’s amenability to treatment and if the youthful offender is found not to be

amenable to treatment, the trial court is required to request a subsequent predisposition report from the Department of Corrections and conduct a separate sentencing hearing. State v. Jose S., 2007-NMCA-146, 142 N.M. 829, 171 P.3d 768, cert. granted, 2007-NMCERT-011.

No authority to order evaluation if child not delinquent. — Although a child was found to have committed delinquent acts, there was no finding that the child was in need of care or rehabilitation, or a finding that the child was a delinquent child, and thus the children's court lacked authority to order a diagnostic evaluation. State v. Doe, 90 N.M. 249, 561 P.2d 948 (Ct. App. 1977).

Relevancy of predisposition reports. — The court may properly call for information in deciding whether to accept or reject a consent decree or provide for a more favorable disposition of the child, as predisposition reports are relevant in deciding an appropriate disposition of the case, and calling for information on the child's background is consistent with the legislative purpose of providing a "program of supervision, care and rehabilitation." State v. Doe, 92 N.M. 354, 588 P.2d 555 (Ct. App. 1978), cert. denied, 92 N.M. 353, 588 P.2d 554 (1979).

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

32A-2-18. Judgment; noncriminal nature; nonadmissibility.

A. The court shall enter a judgment setting forth the court's findings and disposition in the proceeding. A judgment in proceedings on a petition under the Delinquency Act resulting in a juvenile disposition shall not be deemed a conviction of crime nor shall it impose any civil disabilities ordinarily resulting from conviction of a crime nor shall it operate to disqualify the child in any civil service application or appointment. The juvenile disposition of a child and any evidence given in a hearing in court shall not be admissible as evidence against the child in any case or proceeding in any other tribunal whether before or after reaching the age of majority, except in sentencing proceedings after conviction of a felony and then only for the purpose of a presentence study and report.

B. If a judgment resulting from a youthful offender or serious youthful offender proceeding under the Delinquency Act results in an adult sentence, a record of the judgment shall be admissible in any other case or proceeding in any other court involving the youthful offender or serious youthful offender.

C. If a judgment on a proceeding under the Delinquency Act results in an adult sentence, the determination of guilt at trial becomes a conviction for purposes of the Criminal Code [30-1-1 NMSA 1978].

History: 1978 Comp., § 32A-2-18, enacted by Laws 1993, ch. 77, § 47; 1996, ch. 85, § 3.

ANNOTATIONS

The 1996 amendment, effective July 1, 1996, designated the existing language as Subsections A and C, and added Subsection B.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-33 NMSA 1978 have been included in the annotations to this section.

Applicability of criminal appellate procedure does not make children's court matters criminal proceedings. — The applicability of appellate procedure for criminal cases to appeals from judgments of the children's court, where the child was alleged to be delinquent or in need of supervision, does not change the fact that children's court matters are not criminal proceedings. Health & Social Servs. Dep't v. Doe, 91 N.M. 675, 579 P.2d 801 (Ct. App. 1978).

Child not to be charged with crime. — A judgment in proceedings on a petition under the Children's Code shall not be deemed a conviction of a crime. Since the Children's Code refers to an act which would be a crime if committed by an adult, it is apparent that a child is not to be charged with a crime but rather with a delinquent act. 1973 Op. Att'y Gen. No. 73-14.

Time before transfer and filing of information does not count. — A judgment in any proceedings on a petition under the Children's Code shall not be deemed to be a conviction of a crime. The period of time spent prior to the actual transfer and the filing of the criminal information does not count. State v. Howell, 89 N.M. 10, 546 P.2d 858 (Ct. App. 1976).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 106 et seq.

What constitutes delinquency or incorrigibility justifying commitment of infant, 45 A.L.R. 1533, 85 A.L.R. 1099.

Sentence: consideration of accused's juvenile record in sentencing for offense committed as adult, 64 A.L.R.3d 1291.

43 C.J.S. Infants §§ 96 to 102.

32A-2-19. Disposition of an adjudicated delinquent offender.

A. At the conclusion of the dispositional hearing, the court may make and include in the dispositional judgment its findings on the following:

(1) the interaction and interrelationship of the child with the child's parents and siblings and any other person who may significantly affect the child's best interests;

(2) the child's adjustment to the child's home, school and community;

(3) the mental and physical health of all individuals involved, including consideration of such factors as the child's brain development, maturity, trauma history and disability;

(4) the wishes of the child as to the child's custodian;

(5) the wishes of the child's parents as to the child's custody;

(6) whether there exists a relative of the child or other individual who, after study by the department, is found to be qualified to receive and care for the child;

(7) the availability of services recommended in the predisposition report; and

(8) the ability of the parents to care for the child in the home.

B. If a child is found to be delinquent, the court may impose a fine not to exceed the fine that could be imposed if the child were an adult and may enter its judgment making any of the following dispositions for the supervision, care and rehabilitation of the child:

(1) transfer legal custody to the department, an agency responsible for the care and rehabilitation of delinquent children, which shall receive the child at a facility designated by the secretary of the department as a juvenile reception facility. The department shall thereafter determine the appropriate placement, supervision and rehabilitation program for the child. The judge may include recommendations for placement of the child. Commitments are subject to limitations and modifications set forth in Section 32A-2-23 NMSA 1978. The types of commitments include:

(a) a short-term commitment of one year in a facility for the care and rehabilitation of adjudicated delinquent children. No more than nine months shall be served at the facility and no less than ninety days shall be served on supervised release, unless: 1) a petition to extend the commitment has been filed prior to the commencement of supervised release; 2) the commitment has been extended pursuant to Section 32A-2-23 NMSA 1978; or 3) supervised release is revoked pursuant to Section 32A-2-25 NMSA 1978;

(b) a long-term commitment for no more than two years in a facility for the care and rehabilitation of adjudicated delinquent children. No more than twenty-one months shall be served at the facility and no less than ninety days shall be served on

supervised release, unless: 1) supervised release is revoked pursuant to Section 32A-2-25 NMSA 1978; or 2) the commitment is extended pursuant to Section 32A-2-23 NMSA 1978;

(c) if the child is a delinquent offender who committed one of the criminal offenses set forth in Subsection I of Section 32A-2-3 NMSA 1978, a commitment to age twenty-one, unless sooner discharged; or

(d) if the child is a youthful offender, a commitment to age twenty-one, unless sooner discharged;

(2) place the child on probation under those conditions and limitations as the court may prescribe;

(3) place the child in a local detention facility that has been certified in accordance with the provisions of Section 32A-2-4 NMSA 1978 for a period not to exceed fifteen days within a three hundred sixty-five day time period; or if a child is found to be delinquent solely on the basis of Paragraph (3) of Subsection A of Section 32A-2-3 NMSA 1978, the court shall only enter a judgment placing the child on probation or ordering restitution or imposing a fine not to exceed the fine that could be imposed if the child were an adult or any combination of these dispositions; or

(4) if a child is found to be delinquent solely on the basis of Paragraph (2), (3) or (4) of Subsection A of Section 32A-2-3 NMSA 1978, the court may make any disposition provided by this section and may enter its judgment placing the child on probation and, as a condition of probation, transfer custody of the child to the department for a period not to exceed six months without further order of the court; provided that this transfer shall not be made unless the court first determines that the department is able to provide or contract for adequate and appropriate treatment for the child and that the treatment is likely to be beneficial.

C. When the child is an Indian child, the Indian child's cultural needs shall be considered in the dispositional judgment and reasonable access to cultural practices and traditional treatment shall be provided.

D. A child found to be delinquent shall not be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crimes.

E. Whenever the court vests legal custody in an agency, institution or department, it shall transmit with the dispositional judgment copies of the clinical reports, predisposition study and report and other information it has pertinent to the care and treatment of the child.

F. Prior to any child being placed in the custody of the department, the department shall be provided with reasonable oral or written notification and an opportunity to be heard.

G. In addition to any other disposition pursuant to Subsection B of this section, the court may make an abuse or neglect report for investigation and proceedings as provided for in the Abuse and Neglect Act [32A-4-1 NMSA 1978]. The report may be made to a local law enforcement agency, the department or a tribal law enforcement or social service agency for an Indian child residing in Indian country.

H. In addition to any other disposition pursuant to this section or any other penalty provided by law, if a child fifteen years of age or older is adjudicated delinquent on the basis of Paragraph (2), (3) or (4) of Subsection A of Section 32A-2-3 NMSA 1978, the child's driving privileges may be denied or the child's driver's license may be revoked for a period of ninety days. For a second or a subsequent adjudication, the child's driving privileges may be denied or the child's driver's license revoked for a period of one year. Within twenty-four hours of the dispositional judgment, the court may send to the motor vehicle division of the taxation and revenue department the order adjudicating delinquency. Upon receipt of an order from the court adjudicating delinquency, the director of the motor vehicle division of the taxation and revenue department may revoke or deny the delinquent's driver's license or driving privileges. Nothing in this section may prohibit the delinquent from applying for a limited driving privilege pursuant to Section 66-5-35 NMSA 1978 or an ignition interlock license pursuant to the Ignition Interlock Licensing Act [66-5-501 NMSA 1978], and nothing in this section precludes the delinquent's participation in an appropriate educational, counseling or rehabilitation program.

I. In addition to any other disposition pursuant to this section or any other penalty provided by law, when a child is adjudicated delinquent on the basis of Paragraph (6) of Subsection A of Section 32A-2-3 NMSA 1978, the child shall perform the mandatory community service set forth in Section 30-15-1.1 NMSA 1978. When a child fails to completely perform the mandatory community service, the name and address of the child's parent or legal guardian shall be published in a newspaper of general circulation, accompanied by a notice that the parent or legal guardian is the parent or legal guardian of a child adjudicated delinquent for committing graffiti.

History: 1978 Comp., § 32A-2-19, enacted by Laws 1993, ch. 77, § 48; 1995, ch. 204, § 3; 1995, ch. 206, § 13; 1996, ch. 85, § 4; 2003, ch. 225, § 10; 2003, ch. 239, § 5; 2005, ch. 189, § 16; 2009, ch. 239, § 20.

ANNOTATIONS

Cross references. — For the procedure governing disciplinary hearings, *see* Rule 10-229 NMRA.

For escape from custody of the children, youth and families department, *see* 30-22-11.1 NMSA 1978.

For aggravated escape from the custody of the children, youth and families department, *see* 30-22-11.2 NMSA 1978.

The 1995 amendment, effective July 1, 1995, deleted a provision regarding commitments of six months or less in long-term care facilities from Paragraph B(2)(a), and added Paragraph B(2)(c). Laws 1995, ch. 204, § 3, effective July 1, 1995, also amended this section. The section was set out as amended by Laws 1995, ch. 206, § 13. *See* 12-1-8 NMSA 1978.

The 1996 amendment, effective July 1, 1996, substituted "parents" for "parent" in Paragraphs A(1) and (5); added Subparagraph B(1)(c) and redesignated the following subparagraph accordingly; and added Subsection H.

The 2003 amendment, effective April 6, 2003, — added "or an ignition interlock license pursuant to the Ignition Interlock Licensing Act" following "Section 66-5-35 NMSA 1978" in the last sentence of Subsection G. Laws 2003, ch. 225, § 10, effective July 1, 2003, also amended this section. The section was set out as amended by Laws 2003, ch. 239, § 5. *See* 12-1-8 NMSA 1978.

Compiler's note. — Laws 2005, ch. 189 both amended and repealed Laws 2003, ch. 225, § 10. Laws 2005, ch. 189, § 77 repealed Laws 2003, ch. 225, § 10, effective June 17, 2005. Laws 2005, ch. 189, § 16 amended Laws 2003, ch. 225, § 10.

The 2005 amendment, effective June 17, 2005, in Subsection B(1), deleted the former provision that the court could enter a judgment making any disposition that is authorized for the disposition of a neglected or abused child; in Subsection B(1)(a). provided that a commitment may include a short term commitment in a facility for the care and rehabilitation of adjudicated delinquent children, that not more than nine months shall be served at the facility and not less than ninety days on parole unless a petition has been filed to extend the commitment, the commitment has been extended pursuant to a consent decree, or parole is revoked; Subsection B(1)(b), provided that with respect to a long term commitment may not be more than twenty one months at a facility for the care and rehabilitation of adjudicated delinquent children and not less than ninety days on parole unless the commitment has been extended pursuant to a consent decree or parole is revoked; and added Subsection G, which provided that the court may make an abuse or neglect report for investigation and proceedings to a local law enforcement agency, the children, youth and families department, or a tribal law enforcement or social service agency for an Indian child residing in Indian country.

The 2009 amendment, effective July 1, 2009, in Paragraph (3) of Subsection A, after "individuals involved", added the remainder of the sentence; and in Subparagraphs (a) and (b) of Paragraph (1) of Subsection B, changed "parole" to "supervised release".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Commitment to age 21. — Subsection B(1)(c) of this section does not say that commitment to age 21 is authorized only for children who fit the definition of youthful offenders as set forth in Subsection I of Section 32A-2-3 NMSA 1978. State v. Indie C., 2006-NMCA-014, 139 N.M. 80, 128 P.3d 508, cert. denied, 2006-NMCERT-001, 139 N.M. 273, 131 P.3d 660.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-34 NMSA 1978 have been included in the annotations to this section.

Children's Code does not place limitations on type of probation conditions the court may order. State v. Wacey C., 2004-NMCA-029, 135 N.M. 186, 86 P.3d 611.

Geographical and temporal limitations of probation condition do not bring it in the realm of banishment. State v. Wacey C., 2004-NMCA-029, 135 N.M. 186, 86 P.3d 611.

Probation condition does not amount to banishment where child's probation condition does not require him to leave the state or country entirely and does not trigger concerns about interstate or international relations, child's restriction is limited to the period of his probation, not to exceed two years, and the probation condition was fashioned in response to concerns for both the child's welfare, as residents talked about arming themselves against the child, and the welfare of the area, as child had plans for more serious regional criminal activity. State v. Wacey C., 2004-NMCA-029, 135 N.M. 186, 86 P.3d 611.

Finding required for adjudication as delinquent. — A finding that a child is in need of care or rehabilitation is required in order to adjudicate the child to be a delinquent. State v. Doe, 95 N.M. 90, 619 P.2d 194 (Ct. App. 1980).

Amenability to treatment. — Section 31-18-15.3(F) NMSA 1978 gives the district court the discretion to impose an adult sentence as indicated in 32A-2-20 NMSA 1978 based on a finding that a child is not amenable to treatment. If the district court finds the child is amenable to treatment, then the district court should impose a juvenile disposition in accordance with this section. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

Consecutive commitments. — The children's court is not authorized to order consecutive commitments from one dispositional hearing, regardless of the number of petitions filed by the state. State v. Adam M., 2000-NMCA-049, 129 N.M. 146, 2 P.3d 883, cert. denied, 129 N.M. 249, 4 P.3d 1240 (2000).

Non-consecutive commitments. — The imposition of two non-consecutive commitments based on separate petitions stemming from different underlying behavior during one dispositional hearing is authorized by Subsection B(2)(b) of this section. State v. Jose S., 2005-NMCA-094, 138 N.M. 44, 116 P.3d 115, cert. denied, 2005-NMCERT-007, 138 N.M. 145, 117 P.3d 951.

Indeterminate commitment unauthorized. — The children's court has no authority, pursuant to a plea agreement to, commitment a child who has been adjudicated delinquent to the legal custody of the children, youth and families department for an indeterminate period up to the age of eighteen. State ex rel. CYFD v. Paul G., 2006-NMCA-038, 139 N.M. 258, 131 P.3d 108.

Authority to order detentions. — The children's court had authority under its contempt power to order detentions. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 136 N.M. 452, 99 P.3d 1164.

Children's court may use its contempt power as an alternative to probation revocation when the court places a child in detention for violation of grade court, a condition of probation. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

The children's court sentence of two weekends of detention, one for each of two violations, was not an abuse of discretion. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Placement in a local detention facility is an alternative disposition available to the court and is not a limitation on the conditions of probation the court may prescribe. State v. Henry L., 109 N.M. 792, 791 P.2d 67 (1990).

Without adjudication of delinquency child may not be transferred to custody of boys' school, because the school is an institution for the care and rehabilitation of delinquent children. State v. Doe, 95 N.M. 90, 619 P.2d 194 (Ct. App. 1980).

Limited detention as condition of probation. — The language "place child on probation under those conditions and limitations as the court may prescribe" is sufficiently expansive to contemplate the imposition of limited detention as a condition of probation. State v. Henry L., 109 N.M. 792, 791 P.2d 67 (1990).

Revocation of probation to punish for contempt. — The inherent power of the courts to punish for contempt does not validate a children's court order incarcerating a child found in need of supervision for contempt in violating probation, where such order contravenes the purpose of a reasonable children's code provision authorizing incarceration only after three occasions of probation violations have been found by the court. State v. Julia S., 104 N.M. 222, 719 P.2d 449 (Ct. App. 1986).

Child is not entitled to precommitment credit for time served while on probation. State v. Dennis F., 104 N.M. 619, 725 P.2d 595 (Ct. App. 1986).

First degree murder. — The Delinquency Act authorizes an initial commitment to the age of 21 of a child who has been adjudicated delinquent for first degree murder when the child was under 14 years of age. State v. Indie C., 2006-NMCA-014, 139 N.M. 80, 128 P.3d 508, cert. denied, 2006-NMCERT-001, 139 N.M. 273, 131 P.3d 660.

Time limitation on custody transfer void. — While the court possesses the power to transfer legal custody of delinquent children to an agency responsible for their care and rehabilitation, any attempt by the court to impose a time limitation on the transfer of custody, even if well within the time limitations already authorized by statute, is void as being in excess of the court's jurisdiction. 1979 Op. Att'y Gen. No. 79-37.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references.— 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 82 et seq.

Discrimination in punishment for same offense between juveniles and mature offenders, 3 A.L.R. 1614, 8 A.L.R. 854.

Constitutionality of statute committing child to reformatory without parents' consent, 60 A.L.R. 1342.

Notice and hearing to parent before commitment of delinquent children, 76 A.L.R. 247.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 A.L.R.4th 1203.

Defense of infancy in juvenile delinquency proceedings, 83 A.L.R.4th 1135.

32A-2-20. Disposition of a youthful offender.

A. The court has the discretion to invoke either an adult sentence or juvenile sanctions on a youthful offender. The children's court attorney shall file a notice of intent to invoke an adult sentence within ten working days of the filing of the petition, provided that the court may extend the time for filing of the notice of intent to invoke an adult sentence, for good cause shown, prior to the adjudicatory hearing. A preliminary hearing by the court or a hearing before a grand jury shall be held, within ten days after the filing of the intent to invoke an adult sentence, to determine whether probable cause exists to support the allegations contained in the petition.

B. If the children's court attorney has filed a notice of intent to invoke an adult sentence and the child is adjudicated as a youthful offender, the court shall make the following findings in order to invoke an adult sentence:

(1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and

(2) the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders.

C. In making the findings set forth in Subsection B of this section, the judge shall consider the following factors:

(1) the seriousness of the alleged offense;

(2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

(3) whether a firearm was used to commit the alleged offense;

(4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;

(5) 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;

(6) the record and previous history of the child;

(7) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available; and

(8) any other relevant factor, provided that factor is stated on the record.

D. If a child has previously been sentenced as an adult pursuant to the provisions of this section, there shall be a rebuttable presumption that the child is not amenable to treatment or rehabilitation as a child in available facilities.

E. If the court invokes an adult sentence, the court may sentence the child to less than, but shall not exceed, the mandatory adult sentence. A youthful offender given an adult sentence shall be treated as an adult offender and shall be transferred to the legal custody of an agency responsible for incarceration of persons sentenced to adult sentences. This transfer terminates the jurisdiction of the court over the child with respect to the delinquent acts alleged in the petition.

F. If a juvenile disposition is appropriate, the court shall follow the provisions set forth in Section 32A-2-19 NMSA 1978. A youthful offender may be subject to extended commitment in the care of the department until the age of twenty-one, pursuant to the provisions of Section 32A-2-23 NMSA 1978.

G. A child fourteen years of age or older, charged with first degree murder, but not convicted of first degree murder and found to have committed a youthful offender offense as set forth in Subsection I of Section 32A-2-3 NMSA 1978, is subject to the dispositions set forth in this section.

H. A child fourteen years of age or older charged with first degree murder, but found to have committed a delinquent act that is neither first degree murder nor a youthful offender offense as set forth in Subsection I of Section 32A-2-3 NMSA 1978, shall be adjudicated as a delinquent subject to the dispositions set forth in Section 32A-2-19 NMSA 1978.

History: 1978 Comp., § 32A-2-20, enacted by Laws 1993, ch. 77, § 49; 1995, ch. 206, § 14; 1996, ch. 85, § 5; 2003, ch. 225, § 11; 2005, ch. 189, § 17; 2009, ch. 239, § 21.

ANNOTATIONS

Cross references. — For escape from custody of the children, youth and families department, *see* 30-22-11.1 NMSA 1978.

For aggravated escape from the custody of the children, youth and families department, *see* 30-22-11.2 NMSA 1978.

The 1995 amendment, effective July 1, 1995, in Subsection A, substituted "court" for "children's court judge", substituted "shall" for "must" preceding "file a notice", and deleted "children's" preceding "court" in the last sentence; in Paragraph (5) of Subsection C, substituted "child" for "juvenile"; in Subsection D, substituted "court" for "judge" and made a related change; and in Subsection E, substituted "court" for "judge" and "32A-2-19" for "32-2-19" in the first sentence and "32A-2-23" for "32-2-23" at the end.

The 1996 amendment, effective July 1, 1996, added Paragraph C(3) and redesignated the following paragraphs accordingly, and substituted "fourteen to eighteen" for "sixteen or seventeen" in Subsection F.

The 2003 amendment, effective July 1, 2003, added present Subsection D and redesignated Subsections D to F as Subsections E to G.

The 2005 amendment, effective June 17, 2005, in Subsection G, provided that a child fourteen years of age or older, charged with first degree murder, but not convicted of first degree murder and found to have committed a youthful offender offence is subject to the dispositions of this section; and added Subsection H, which provided that a child

fourteen years of age or older charged with first degree murder, but found to have committed a delinquent act that is not first degree murder or a youthful offender offence shall be adjudicated as a delinquent subject to the dispositions of Section 32A-2-19 NMSA 1978.

The 2009 amendment, effective July 1, 2009, in Paragraph (5) of Subsection C, at the beginning of the sentence, before "maturity", deleted "sophistication and"; after "environmental situation", deleted "emotional attitude and" and added "social and emotional health"; and after "pattern of living", added "brain development, trauma history and disability".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Amenability hearing is a condition precedent for exercising adult sentencing authority in youthful offender cases. — Only serious youthful offenders charged with first-degree murder can be tried in district court and automatically sentenced as adults if convicted. All others remain in the juvenile system until after adjudication and may be sentenced as adults only after an amenability hearing. State v. Jones, 2010-NMSC-012, 148 N.M. 1, 229 P.3d 474.

The right to an amenability hearing cannot be waived. State v. Jones, 2010-NMSC-012, 148 N.M. 1, 229 P.3d 474.

First-degree murder charges voluntarily dismissed by the state. — If the state voluntarily dismisses a first-degree murder charge against defendant and substitutes a youthful offender offense, then from the moment the state drops the first-degree murder charge, defendant is a child who is entitled to the full range of protections afforded by the Delinquency Act and the court lacks authority to sentence defendant as an adult without first determining defendant’s amenability to treatment or rehabilitation as a juvenile. State v. Jones, 2010-NMSC-012, 148 N.M. 1, 229 P.3d 474.

First-degree murder charges voluntarily dismissed by the state. — Where defendant, who was age 17, was originally charged as a serious youthful offender with first-degree murder of an infant child; the state subsequently voluntarily dismissed the first-degree murder charge against defendant after recognizing that the state lacked the evidence to prove the crime and substituted the charge of child abuse resulting in death; defendant pled guilty to child abuse resulting in death, agreed to an adult disposition, and received an adult sentence of 18 years imprisonment; and in sentencing defendant, the district court did not first determine whether defendant was amenable to treatment or rehabilitation as a juvenile, defendant was a youthful offender when defendant entered into the plea agreement and the court erred in sentencing defendant as a adult without first determining defendant’s amenability to treatment or rehabilitation as a juvenile. State v. Jones, 2010-NMSC-012, 148 N.M. 1, 229 P.3d 474.

Subsections B and C of 32A-2-20 NMSA 1978 are facially unconstitutional under the due process clause of the Fourteenth Amendment, because they require the trial court, not a jury, to find the additional facts necessary to impose an adult sentence. State v. Rudy B., 2009-NMCA-104, 147 N.M. 45, 216 P.3d 810, cert. granted, 2009-NMCERT-009, overruling State v. Gonzales, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776.

Amenability to treatment. — Where defendant, who was a child offender under the juvenile system, pled guilty to second degree murder; defendant admitted that after a fight between the victim and defendant's cousin had ended, defendant went to defendant's car, opened the trunk, removed a sawed-off shotgun, loaded the shotgun and fired the shotgun at the victim; at the time the victim was shot, the victim was facing defendant with the victim's hands in the air; defendant's prior criminal history involved a firearm; defendant was married subsequent to the shooting; and defendant suffered from post-traumatic stress disorder because of the incident, the evidence was sufficient to support the court's determination that defendant was not amenable to treatment. State v. Trujillo, 2009-NMCA-128, 147 N.M. 334, 222 P.3d 1040, cert. granted, 2009-NMCERT-011.

Amenability to treatment is a jury question. — The due process clause of the Fourteenth Amendment requires that the determination of whether an offender is amenable to treatment or rehabilitation or is eligible for commitment to an institution as a condition to imposing an adult sentence be made by a jury beyond a reasonable doubt. State v. Rudy B., 2009-NMCA-104, 147 N.M. 45, 216 P.3d 810, cert. granted, 2009-NMCERT-009, overruling State v. Gonzales, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776.

Constitutionality. — This section is not arbitrary or discriminatory and adequately provides for the elemental due process rights of a child under the constitution. State v. Ernesto M., 1996-NMCA-039, 121 N.M. 562, 915 P.2d 318.

Entitlement to dispositional hearing. — No matter what kind of youthful offender category a child falls under, that child is entitled to a dispositional hearing to determine whether he or she will be subject to juvenile sanctions or an adult sentence. State v. Stephen F., 2005-NMCA-048, 137 N.M. 409, 112 P.3d 270, cert. granted, 2005-NMCERT-004, 137 N.M. 455, 112 P.3d 1112.

Meaning of "offense less than first degree murder." — Had the legislature intended to limit the scope of Subsection G of this section to lesser-included offenses of first degree murder, it could have expressed that intent by using the phrase "lesser-included offense". Instead, the legislature meant Subsection G to apply to all crimes other than first degree murder, which are "lesser crimes" in the sense that they carry lesser penalties than life imprisonment or death. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

Sentencing as adult for unlisted crime. — A juvenile who is adjudicated for any of the offenses listed under 32A-2-3I NMSA 1978 may be subject to adult sanctions under this section for any other offense in the same case. State v. Montano, 120 N.M. 218, 900 P.2d 967 (Ct. App. 1995).

District court had authority to impose an adult sentence on a juvenile who was originally charged as a serious youthful offender, but who subsequently pled guilty only to offenses that would not qualify for an adult sentence if brought independently. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

Serious youthful offender not to be treated as delinquent child. — A serious youthful offender, upon conviction for a lesser crime than first degree murder, should always be treated as a youthful offender, even when convicted of a crime that would otherwise categorize the child as a delinquent child. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

Disposition of a youthful offender. — Children who are not convicted of first degree murder and who appear to be amenable to rehabilitation have a basic and essential right not to be sentenced as adults unless the trial court fulfills the requirements of Subsections B and C. State v. Hunter, 2001-NMCA-078, 131 N.M. 76, 33 P.3d 296.

Sentencing for non-capital felonies. — The basic sentences prescribed by 31-18-15 NMSA 1978 are "mandatory" within the meaning of Subsection D of this section, while the alterations in the basic sentences allowed by 31-18-15.1 NMSA 1978 are discretionary and, therefore, circumscribed by the Children's Code (32A-1-1 NMSA 1978 et seq.); thus, the maximum sentence that may be imposed upon a youthful offender convicted of a non-capital felony is the basic sentence, plus, if applicable, the enhancements prescribed by 31-18-16 and 31-18-16.1 NMSA 1978. State v. Guerra, 2001-NMCA-031, 130 N.M. 302, 24 P.3d 334, cert. denied, No. 26,899 (2001).

Standard of proof applied to findings. — Neither the due process clause of the Fourteenth Amendment to the United States Constitution nor Article 2, Section 4 of the New Mexico Constitution require that findings under Subsection B be made by a jury beyond a reasonable doubt. State v. Gonzales, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776.

Weighing of factors. — Determination of the children's court judge that the order of enumeration of the factors set forth in this section were to be read in descending order of importance, and the application by the court of such methodology in his findings, did not prejudice the defendant child. State v. Ernesto M., 1996-NMCA-039, 121 N.M. 562, 915 P.2d 318.

Amenability to treatment. — Even though the testimony of the experts was conflicting, the decision of the children's court judge that the defendant child was not amenable to treatment was supported by substantial evidence. State v. Ernesto M., 1996-NMCA-039, 121 N.M. 562, 915 P.2d 318.

Every factor listed in Subsection C provides important information about the child and the child's propects for rehabilitation. State v. Gonzales, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776.

Section 31-18-15.3(F) NMSA 1978 gives the district court the discretion to impose an adult sentence as indicated in this section based on a finding that a child is not amenable to treatment. If the district court finds the child is amenable to treatment, then the district court should impose a juvenile disposition in accordance with 32A-2-19 NMSA 1978. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

Eligibility for commitment. — In deciding whether defendant was eligible for commitment, the trial court was required to consider the seven factors listed in Subsection C. The court was not required to find eligibility based on facts that an expert deemed the child eligible for commitment under 32A-6-13(I) NMSA 1978, or that a treatment facility was willing and able to accept the child. State v. Gonzales, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776.

The district court did not abuse its discretion in finding that defendant "is not amenable to treatment or rehabilitation as a child in available facilities," and that he is not likely to be rehabilitated in "facilities currently available." State v. Todisco, 2000-NMCA-064, 129 N.M. 310, 6 P.3d 1032, cert. quashed, 132 N.M. 484, 51 P.3d 527 (2002).

Offense against person or property. — Sentencing of 17-year-old defendant as an adult upon conviction for shooting into a vehicle causing great bodily harm and aggravated assault with a deadly weapon was warranted based on consideration of the factors listed in this section. State v. Sosa, 1997-NMSC-032, 123 N.M. 564, 943 P.2d 1017.

Sentence not cruel and unusual punishment. — Sentencing a 17-year-old child as an adult to a 30-year term for rape and other crimes he admitted to committing was not cruel and unusual punishment. State v. Ernesto M., 1996-NMCA-039, 121 N.M. 562, 915 P.2d 318.

Standard of review. — Because the trial court used the clear and convincing standard in its finding that defendant was not amenable to treatment as a juvenile or eligible for commitment, the court of appeals evaluated whether, viewing the evidence in the light most favorable to the state, the trial court could have found that the clear and convincing standard was met. State v. Gonzales, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776.

Law reviews. — For note, "*State v. Muniz*: Authorizing Adult Sentencing of Juveniles Absent a Conviction That Authorizes an Adult Sentence", see 35 N.M.L. Rev. 229 (2005).

32A-2-21. Disposition of a child with a mental disorder or developmental disability in a delinquency proceeding.

A. If in a hearing at any stage of a proceeding on a delinquency petition the evidence indicates that the child has or may have a mental disorder or developmental disability, the court may:

(1) order the child detained if appropriate under the criteria established pursuant to the provisions of the Delinquency Act; and

(2) initiate proceedings for the involuntary placement of the child as a minor with a mental disorder or developmental disability pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act [32A-6-1 NMSA 1978].

B. If the child is placed for residential treatment or habilitation pursuant to the Children's Mental Health and Developmental Disabilities Act, the department shall retain legal custody during the period of involuntary placement or until further order of the court.

C. If a child is committed to a psychiatric hospital for treatment or habilitation and in the event that the department should be required to pay more than four hundred dollars ($400) per day because of the individualized treatment plan, the annual costs over four hundred dollars ($400) per child per day will be reported annually by the department to the legislative finance committee.

D. The child may remain in the residential treatment or habilitation facility pending the disposition of the delinquency petition.

E. When a child in departmental custody needs involuntary placement for residential mental health or developmental disability services as a result of a mental disorder or developmental disability, the department shall request the children's court attorney to petition for that child's placement pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act.

F. A child subject to the provisions of the Delinquency Act who receives treatment in a residential treatment or habilitation program shall enjoy all the substantive and procedural rights set forth in the Children's Mental Health and Developmental Disabilities Act.

G. A child's competency to stand trial or participate in his own defense may be raised by a party at any time during a proceeding. If the child has been accused of an act that would be considered a misdemeanor if the child were an adult and the child is found to be incompetent to stand trial, the court shall dismiss the petition with prejudice and may recommend that the children's court attorney initiate proceedings pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act. In all other cases, the court shall stay the proceedings until the child is competent to stand trial; provided that a petition shall not be stayed for more than one year. The court may order treatment to enable the child to attain competency to stand trial and may amend the conditions of release pursuant to Sections 32A-2-11 and 32A-2-13 NMSA 1978. The

child's competency to stand trial shall be reviewed every ninety days for up to one year. The court shall dismiss the petition without prejudice if, at any time during the year, the court finds that a child cannot be treated to competency or if, after one year, the court determines that a child is incompetent to stand trial or participate in his own defense. Upon dismissal, the court may recommend that the children's court attorney initiate proceedings pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act.

H. Involuntary residential treatment shall only occur pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act.

History: 1978 Comp., § 32A-2-21, enacted by Laws 1993, ch. 77, § 50; 1995, ch. 206, § 15; 2005, ch. 189, § 18.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, inserted "delinquency" following "child in a" in the section heading; substituted "Children's Mental Health and Developmental Disabilities Act" for "Children's Code" and made minor stylistic changes throughout the section; deleted former Subsections B, C, F, and G, related to involuntary placement and residential treatment facilities, and redesignated the remaining subsections accordingly; in Subsection A, deleted former Paragraph (2) relating to a stay of the petition and redesignated former Paragraph (3) as Paragraph (2); in Subsection B, deleted "or department of health" following "the department"; rewrote Subsection E; and added Subsections F and G.

The 2005 amendment, effective June 17, 2005, in Subsection G, provided that if a child has been accused of an act that is a misdemeanor if the child were an adult and the child is found to be incompetent to stand trial, the court shall dismiss the petition and recommend that the children's court attorney proceed under the Children's Mental Health and Development Disabilities Act; that in all other cases, the court shall stay the proceedings until the child is competent to stand trial, but not longer than one year; that the court may order treatment to enable the child to be competent to stand trail; that the child's competency shall be reviewed every ninety days for up to one year and that the court shall dismiss the petition during the year if the child cannot be treated to competency; and added Subsection H, which provided that involuntary residential treatment shall occur pursuant to the Children's Mental Health and Development Disabilities Act.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-35 NMSA 1978 have been included in the annotations to this section.

Disposition of petition regarding incompetent child. — Where the evidence persuades the court that a child cannot likely be treated to competency, the court may,

in the sound exercise of its discretion, dismiss a delinquency petition without prejudice. In re Daniel H., 2003-NMCA-063, 133 N.M. 630, 68 P.3d 176.

A trial court is not required to dismiss a petition in every case where the child is found incompetent to stand trial and not amenable to treatment; rather, the court has the discretion to proceed consistent with 10-221(D) NMRA, stay the proceedings on the petition, and order conditions of release or treatment. Dismissal without prejudice is an additional option for the trial court under such circumstances. In re Daniel H., 2003-NMCA-063, 133 N.M. 630, 68 P.3d 176.

Commitment to boys' school of mentally ill and delinquent child. — The children's court did not err in committing mentally ill, delinquent children to state boys' school and in ordering that psychiatric care be provided them at the school. State v. Doe, 90 N.M. 572, 566 P.2d 121 (Ct. App. 1977).

Section confers legislative grant of jurisdiction to the courts. — Children's court had jurisdiction to transfer child to the custody of state health and social services (now human services) department for further study and a report on the child's condition. In re Doe, 88 N.M. 632, 545 P.2d 491 (Ct. App. 1975).

Availability of accommodations controlling factor in determining admission. — Juvenile (now children's) courts do not have the power to commit juveniles to state institutions regardless of available accommodations. Availability of accommodations is made the controlling factor in determining admissions, and this question rests solely with the relators and not with the court. Carter v. Montoya, 75 N.M. 730, 410 P.2d 951 (1966).

Court did not abuse its discretion in denying child's motion for transfer to more appropriate agency, where there was evidence that the only additional testing needed was an electroencephalogram and a neurological study which could be performed without the requested transfer. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

Law reviews. — For article, "Treating Children Under the New Mexico Mental Health and Developmental Disabilities Code," see 10 N.M.L. Rev. 279 (1980).

32A-2-22. Continuance under supervision without judgment; consent decree; disposition.

A. At any time after the filing of a delinquency petition and before the entry of a judgment, the court may, on motion of the children's court attorney or that of counsel for the child, suspend the proceedings and continue the child under supervision in the child's own home under terms and conditions negotiated with probation services and agreed to by all the parties affected. The court's order continuing the child under supervision under this section shall be known as a "consent decree". An admission of

some or all of the allegations stated in the delinquency petition shall not be required for a consent decree order.

B. If the child objects to a consent decree, the court shall proceed to findings, adjudication and disposition of the case. If the child does not object but an objection is made by the children's court attorney after consultation with probation services, the court shall, after considering the objections and the reasons given, proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

C. A consent decree shall remain in force for six months unless the child is discharged sooner by probation services. Prior to the expiration of the six-month period and upon the application of probation services or any other agency supervising the child under a consent decree, the court may extend the decree for an additional six months in the absence of objection to extension by the child. If the child objects to the extension, the court shall hold a hearing and make a determination on the issue of extension.

D. If either prior to discharge by probation services or expiration of the consent decree the child allegedly fails to fulfill the terms of the decree, the children's court attorney may file a petition to revoke the consent decree. Proceedings on the petition shall be conducted in the same manner as proceedings on petitions to revoke probation. If the child is found to have violated the terms of the consent decree, the court may:

(1) extend the period of the consent decree; or

(2) make any other disposition that would have been appropriate in the original proceeding.

E. A child who is discharged by probation services or who completes a period under supervision without reinstatement of the original delinquency petition shall not again be proceeded against in any court for the same offense alleged in the petition or an offense based upon the same conduct and the original petition shall be dismissed with prejudice. Nothing in this subsection precludes a civil suit against the child for damages arising from the child's conduct.

F. A judge who pursuant to this section elicits or examines information or material about a child that would be inadmissible in a hearing on the allegations of the petition shall not, over the objection of the child, participate in any subsequent proceedings on the delinquency if:

(1) a 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.

G. If a consent decree has been entered pursuant to the filing of a delinquency petition based on Paragraph (2), (3) or (4) of Subsection A of Section 32A-2-3 NMSA 1978 for a child who is fifteen years of age or older, a condition of the consent decree agreement may be the denial of the child's driving privileges or the revocation of the child's driver's license for a period of ninety days. For the second or subsequent adjudication, the child's driving privileges may be denied or the child's driver's license revoked for a period of one year. Within twenty-four hours of the entry by the court of a decree consenting to the revocation or denial of the child's driver's license or driving privileges, the court shall send the decree to the motor vehicle division of the taxation and revenue department. Upon receipt of the decree from the court consenting to the denial or revocation of the child's driving privileges or driver's license, the director of the motor vehicle division of the taxation and revenue department shall revoke or deny the delinquent child's driver's license or driving privileges. Nothing in this section shall prohibit the delinquent child from applying for a limited driving privilege pursuant to Section 66-5-35 NMSA 1978 or an ignition interlock license pursuant to the Ignition Interlock Licensing Act [66-5-501 NMSA 1978], and nothing in this section precludes the delinquent child's participation in an appropriate educational, counseling or rehabilitation program.

History: 1978 Comp., § 32A-2-22, enacted by Laws 1993, ch. 77, § 51; 1995, ch. 206, § 16; 2003, ch. 239, § 6; 2005, ch. 189, § 19.

ANNOTATIONS

Cross references. — For consent decrees, *see* 10-225 NMRA.

The 1995 amendment, effective July 1, 1995, made a minor stylistic change in Paragraph (2) of Subsection D, substituted "32A-2-2" for "32-2-2" in Subsection G, and added Subsection H.

The 2003 amendment, effective April 6, 2003, added "or an ignition interlock license pursuant to the Ignition Interlock Licensing Act" following "Section 66-5-35 NMSA 1978" in the last sentence of Subsection G.

The 2005 amendment, effective June 17, 2005, in Subsection A, provided that an admission of some or all of the allegation stated in the delinquency petition shall not be required for a consent decree order and deleted former Subsection H which provided that the court shall not order more than one consent decree for a child in a two year period.

Discretion of court. — Accepting a consent decree is entirely within the discretion of the court. In re Crystal L., 2002-NMCA-063, 132 N.M. 349, 48 P.3d 87.

Admission of guilt. — A consent decree may only be accepted by the court after the child has made an admission of guilt. In re Crystal L., 2002-NMCA-063, 132 N.M. 349, 48 P.3d 87.

Timeliness of decree. — A child who goes to trial and is adjudicated to have committed delinquent acts cannot avail herself of a consent decree after the court or jury has entered a verdict. In re Crystal L., 2002-NMCA-063, 132 N.M. 349, 48 P.3d 87.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

32A-2-23. Limitations on dispositional judgments; modification; termination or extension of court orders.

A. A judgment transferring legal custody of an adjudicated delinquent child to an agency responsible for the care and rehabilitation of delinquent children divests the court of jurisdiction at the time of transfer of custody, unless the transfer of legal custody is for a commitment not exceeding fifteen days pursuant to the provisions of Section 32A-2-19 NMSA 1978, in which case the court retains jurisdiction.

B. A judgment of probation or protective supervision shall remain in force for an indeterminate period not to exceed the term of commitment from the date entered.

C. A child shall be released by an agency and probation or supervision shall be terminated by juvenile probation and parole services or the agency providing supervision when it appears that the purpose of the order has been achieved before the expiration of the period of the judgment. A release or termination and the reasons therefor shall be reported promptly to the court in writing by the releasing authority.

D. Prior to the expiration of a short-term commitment of one year, as provided for in Section 32A-2-19 NMSA 1978, the court may extend the judgment for up to one six-month period if the court finds that the extension is necessary to safeguard the welfare of the child or the public safety. If a short-term commitment is extended, the mandatory ninety-day supervised release, as required by Section 32A-2-19 NMSA 1978, shall be included in the extension. Notice and hearing are required for any extension of a juvenile's commitment.

E. Prior to the expiration of a long-term commitment, as provided for in Section 32A-2-19 NMSA 1978, the court may extend the judgment for additional periods of one year until the child reaches the age of twenty-one if the court finds that the extension is necessary to safeguard the welfare of the child or the public safety. If a long-term commitment is extended, the mandatory ninety-day supervised release, as required by Section 32A-2-19 NMSA 1978, shall be included in the extension. Notice and hearing are required for any extension of a juvenile's commitment.

F. Prior to the expiration of a judgment of probation, the court may extend the judgment for an additional period of one year until the child reaches the age of twenty-one if the court finds that the extension is necessary to protect the community or to safeguard the welfare of the child.

G. The court may dismiss a motion if it finds after preliminary investigation that the motion is without substance. If the court is of the opinion that the matter should be reviewed, it may, upon notice to all necessary parties, proceed to a hearing in the manner provided for hearings on petitions alleging delinquency. The court may terminate a judgment if it finds that the child is no longer in need of care, supervision or rehabilitation or it may enter a judgment extending or modifying the original judgment if it finds that action necessary to safeguard the child or the public interest.

H. A child may make a motion to modify a children's court or adult disposition within thirty days of the judge's decision. If the court is of the opinion that the matter should be reviewed, it may, upon notice to all necessary parties, proceed to a hearing in the manner provided for hearings on petitions alleging delinquency.

I. The department may seek a bench warrant from the court when the child absconds from supervised release.

History: 1978 Comp., § 32A-2-23, enacted by Laws 1993, ch. 77, § 52; 1995, ch. 206, § 17; 2003, ch. 225, § 12; 2005, ch. 189, § 20; 2009, ch. 239, § 22.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "32A-2-19" for "32-2-19" in Subsections A and D, deleted former Subsection E, relating to extension of six-month commitments for juveniles, redesignated the remaining subsections accordingly, and made a minor stylistic change in Subsection E.

The 2003 amendment, effective July 1, 2003, added "subject to the provisions of Section 32A-7-8 NMSA 1978" at the end of Paragraph A(1); rewrote Paragraph A(2); added present Paragraph A(3); redesignated former Paragraph A(3) as Paragraph A(4).

The 2005 amendment, effective June 17, 2005, deleted the former provision in Paragraph A(3), which provided that a child who completes a short term commitment of one year, upon release, shall be placed on parole and supervision for ninety days; added Subsection D, which provided that prior to the expiration of a short-term commitment of one year, the court may extend the judgment for up to one six-month period and if the short-term commitment is extended, the mandatory ninety-day parole shall be included in the extension; and added the provision in Subsection E that if a long-term commitment is extended, the mandatory ninety-day parole shall be included in the extension.

The 2009 amendment, effective July 1, 2009, deleted Paragraph (1) of Subsection A, which provided that the juvenile parole board had exclusive power to parole or release the child; deleted Paragraph (2) of Subsection A, which provided that the supervision of a child after release shall be conducted by the department; deleted Paragraph (3) of Subsection A, which provided that the time a child absconds from parole or probation tolls all time limits for filing a petition to revoke probation or parole and the computation

of the period of probation or parole; in Subsections D and E, changed "parole" to "supervised release"; and added Subsection I.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-38 NMSA 1978 have been included in the annotations to this section.

Court's jurisdiction to modify disposition. — The children's court may modify a child's disposition after transfer of custody to the Children, Youth and Families Department when the court invites reconsideration of the child's disposition and finds the modification necessary to safeguard the child or the public interest. State v. Dylan A., 2007-NMCA-114, 142 N.M. 467, 166 P.3d 1121, cert. granted, 2007-NMCERT-008, 142 N.M 436, 166 P.3d 1090.

There is no conflict between Subsection G [H] of this section and 10-230.1 B NMRA. In re Michael L., 2002-NMCA-076, 132 N.M. 479, 50 P.3d 574, cert. denied, 132 N.M. 484, 51 P.3d 527.

Subsections F and G [G and H] set out exceptions to the general rule spelled out in Subsection A of this section. In re Michael L., 2002-NMCA-076, 132 N.M. 479, 50 P.3d 574, cert. denied, 132 N.M. 484, 51 P.3d 527.

Age confinement must end. — Under the 1981 Children's Code, the courts do not have jurisdiction to extend a child's confinement beyond the age of eighteen. State v. Adam M., 1998-NMCA-014, 124 N.M. 505, 953 P.2d 40.

The constitutional prohibition against ex post facto laws prevents the courts from applying the Children's Code adopted in 1993, which permits the confinement of a child until he or she reaches the age of twenty-one where the delinquent acts and original adjudication occurred while the prior Code was in effect. State v. Adam M., 1998-NMCA-014, 124 N.M. 505, 953 P.2d 40.

Length of commitments. — All commitments under Delinquency Act represent maximum time that a child may spend in custody. State v. Indie C., 2006-NMCA-014, 139 N.M. 80, 128 P.3d 508, cert. denied, 2006-NMCERT-001, 139 N.M. 273, 131 P.3d 660.

Court's jurisdiction to extend commitment. — The court's jurisdiction to extend a delinquent child's commitment was not affected by the fact that the juvenile parole board had issued a certificate of discharge. In re Ruben D., 2001-NMCA-006, 130 N.M. 110, 18 P.3d 1063.

Evidence sufficient to extend commitment. — Evidence that the child did not make any progress in his rehabilitation for the first 18 months of his two-year commitment and of his anger management problems, coupled with his escape and his failure to obtain his graduate equivalency diploma was sufficient to find that an extension of his commitment was necessary. In re Ruben D., 2001-NMCA-006, 130 N.M. 110, 18 P.3d 1063.

Commitment to boys' school for two years was improper. State v. Doe, 93 N.M. 206, 598 P.2d 1166 (Ct. App. 1979).

Motion for reconsideration filed after thirty-day period. — Children's court was without jurisdiction to modify a commitment to the children, youth and families department, where the child's motion for reconsideration on grounds of abuse was filed after the thirty-day period. Instead, the child's remedy for alleged abuses is under 32A-4-3 NMSA 1978. In re Zac McV., 1998-NMCA-114, 125 N.M. 583, 964 P.2d 144, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

Child is not entitled to precommitment credit for time served while on probation. State v. Dennis F., 104 N.M. 619, 725 P.2d 595 (Ct. App. 1986).

Court's jurisdiction ends upon transferring child to human services department. — Once the children's court transfers legal custody of a child to the health and social services department (now human services department), the court's jurisdiction ends, and so, having transferred legal custody to the department, the children's court had no authority to order the department to place the physical custody of the child with any particular organization. Health & Social Servs. Dep't v. Doe, 91 N.M. 675, 579 P.2d 801 (Ct. App. 1978).

Time limitation on custody transfer void. — While the court possesses the power to transfer legal custody of delinquent children to an agency responsible for their care and rehabilitation, any attempt by the court to impose a time limitation on the transfer of custody, even if well within the time limitations already authorized by statute, is void as being in excess of the court's jurisdiction. 1979 Op. Att'y Gen. No. 79-37.

Authority to petition for parole extension. — Probation officer has authority to petition the court for extension of the period of parole supervision of a child where such action is necessary to safeguard the welfare of the child or the public interest. State v. Doe, 92 N.M. 589, 592 P.2d 189 (Ct. App. 1979).

Jurisdiction in subsequent proceeding. — Children's court could adjudicate child as delinquent and commit him to an indeterminate sentence not to exceed two years, notwithstanding his prior adjudication in another case. Moreover, the disposition was not rendered invalid by its effect on the child's eligibility for an alternative placement. State v. Augustine R., 1998-NMCA-139, 126 N.M. 122, 967 P.2d 462.

Children's court had jurisdiction to modify child's sentence four months after sentencing him to the custody of the Children, Youth and Families Department. State v. Carlos A., 1996-NMCA-082, 122 N.M. 241, 923 P.2d 608.

Recommitment standard. — An order of recommitment under Subsection D must review the child's progress during his term of initial commitment; the acts that justified the original commitment cannot provide the sole basis for extending the commitment. State v. Sergio B., 2002-NMCA-070, 132 N.M. 375, 48 P.3d 764.

Written motion was not required to allow the children's' court to modify a child's sentence. State v. Carlos A., 1996-NMCA-082, 122 N.M. 241, 923 P.2d 608.

Court-invited motions. — 10-230.1 B NMRA makes no reference to court-invited motions allowed under Subsection F of this section. In re Michael L., 2002-NMCA-076, 132 N.M. 479, 50 P.3d 574, cert. denied, 132 N.M. 484, 51 P.3d 527.

Time limit on court ruling. — Where 10-230.1 NMRA required juvenile's motion to reconsider, filed pursuant to 32A-2-23G NMSA 1978, to be ruled upon within 90 days after filing, children's court erred in ruling on motion after the 90 day period elapsed and the motion should have been deemed denied. In re Christobal V., 2002-NMCA-077, 132 N.M. 474, 50 P.3d 569, cert. denied, 132 N.M. 484, 51 P.3d 527 (2002).

Court's authority after child in custody of department. — Once legal custody is in the department of human services, the children's court has no authority to prohibit the department from placing physical custody of the child with any particular person. State ex rel. Human Servs. Dep't, 107 N.M. 769, 764 P.2d 1327 (Ct. App. 1988).

Sexual orientation of proposed custodian, standing alone, is not enough to support a conclusion that the person cannot provide a proper environment. State ex rel. Human Servs. Dep't, 107 N.M. 769, 764 P.2d 1327 (Ct. App. 1988).

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

32A-2-23.1. Release eligibility.

A. The department shall have exclusive jurisdiction and authority to release an adjudicated delinquent child during the term of the child's commitment, consistent with the provisions of the Victims of Crime Act [31-26-1 NMSA 1978]. In determining whether to release a child, the department shall give due consideration to public safety, the extent to which the child has been rehabilitated, the adequacy and suitability of the proposed release plan and the needs and best interests of the child, including the child's need for behavioral health or medical services that are not available in facilities for adjudicated delinquent children.

B. The decision to grant or deny release shall be made by the secretary of children, youth and families or the secretary's designee. The department may impose such conditions of release as it deems appropriate.

C. A child is eligible for release any time after the entry of a judgment transferring legal custody to the department, and the department may consider a reasonable request for release from the child at any time sixty days after the child has been committed.

D. In the event release for a child is denied by the department after release is recommended for the child by the juvenile public safety advisory board, or release is approved by the department after the board has recommended that the child not be released, within ten days, the board may request a review of the decision by the court of the judicial district from which legal custody of the child was transferred, and the department shall transmit the child's records to the court. The court shall have jurisdiction to review the matter without conducting a formal hearing and to issue an order that either denies or grants release to the child. If the board requests review under this section, the child shall not be released until such time as the court has issued a decision. If the board does not petition the district court for review of the department's decision to grant or deny release within ten days of the department's decision, the department's decision shall be final, and the department shall release the child or continue the commitment in accordance with the terms of its decision.

E. The secretary of children, youth and families or the secretary's designee may review the case of any child upon the child's or the juvenile public safety advisory board's reasonable request at any time after release is denied.

History: 1978 Comp., § 32A-2-23.1, as enacted by Laws 2009, ch. 239, § 23.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-2-23.2. Release proceedings.

A. When the department determines that a child is ready to be released, it shall provide a list of children to the juvenile public safety advisory board at least thirty-five days prior to the next regularly scheduled release consideration meeting. The department shall ensure that all other notifications of a pending release proceeding are accomplished consistent with the provisions of the Victims of Crime Act [31-26-1 NMSA 1978].

B. Release consideration meetings shall be held at least quarterly, are not open to the public and shall include the child, a quorum of the board and a representative of the department. The child's attorney shall receive notice and may be present at the release meeting.

History: 1978 Comp., § 32A-2-23.2, as enacted by Laws 2009, ch. 239, § 24.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-2-24. Probation revocation; disposition.

A. A child on probation incident to an adjudication as a delinquent child who violates a term of the probation may be proceeded against in a probation revocation proceeding. A proceeding to revoke probation shall be begun by filing in the original proceeding a petition styled as a "petition to revoke probation". Petitions to revoke probation shall be screened, reviewed and prepared in the same manner and shall contain the same information as petitions alleging delinquency. Procedures of the Delinquency Act regarding taking into custody and detention shall apply. The petition shall state the terms of probation alleged to have been violated and the factual basis for these allegations.

B. The standard of proof in probation revocation proceedings shall be evidence beyond a reasonable doubt and the hearings shall be before the court without a jury. In all other respects, proceedings to revoke probation shall be governed by the procedures, rights and duties applicable to proceedings on a delinquency petition. If a child is found to have violated a term of the child's probation, the court may extend the period of probation or make any other judgment or disposition that would have been appropriate in the original disposition of the case.

History: 1978 Comp., § 32A-2-24, enacted by Laws 1993, ch. 77, § 53; 2009, ch. 239, § 25.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, in Subsection B, after "violated a term of", deleted "his" and add "the child’s".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed

on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-43 NMSA 1978 have been included in the annotations to this section.

Rule 10-226 NMRA governs the time limits within which the children's court must hear a petition to revoke probation. State v. Katrina G., 2007-NMCA-048, 141 N.M. 501, 157 P.3d 66.

Probation revocation procedures not mandated. — This section does not mandate that in order for the children's court to order detention for violation of probation, the court must follow probation revocation procedures in all instances. State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, cert. denied, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Valid probation order. — Since the order placing the child on probation was void, the situation was as if no probation order had been entered, and thus the order revoking probation was without legal effect despite the fact that the court attempted therein to supply the requisite finding that the child was in need of rehabilitation, absence of which had rendered the initial probation order void. State v. Doe, 90 N.M. 249, 561 P.2d 948 (Ct. App. 1977).

Governed by procedure applicable to delinquency petition. — Generally, proceedings to revoke probation are governed by the procedure applicable to proceedings on a delinquency petition. State v. Doe, 90 N.M. 249, 561 P.2d 948 (Ct. App. 1977).

Child to be informed of violated condition of probation. — Trial court violated child's right to due process by revoking his probation, absent competent evidence that respondent had been informed of the condition of probation which he allegedly violated. State v. Doe, 104 N.M. 107, 717 P.2d 83 (Ct. App. 1986).

Self-executing provision in a probation order, requiring automatic confinement in the juvenile detention center merely upon a reported absence from school, was invalid because it would circumvent the procedural requirements, but was separable from the remaining portion of the probation order. State v. Don S., 109 N.M. 777, 790 P.2d 1058 (Ct. App. 1990).

Determination based on verified facts. — The determination of whether a juvenile violated the conditions of his probation must be based on verified facts. State v. Doe, 104 N.M. 107, 717 P.2d 83 (Ct. App. 1986).

Revocation of juvenile parole for adult offenses. — The order of the children's court revoking the defendant's probation based on offenses committed by the defendant after

he became an adult for which he was convicted and fined did not violate his constitutional rights guaranteeing protection against double jeopardy; since with respect to adult offenders any punishment resulting from revocation of a defendant's probation is punishment that relates to the person's original offense, an individual's subsequent prosecution for the same conduct in a new proceeding does not violate double jeopardy principles. In re Lucio F.T., 119 N.M. 76, 888 P.2d 958 (Ct. App. 1994).

Applicability of Rules of Evidence. — The Rules of Evidence apply to the adjudicatory phase of juvenile probation revocation proceedings; however, they do not apply to the dispositional phase. State v. Erickson K., 2002-NMCA-058, 132 N.M. 258, 46 P.3d 1258, cert. quashed, 132 N.M. 732, 55 P.3d 428 (2002).

Improper procedures. — If a special master lacks authority to hear a probation revocation petition, the court is without jurisdiction at the hearing on the petition. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

When the district judge disposes of the case more than 30 days after the petition is filed, the petition should be dismissed with prejudice. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

Revocation improper. — Revocation of the juvenile's probation was improper pursuant to this section where the juvenile did not willfully violate his probation agreement when he left the state because all evidence showed that the mother was responsible for making the decision to leave the state; further, the drug test result should not have been considered by the trial court because they did not meet the admissibility requirements. In re Bruno R., 2003-NMCA-057, N.M. , 66 P.3d 339.

Extrajudicial admissions. — Without proof of drug testing, the admission of the juvenile could not stand as the sole evidence of the violation because extrajudicial admissions or confessions were not sufficient as evidence that a child committed delinquent acts absent other corroborating evidence. In re Bruno R., 2003-NMCA-057, N.M. , 66 P.3d 339.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right and sufficiency of allocation in probation revocation proceeding, 70 A.L.R.5th 533.

32A-2-25. Parole revocation; procedures.

A. A child on parole from an agency that has legal custody who violates a term of parole may be proceeded against in a parole revocation proceeding conducted by the department or the supervising agency or by a hearing officer contracted by the department who is neutral to the child and the agency in accordance with procedures established by the department in cooperation with the juvenile parole board. A juvenile probation and parole officer may detain a child on parole status who is alleged to have violated a term or condition of parole until the completion and review of a preliminary

parole revocation hearing. A child may waive the right to a preliminary parole revocation hearing after consultation with the child's attorney, parent, guardian or custodian.

B. If a retake warrant is issued by the department upon the completion of the preliminary parole revocation hearing, the juvenile institution to which the warrant is issued shall promptly transport the child to that institution at the expense of the department. If a child absconds from parole supervision and is apprehended in another state after the issuance of a retake warrant by the department, the juvenile justice division of the department shall cause the return of the child to this state at the expense of the department.

History: 1978 Comp., § 32A-2-25, enacted by Laws 1993, ch. 77, § 54; 2005, ch. 189, § 21.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, in Subsection A, provided that a child may be proceeded against by a hearing officer who is neutral to the child and the supervising agency and that a child may waive the right to a preliminary parole revocation hearing.

32A-2-26. Sealing of records.

A. On motion by or on behalf of a person who has been the subject of a delinquency petition or on the court's own motion, the court shall vacate its findings, orders and judgments on the petition and order the legal and social files and records of the court, probation services, and any other agency in the case sealed. If requested in the motion, the court shall also order law enforcement files and records sealed. An order sealing records and files shall be entered if the court finds that:

(1) two years have elapsed since the final release of the person from legal custody and supervision or two years have elapsed since the entry of any other judgment not involving legal custody or supervision;

(2) the person has not, within the two years immediately prior to filing the motion, been convicted of a felony or of a misdemeanor involving moral turpitude or been found delinquent by a court and no proceeding is pending seeking such a conviction or finding; and

(3) the person is eighteen years of age or older or the court finds that good cause exists to seal the records prior to the child's eighteenth birthday.

B. Reasonable notice of the motion shall be given to:

(1) the children's court attorney;

(2) the authority granting the release;

(3) the law enforcement officer, department and central depository having custody of the law enforcement files and records; and

(4) any other agency having custody of records or files subject to the sealing order.

C. Upon the entry of the sealing order, the proceedings in the case shall be treated as if they never occurred and all index references shall be deleted. 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. Copies of the sealing order shall be sent to each agency or official named in the order.

D. Inspection of the files and records or the release of information in the records included in the sealing order may thereafter be permitted by the court only:

(1) upon motion by the person who is the subject of the records and only to those persons named in the motion; and

(2) in its discretion, in an individual case, to any clinic, hospital or agency that has the person under care or treatment or to other persons engaged in fact finding or research.

E. Any finding of delinquency or need of services or conviction of a crime subsequent to the sealing order may at the court's discretion be used by the court as a basis to set aside the sealing order.

F. A child who has been the subject of a petition filed pursuant to the provisions of the Delinquency Act [32A-2-1 NMSA 1978] shall be notified in writing by the department when the child reaches the age of eighteen or at the expiration of legal custody and supervision, whichever occurs later, that the department's records have been sealed and that the court, the children's court attorney, the child's attorney and the referring law enforcement agency have been notified that the child's records are subject sealing.

G. The department shall seal the child's files and records when the child reaches the age of eighteen or at the expiration of the disposition, whichever occurs later. The department shall notify the children's court attorney, the child's attorney and the referring law enforcement agency that the child's records are subject to sealing.

H. A child who is determined by the court not to be a delinquent offender shall have the child's files and records in the instant proceeding automatically sealed by the court upon motion by the children's court attorney at the conclusion of the proceedings.

I. After sealing, the department may store and use a person's records for research and reporting purposes, subject to the confidentiality provisions of Section 32A-2-32 NMSA 1978 and other applicable federal and state laws.

History: 1978 Comp., § 32A-2-26, enacted by Laws 1993, ch. 77, § 55; 2003, ch. 225, § 13; 2009, ch. 239, § 26.

ANNOTATIONS

Cross references. — For right to inspect public records, *see* 14-2-1 NMSA 1978.

For Arrest Record Information Act, *see* 29-10-1 NMSA 1978.

The 2003 amendment, effective July 1, 2003, substituted "person" for "individual" throughout the section and added Subsections G and H.

The 2009 amendment, effective July 1, 2009, added Paragraph (3) of Subsection A; in Paragraph (3) of Subsection B, after "files and records", deleted "if those records are included in the motion"; in Subsection F, at the beginning of the sentence, after "A", changed "person" to "child"; deleted former Subsection G, which provided that the files of a person who is not the subject of a delinquency petition or who has not been determined to be a delinquent offender shall be sealed; deleted Subsection H, which provided that the files of a person who has not received new allegations of delinquency shall be sealed; and added Subsections G through I.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-45 NMSA 1978 have been included in the annotations to this section.

Record sealing discretionary when child commits felony following two "clean" years. — When an individual has been the subject of a petition filed under the Children's Code, has two subsequent "clean" years and then commits a series of felonies, the provisions of Subsection A, relating to the sealing of children's courts records, are not mandatory but are discretionary, pursuant to Subsection E. State v. Doe, 96 N.M. 648, 633 P.2d 1246 (Ct. App. 1981).

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 115 et seq.

32A-2-27. Injury to person or destruction of property; liability; costs and attorney fees; restitution.

A. Any person may recover damages not to exceed four thousand dollars ($4,000) in a civil action in a court or tribunal of competent jurisdiction from the parent or guardian having custody and control of a child when the child has maliciously or willfully injured a person or damaged, destroyed or deprived use of property, real or personal, belonging to the person bringing the action.

B. Recovery of damages under this section is limited to the actual damages proved in the action, not to exceed four thousand dollars ($4,000) taxable court costs and, in the discretion of the court, reasonable attorney fees to be fixed by the court or tribunal.

C. Nothing contained in this section limits the discretion of the court to issue an order requiring damages or restitution to be paid by the child when the child has been found to be within the provisions of the Delinquency Act.

D. Nothing contained in this section shall be construed so as to impute liability to any foster parent.

History: 1978 Comp., § 32A-2-27, enacted by Laws 1993, ch. 77, § 56; 2005, ch. 189, § 22.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, deleted "or custodian" in Subsection A.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-46 NMSA 1978 have been included in the annotations to this section.

Not violative of due process. — As the legislature can properly determine that a parental liability statute is reasonably necessary, such a statute does not deprive the parents of property without due process of law. Alber v. Nolle, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

Equal protection. — A similar statute does not deprive parents of equal protection of the laws. Alber v. Nolle, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

Legislative intent. — A similar statute constituted a legislative recognition of the moral duty owed by a parent to exercise reasonable care so as to control his minor child and prevent him from maliciously or willfully damaging the property of another. Potomac Ins. Co. v. Torres, 75 N.M. 129, 401 P.2d 308 (1965).

Definition of "willful" and "malicious" conduct. — There is very little, if any, difference between "willful" and "malicious" conduct, and an act done "willfully" or "maliciously" means the intentioned doing of a harmful act without just cause or excuse or an intentional act done in utter disregard for the consequences, and does not necessarily mean actual malice or ill will. Potomac Ins. Co. v. Torres, 75 N.M. 129, 401 P.2d 308 (1965); Ortega v. Montoya, 97 N.M. 159, 637 P.2d 841 (1981).

Young child may be capable of willful and malicious conduct. — As a matter of law, a young child is not incapable of willful and malicious conduct in committing an intentional tort. It is for the trier of fact to determine, based upon the child's age, experience and mental capacity, whether the child acted in a willful and malicious manner. Ortega v. Montoya, 97 N.M. 159, 637 P.2d 841 (1981).

Statutory basis required for parental liability. — In the absence of statutory authority, there is no basis for holding the parents, qua parents, civilly liable for crimes of their minor child. Lamb v. Randall, 95 N.M. 35, 618 P.2d 379 (Ct. App. 1980).

Requisite malice or willfulness may be readily inferred from defendant's act in driving at excessive speeds in a crowded business district, in attempting to evade police pursuit, and in striking a car which was stopped at a red traffic light. Potomac Ins. Co. v. Torres, 75 N.M. 129, 401 P.2d 308 (1965).

Child need not first be found liable. — There is no requirement, as a predicate for parental liability, that the child be first found liable. Alber v. Nolle, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

Parents do not have property right in their child's teeth. — The court found no logical reason which would justify holding that either their child's teeth or the investment in orthodontic work on them should properly be considered as property of the parent, and for the damage or destruction of which recovery might be had. Ross v. Souter, 81 N.M. 181, 464 P.2d 911 (Ct. App. 1970).

Seizure of money of inmate of boys' school. — The only legal way that the money of any boy in New Mexico boys' school can be taken or seized for damages to property caused by him is to institute a civil action, obtain a judgment and then levy execution on any money held by the institution. 1959-60 Op. Att'y Gen. No. 60-121.

Pain and suffering is an actual damage recoverable under the parental liability statute. Alber v. Nolle, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982) (decided prior to 1993 revision).

Award of attorney fees on appeal requires statutory authority. Alber v. Nolle, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Criminal responsibility of parent for act of child, 12 A.L.R.4th 673.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 A.L.R.4th 985.

Liability of adult assailant's family to third party for physical assault, 25 A.L.R.5th 1.

32A-2-28. Parental responsibility.

A. In any complaint alleging delinquency, a parent of the child alleged to be delinquent may be made a party in the petition. If a parent is made a party and if a child is adjudicated a delinquent, the court may order the parent or parents to submit to counseling, participate in any probation or other treatment program ordered by the court and, if the child is committed for institutionalization, participate in any institutional treatment or counseling program including attendance at the site of the institution. The court shall order the parent to support the child committed for institutionalization by paying the reasonable costs of support, maintenance and treatment of the child that the parent is financially able to pay. The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment.

B. If a fine is imposed against a child by a court of this state, the parent of the child is not liable to pay the fine.

C. The court may enforce any of its orders issued pursuant to this section by use of its contempt power.

History: 1978 Comp., § 32A-2-28, enacted by Laws 1993, ch. 77, § 57.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of juvenile court defendant to be represented during court proceedings by parent, 11 A.L.R.4th 719.

Criminal responsibility of parent for act of child, 12 A.L.R.4th 673.

32A-2-29. Motor Vehicle Code violations.

A. The municipal, magistrate or metropolitan court shall have original exclusive jurisdiction over all Motor Vehicle Code [66-1-1 NMSA 1978] or municipal traffic code violations when the person alleged to have committed the violation is a child, with the exception of those violations contained in Paragraph (1) of Subsection A of Section

32A-2-3 NMSA 1978 and all traffic offenses alleged to have been committed by the child arising out of the same occurrence pursuant to Subsection B of this section.

B. If the court acquires jurisdiction over a child pursuant to Section 32A-2-3 NMSA 1978, it shall have exclusive jurisdiction over all traffic offenses alleged to have been committed by the child arising out of the same occurrence.

C. Disposition as to any delinquent offenses shall be pursuant to the Delinquency Act.

D. Disposition as to a Motor Vehicle Code or municipal traffic code violation in which jurisdiction is acquired as set forth in Subsection B of this section shall be pursuant to the respective Motor Vehicle Code or municipal traffic code in the children's court's discretion and to the extent that it neither conflicts with nor is inconsistent with the dispositional provisions of the Children's Code [32A-1-1 NMSA 1978].

E. All traffic offenses that the child is found to have committed by the municipal, magistrate or metropolitan court or for which the child is adjudicated delinquent by the children's court shall be subject to the reporting requirements and the suspension and revocation provisions of the Motor Vehicle Code and shall not be subject to the confidentiality provisions of the Delinquency Act.

F. Only the children's court may incarcerate a child who has been found guilty of any Motor Vehicle Code or municipal traffic code violations.

History: 1978 Comp., § 32A-2-29, enacted by Laws 1993, ch. 77, § 58; 2003, ch. 225, § 14; 2009, ch. 239, § 27.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, substituted "Section 32A-2-3" for "Section 32-2-3" following "Subsection A of" in Subsections A and B; deleted "children's" near the beginning of Subsection B; in Subsection D, substituted "Only the children's court" for "No tribunal" at the beginning and deleted "without first securing the approval of the children's court" at the end.

The 2009 amendment, effective July 1, 2009, in Subsection B, after "child pursuant to", deleted "any of those Motor Vehicle Code violations contained in Paragraph (1) of Subsection A of", and before "jurisdiction", added "exclusive"; and added Subsections C and D.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-48 NMSA 1978 have been included in the annotations to this section.

Failure of child-defendant to appear. — When a court has jurisdiction over violations of the Motor Vehicle Code by a child, that court also has authority to issue an arrest warrant pursuant to court rule when the child-defendant fails to appear as ordered. 1989 Op. Att'y Gen. No. 89-14.

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

32A-2-30. Indigency standard; fee schedule; reimbursement.

A. The court shall use a standard adopted and information provided by the public defender department to determine indigency of children in proceedings on petitions alleging delinquency.

B. The court shall use a fee schedule adopted by the public defender department when appointing attorneys to represent children in proceedings on petitions alleging delinquency.

C. The court shall order reimbursement from the parents or guardians of a child who has received or desires to receive legal representation or another benefit under the Public Defender Act [31-15-1 NMSA 1978] after a determination is made that the child was not indigent according to the standard for indigency of children adopted by the public defender department.

D. Any amounts recovered pursuant to this section shall be paid to the state treasurer for credit to the general fund.

History: 1978 Comp., § 32A-2-30, enacted by Laws 1993, ch. 77, § 59; 2005, ch. 189, § 23.

ANNOTATIONS

Cross references. — For defense of indigents, *see* 31-16-1 to 31-16-10 NMSA 1978.

For form for indigent defense services eligibility determination in children's court, *see* Rule 10-408 NMRA.

The 2005 amendment, effective June 17, 2005, in Subsection C, deleted "or custodian".

32A-2-31. Child adjudicated delinquent; victim restitution; compensation; deductions.

A. A delinquent child may be ordered by the court to pay restitution to the victim of the child's delinquent act.

B. The department may provide compensation to a delinquent child engaged in a rehabilitative work program and shall promulgate necessary rules and regulations to provide deductions from that compensation for:

(1) victim restitution ordered by the court and for transmitting those deductions to the clerk of that court;

(2) the crime victims reparation fund and for transmitting those deductions to the state treasurer for credit to that fund; and

(3) the reasonable costs incident to the confinement of the delinquent child.

C. The deductions provided by Subsection B of this section shall not exceed fifty percent of the compensation earned by the child and shall not be less than five percent of that compensation.

History: 1978 Comp., § 32A-2-31, enacted by Laws 1993, ch. 77, § 60.

32A-2-32. Confidentiality; records.

A. All records pertaining to the child, including all related 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, 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 possession of the department, are confidential and shall not be disclosed directly or indirectly to the public.

B. The disclosure of all mental health and developmental disability records shall be made pursuant to the Children's Mental Health and Developmental Disabilities Act [32A-6A-1 NMSA 1978].

C. The records described in Subsection A of this section, other than mental health and developmental disability records, shall be disclosed only to any of the following, provided that the agency, person or institution receiving information shall not re-release the information without proper consent or as otherwise provided by law:

(1) court personnel;

(2) the child's court appointed special advocates;

(3) the child's attorney or guardian ad litem representing the child in any matter;

(4) department personnel;

(5) corrections department personnel;

(6) law enforcement officials when the request is related to the investigation of a crime;

(7) district attorneys or children's court attorneys;

(8) a state government social services agency in any state;

(9) those persons or entities of a child's Indian tribe specifically authorized to inspect such records pursuant to the federal Indian Child Welfare Act of 1978 or any regulations promulgated under that act;

(10) tribal juvenile justice system and social service representatives;

(11) a foster parent, if the records are those of a child currently placed with that foster parent or of a child being considered for placement with that foster parent, when the disclosure of the information is necessary for the child's treatment or care and shall include only that information necessary to provide for treatment and care of the child;

(12) school personnel involved with the child if the records concern the child's educational needs, but shall only include that information necessary to provide for the child's educational planning and needs;

(13) a health care or mental health professional involved in the evaluation or treatment of the child, the child's parents, guardians or custodian or other family members;

(14) representatives of the protection and advocacy system;

(15) the child's parent, guardian or legal custodian when the disclosure of the information is necessary for the child's treatment or care and shall include only that information necessary to provide for the treatment or care of the child;

(16) any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court who agrees not to otherwise release the records; and

(17) the child, if fourteen years of age or older.

D. 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 shall be redacted or otherwise deleted.

E. Whoever intentionally and unlawfully releases any information or records closed to the public pursuant to this section or releases or makes other unlawful use of records in violation of this section is guilty of a petty misdemeanor.

F. The department shall promulgate rules for implementing disclosure of records pursuant to this section and in compliance with state and federal law and the Children's Court Rules [10-101 NMRA].

History: 1978 Comp., § 32A-2-32, enacted by Laws 1993, ch. 77, § 61; 2003, ch. 225, § 15; 2005, ch. 189, § 24; 2009, ch. 239, § 28.

ANNOTATIONS

Cross references. — For the federal Developmental Disabilities Assistance and Bill of Rights Act, *see* 42 U.S.C. § 6000 et seq.

For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901 et seq.

For the federal Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991, *see* 42 U.S.C. § 10801 et seq.

The 2003 amendment, effective July 1, 2003, inserted "attorney or" in Paragraph B(3) and inserted "Amendments" following "Mentally Ill Individuals" in Paragraph B(15).

The 2005 amendment, effective June 17, 2005, in Subsection A, provided that all records pertaining to the child, including all related diagnostic evaluations and records from local detention facilities, client-identifying records from facilities for the care and rehabilitation of delinquent children, are confidential; in Subsection B, provided that records may be disclosed only to the listed persons or entities; in Subsection B(12), provided that records may be disclosed to a foster parent when the disclosure is necessary for the child's treatment or care; in Subsection B(13), provided that records may be disclosed to school personnel for the child’s educational planning; in Subsection B(15), deleted the former provision that records could be disclosed to representatives of the protection and advocacy system pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act and the Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991; added Subsection B(16), which provided that records may be disclosed to the child's parent, guardian or legal custodian when necessary for the child's treatment or care; and added Subsection D to provide that the department shall promulgate rules for implementing the disclosure of records.

The 2009 amendment, effective July 1, 2009, in Subsection A, after "All", deleted "social"; after "including all related", added "social records, behavioral health screenings"; after "pre-parole", added "or supervised release"; and after "parole officers and", deleted "parole" and added "the juvenile public safety advisory"; added Subsection B; in Subsection C, after "this section", added "other than mental health and developmental disability records"; and after "disclosed only to", added the remainder of

the sentence to the colon; in Paragraph (2) of Subsection C, at the beginning of the sentence, added "this child's"; in Paragraph (e) of Subsection C, after "guardian ad litem", added "representing the child in any matter"; deleted former Paragraph (5) of Subsection C, which listed a local substitute care review board or agency contracted to implement local substitute care review boards; in Paragraph (6) of Subsection C, after "officials", added the remainder of the sentence; in Paragraph (7) of Subsection C, after "attorneys", added the remainder of the sentence; deleted former Paragraph (9) of Subsection C, which listed state government social services agencies; deleted former Paragraph (10) of Subsection C, which listed persons or entities of a child's Indian tribe; deleted former Paragraph (11) of Subsection C, which listed tribal juvenile justice system and social service representatives; deleted former Paragraph (12) of Subsection C, which listed a foster parent; deleted former Paragraph (13) of Subsection C, which listed school personnel; deleted former Paragraph (14) of Subsection C, which listed health care or mental health professionals involved in the treatment or evaluation of the child, or the child's parents, guardians or custodian or other family members; deleted former Paragraph (15) of Subsection C, which listed representatives of the protection and advocacy system; deleted former Paragraph (16) of Subsection C, which listed the child's parents, guardian or legal custodian; added Paragraphs (8) through (15) and (17) of Subsection C; in Paragraph (16) of Subsection C, after "work of the court", added "who agrees not to otherwise release the records"; and added Subsection D.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-2-32.1. Information not to be disclosed on a public access web site.

A state agency or a political subdivision of the state, including a school district, county, municipality or home-rule municipality, shall not disclose on a public access web site maintained by it any information concerning the following:

A. an arrest or detention of a child;

B. delinquency proceedings for a child;

C. an adjudication of a child;

D. an adult sentence imposed on a child, except information required to be disclosed pursuant to the Sex Offender Registration and Notification Act [29-11A-1 NMSA 1978]; or

E. social records pertaining to a child as provided in Section 32A-2-32 NMSA 1978.

History: Laws 2007, ch. 96, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 96, § 2 made the section effective July 1, 2007.

32A-2-33. Child in possession of a firearm on school premises; detention; hearing.

A. If a public school administrator or employee has reasonable cause to believe that a child is in possession of or has been in possession of a firearm on school premises in violation of Section 30-7-2.1 NMSA 1978, the administrator or employee shall immediately report the child's actions to a law enforcement agency and the children, youth and families department.

B. Upon receipt of a report pursuant to Subsection A of this section, the law enforcement agency may conduct an investigation to determine if there is probable cause to believe that the child possessed a firearm on school premises.

C. If the law enforcement agency determines there is probable cause to believe that the child possessed a firearm on school premises, the law enforcement agency may take the child into custody and deliver the child to a detention facility licensed by the department. After the child is delivered to a detention facility, the department shall comply with the notification provisions set forth in Subsection C of Section 32A-2-10 NMSA 1978. The child shall be detained in the detention facility, pending a detention hearing pursuant to the provisions of Section 32A-2-13 NMSA 1978.

D. As used in this section, "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer. "Firearm" includes any handgun, rifle or shotgun.

History: Laws 1999, ch. 216, § 1; 2003, ch. 225, § 16.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, deleted "the federal Gun-Free Schools Act of 1994 or" following "in violation of" in Subsection A; substituted "may" for "shall immediately" following "law enforcement agency" in Subsections B and C; and added "As used in this section" at the beginning of Subsection D.

ARTICLE 3
Family in Need of Services

ANNOTATIONS

Compiler's notes. — Section 32A-3-1 NMSA 1978 was originally enacted as 32-3-1 NMSA 1978 by Laws 1993, ch. 77, § 62, but were recompiled to Chapter 32A NMSA 1978, in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been included whenever possible.

32A-3-1. Repealed.

History: 1978 Comp., § 32A-3-1, enacted by Laws 1993, ch. 77, § 62; 2005, ch. 189, § 77.

ANNOTATIONS

Repeals. — Laws 2005, ch. 189, § 77 repealed 32A-3-1 NMSA 1978, as enacted by Laws 1993, ch. 77, § 62, the short title of the Family in Need of Services Act, effective June 17, 2005.

ARTICLE 3A
Families Services

ANNOTATIONS

Compiler's notes. — Sections 32A-3A-1 to 32A-3A-10 NMSA 1978 were originally enacted as 32-3A-1 to 32-3A-10 NMSA 1978 by Laws 1993, ch. 77, §§ 63 to 72, and were subsequently recompiled to this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law.

32A-3A-1. Short title; purpose.

A. Chapter 32A, Article 3A NMSA 1978 may be cited as the "Family Services Act".

B. The Family Services Act shall be interpreted and construed to effectuate the following expressed legislative purposes:

(1) to recognize that many instances of a child's behavior are symptomatic of a family in need of family services; and

(2) to provide prevention, diversion and intervention services for a child or family.

History: 1978 Comp., § 32A-3A-1, enacted by Laws 1993, ch. 77, § 63; 2005, ch. 189, § 25.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, stated the title of the act in Subsection A and provided in Subsection B that the purpose of the Family Services Act is to recognize that a child's behavior is symptomatic of a need for family services, to provide prevention, diversion and intervention services

32A-3A-2. Definitions.

As used in the Family Services Act:

A. "child or family in need of family services" means:

(1) a family whose child's behavior endangers the child's health, safety, education or well-being;

(2) a family whose child is absent from the child's place of residence for twenty-four hours or more without the consent of the parent, guardian or custodian;

(3) a family in which the parent, guardian or custodian of a child refuses to permit the child to live with the parent, guardian or custodian; or

(4) a family in which the child refuses to live with his parent, guardian or custodian; and

B. "family services" means services that address specific needs of the child or family.

History: 1978 Comp., § 32A-3A-2, enacted by Laws 1993, ch. 77, § 64; 2005, ch. 189, § 26.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, in Subsection A(1), defined "child or family in need of family services" to mean a family whose child's behavior endangers the child's health, safety, education or well-being; deleted former Subsection B, which defined "family needs assessment"; in Subsection B, defined "family services" to mean services that address needs of the child or family; deleted former Subsection C(1) through (10), which listed service that where included in the former definition of "family services" and deleted former Subsection D, which defined "plan for family services" as an intervention plan based on the needs of the child and family.

32A-3A-3. Request for family services; withdrawal of request; presumption of good faith.

A. Any child or family member who has a reasonable belief that the child or family is in need of family services may request family services from the department.

B. Any person who has a reasonable belief that a child or family is in need of family services may submit a referral to the department.

C. A family that requests or accepts family services may withdraw its request for or acceptance of family services at any time.

D. A person who refers a child or family for family services is presumed to be acting in good faith and shall be immune from civil or criminal liability, unless the person acted in bad faith or with malicious purpose.

History: 1978 Comp., § 32A-3A-3, enacted by Laws 1993, ch. 77, § 65; 2005, ch. 189, § 27.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, in Subsection A, provided that any child or family member who believes that a child is in need of family services may request family services from the department; in Subsection B, provided that any person who believes that a child is in need of family services may submit a referral to the department; and deleted former Subsection C, which authorized a representative of a school to submit a request for family services on behalf of a family to the department under listed certain circumstances.

32A-3A-4. Referral process.

A. The department shall, subject to the availability of resources, design and implement a referral process to assist a child or family in accessing appropriate services.

B. When the child involved in the referral process is an Indian child, the assessment and referral process shall include contact with the Indian child's tribe for the purpose of consulting and exchanging information.

History: 1978 Comp., § 32A-3A-4, enacted by Laws 1993, ch. 77, § 66; 1995, ch. 206, § 18; 2005, ch. 189, § 28.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "the department, the state department of public education [public education department], the local education agency and the department of health" following "child's family" in Subsection C.

The 2005 amendment, effective June 17, 2005, in Subsection A, deleted the requirement that the state department of public education [public education department] and the department of health cooperate to design and implement an assessment and referral process for the purpose of assessing the needs of a family in need of services

and making referrals; deleted former Subsections B and C, which provided for the elements of the assessment and referral process; and redesignated former Subsection D as Subsection B.

32A-3A-5. Repealed.

History: 1978 Comp., § 32A-3A-5, enacted by Laws 1993, ch. 77, § 67; 2005, ch. 189, § 77.

ANNOTATIONS

Repeals. — Laws 2005, Chapter 189, § 77 repealed 32A-3A-5 NMSA 1978, as enacted by Laws 1993, ch. 77, § 67, relating to plan for family services, effective June 17, 2005. Because the former and new sections are substantially the same, the new section is considered a continuation of the former section. *See* 12-2A-14 NMSA 1978. For provisions of former section, *see* the 2004 NMSA 1978 on New Mexico One Source of Law DVD.

32A-3A-6. Voluntary placement of child outside home; documentation.

A. Upon written application by a parent, guardian or custodian, and if good cause is shown, the department may accept custody of a minor child for temporary voluntary placement outside the home.

B. Prior to accepting any child for voluntary placement, the department shall document the following:

(1) the efforts made by the department to provide or arrange for services by other public or private agencies that would be affordable to the family and that would alleviate the conditions leading to the placement request;

(2) any determination that the services are not available;

(3) any refusal by the parent, guardian or custodian to accept the services; and

(4) the fact that conditions leading to the placement request could not be alleviated by services aimed at keeping the child in the home.

C. If the department accepts custody of a child, the department shall provide the child with shelter in an appropriate facility, pursuant to the provisions of Section 32-3B-6 [32A-3B-6] NMSA 1978, that is located as close as possible to the child's residence. The child shall not be held in a jail or other facility intended or used for the incarceration of adults charged or convicted of criminal offenses or a facility for the detention of children alleged to be or adjudicated as delinquent children.

History: 1978 Comp., § 32A-3A-6, enacted by Laws 1993, ch. 77, § 68.

32A-3A-7. Voluntary placement; time limitation.

A. No child shall remain in voluntary placement for longer than one hundred eighty consecutive days or for more than one hundred eighty days in any calendar year; provided that a child may remain in voluntary placement up to an additional one hundred eighty consecutive days upon order of the court after the filing of a petition by the department for extension of voluntary placement, a hearing and a finding that additional voluntary placement is in the best interests of the child.

B. In no event shall a child remain in voluntary placement for a period in excess of three hundred sixty-five days in any two-year period.

C. Any placement described in this section shall not be considered abandonment by a parent, guardian or custodian or other family member.

History: 1978 Comp., § 32A-3A-7, enacted by Laws 1993, ch. 77, § 69; 2005, ch. 82, § 1.

ANNOTATIONS

The 2005 amendment, effective April 4, 2005, extended the time for temporary placements of children.

32A-3A-8. Duty to file a petition.

If any child has remained in voluntary placement for longer than three hundred sixty-five days in any two-year period and the parent, guardian or custodian of the child refuses to or cannot accept the child back into the parent's, guardian's or custodian's custody, the department shall immediately file a petition alleging that the child is a neglected child or that the child's family needs court-ordered family services.

History: 1978 Comp., § 32A-3A-8, enacted by Laws 1993, ch. 77, § 70; 2005, ch. 82, § 2.

ANNOTATIONS

The 2005 amendment, effective April 4, 2005, extended the time of placement after which the department is required to file a petition.

32A-3A-9. Right to regain custody.

A parent, guardian or custodian may at any time demand and obtain the return of a child voluntarily placed outside the home. The child shall be returned within seventy-two hours of the demand; however, the department may prevent the immediate return by

requesting the children's court attorney to file a petition alleging neglect or abuse and by obtaining temporary custody of the child before the expiration of the seventy-two hours.

History: 1978 Comp., § 32A-3A-9, enacted by Laws 1993, ch. 77, § 71.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of parent to regain custody of child after temporary conditional relinquishment of custody, 35 A.L.R.4th 61.

32A-3A-10. Voluntary placement; rights of parent.

Any parent, guardian or custodian whose child is in voluntary placement shall have the following rights with respect to the child:

A. the right of reasonable visitation with the child;

B. the right to be informed of changes in the child's school or of changes in the child's placement by the department; and

C. the right of decision as to all nonemergency and nonroutine medical care provided for the child.

History: 1978 Comp., § 32A-3A-10, enacted by Laws 1993, ch. 77, § 72.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Denial or restriction of visitation rights to parent charged with sexually abusing child, 1 A.L.R.5th 776.

ARTICLE 3B
Families in Need of Court-Ordered Services

ANNOTATIONS

Compiler's notes. — Sections 32A-3B-1 to 32A-3B-22 NMSA 1978 were originally enacted as 32-3B-1 to 32-3B-22 NMSA 1978 by Laws 1993, ch. 77, §§ 73 to 94, and were recompiled to this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law.

32A-3B-1. Short title; purpose.

A. Chapter 32A, Article 3B NMSA 1978 may be cited as the "Family in Need of Court-Ordered Services Act".

B. The Family in Need of Court-Ordered Services Act shall be interpreted and construed to effectuate the following expressed legislative purposes:

(1) through court intervention, to provide services for a family in need of services when voluntary services have been exhausted; and

(2) 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.

History: 1978 Comp., § 32A-3B-1, enacted by Laws 1993, ch. 77, § 73; 2005, ch. 189, § 29.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, stated the title of the act in Subsection A and deleted the former statement that the purpose of the act is to determine whether learning problems are a cause of a child's absence form school and the steps to overcome the learning problems.

32A-3B-2. Definitions.

As used in Chapter 32A, Article 3B NMSA 1978, "family in need of court-ordered services" means the child or the family has refused family services or the department has exhausted appropriate and available family services and court intervention is necessary to provide family services to the child or family and the following circumstances exist:

A. it is a family whose child, subject to compulsory school attendance, is absent from school without an authorized excuse more than ten days during a school year;

B. it is a family whose child is absent from the child's place of residence for a time period of twelve hours or more without consent of the child's parent, guardian or custodian;

C. it is a family whose 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 the parent, guardian or custodian; or

D. it is a family in which 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."

History: 1978 Comp., § 32A-3B-2, enacted by Laws 1993, ch. 77, § 74; 2007, ch. 185, § 1; 2009, ch. 193, § 5.

ANNOTATIONS

Cross references. — For assistance of law enforcement in locating a runaway, *see* 32A-1-21 NMSA 1978.

The 2007 amendment, effective June 15, 2007, reduced the time period in Subsection B from 24 to 12 hours.

The 2009 amendment, effective June 19, 2009, in Subsection A, after "during a school", changed "semester" to "year".

32A-3B-3. Protective custody; interference with protective custody; penalty.

A. A child may be taken into protective custody by a law enforcement officer without a court order when the officer has reasonable grounds to believe that:

(1) the child has run away from the child's parent, guardian or custodian;

(2) the child without parental supervision is suffering from illness or injury;

(3) the child has been abandoned; or

(4) the child is endangered by his surroundings and removal from those surroundings is necessary to ensure the child's safety.

B. A child may be taken into protective custody pursuant to a court order issued after an agency legally charged with the supervision of the child has notified a law enforcement agency that the child has run away from a placement.

C. When a child is taken into protective custody, the department shall make a reasonable effort to determine whether the child is an Indian child.

D. Any person, other than the child taken into protective custody, who interferes with placing the child in protective custody is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: 1978 Comp., § 32A-3B-3, enacted by Laws 1993, ch. 77, § 75.

32A-3B-4. Protective custody; restrictions; time limitations.

A. A law enforcement officer who takes a child into protective custody shall, with all reasonable speed:

(1) inform the child of the reasons for the protective custody; and

(2) contact the department.

B. When the department is contacted by a law enforcement officer who has taken a child into protective custody, the department may:

(1) accept custody of the child and designate an appropriate facility in which to place the child; or

(2) return the child to the child's parent, guardian or custodian if the child's safety is assured.

C. A child taken into protective custody shall not be placed in or transported in a law enforcement vehicle or any other vehicle that contains an adult placed under arrest, unless circumstances exist in which any delay in transporting the child to an appropriate facility would be likely to result in substantial danger to the child's physical safety. When such circumstances exist, the circumstances shall be described in writing by the driver of the vehicle and submitted to the driver's supervisor within two days after the driver transported the child.

D. A child taken into protective custody shall not be held involuntarily for more than two days, unless a petition to extend the custody is filed pursuant to the provisions of the Family in Need of Court-Ordered Services Act or the Abuse and Neglect Act [32A-4-1 NMSA 1978].

E. When a petition is filed or any time thereafter, the children's court or district court may issue an ex-parte custody order based upon a sworn written statement of facts showing that probable cause exists to believe that protective custody of the child is necessary.

F. The protective custody order shall be served on the respondent by a person authorized to serve arrest warrants and shall direct the law enforcement officer to take custody of the child and deliver the child to a place designated by the court.

G. The Rules of Evidence do not apply to the issuance of an ex-parte custody order.

History: 1978 Comp., § 32A-3B-4, enacted by Laws 1993, ch. 77, § 76; 2005, ch. 189, § 30.

ANNOTATIONS

Cross references. — For the applicability of the Rules of Evidence, *see* Rule 11-1101 NMRA.

The 2005 amendment, effective June 17, 2005, changed "forty-eight hours" to "two days" in Subsections C and D.

32A-3B-5. Notification to family; release from protective custody.

A. When the department takes a child into protective custody and the child is not released to the child's parent, guardian or custodian, the department shall provide written notice as soon as possible, and in no case later than twenty-four hours, to the child's parent, guardian or custodian, with a statement of the reasons for taking the child into protective custody.

B. When the department releases a child placed in protective custody to the family, the department shall refer the family for voluntary family services.

C. When the department releases a child from protective custody and the child's parent, guardian or custodian refuses to allow the child to return home, the department shall file a petition pursuant to the provisions of the Abuse and Neglect Act [32A-4-1 NMSA 1978].

D. If the department is not releasing the child to the parent, guardian or custodian within two days, the department shall notify the tribe if the child is an Indian child.

History: 1978 Comp., § 32A-3B-5, enacted by Laws 1993, ch. 77, § 77; 2005, ch. 189, § 31.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, added Subsection D to provide that if the department is not releasing the child to the parent, guardian or custodian within two days, the department shall notify the tribe if the child is an Indian child.

32A-3B-6. Place of custody.

Unless a child from a family in need of services who has been placed in department custody is also alleged or adjudicated delinquent, the child shall not be held in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent children, but may be placed in the following community-based shelter-care facilities:

A. 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;

B. a facility operated by a licensed child welfare services agency;

C. a facility provided for in the Children's Shelter Care Act [32A-9-1 NMSA 1978]; or

D. 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.

History: 1978 Comp., § 32A-3B-6, enacted by Laws 1993, ch. 77, § 78.

ANNOTATIONS

Compiler's notes. — This section is substantively similar to former 32-1-23 NMSA 1978. *See* 32A-1-15 and 32A-2-10 NMSA 1978.

32A-3B-6.1. Indian child placement; preferences.

A. An Indian child accepted in department custody shall 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 shall be placed within reasonable proximity to the child's home, taking into account any special needs of the child. Preference shall be given to placement with:

(1) a member of the Indian child's extended family;

(2) a foster care home licensed, approved and specified by the Indian child's tribe;

(3) an Indian foster care home licensed or approved by an authorized non-Indian licensing authority; or

(4) 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.

B. When the placement preferences set forth in Subsection A of this section are not followed or if the Indian child is placed in an institution, a plan shall be developed to ensure that the Indian child's cultural ties are protected and fostered.

History: Laws 2005, ch. 189, § 37.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 189 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-3B-7. Protective custody hearing; time limitations.

A. When a child of an alleged family in need of court-ordered services is taken into protective custody by the department or the department petitions the court for protective

custody of the child, a custody hearing shall be held within ten days from the date the petition is filed to determine if the child should remain with the family or be placed in the custody of the department pending adjudication. Upon written request of the respondent, the hearing may be held earlier, but in no event shall the hearing be held sooner than two days after the date the petition was filed.

B. The parent, guardian or custodian of the child shall be given reasonable notice of the time and place of the hearing.

C. When the custody hearing is conducted, the court shall release the child to his parent, guardian or custodian unless probable cause exists to believe that:

(1) the child is in immediate danger from his surroundings and the child's removal from those surroundings is necessary for his safety or well-being;

(2) the child will be subject to injury by others if not placed in the protective custody of the department; or

(3) 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.

D. At the conclusion of the protective custody hearing, if the court determines that protective custody pending adjudication is appropriate, the court may:

(1) award custody of the child to the department; or

(2) 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.

E. In addition to any disposition made by the court pursuant to the provisions of Subsection D of this section, the court may order the child and family to participate in an assessment and referral process. Copies of any diagnostic or evaluation reports ordered by the court shall be provided to the parties at least five days before the adjudicatory hearing is scheduled. The diagnostic and evaluation reports shall not be sent to the court.

F. The Rules of Evidence shall not apply to protective custody hearings conducted pursuant to the provisions of this section.

History: 1978 Comp., § 32A-3B-7, enacted by Laws 1993, ch. 77, § 79.

ANNOTATIONS

Cross references. — For the applicability of the Rules of Evidence, *see* Rule 11-1101 NMRA.

32A-3B-8. Basic rights.

A. A child subject to the provisions of the Children's Code [32A-1-1 NMSA 1978] is entitled to the same basic rights as an adult, except as otherwise provided in the Children's Code.

B. In proceedings on a petition alleging a family in need of court-ordered services, the court may appoint counsel if appointment of counsel would serve the interests of justice.

C. In proceedings on a petition alleging a family in need of court-ordered services, the court shall appoint a guardian ad litem for a child under the age of fourteen and the court shall appoint an attorney for a child fourteen years of age or older at the inception of the proceedings. An officer or employee of an agency vested with legal custody of the child shall not be appointed as a guardian ad litem or attorney for the child. Only an attorney with appreciable training or experience shall be appointed as guardian ad litem of or attorney for the child.

D. When a child reaches fourteen years of age, the child's guardian ad litem shall continue as the child's attorney; provided that the court shall appoint a different attorney for the child if:

(1) the child requests a different attorney;

(2) the guardian ad litem requests to be removed; or

(3) the court determines that the appointment of a different attorney is appropriate.

E. Whenever it is reasonable and appropriate, the court shall appoint a guardian ad litem or attorney who is knowledgeable about the child's cultural background.

F. A person afforded rights pursuant to the provisions of the Children's Code shall be advised of those rights at that person's first appearance before the court on a petition filed under the Children's Code.

G. A child of an alleged or adjudicated family in need of court-ordered services shall not be fingerprinted or photographed for identification purposes, unless pursuant to a court order.

History: 1978 Comp., § 32A-3B-8, enacted by Laws 1993, ch. 77, § 80; 2005, ch. 189, § 32; 2009, ch. 239, § 29.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, provided in Subsection C that the court shall appoint a guardian ad litem for a child under the age of fourteen and an attorney for a child fourteen years of age or older.

The 2009 amendment, effective July 1, 2009, in Subsection C, after "age of fourteen and", added "the court shall appoint", and added the last sentence; and added Subsection D.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-3B-9. Change in placement.

A. When a child's placement is changed, including a return to the child's home, written notice of the placement change shall be given to the parties and to the child's tribe if the child is an Indian child ten days prior to the placement change, unless an emergency situation requires moving the child prior to sending notice.

B. When a child's guardian ad litem or attorney requests a court hearing to contest the proposed placement change, the department shall not change the child's placement pending the result of the court hearing, unless an emergency requires changing the child's placement prior to the hearing.

C. When a child's placement is changed and notice pursuant to the provisions of Subsection A of this section is not provided, written notice shall be sent to the parties and to the child's tribe if the child is an Indian child within three days after the placement change.

D. Notice pursuant to the provisions of this section is not required for removal of the child from temporary emergency care, emergency foster care or respite care.

History: 1978 Comp., § 32A-3B-9, enacted by Laws 1993, ch. 77, § 81; 2005, ch. 189, § 33.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, provided in Subsection A that if a child's placement is changed, notice of the change shall be given to the parties and to the child's tribe if the child is an Indian child and in Subsection C that if notice of placement is not given under Subsection A, notice of the change of placement shall be given to the parties and to the child's tribe if the child is an Indian child.

32A-3B-10. Petition; endorsement of petition.

A petition regarding an alleged family in need of court-ordered services shall not be filed unless the children's court attorney, after consultation with the department, determines and endorses upon the petition that filing is in the best interests of the child and family.

History: 1978 Comp., § 32A-3B-10, enacted by Laws 1993, ch. 77, § 82.

32A-3B-11. Petition; allegations.

A. A petition to initiate a proceeding regarding an alleged family in need of court-ordered services shall include the following allegations:

(1) that the child or the family are in need of court-ordered family services;

(2) that the child and the family participated in or refused to participate in a plan for family services and that the department has exhausted appropriate and available services; and

(3) that court intervention is necessary to assist the department in providing necessary services to the child and the family.

B. In addition to the allegations required pursuant to the provisions of Subsection A of this section, a petition that alleges a child's chronic absence from school shall be accompanied by an affidavit filed by a school official, in accordance with the provisions of Section 32-3A-3 [32A-3A-3] NMSA 1978.

History: 1978 Comp., § 32A-3B-11, enacted by Laws 1993, ch. 77, § 83.

32A-3B-12. Adjudicatory hearing; time limitations.

A. An adjudicatory hearing for an alleged family in need of court-ordered services shall be commenced within sixty days after the date of service on the respondent.

B. The children's court attorney shall represent the state at the adjudicatory hearing.

C. If the adjudicatory hearing is not commenced within the time limits specified in this section or within the period of any extension of those time limits, the petition shall be dismissed with prejudice.

History: 1978 Comp., § 32A-3B-12, enacted by Laws 1993, ch. 77, § 84; 2009, ch. 239, § 30.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, in Subsection A, changed "ninety days" to "sixty days"; after "ninety days after the", deleted "latest of the following dates:";

deleted Paragraphs (1) through (3) of Subsection A, which listed the date the petition is served on the respondent; the date the trial court orders a mistrial or a new trial; and the date a mandate in an appeal or order disposing of the appeal is filed; and added “date of service on the respondent”.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-3B-13. Conduct of hearings; penalty.

A. All hearings shall be recorded by stenographic notes or by electronic, mechanical or other appropriate means.

B. All hearings regarding a family in need of court-ordered services shall be closed to the general public, subject to the following exceptions:

(1) the parties, the parties' counsel, witnesses and other persons approved by the court may be present at the hearings. Those other persons the court finds to have a proper interest in the case or in the work of the court may be admitted by the court to closed hearings on the condition that they refrain from divulging any information that would identify the child or family involved in the proceedings; and

(2) accredited representatives of the news media shall be allowed to be present at the hearings, subject to the condition that they refrain from divulging information that would identify any child involved in the proceedings or the parent, guardian or custodian of that child and further subject to enabling 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-1-1 NMSA 1978].

C. If the court finds that it is in the best interest of a child under fourteen years of age, the child may be excluded from a hearing under the Family in Need of Court-Ordered Services Act. A child fourteen years of age or older may be excluded from a hearing only if the court makes a finding that there is a compelling reason to exclude the child and states the factual basis for the finding.

D. A person or party granted admission to a closed hearing who intentionally divulges information concerning the hearing in violation of the provisions of this section is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: 1978 Comp., § 32A-3B-13, enacted by Laws 1993, ch. 77, § 85; 2005, ch. 189, § 34.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, deleted former Subsection C, which provided that when the court finds it in the best interest of the child, the child may be excluded from a hearing, and added a new Subsection C, which provided that if it is in the best interest of the child under fourteen years of age, the child may be excluded from a hearing and that a child fourteen years of age or older may be excluded from a hearing only for a compelling reason.

32A-3B-14. Findings; dismissal; dispositional matters.

A. The court shall determine if the allegations of the petition are admitted or denied by the parent or child. If the allegations are denied, the court shall proceed to hear evidence on the petition. The court, after hearing all of the evidence regarding an alleged family in need of court-ordered services, shall make and record its findings.

B. If the court finds, on the basis of a valid admission of the allegations set forth in the petition or on the basis of clear and convincing evidence that is competent, material and relevant in nature, 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 make 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 shall dismiss the petition.

C. In that part of the hearings regarding dispositional issues, 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 part of the hearings regarding adjudicatory issues.

D. On the court's motion or motion of a party, the court may continue the hearing on the petition for a reasonable time to receive reports and other evidence regarding disposition. The court shall continue the hearing pending the receipt of the plan for family services if that document has not been prepared and received. During any continuance granted pursuant to this subsection, the court shall make an appropriate order for legal custody of the child.

History: 1978 Comp., § 32A-3B-14, enacted by Laws 1993, ch. 77, § 86; 1995, ch. 206, § 19.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, inserted "by the parent or child" in the first sentence of Subsection A.

32A-3B-15. Plan for family services.

A. Prior to holding a dispositional hearing, the court shall direct the department to prepare a written family services plan for submission to the court.

B. The plan for family services shall contain the following information:

(1) a statement of the problem;

(2) the needs of the child;

(3) the needs of the family;

(4) a description of the specific progress needed to be made by both the parent and the child, the reasons why the plan is likely to be useful, the availability of any proposed services and the department's overall plan for ensuring that the services will be delivered;

(5) if removal from the home or continued residence outside the home is recommended for the child, a statement of the likely harm the child will suffer as a result of removal from the home, including emotional harm resulting from separation from the child's parents;

(6) if removal from the home or continued residence outside the home is recommended for the child, a description of any previous efforts to work with the parent and the child in the home and a description of any in-home treatment programs that have been considered and rejected;

(7) a description of the steps that will be taken to minimize any harm to the child that may result if separation from the child's parent occurs or continues;

(8) if removal from the home or continued residence outside the home is recommended for the child and the child is sixteen years of age or older, a description of the specific skills the child requires for successful transition into independent living as an adult, what programs are necessary to develop the skills, the reasons why the programs are likely to be useful, the availability of any proposed programs and the department's overall plan for ensuring that the child will be adequately prepared for adulthood; and

(9) when the child is an Indian child, contact shall be made with the child's Indian tribe for the purpose of consultation and exchange of information and the plan shall indicate the person contacted in the child's Indian tribe and the results of that contact.

C. A copy of the plan shall be provided by the department to all parties at least five days before the dispositional hearing.

D. If the child is a member of an adjudicated family in need of court-ordered services, any temporary custody orders shall remain in effect until the court has received and considered the plan at the dispositional hearing.

History: 1978 Comp., § 32A-3B-15, enacted by Laws 1993, ch. 77, § 87.

32A-3B-16. Dispositional judgment.

A. At the conclusion of the dispositional hearing, the court shall set forth its findings on the following issues in the dispositional judgment:

(1) the ability of the parent and child to share a residence;

(2) the interaction and interrelationship of the child with the child's parent, siblings and any other person who may significantly affect the child's best interest;

(3) the child's adjustment to home, school and community;

(4) whether the child's educational needs are being met;

(5) the mental and physical health of all individuals involved;

(6) the wishes of the child as to the child's custodian;

(7) the wishes of the child's parent, guardian or custodian as to the child's custody;

(8) whether there exists a relative of the child or any other individual who, after study by the department, is found to be qualified to receive and care for the child;

(9) the availability of services recommended in the treatment plan;

(10) the department's efforts to work with the parent and child in the home and a description of the in-home treatment programs that the department has considered and rejected;

(11) whether the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the child's Indian tribe have been incorporated into the plan. When placement preferences have not been incorporated into the plan, an explanation shall be clearly stated and supported;

(12) when the child is an Indian child, whether the plan provides for maintaining the Indian child's cultural ties; and

(13) when the child is an undocumented immigrant child, 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.

B. When there is an adjudication regarding a family in need of court-ordered services, the court shall enter judgment and make any of the following dispositions:

(1) permit the child to remain with the child's parent, guardian or custodian, subject to conditions and limitations the court may prescribe;

(2) place the child under the protective supervision of the department;

(3) transfer legal custody of the child to:

(a) the department;

(b) an agency responsible for the care of neglected or abused children; or

(c) the child's noncustodial parent, if that is found to be in the child's best interests; or

(4) 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 forty-five days, attempt to meet the child's educational needs and document its efforts to meet the child's educational needs.

C. Unless a child of an adjudicated family in need of court-ordered services is also found to be a delinquent child, the child shall not be confined in an institution established for the long-term care and rehabilitation of delinquent children or in a facility for the detention of alleged delinquent children.

D. When the child is an Indian child, the child's cultural needs shall be considered during dispositional judgment and, when reasonable, access to cultural practices and traditional treatment shall be provided to the Indian child.

History: 1978 Comp., § 32A-3B-16, enacted by Laws 1993, ch. 77, § 88; 2009, ch. 239, § 31.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 2009 amendment, effective July 1, 2009, in Paragraph (12) of Subsection A, after "whether the", deleted "family service"; and added Paragraph (13) of Subsection A.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-3B-17. Disposition of a child with a developmental disability or mental disorder; proceedings.

A. If during any stage of a proceeding regarding a family in need of court-ordered services petition the evidence indicates that the child has or may have a developmental disability or a mental disorder, the court may order the department to:

(1) secure an assessment of the child;

(2) prepare appropriate referrals for services for the child; and

(3) if necessary, initiate proceedings for the involuntary placement of the child pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act [32A-6-1 NMSA 1978].

B. When a child in department custody needs involuntary placement for residential mental health or developmental disability services, the department shall file a motion for that child's placement pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act.

C. A court hearing for consideration of an involuntary placement of a child for residential treatment or habilitation, when the child is subject to the provisions of the Family in Need of Court-Ordered Services Act, may be heard by the court as a part of the family in need of court-ordered services proceedings or may be heard in a separate proceeding. All parties to the family in need of court-ordered services proceedings shall be provided with notice of the involuntary placement hearing.

D. A guardian ad litem appointed pursuant to the Family in Need of Court-Ordered Services Act shall serve as the guardian ad litem for a child for the purposes of the Children's Mental Health and Developmental Disabilities Act. When a child is fourteen years of age or older, the child shall be represented by an attorney unless, after consultation between the child and the child's attorney, the child elects to be represented by counsel appointed by the court in the proceedings under the Children's Mental Health and Developmental Disabilities Act.

E. When a child is subject to the provisions of the Family in Need of Court-Ordered Services Act and is receiving residential treatment or habilitation services, any documentation required pursuant to the Children's Mental Health and Developmental Disabilities Act shall be filed with the court as part of the family in need of court-ordered services proceeding. A review of the child's placement in a residential treatment or habilitation program shall occur in the same manner and within the same time requirements as provided in the Children's Mental Health and Developmental Disabilities Act.

F. The clerk of the court shall maintain a separate section within a child's family in need of court-ordered services file for documents pertaining to actions taken under the Children's Mental Health and Developmental Disabilities Act.

G. A child subject to the provisions of the Family in Need of Court-Ordered Services Act who receives treatment in a residential treatment or habilitation program shall enjoy all the substantive and procedural rights set forth in the Children's Mental Health and Developmental Disabilities Act.

History: 1978 Comp., § 32A-3B-17, enacted by Laws 1993, ch. 77, § 89; 1995, ch. 206, § 20; 2005, ch. 189, § 35.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "in a proceeding under the Family in Need of Services Act" in the section heading, in Subsection B, substituted "when a child in department custody needs involuntary placement for residential" for "when the department has reason to believe that a child in department custody needs residential" and substituted "file a motion" for "petition", and added Subsections C through G.

The 2005 amendment, effective June 17, 2005, in Subsection C, provided that a consideration of involuntary placement of a child may be heard in a hearing separate from a family in need of court-ordered services proceeding; and in Subsection D, deleted the former provision that if a guardian ad litem determines that a child's wishes conflict with the child's best interests, the guardian may petition for appointment of an attorney for the child and added the provision that when a child is fourteen years of age or older, the child shall be represented by an attorney unless child elects to be represented by counsel appointed by the court in proceedings under the Children’s Mental Health and Developmental Disabilities Act.

32A-3B-18. Dispositional judgments; time limitations; modification, termination or extension of court order.

A. A judgment vesting legal custody of a child in an agency shall remain in force for an indeterminate period not exceeding two years from the date entered.

B. A judgment vesting legal custody of a child in an individual, other than the child's parent, shall remain in force for two years from the date entered unless terminated sooner by court order.

C. A judgment vesting legal custody of a child in the child's parent or a permanent guardian shall remain 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.

D. At any time prior to expiration, a judgment vesting legal custody or granting protective supervision may be modified, revoked or extended on motion by a party, including the child by and through the child's guardian ad litem or attorney.

E. Prior to the expiration of a judgment transferring legal custody to an agency, 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.

F. When a child reaches eighteen years of age, all family in need of court-ordered services orders affecting the child then in force automatically terminate. The termination of the orders shall not disqualify a child from eligibility for transitional services.

History: 1978 Comp., § 32A-3B-18, enacted by Laws 1993, ch. 77, § 90; 2009, ch. 239, § 32.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, in Subsection D, after "motion by a party", deleted "or the" and added "including the child by and through the child's"; and after "guardian ad litem", added "or attorney".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-3B-19. Periodic review of dispositional judgments.

A. Within six months of any original dispositional order and within six months of any subsequent continuation of the order, the department shall petition the court for a review of the disposition of the family in need of court-ordered services order. The review may be carried out by either of the following:

(1) a judicial review hearing conducted by the court; or

(2) a judicial review hearing conducted by a special master; provided, however, that the court approve any findings made by the special master.

B. The children's court attorney shall give twenty days' written notice to all parties of the time, place and purpose of any judicial review hearing held pursuant to Subsection A of this section.

C. At any judicial review hearing held pursuant to Subsection A of this section, the department and all persons given notice of the judicial review shall have the opportunity to present evidence and to cross-examine witnesses. At the hearing, the department shall not only show that it has made reasonable effort to implement the plan for family services approved by the court in its dispositional order, but shall also present an updated plan for any period of extension of the dispositional order. The parent, guardian or custodian of the child shall demonstrate to the court the family's effort to comply with the plan for family services approved by the court in its dispositional order and, if

applicable, that the family's effort to maintain contact with the child was diligent and made in good faith, given the family's circumstances and abilities.

D. The Rules of Evidence shall not apply to hearings held pursuant to this section.

E. At the conclusion of any hearing held pursuant to this section, the court shall make findings of fact and conclusions of law.

F. The court shall determine, during a review of a dispositional or continuation order, whether the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the child's Indian tribe have been followed and whether the child's treatment plan provides for maintaining the child's cultural ties. When placement preferences have not been incorporated into an order, good cause for noncompliance shall be clearly stated and supported.

G. Based on its findings, the court shall order one or more of the following dispositions:

(1) permit the child to remain with the child's parent, guardian or custodian, subject to conditions and limitations the court may prescribe, including protective supervision of the child by the department;

(2) return the child to his parents and place the child under the protective supervision of the department;

(3) transfer or continue legal custody of the child to:

(a) the department, subject to the provisions of Paragraph (6) of this subsection;

(b) a relative or other individual who, after study by the department or other agency designated by the court, is found by the court to be qualified to receive and care for the child with protective supervision by the department; or

(c) to the noncustodial parent, if that is found to be in the child's best interests;

(4) dismiss the action and return the child to the child's parent without supervision;

(5) continue the child in the legal custody of the department with or without any required parental involvement in a treatment plan;

(6) make additional orders regarding the treatment plan or placement of the child to protect the child's best interests, if the court determines the department has

failed in implementing any material provision of the treatment plan or abused its discretion in the placement or proposed placement of the child;

(7) if at any judicial review the court finds that the child's parent, guardian or custodian has not complied with the court-ordered treatment plan, the court may order the child's parent, guardian or custodian to show cause why he should not be held in contempt of court and subject to sanctions;

(8) provide for a culturally appropriate treatment plan, access to cultural practices and traditional treatment for an Indian child;

(9) direct the department to show cause why an abuse or neglect action has not been filed; or

(10) 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.

H. Dispositional orders entered pursuant to this section shall remain in force for a period of six months.

History: 1978 Comp., § 32A-3B-19, enacted by Laws 1993, ch. 77, § 91; 1995, ch. 206, § 21.

ANNOTATIONS

Cross references. — For children's court attorney, *see* 32A-1-6 NMSA 1978.

For the applicability of the Rules of Evidence, *see* Rule 11-1101 NMRA.

For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1995 amendment, effective July 1, 1995, substituted "plan for family services" for "family services plan" in Subsection C and inserted "or more" following "order one" in Subsection G.

32A-3B-20. Parental responsibility.

A. The court shall order the parent to pay the reasonable costs of support and maintenance of the child that the parent is financially able to pay if a child is adjudicated to be a child of a family in need of court-ordered services and the court orders the child placed with an agency or individual other than the parent. The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment.

B. The court may enforce any of its orders issued pursuant to this section by use of its contempt power.

History: 1978 Comp., § 32A-3B-20, enacted by Laws 1993, ch. 77, § 92.

32A-3B-21. Expungement of records.

A. On motion by or on behalf of an individual who has been the subject of a petition filed under the Children's Code [32A-1-1 NMSA 1978], or on the court's own motion, the court shall vacate its findings, orders and judgments on the petition, and order the legal and social files and records of the court, the department and any other agency in the case expunged, and if requested in the motion the court shall also order law enforcement files and records expunged. An order expunging records and files shall be entered if the court finds that:

(1) two years have elapsed since the final release of the individual from legal custody and supervision or two years have elapsed since the entry of any other judgment not involving legal custody or supervision; and

(2) the individual has not, within the two years immediately prior to filing the motion, been convicted of a felony or of a misdemeanor involving moral turpitude or found delinquent by a court, and no proceeding is pending seeking such a conviction or finding.

B. Reasonable notice of the motion shall be given to:

(1) the children's court attorney;

(2) the authority granting the release if the final release was from an agency, parole or probation;

(3) the law enforcement officer, department and central depository having custody of the law enforcement files and records if those records are included in the motion; and

(4) any other agency having custody of records or files subject to the expungement order.

C. Upon the entry of the expungement order, the proceedings in the case shall be treated as if they never occurred, and all index references shall be deleted and the court, law enforcement officers and departments and agencies shall reply, and the individual may reply, to an inquiry that no record exists with respect to such person. Copies of the expungement order shall be sent to each agency or official named in the order.

D. Any finding of delinquency or conviction of a crime, subsequent to the expungement order may at the court's discretion be used by the court as a basis to set aside the expungement order.

E. A person who has been the subject of a petition filed under the Children's Code shall be notified of the right to have records expunged.

History: 1978 Comp., § 32A-3B-21, enacted by Laws 1993, ch. 77, § 93.

32A-3B-22. Confidentiality; records; penalty.

A. All records or information concerning a family in need of court-ordered services, including social records, diagnostic evaluation, psychiatric or psychological reports, videotapes, transcripts and audio recordings of a child's statement of abuse or medical reports, obtained as a result of an investigation in anticipation of or incident to a family in need of court-ordered services proceeding shall be confidential and closed to the public.

B. The records described in Subsection A of this section shall be disclosed only to the parties and to:

(1) court personnel;

(2) court appointed special advocates;

(3) the child's guardian ad litem or attorney;

(4) the child's attorney representing the child in an abuse or neglect action, a delinquency action or any other action, including a public defender;

(5) department personnel;

(6) any local substitute care review board or any agency contracted to implement local substitute care review boards;

(7) law enforcement officials;

(8) district attorneys;

(9) a state or tribal government social services agency of any state;

(10) those persons or entities of an Indian tribe specifically authorized to inspect the records pursuant to the federal Indian Child Welfare Act of 1978 or any regulations promulgated thereunder;

(11) tribal juvenile justice system and social service representatives;

(12) a foster parent, if the records are those of a child currently placed with that foster parent or of a child being considered for placement with that foster parent and the records concern the social, medical, psychological or educational needs of the child;

(13) school personnel involved with the child, if the records concern the child's social or educational needs;

(14) 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;

(15) protection and advocacy representatives, pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act and the federal Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991; and

(16) any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court.

C. Whoever intentionally and unlawfully releases any information or records that are closed to the public pursuant to the provisions of the Children's Code or releases or makes other unlawful use of records in violation of that code is guilty of a petty misdemeanor.

D. The department shall promulgate rules for implementing disclosure of records pursuant to this section and in compliance with state and federal law and the Children's Court Rules.

History: 1978 Comp., § 32A-3B-22, enacted by Laws 1993, ch. 77, § 94; 2005, ch. 189, § 36.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

For the federal Development Disabilities Assistance and Bill of Rights Act, *see* 42 U.S.C. § 6000.

For the federal Protection and Advocacy for Mentally Ill Individuals Act of 1991, *see* 42 U.S.C. § 10801.

The 2005 amendment, effective June 17, 2005, in Subsection A, provided that all records and information obtained as a result an investigation are confidential; in Subsection B, provided that records may be disclosed only to the persons listed in Subsection B(1) through (16); in Subsection B(3), provided that records may be disclosed to the child's attorney; in Subsection B(4), provided that records may be disclosed t the child's attorney representing the child in an abuse or neglect action, a delinquency action or any other action, including a public defender; in Subsection B(9), provided that records may be disclosed to a tribal government; and added Subsection

D, which provided that the department shall promulgate rules for the disclosure of records.

ARTICLE 4
Child Abuse and Neglect

ANNOTATIONS

Compiler's notes. — Sections 32A-4-1 to 32A-4-33 NMSA 1978 were originally enacted as 32-4-1 to 32-4-31 NMSA 1978 by Laws 1993, ch. 77, §§ 95 to 127, but since the former provisions of the Interstate Compact on Placement of Juveniles were compiled at that location, the sections as enacted by Chapter 77 of Laws 1993 were recompiled to Chapter 32A NMSA in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been included whenever possible.

32A-4-1. Short title.

Chapter 32 [32A], Article 4 NMSA 1978 may be cited as the "Abuse and Neglect Act".

History: 1978 Comp., § 32A-4-1, enacted by Laws 1993, ch. 77, § 95.

ANNOTATIONS

Cross references. — For provisions of Safe Haven for Infants Act, *see* 24-22-1 NMSA 1978 et seq.

For the Kinship Guardianship Act, *see* 40-10B-1 NMSA 1978 et seq.

For abuse of a child, *see* 30-6-1 NMSA 1978.

Because the statutory scheme of the Abuse and Neglect Act is unitary in nature, the process due at each stage should be evaluated in light of the process received throughout the proceedings. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

And parent has constitutional right to fair notice and opportunity to participate in all critical stages of abuse and neglect proceedings. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

District court has affirmative duty to ensure the parents' due process rights are protected from the initiation of abuse and neglect proceedings. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

32A-4-2. Definitions.

As used in the Abuse and Neglect Act:

A. "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;

B. "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;

C. "aggravated circumstances" includes 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 parental rights over a sibling of the child terminated involuntarily;

D. "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 a member or organ of the body;

E. "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 that person's 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 [32A-1-1 NMSA 1978] 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;

F. "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;

G. "sexual abuse" includes but is not limited to criminal sexual contact, incest or criminal sexual penetration, as those acts are defined by state law;

H. "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; and

I. "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 shall also include responsibilities of the child, and any other party as appropriate, to enable the child to be self-sufficient upon emancipation.

History: 1978 Comp., § 32A-4-2, enacted by Laws 1993, ch. 77, § 96; 1997, ch. 34, § 1; 1999, ch. 77, § 3; 2009, ch. 239, § 33.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, added Paragraph B(1) and redesignated former Paragraphs B(1) to (4) as Paragraphs B(2) to (5).

The 1999 amendment, effective July 1, 1999, deleted "but is not limited to" following "includes" in the introductory language of Subsection A; in Subsection B, in Paragraph (1), inserted "has suffered or who" and added the language beginning "because of" to the end, and in Paragraph (2), inserted "or caused"; added Subsections C and D and redesignated the subsequent subsections accordingly; in Subsection E, in Paragraph (2), substituted "failure" for "neglect", and in Paragraph (4), deleted "other" following "hospitalization or".

The 2009 amendment, effective July 1, 2009, added Subsection I.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-3 NMSA 1978 have been included in the annotations to this section.

Sufficient evidence of neglect. — Where the children lived with the mother; the father and the mother failed to see to the well-being, needs and support of the children; the father knew about the mother's propensities for drug abuse and domestic violence and knew or should have known about the Children, Youth and Families Department involvement with the children and the placement of the children with fictive kin; the father indicated to the department that he had no concerns regarding the care of the children; the father failed to respond to messages from the department and failed to appear at meetings with the department; the father was delinquent with child support; the father visited the children only once or twice a month; and the father made no effort to have the children live with him, the evidence was clear and convincing that the father neglected the children. State of N.M. ex rel. CYFD v. Cosme V., 2009-NMCA-094, 146 N.M. 809, 215 P.3d 747, cert. denied, 2009-NMCERT-007.

Insufficient evidence of neglect. — Evidence that the newborn child's initial toxicology test was positive, that the mother admitted to using narcotics and marijuana during her pregnancy, and that the mother left the child in the care of nurses while she left the hospital to smoke was insufficient to make the child neglected because of the mother's intentional or negligent disregard of the child's wellbeing and proper needs. State of NM ex rel., CYFD v. Amanda H., 2007-NMSA-029, 141 N.M. 259, 154 P.3d 674.

Evidence that the mother of a newborn child had a long history of drug abuse, a criminal history and a history of violence was insufficient to show that the mother was actually unable to provide proper parental care or discharge her responsibilities to the child. State of NM ex rel., CYFD v. Amanda H., 2007-NMSA-029, 141 N.M. 259, 154 P.3d 674.

Act not unconstitutionally vague. — Abuse and Neglect Act is not unconstitutionally vague. State ex rel. Children, Youth & Families Dept. v. Shawna C., 2005-NMCA-066, 137 N.M. 687, 114 P.3d 367.

"Abused child". — Prior to its amendment in 1997, the definition of "abused child," did not permit the children's court to adjudicate a child abused or neglected where there was no evidence that the parent, guardian or custodian was responsible for the abuse or neglect. State ex rel. Children, Youth & Families Dep't v. Vincent L., 1998-NMCA-089, 125 N.M. 452, 963 P.2d 529, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998).

"Aggravated circumstances". — Sections 32A-4-2C, 32A-4-22C, and 32A-4-28B(2) NMSA 1978 are constitutional facially and as applied to a mother, whose parental rights were terminated without the state making reasonable efforts toward family reunification, where the mother had previously had parental rights terminated as to another child and no progress was evident in the mother's efforts to kick a 4-year drug abuse problem.

State ex rel. Children, Youth & Families Dep't v. Amy B., 2003-NMCA-017, 133 N.M. 136, 61 P.3d 845.

Where mother emphasized that she has not abused child and has not had an opportunity to actually demonstrate her parenting skills with child, and while true, the court noted that she has had an opportunity to demonstrate her abilities with five older children, and her admission of involuntary termination of her parental rights to those older children operates as clear and convincing proof of that fact, while this fact is not determinative for a finding of abuse and neglect, it is considered an aggravated circumstance under the Abuse and Neglect Act in the context of termination of parental rights. State ex rel. Children, Youth & Families Dept. v. Shawna C., 2005-NMCA-066, 137 N.M. 687, 114 P.3d 367.

Stepfather as "custodian". — A stepfather meets the definition of "custodian" for purposes of the court's subject matter jurisdiction over him in a proceeding on a petition alleging abuse or neglect of a child. State ex rel. Children, Youth & Families Dep't (In re Candice Y.), 2000-NMCA-035, 128 N.M. 813, 999 P.2d 1045.

"Neglected". — Evidence that a mother left her children in the care at their grandparents presented insufficient evidence to prove that mother was unfit to care for her children and failed to show that the children were "neglected" under Paragraph E(2), where mother left the children with the grandparents for extended periods of time but she visited them and had them to her various residences on a regular basis. Thomas-Lott v. Earles, 2002-NMCA-103, 132 N.M. 772, 55 P.3d 984, cert. denied, 132 N.M. 732 (2002).

Neglect of psychological needs. — The New Mexico Children's Code's definition of a "neglected child" is subject to broad interpretation and arguably encompasses situations where the child's psychological needs are neglected. Martinez v. Mafchir, 35 F.3d 1486 (10th Cir. 1994).

Although low IQ, mental disability, or mental illness alone are not sufficient grounds for a finding of abuse or neglect where mother was unable to effectively parent due to her mental disorder and incapacity, this finding meets the definition of neglect under Subsection E(4) of this section. State ex rel. Children, Youth & Families Dept. v. Shawna C., 2005-NMCA-066, 137 N.M. 687, 114 P.3d 367.

Definition of "sexual abuse" constitutional. — The definition of "sexual abuse" in this section is not unconstitutionally vague as applied to defendant's conduct which fit squarely within the specifically prohibited conduct, namely criminal sexual contact of a minor. State ex rel. Children, Youth & Families Dep't (In re Candice Y.), 2000-NMCA-035, 128 N.M. 813, 999 P.2d 1045.

Retardation evidence not required for ruling on neglect. — In a neglect proceeding, evidence that a child is severely retarded is not required for a ruling that the child is

neglected. State ex rel. Health & Social Servs. Dep't v. Natural Father, 93 N.M. 222, 598 P.2d 1182 (Ct. App. 1979).

Incarceration. — Even though incarceration alone is not an appropriate reason to terminate parental rights, where the father was convicted of the murder of the mother, his subsequent long-term incarceration was sufficient to establish that the child was neglected, and that termination of his parental rights was justified. State ex rel. Children, Youth & Families Dep't v. Joe R., 1997-NMSC-038, 123 N.M. 711, 945 P.2d 76.

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For article, "Treating Children Under the New Mexico Mental Health and Developmental Disabilities Code," see 10 N.M.L. Rev. 279 (1980).

For note, "Children's Code - Neglect - State ex rel. Health & Social Services Department v. Natural Father," see 12 N.M.L. Rev. 505 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Power of court or other public agency to order medical treatment for child over parental objections not based on religious grounds, 97 A.L.R.3d 421.

32A-4-3. Duty to report child abuse and child neglect; responsibility to investigate child abuse or neglect; penalty.

A. Every person, including a licensed physician; a resident or an intern examining, attending or treating a child; a law enforcement officer; a judge presiding during a proceeding; a registered nurse; a visiting nurse; a schoolteacher; a school official; a social worker acting in an official capacity; or 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 an abused or a neglected child shall report the matter immediately to:

(1) a local law enforcement agency;

(2) the department; or

(3) a tribal law enforcement or social services agency for any Indian child residing in Indian country.

B. A law enforcement agency receiving the report shall immediately transmit the facts of the report and the name, address and phone number of the reporter by telephone to the department and shall transmit the same information in writing within forty-eight hours. The department shall immediately transmit the facts of the report and the name, address and phone number of the reporter by telephone to a local law enforcement agency and shall transmit the same information in writing within forty-eight

hours. The written report shall contain the names and addresses of the child and the child's parents, guardian or custodian, the child's age, the nature and extent of the child's injuries, including any evidence of previous injuries, and other information that the maker of the report believes might be helpful in establishing the cause of the injuries and the identity of the person responsible for the injuries. The written report shall be submitted upon a standardized form agreed to by the law enforcement agency and the department.

C. The recipient of a report under Subsection A of this section shall take immediate steps to ensure prompt investigation of the report. The investigation shall ensure that immediate steps are taken to protect the health or welfare of the alleged abused or neglected child, as well as that of any other child under the same care who may be in danger of abuse or neglect. A local law enforcement officer trained in the investigation of child abuse and neglect is responsible for investigating reports of alleged child abuse or neglect at schools, daycare facilities or child care facilities.

D. If the child alleged to be abused or neglected is in the care or control of or in a facility administratively connected to the department, the report shall be investigated by a local law enforcement officer trained in the investigation of child abuse and neglect. The investigation shall ensure that immediate steps are taken to protect the health or welfare of the alleged abused or neglected child, as well as that of any other child under the same care who may be in danger of abuse or neglect.

E. A law enforcement agency or the department shall have access to any of the records pertaining to a child abuse or neglect case maintained by any of the persons enumerated in Subsection A of this section, except as otherwise provided in the Abuse and Neglect Act.

F. A person who violates the provisions of Subsection A of this section is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: 1978 Comp., § 32A-4-3, enacted by Laws 1993, ch. 77, § 97; 1997, ch. 34, § 2; 2003, ch. 189, § 1; 2005, ch. 189, § 38.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, inserted "responsibility to investigate child abuse or neglect" in the section heading, deleted "or persons" following "person" in the next-to-last sentence in Subsection B, substituted "alleged abused" for "abused" in the second sentence in Subsection C and in the second sentence in Subsection D, added the third sentence in Subsection C, deleted former Subsection D relating to abuse or neglect of a child while in the care of a child care facility or family day care home, redesignated former Subsections E to G as Subsections D to F, and substituted "by local law enforcement" for "through the office of the district attorney" at the end of the first sentence in Subsection D.

The 2003 amendment, effective July 1, 2003, in Subsection A, deleted "but not limited to" near the beginning, inserted "or a member of the clergy who has information that is not privileged as a matter of law" following "an official capacity"; substituted "agency" for "agencies" in Paragaraph A(3); substituted "A department office" for "Any office of the department" preceding "receiving a report" in Subsection B.

The 2005 amendment, effective June 17, 2005, deleted the requirement in Subsections A and B that reports be made to the department office in the county where the child resides; and provided in Subsections C and D that a law enforcement officer trained in the investigation of child abuse and neglect is responsible for investigating reports of abuse and neglect.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-15 NMSA 1978 have been included in the annotations to this section.

Dismissals from human services department were in accordance with law and supported by substantial evidence, which included the failure to promptly report the alleged sexual abuse of a child to the proper authorities. Perkins v. Department of Human Servs., 106 N.M. 651, 748 P.2d 24 (Ct. App. 1987).

Requirement of "consultation" is not due process pre-deprivation hearing requirement, and plaintiff day-care center operator's constitutional right to due process was not violated by the human services department's transfer of state subsidized children to other facilities and suspension of federal funds pending completion of an investigation. Rice v. Vigil, 642 F. Supp. 212 (D.N.M. 1986), aff'd sub nom. Rice v. New Mexico, 854 F.2d 1323 (10th Cir. 1988).

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Infants § 16.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

Sexual abuse of child by parent as ground for termination of parent's right to child, 58 A.L.R.3d 1074.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness or the like in dependency or divestiture proceeding, 79 A.L.R.3d 417.

Admissibility of expert medical testimony on battered child syndrome, 98 A.L.R.3d 306.

Validity and construction of penal statute prohibiting child abuse, 1 A.L.R.4th 38.

Validity, construction, and application of state statute requiring doctor or other person to report child abuse, 73 A.L.R.4th 782.

Physical examination of child's body for evidence of abuse as violative of Fourth Amendment or as raising Fourth Amendment issue, 93 A.L.R. Fed. 530.

43 C.J.S. Infants § 14.

32A-4-4. Complaints; referral; preliminary inquiry.

A. Reports alleging neglect or abuse shall be referred to the department, which shall conduct an investigation to determine the best interests of the child with regard to any action to be taken. The name and information regarding the person making the report shall not be disclosed absent the consent of the informant or a court order.

B. During the investigation of a report alleging neglect or abuse, the matter may be referred to another appropriate agency and conferences may be conducted for the purpose of effecting adjustments or agreements that will obviate the necessity for filing a petition. A representative of the department shall, at the initial time of contact with the party subject to the investigation, advise the party of the reports or allegations made, in a manner that is consistent with laws protecting the rights of the informant. The parties shall be advised of their basic rights and no party may be compelled to appear at any conference, to produce any papers or to visit any place. The investigation shall be completed within a reasonable period of time from the date the report was made.

C. After completion of the investigation on a neglect or abuse report, the department shall either recommend or refuse to recommend the filing of a petition.

D. When a child is taken into custody, the department shall file a petition within two days. If a petition is not filed in a timely manner, the child shall be released to the child's parent, guardian or custodian.

History: 1978 Comp., § 32A-4-4, enacted by Laws 1993, ch. 77, § 98; 2005, ch. 189, § 39.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, in Subsection A, provided that the name and information regarding the person making the report shall not be disclosed absent the consent of the informant or a court order; in Subsection B, provided that a representative of the department shall at the initial time of contact with a party, advise the party of the reports of allegations in a manner that is consistent with the laws protecting the informant; and in Subsection D, provided that when a child is taken into custody, the department shall file a petition within two days.

A third party has no standing to bring an abuse and neglect action. — Where the petitioner, who was the child's aunt by marriage, filed a petition for custody of the child; the child lived with the child's grandmother; the child's mother had consented to a kinship guardianship of the child to the grandmother; petitioner alleged that the child was abused by the grandmother and the mother; and the Children, Youth and Families Department found that the abuse allegations were unsubstantiated, the petitioner lacked standing to bring a custody case. Vescio v. Wolf, 2009-NMCA-129, 147 N.M. 374, 223 P.3d 371.

32A-4-5. Admissibility of report in evidence; immunity of reporting person; investigation of report.

A. In any proceeding alleging neglect or abuse under the Children's Code [32A-1-1 NMSA 1978] resulting from a report required by Section 32A-4-3 NMSA 1978 or in any proceeding in which that report or any of its contents are sought to be introduced in evidence, 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 shall not be excluded on the ground that the matter is or may be the subject of a physician-patient privilege or similar privilege or rule against disclosure.

B. Anyone reporting an instance of alleged child neglect or abuse or participating in a judicial proceeding brought as a result of a report required by Section 32A-4-3 NMSA 1978 is presumed to be acting in good faith and shall be immune from liability, civil or criminal, that might otherwise be incurred or imposed by the law, unless the person acted in bad faith or with malicious purpose.

C. After properly verifying the identity of the public official, any school personnel or other person who has the duty to report child abuse pursuant to Section 32A-4-3 NMSA 1978 shall permit a member of a law enforcement agency, including tribal police officers, an employee of the district attorney's office, an investigative interviewer for a program described in Subsection E of this section or an employee of the department, to interview a child with respect to a report without the permission of the child's parent or guardian. Any person permitting an interview pursuant to this subsection is presumed to be acting in good faith and shall be immune from liability, civil or criminal, that might otherwise be incurred or imposed by law, unless the person acted in bad faith or with malicious purpose.

D. An investigation may be conducted by law enforcement, the district attorney's office, a program described in Subsection E of this section and the department. Interviews shall be conducted in a manner and place that protects the child and family from unnecessary trauma and embarrassment. The investigating entity shall conduct the investigation in a manner that will protect the privacy of the child and the family, with the paramount consideration being the safety of the child. All interactions with child victims and child witnesses shall be conducted in a child-sensitive manner, taking into consideration the special needs of the child and the child's abilities, age and intellectual

maturity. The interviews shall be conducted in a place where the child feels secure and in a language that the child uses and understands.

E. If a community has a program for child abuse investigation that includes an investigation interview of the alleged victim or child witness, the investigation may be conducted at a site designated by the community program. The child abuse victim or child witness shall, when possible, be interviewed in an environment where the alleged abuse perpetrator will not be present.

F. Prior to interviewing a child, the department shall notify the parent or guardian of the child who is being interviewed, unless the department determines that notification would adversely affect the safety of the child about whom the report has been made or compromise the investigation.

History: 1978 Comp., § 32A-4-5, enacted by Laws 1993, ch. 77, § 99; 1995, ch. 206, § 22; 2005, ch. 189, § 40; 2009, ch. 239, § 34.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "investigation of report" in the section heading, added "an employee of the district attorney's office, an investigative interviewer for a program described in Subsection E of this section" in Subsections C and D, and added Subsection E.

The 2005 amendment, effective June 17, 2005, in Subsection C, deleted "custodian"; in Subsection D, provided that the investigating entity shall conduct the investigation in a manner that will protect the privacy of the child and the family with paramount consideration being the safety of the child; and added Subsection F, which provided that prior to interviewing the child, the department shall notify the child's parent or guardian, unless notification would adversely affect the safety of the child or compromise the investigation.

The 2009 amendment, effective July 1, 2009, in Subsection D, added the last sentence; and in Subsection E, after "alleged victim", added "or child witness"; and added the last sentence.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect, 44 A.L.R.4th 649.

32A-4-6. Taking into custody; penalty.

A. A child may be held or taken into custody:

(1) by a law enforcement officer when the officer has evidence giving rise to reasonable grounds to believe that the child is abused or neglected and that there is an immediate threat to the child's safety; provided that the law enforcement officer contacts the department to enable the department to conduct an on-site safety assessment to determine whether it is appropriate to take the child into immediate custody, except that a child may be taken into custody by a law enforcement officer without a protective services assessment being conducted if:

(a) the child's parent, guardian or custodian has attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child's sibling;

(b) the child's parent, guardian or custodian has attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;

(c) the child has been abandoned;

(d) the child is in need of emergency medical care;

(e) the department is not available to conduct a safety assessment in a timely manner; or

(f) the child is in imminent risk of abuse; or

(2) by medical personnel when there are reasonable grounds to believe that the child has been injured as a result of abuse or neglect and that the child may be at risk of further injury if returned to the child's parent, guardian or custodian. The medical personnel shall hold the child until a law enforcement officer is available to take custody of the child pursuant to Paragraph (1) of Subsection A of this section.

B. When a child is taken into custody by law enforcement, the department is not compelled to place the child in an out-of-home placement and may release the child to the child's parent, guardian or custodian.

C. When a child is taken into custody, the department shall make reasonable efforts to determine whether the child is an Indian child.

D. If a child taken into custody is an Indian child and is alleged to be neglected or abused, the department shall give notice to the agent of the Indian child's tribe in accordance with the federal Indian Child Welfare Act of 1978.

E. Any person who intentionally interferes with protection of a child, as provided by Subsection A of this section, is guilty of a petty misdemeanor.

History: 1978 Comp., § 32A-4-6, enacted by Laws 1993, ch. 77, § 100; 2005, ch. 189, § 41; 2009, ch. 239, § 35.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 2005 amendment, effective June 17, 2005, in Subsection B, deleted "by the department".

The 2009 amendment, effective July 1, 2009, in Paragraph (1) of Subsection A, after "when the officer has", deleted language which provided that an officer who has reasonable grounds to believe a child is suffering from illness or injury as a result of abuse or neglect or has been abandoned or is in danger could take the child into custody; and added the remainder of the sentence; added Subparagraphs (a) through (f) of Paragraph (1) of Subsection A; in Paragraph (2) of Subsection A, in the last sentence, after "custody of the child", deleted "or until a law enforcement officer has authorized release of the child to the department", and added the remainder of the sentence; and added Subsection B.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Warrant required to enter home. — For the purpose of qualified immunity analysis, it is clearly established that an officer could not enter a home without a warrant absent exigent circumstances or an emergency situation. Chavez v. Board of County Comm'rs, 2001-NMCA-065, 130 N.M. 753, 31 P.3d 1027.

Exception to warrant requirement. — Implicit in this section and other New Mexico authority is the recognition that a law enforcement officer may not intrude on a person's reasonable expectation of privacy unless the officer has reasonable grounds to believe that immediate action is necessary to safeguard a child from imminent harm or injury. Chavez v. Board of County Comm'rs, 2001-NMCA-065, 130 N.M. 753, 31 P.3d 1027.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic violence in awarding custody of children, 51 A.L.R.5th 241.

32A-4-7. Release or delivery from custody.

A. A person taking a child into custody shall, with all reasonable speed:

(1) release the child to the child's parent, guardian or custodian and issue verbal counsel or warning as may be appropriate; or

(2) deliver the child to the department or, in the case of a child who is believed to be suffering from a serious physical or mental condition or illness that requires prompt treatment or diagnosis, deliver the child to a medical facility. If a law enforcement officer delivers a child to a medical facility, the officer shall immediately notify the department that the child has been placed in the department's legal custody.

B. When an alleged neglected or abused child is delivered to the department, a department caseworker shall review the need for placing the child in custody and shall release the child from custody unless custody is appropriate or has been ordered by the court. When a child is delivered to a medical facility, a department caseworker shall review the need for retention of custody within a reasonable time after delivery of the child to the facility and shall release the child from custody unless custody is appropriate or has been ordered by the court.

C. If a child is placed in the legal custody of the department and is not released to the child's parent, guardian or custodian, the department shall give written notice thereof as soon as possible, and in no case later than twenty-four hours, to the child's parent, guardian or custodian together with a statement of the reason for taking the child into custody.

D. 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. In all cases when a child is taken into custody, the child shall be released to the child's parent, guardian or custodian, unless the department files a petition within two days from the date that the child was taken into custody.

E. The department may release the child at any time within the two-day period after the child was taken into custody if it is determined by the department that release is appropriate or if release has been ordered by the court.

History: 1978 Comp., § 32A-4-7, enacted by Laws 1993, ch. 77, § 101; 1999, ch. 77, § 4; 2005, ch. 189, § 42; 2009, ch. 239, § 36.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, in Paragraph A(2), substituted "or" for "and" in the first sentence, and inserted "or a medical facility" in the second sentence; in Subsection B, inserted "or medical facility" in the second sentence; and added the first sentence of Subsection D.

The 2005 amendment, effective June 17, 2005, changed "custody" to "legal custody" in Subsections A(2) and C.

The 2009 amendment, effective July 1, 2009, in Paragraph (2) of Subsection A, in the first sentence, after "child to the department", deleted "or to an appropriate shelter-care facility" and in the second sentence, after "delivers a child to", deleted "a shelter-care facility or"; in Subsection B, in the second sentence, after "child is delivered to", deleted "an appropriate shelter-care facility or"; and added Subsection E.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-8. Place of temporary custody.

Unless a child alleged to be neglected or abused is also alleged or adjudicated delinquent, the child shall not be held in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent children, but may be placed in the following community-based shelter-care facilities:

A. with a relative of the child who is willing to guarantee to the court that the child will not be returned to the alleged abusive or neglectful parent, guardian or custodian without the prior approval of the court;

B. a licensed foster home or any home authorized under the law for the provision of foster care, group care or use as a protective residence;

C. a facility operated by a licensed child welfare services agency; or

D. a facility provided for in the Children's Shelter Care Act [32A-9-1 NMSA 1978].

History: 1978 Comp., § 32A-4-8, enacted by Laws 1993, ch. 77, § 102.

32A-4-9. Indian child placement; preferences.

A. An Indian child accepted for foster care or pre-adoptive placement shall be placed in the least restrictive setting that most closely approximates a family in which his special needs, if any, may be met. The Indian child shall also be placed within

reasonable proximity to the Indian child's home, taking into account any special needs of the Indian child. In any foster care or pre-adoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with:

(1) a member of the Indian child's extended family;

(2) a foster care home licensed, approved and specified by the Indian child's tribe;

(3) an Indian foster care home licensed or approved by an authorized non-Indian licensing authority; or

(4) 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.

B. When the placement preferences set forth in Subsection A of this section are not followed or if the Indian child is placed in an institution, a plan shall be developed to ensure that the Indian child's cultural ties are protected and fostered.

History: 1978 Comp., § 32A-4-9, enacted by Laws 1993, ch. 77, § 103.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. §§ 1901 et seq.) upon child custody determinations, 89 A.L.R.5th 195.

32A-4-10. Basic rights.

A. A child subject to the provisions of the Children's Code [32A-1-1 NMSA 1978] is entitled to the same basic rights as an adult, except as otherwise provided in the Children's Code.

B. At the inception of an abuse or neglect proceeding, counsel shall be appointed for the parent, guardian or custodian of the child. The appointed counsel shall represent the parent, guardian or custodian who is named as a party until an indigency determination is made at the custody hearing. Counsel shall also be appointed if, in the court's discretion, appointment of counsel is required in the interest of justice.

C. At the inception of an abuse and neglect proceeding, the court shall appoint a guardian ad litem for a child under fourteen years of age. If the child is fourteen years of age or older, the court shall appoint an attorney for the child. No officer or employee of an agency that is vested with the legal custody of the child shall be appointed as guardian ad litem of or attorney for the child. Only an attorney with appropriate experience shall be appointed as guardian ad litem of or attorney for the child.

D. When reasonable and appropriate, the court shall appoint a guardian ad litem or attorney who is knowledgeable about the child's particular cultural background.

E. When a child reaches fourteen years of age, the child's guardian ad litem shall continue as the child's attorney; provided that the court shall appoint a different attorney for the child if:

(1) the child requests a different attorney;

(2) the guardian ad litem requests to be removed; or

(3) the court determines that the appointment of a different attorney is appropriate.

F. The court shall assure that the child's guardian ad litem zealously represents the child's best interest and that the child's attorney zealously represents the child.

G. A person afforded rights under the Children's Code shall be advised of those rights at that person's first appearance before the court on a petition under the Children's Code.

History: 1978 Comp., § 32A-4-10, enacted by Laws 1993, ch. 77, § 104; 2005, ch. 189, § 43.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, in Subsection B, provided that at the inception of an abuse or neglect proceeding, counsel shall be appointed and that counsel shall represent the parent, guardian or custodian who is named as a party; in Subsection C, provided that at the inception of a proceeding, the court shall appoint a guardian ad litem for a child under fourteen years of age and an attorney for a child who is fourteen year of age or older and that only an attorney with appropriate experience shall be appointed as guardian ad litem of or as attorney for the child; added Subsection E, which provided that when a child reaches the age of fourteen, the child’s guardian ad litem shall continue as the child's attorney, unless the court appoints a different attorney for the reasons stated in Paragraphs E(1) through (3); and in Subsection F, provided that the court shall assure that the child's guardian ad litem zealously represents the child’s best interests and that the child's attorney zealously represents the child.

A parent has standing to assert the child’s right to counsel in a termination of parental rights proceeding. State of N.M. ex rel. CYFD v. John R., 2009-NMCA-025, 145 N.M. 636, 203 P.3d 167.

Failure to appoint counsel. — The failure of the court to appoint counsel for a child who has turned fourteen years of age during the pendency of a termination of parental rights proceeding is reversible error if the guardian ad litem appointed for the child

requests to be removed. State of N.M. ex rel. CYFD v. John R., 2009-NMCA-025, 145 N.M. 636, 203 P.3d 167.

Children's court's failure to appoint guardian not jurisdictional. — In a proceeding to terminate a minor mother's parental rights, the failure of the children's court to appoint a guardian ad litem for the mother did not deprive the court of jurisdiction since the court appointed counsel to represent her pursuant to 1-017C NMRA. State ex rel. Children, Youth & Families Dep't v. Lilli L., 1996-NMCA-014, 121 N.M. 376, 911 P.2d 884.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights, 92 A.L.R.5th 379.

32A-4-11. Use immunity.

A. At any stage of a proceeding under the Abuse and Neglect Act, the children's court attorney may apply for use immunity for a respondent for in-court testimony. The in-court testimony of an immunized respondent shall not be used against that respondent in a criminal prosecution; provided, however, that the respondent may be prosecuted for perjury that occurs during the respondent's testimony in children's court.

B. At any stage of a proceeding under the Abuse and Neglect Act, the children's court attorney may apply for use immunity for any records, documents or other physical objects produced by the immunized respondent in that children's court proceeding, production of which was compelled by a court order.

C. At any stage of a proceeding under the Abuse and Neglect Act, the children's court attorney may apply for use immunity for a respondent for any statement that a respondent makes in the course of a court-ordered psychological evaluation or treatment program to the professional designated by the department in furtherance of the court's order. Such 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.

D. Any other information available to the professional designated by the department to perform the court-ordered evaluation or treatment shall not be the subject of any application or order for immunity.

E. All immunized statements referred to in Subsection C that are subsequently reduced to writing shall be deleted before any report is released to law enforcement officers or district attorneys.

F. Use immunity orders shall not be entered nunc pro tunc.

G. The children's court attorney shall request a hearing on any application for immunity and shall give at least forty-eight hours notice to all parties and to the district

attorney for the county in which the alleged abuse or neglect occurred. The district attorney shall have standing to object to the order for immunity.

History: 1978 Comp., § 32A-4-11, enacted by Laws 1993, ch. 77, § 105.

32A-4-12. Protective orders.

A. At any stage of a proceeding under the Abuse and Neglect Act, the children's court attorney may apply to the court 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 pursuant to a court order. The protective order shall apply to any person, except as designated by court order. The purpose of the protective order is to allow the respondents to engage in evaluation and treatment programs as ordered by the court and to ensure that any statement by the respondents will remain privileged and confidential and will not be divulged to any other person, including law enforcement officers and district attorneys.

B. The children's court attorney shall apply for the protective order and request a hearing, and shall give at least forty-eight hours notice to all parties and to the district attorney for the county in which the alleged abuse or neglect occurred. The district attorney shall have standing to object to the protective order.

C. After the hearing, the court may issue a protective order, if issuance of the order will reasonably assist in the delivery of diagnostic and therapeutic services to the respondent and the respondent is otherwise likely to refuse to make statements on the basis of his privilege against self-incrimination.

History: 1978 Comp., § 32A-4-12, enacted by Laws 1993, ch. 77, § 106.

32A-4-13. Contempt power.

A. At any stage of a proceeding under the Abuse and Neglect Act, the court shall have the power and authority to issue orders to compel the appearance of witnesses, the giving of testimony and production of evidence by witnesses, including any party. Production of evidence includes an order to a respondent to undergo a psychological diagnostic evaluation and treatment.

B. Failure or refusal to obey the court's order may be punished by the court as contempt. A claim that giving testimony or producing evidence might tend to incriminate the person who is the subject of the order shall not excuse the person from complying with the court's order.

C. The children's court attorney shall make application to the court to compel compliance with the orders of the court.

History: 1978 Comp., § 32A-4-13, enacted by Laws 1993, ch. 77, § 107.

32A-4-14. Change in placement.

A. When the child's placement is changed, including a return to the child's home, written notice of the factual grounds supporting the change in placement shall be sent to the child's guardian ad litem or attorney, all parties, the child's CASA, the child's foster parents and the court ten days prior to the placement change, unless an emergency situation requires moving the child prior to sending notice.

B. When the child, by and through the child's guardian ad litem or attorney, files a motion and requests a court hearing to contest the proposed change, the department shall not change the child's placement pending the results of the court hearing, unless an emergency requires changing the child's placement prior to the hearing.

C. When a child's placement is changed without prior notice as provided for in Subsection A of this section, written notice shall be sent to the child's guardian ad litem or attorney, all parties, the child's CASA, the child's foster parents and the court within three days after the placement change.

D. Written notice is not required for removal of a child from temporary emergency care, emergency foster care or respite care. The department shall provide oral notification of the removal to the child's guardian ad litem or attorney.

E. Notice need not be given to the parties, other than the child, or to the court when placement is changed at the request of the child's foster parents or substitute care provider. Notice shall be given to the child's guardian ad litem or attorney.

History: 1978 Comp., § 32A-4-14, enacted by Laws 1993, ch. 77, § 108; 2005, ch. 189, § 44; 2009, ch. 239, § 37.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, in Subsection E, provided that notice need not be given to the parties other than the child or to the court when placement is changed at the request of the child's foster parents, but notice shall be given to the child's guardian ad litem or attorney.

The 2009 amendment, effective July 1, 2009, in Subsection A, after "written notice", added "of the factual grounds supporting the change in placement" and after "guardian ad litem", added "or attorney"; in Subsection B, after "When the", added "child, by and through" and after "guardian ad litem", added "or attorney, files a motion and"; and in Subsections C and D, after "guardian ad litem", added "or attorney".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed

on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-15. Petition; authorization to file.

A petition alleging neglect or abuse shall not be filed unless the children's court attorney has determined and endorsed upon the petition that the filing of the petition is in the best interests of the child. The children's court attorney shall, upon request of a person authorizing the filing of a petition, furnish legal services in connection with the authorization and preparation of the petition and the representation of the petitioner if the petitioner so requests.

History: 1978 Comp., § 32A-4-15, enacted by Laws 1993, ch. 77, § 109.

32A-4-16. Ex-parte custody orders.

A. At the time a petition is filed or any time thereafter, the children's court or the district court may issue an ex-parte custody order upon a sworn written statement of facts showing probable cause exists to believe that the child is abused or neglected and that custody under the criteria set forth in Section 32-4-16 [32A-4-18] NMSA 1978 is necessary.

B. The ex-parte custody order shall be served on the respondent by a person authorized to serve arrest warrants and shall direct the officer to take custody of the child and deliver him to a place designated by the court.

C. The Rules of Evidence do not apply to the issuance of an ex-parte custody order.

History: 1978 Comp., § 32A-4-16, enacted by Laws 1993, ch. 77, § 110.

ANNOTATIONS

Cross references. — For the applicability of the Rules of Evidence, *see* Rule 11-1101 NMRA.

32A-4-17. Summons; content.

In addition to the requirements set forth in Section 32-1-11 [32A-1-12] NMSA 1978, in abuse and neglect proceedings, the summons shall clearly state that the proceeding could ultimately result in termination of the respondents' parental rights.

History: 1978 Comp., § 32A-4-17, enacted by Laws 1993, ch. 77, § 111.

32A-4-18. Custody hearings; time limitations; notice; probable cause.

A. When a child alleged to be neglected or abused has been placed in the legal custody of the department or the department has petitioned the court for temporary custody, a custody hearing shall be held within ten days from the date the petition is filed to determine if the child should remain in or be placed in the department's custody pending adjudication. Upon written request of the respondent, the hearing may be held earlier, but in no event shall the hearing be held sooner than two days after the date the petition was filed.

B. The parent, guardian or custodian of the child alleged to be abused or neglected shall be given reasonable notice of the time and place of the custody hearing.

C. At the custody hearing, the court shall return legal custody of the child to the child's parent, guardian or custodian unless probable cause exists to believe that:

(1) the child is suffering from an illness or injury, and the parent, guardian or custodian is not providing adequate care for the child;

(2) the child is in immediate danger from the child's surroundings, and removal from those surroundings is necessary for the child's safety or well-being;

(3) the child will be subject to injury by others if not placed in the custody of the department;

(4) there has been an abandonment of the child by the child's parent, guardian or custodian; or

(5) the parent, guardian or custodian is not able or willing to provide adequate supervision and care for the child.

D. At the conclusion of the custody hearing, if the court determines that probable cause exists pursuant to Subsection C of this section, the court may:

(1) return legal custody of the child to the child's parent, guardian or custodian upon such conditions as will reasonably ensure the safety and well-being of the child, including protective supervision by the department; or

(2) award legal custody of the child to the department.

E. Reasonable efforts shall be made to preserve and reunify the family, with the paramount concern being the child's health and safety.

F. At the conclusion of the custody hearing, if the court determines that probable cause does not exist pursuant to Subsection C of this section, the court shall:

(1) retain jurisdiction and, unless the court permits otherwise, order that the respondent and child remain in the jurisdiction of the court pending the adjudication;

(2) return legal custody of the child to the child's parent, guardian or custodian with conditions to provide for the safety and well-being of the child; and

(3) order that the child's parent, guardian or custodian allow the child necessary contact with the child's guardian ad litem or attorney.

G. 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. If the court determines that probable cause does not exist, the court may order the respondent or the child alleged to be neglected or abused, 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. Copies of any diagnostic or evaluation reports ordered by the court shall be provided to the parties at least five days before the adjudicatory hearing is scheduled. The reports shall not be sent to the court.

H. The Rules of Evidence [11-101 NMRA] shall not apply to custody hearings.

I. Nothing in this section shall be construed to abridge the rights of Indian children pursuant to the federal Indian Child Welfare Act of 1978.

History: 1978 Comp., § 32A-4-18, enacted by Laws 1993, ch. 77, § 112; 1999, ch. 77, § 5; 2005, ch. 189, § 45; 2009, ch. 239, § 38.

ANNOTATIONS

Cross references. — For the applicability of the Rules of Evidence, *see* Rule 11-1101 NMRA.

The 1999 amendment, effective July 1, 1999, added the undesignated paragraph following Subsection D(2).

The 2005 amendment, effective June 17, 2005, in Subsection A, changed "taken into custody" to "placed in the legal custody"; in Subsection C, changed "release of the child" to "return legal custody of the child"; and in Subsection D, provided that if the court determines that probable cause exists pursuant to Subsection C, the court may return legal custody of the child to his parent, guardian or custodian upon conditions that include protective supervision by the department or award legal custody to the department and deletes the former provision concerning visitation rights.

The 2009 amendment, effective July 1, 2009, added Subsection F; in Subsection G, added the second sentence; and added Subsection I.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed

on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-19. Adjudicatory hearings; time limitations.

A. The adjudicatory hearing in a neglect or abuse proceeding shall be commenced within sixty days after the date of service on the respondent.

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.

C. The children's court attorney shall represent the state at the adjudicatory hearing.

D. When the adjudicatory hearing on any petition is not commenced within the time period specified in Subsection A of this section or within the period of any extension granted, the petition shall be dismissed with prejudice.

History: 1978 Comp., § 32A-4-19, enacted by Laws 1993, ch. 77, § 113; 1997, ch. 34, § 3; 2009, ch. 239, § 39.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "sixty days" for "ninety days" in the introductory paragraph of Subsection A, added Subsection B, and redesignated former Subsections B and C as Subsections C and D.

The 2009 amendment, effective July 1, 2009, in Subsection A, after "sixty days after the", deleted "latest of the following dates:"; deleted Paragraphs (1) through (3) of Subsection A, which listed: the date the petition is served on the respondent; the date the trial court orders a mistrial or a new trial; and the date a mandate in an appeal or order disposing of the appeal is filed; and added "date of service on the respondent".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Violation of federal Indian Child Welfare Act of 1978. — Where the parent, who was a member of the Navajo nation, consented at a temporary custody hearing to the temporary custody of the child by CYFD; in the temporary custody order, the parent stipulated to a finding that clear and convincing evidence existed to believe that continued custody of the child by the parent or a guardian was likely to result in serious emotional or physical damage to the child; the parent contested CYFD’s permanent custody of the child at the adjudicatory hearing; CYFD did not put on any evidence to establish that continued custody of the child by the parent or an Indian custodian was

likely to result in serious emotional or physical damage to the child as required by the federal Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2006), at either the temporary custody hearing or at the adjudicatory hearing, the adjudication of neglect was not based on sufficient evidence. State of N.M. ex rel. CYFD v. Marlene C., 2009-NMCA-058, 146 N.M. 588, 212 P.3d 1142, cert. granted, 2009-NMCERT-006.

32A-4-20. Conduct of hearings; findings; dismissal; dispositional matters; penalty.

A. The proceedings shall be recorded by stenographic notes or by electronic, mechanical or other appropriate means.

B. All abuse and neglect hearings shall be closed to the general public.

C. Only the parties, their counsel, witnesses and other persons approved by the court may be present at a closed hearing. The foster parent, preadoptive parent or relative providing care for the child shall be given notice and an opportunity to be heard at the dispositional phase. Those other persons the court finds to have a proper interest in the case or in the work of the court may be admitted by the court to closed hearings on the condition that they refrain from divulging any information that would identify the child or family involved in the proceedings.

D. Accredited representatives of the news media shall be allowed to be present at closed hearings, subject to the condition that they refrain from divulging information that would identify any child involved in the proceedings or the parent, guardian or custodian of that child and subject to enabling regulations as the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Children's Code [32A-1-1 NMSA 1978]. 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.

E. If the court finds that it is in the best interest of a child under fourteen years of age, the child may be excluded from a hearing under the Abuse and Neglect Act. A child fourteen years of age or older may be excluded from a hearing only if the court makes a finding that there is a compelling reason to exclude the child and states the factual basis for the finding.

F. Those persons or parties granted admission to a closed hearing who intentionally divulge information in violation of this section are guilty of a petty misdemeanor.

G. The court shall determine if the allegations of the petition are admitted or denied. If the allegations are denied, the court shall proceed to hear evidence on the petition. The court, after hearing all of the evidence bearing on the allegations of neglect or abuse, shall make and record its findings on whether the child is a neglected child, an abused child or both. If the petition alleges that the parent, guardian or custodian has

subjected the child to aggravated circumstances, then the court shall also make and record its findings on whether the aggravated circumstances have been proven.

H. If the court finds on the basis of a valid admission of the allegations of the petition or on the basis of clear and convincing evidence, competent, material and relevant in nature, that the child is neglected or abused, the court may proceed immediately or at a postponed hearing to make disposition of the case. If the court does not find that the child is neglected or abused, the court shall dismiss the petition and may refer the family to the department for appropriate services.

I. In that part of the hearings held under the Children's Code on dispositional issues, 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 part of the hearings on adjudicatory issues.

J. On the court's motion or that of a party, the court may continue the hearing on the petition for a period not to exceed thirty days to receive reports and other evidence in connection with disposition. The court shall continue the hearing pending the receipt of the predisposition study and report if that document has not been prepared and received. During any continuances under this subsection, the court shall make an appropriate order for legal custody.

History: 1978 Comp., § 32A-4-20, enacted by Laws 1993, ch. 77, § 114; 1997, ch. 34, § 4; 1999, ch. 77, § 6; 2005, ch. 189, § 46; 2009, ch. 239, § 40.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "period not to exceed thirty days" for "reasonable time" in the first sentence in Subsection J.

The 1999 amendment, effective July 1, 1999, added the second sentence in Subsection C and the last sentence in Subsection G.

The 2005 amendment, effective June 17, 2005, in Subsection E, provided that a child under fourteen years of age may be excluded from a hearing and that a child fourteen years of age or older may be excluded from a hearing only if there is a compelling reason.

The 2009 amendment, effective July 1, 2009, in Subsection D, added the last sentence.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Standing to contest dismissal of petition against co-respondent. — A co-respondent does not have standing to contest the dismissal of an abuse and neglect petition against the other co-respondent. State of N.M. ex rel. CYFD v. Jeremy N., 2008-NMCA-145, 145 N.M. 198, 195 P.3d 365, cert. denied, 2008-NMCERT-009.

Where the main issue at the adjudicatory proceeding is the cause of the child's injuries and where there is an increased risk of an erroneous deprivation of the parent's interest without the appointment of an expert to determine if there is an alternative cause of the child's injuries, an indigent parent is entitled to the appointment of an expert witness at the state's expense. State of NM ex. rel., CYFD v. Kathleen D.C., 2007-NMSC-018, 141 N.M. 535, 157 P.3d 714.

Departmental custody continued until final determination made. — In a proceeding on an abuse and neglect petition filed by the Children, Youth and Families Department, the trial court had authority to continue custody of the children in the Department until determination of proper placement, and the Children's Court had authority under Subsection J to make necessary findings and conclusions with regard to the father's fitness to be a legal custodian. State ex rel. Children, Youth & Families Dep't v. A.H., 1997-NMCA-118, 124 N.M. 244, 947 P.2d 1064.

Authority of court to exclude media. — Even though the conditioning of media access on a requirement that the press refrain from divulging information that would identify a child, parent, guardian, or custodian, could not be met in a highly publicized child abuse and neglect case, the children's court was within its discretion under Subsection D to decide whether to allow the media to attend the proceedings. Albuquerque Journal v. Jewell, 2001-NMSC-005, 130 N.M. 64, 17 P.3d 437.

Hearsay statements. — Admission of child's hearsay statements did not violate parents' constitutional rights to due process at the adjudicatory hearing where parents received proper notice of department's intent to use the child's statements, they were each represented by able attorneys who argued vigorously on their behalf and carefully cross-examined department's witnesses about the reliability and credibility of the child's statements, and a guardian ad litem had been appointed for the child. State ex rel. Children, Youth & Families Dept. v. Frank G., 2005-NMCA-026, 137 N.M. 137, 108 P.3d 543, cert granted, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

Final appealable order. — Abuse and neglect adjudication is a final, appealable order. State ex rel. Children, Youth & Families Dept. v. Frank G., 2005-NMCA-026, 137 N.M. 137, 108 P.3d 543, cert granted, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

Jurisdiction pending appeal. — While appeal of abuse and neglect adjudication is pending, the children's court has jurisdiction to take further action in the case. State ex rel. Children, Youth & Families Dept. v. Frank G., 2005-NMCA-026, 137 N.M. 137, 108 P.3d 543, cert granted, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

32A-4-21. Neglect or abuse predisposition studies, reports and examinations.

A. Prior to holding a dispositional hearing, the court shall direct that a predisposition study and report be submitted in writing to the court by the department.

B. The predisposition study required pursuant to Subsection A of this section shall contain the following information:

(1) a statement of the specific reasons for intervention by the department or for placing the child in the department'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 being removed from the parent's home, including emotional harm that may result due to separation from the child's 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 child's custodian;

(4) whether the child has a family member who, subsequent to study by the department, is determined to be qualified to care for the child;

(5) a description of services offered to the child, the child's family and the child's foster care family and a summary of reasonable efforts made to prevent removal of the child from the child's family or reasonable efforts made to reunite the child with the child's 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 federal Indian Child Welfare Act of 1978 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 the child's parents to facilitate permanent placement of the child in the parent's home;

(11) for children sixteen years of age and older, a 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 child's parent's home; and

(12) 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; 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, including plans for travel for the child to remain in the school in which the child was enrolled at the time of placement, if reasonable and in the child's best interest.

C. A copy of the predisposition report shall be provided by the department to counsel for all parties five days before the dispositional hearing.

D. If the child is an adjudicated abused child, any temporary custody orders shall remain in effect until the court has received and considered the predispositional study at the dispositional hearing.

History: 1978 Comp., § 32A-4-21, enacted by Laws 1993, ch. 77, § 115; 1997, ch. 34, § 5; 2009, ch. 239, § 41.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act, *see* 25 U.S.C. § 1901.

The 1997 amendment, effective July 1, 1997, substituted "report be submitted" for "report be made" in Subsection A and rewrote Subsection B.

The 2009 amendment, effective July 1, 2009, added Paragraphs (12) and (13) of Subsection B.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-22. Disposition of adjudicated abused or neglected child.

A. If not held in conjunction with the adjudicatory hearing, the dispositional hearing shall be commenced within thirty days after the conclusion of the adjudicatory hearing. At the conclusion of the dispositional hearing, the court shall make and include in the dispositional judgment its findings on the following:

(1) the interaction and interrelationship of the child with the child's parent, siblings and any other person who may significantly affect the child's best interest;

(2) the child's adjustment to the child's home, school and community;

(3) the mental and physical health of all individuals involved;

(4) the wishes of the child as to the child's 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 the department, 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 Section 32A-4-21 NMSA 1978;

(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 the department 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 the department to place siblings in custody 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 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 the federal Indian Child Welfare Act of 1978 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 shall be clearly stated and supported.

B. If a child is found to be neglected or abused, the court may enter its judgment making any of the following dispositions to protect the welfare of the child:

(1) permit the child to remain with the child's parent, guardian or custodian, subject to those conditions and limitations the court may prescribe;

(2) place the child under protective supervision of the department; or

(3) transfer legal custody of the child to any of the following:

(a) the noncustodial parent, if it is found to be in the child's best interest;

(b) an agency responsible for the care of neglected or abused children; or

(c) 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.

C. If a child is found to be neglected or abused, in its dispositional judgment the court shall also order the department to implement and the child's parent, guardian or custodian to cooperate with any treatment plan approved by the court. Reasonable efforts shall be made to preserve and reunify the family, with the paramount concern being the child's health and safety. The court may determine that reasonable efforts are not required to be made when the court finds that:

(1) the efforts would be futile; or

(2) the parent, guardian or custodian has subjected the child to aggravated circumstances.

D. Any parent, guardian or custodian of a child who is placed in the legal custody of the department or other person pursuant to Subsection B of this section shall have reasonable rights of visitation with the child as determined by the court, unless the court finds that the best interests of the child preclude any visitation.

E. The court may order reasonable visitation between a child placed in the custody of the department 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.

F. Unless a child found to be neglected or abused is also found to be delinquent, the child shall not be confined in an institution established for the long-term care and rehabilitation of delinquent children.

G. When the court vests legal custody in an agency, institution or department, the court shall transmit with the dispositional judgment copies of the clinical reports, the

predisposition study and report and any other information it has pertinent to the care and treatment of the child.

H. Prior to a child being placed in the custody or protective supervision of the department, the department shall be provided with reasonable oral or written notification and an opportunity to be heard. At any hearing held pursuant to this subsection, the department may appear as a party.

I. When a child is placed in the custody of the department, the department shall investigate whether the child is eligible for enrollment as a member of an Indian tribe and, if so, the department shall pursue the enrollment on the child's behalf.

J. When the court determines pursuant to Subsection C of this section that no reasonable efforts at reunification are required, the court shall conduct, within thirty days, a permanency hearing as described in Section 32A-4-25.1 NMSA 1978. Reasonable efforts shall be made to implement and finalize the permanency plan in a timely manner.

History: 1978 Comp., § 32A-4-22, enacted by Laws 1993, ch. 77, § 116; 1997, ch. 34, § 6; 1999, ch. 77, § 7; 2005, ch. 189, § 47; 2009, ch. 239, § 42.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act, *see* 25 U.S.C. § 1901.

The 1997 amendment, effective July 1, 1997, added the first sentence in Subsection A, substituted "32A-4-21" for "32-4-19" in Paragraph A(7) and made minor stylistic changes in Paragraph A(9) and Subparagraph B(3)(a).

The 1999 amendment, effective July 1, 1999, in Subsection C, added the last two sentences in the introductory language and added Paragraphs (1) through (3); and added Subsection J.

The 2005 amendment, effective June 17, 2005, in Subsection A(4), changed "his custodian" to "the child’s placement"; and deleted former Subsection C(3), which provided that the court may determine that reasonable efforts are not required to preserve and reunify the family if the parental rights of the parent to a sibling of the child have been terminated involuntarily.

The 2009 amendment, effective July 1, 2009, added Paragraph (10) of Subsection A

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-34 NMSA 1978 have been included in the annotations to this section.

Dismissal of proceedings as to one parent. — Where the district court determined that the mother had abused her child; the court dismissed abuse and neglect proceedings against the father; the court determined that placement of the child with the father was in the best interests of the child, the CYFD ceased to have the authority to maintain custody of the child and the mother did not have a liberty interest in continuing the course of her treatment program with the CYFD. State of N.M. ex rel. CYFD v. Lisa A., 2008-NMCA-087, 144 N.M. 324, 187 P.3d 189.

Grandparent visitation rights. — The Abuse and Neglect Act does not grant a grandparent unfettered visitation, particularly after an adoption proceeding has occurred. State of N.M. ex rel. CYFD v. Senaida C., 2008-NMCA-007, 143 N.M. 335, 176 P.3d 324.

Standard of review. – The district court did not err when it used the arbitrary and capricious standard to review CYFD's denial of a grandmother's right of placement. State of N.M. ex rel. CYFD v. Senaida C., 2008-NMCA-007, 143 N.M. 335, 176 P.3d 324.

Mootness. — In adjudications of neglect or abuse, because the issue of sufficiency of the evidence is capable of repetition, but may evade appellate review, the 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 of NM ex rel., CYFD v. Amanda H., 2007-NMSA-029, 141 N.M. 259, 154 P.3d 674.

No unconstitutional delegation of legislative power. — Since the provisions relating to the meaning of "neglected child" are to be defined and applied by a court and not the department of human services, there is no unconstitutional, standardless delegation of legislative power to a state agency. State ex rel. Health & Social Servs. Dep't v. Natural Father, 93 N.M. 222, 598 P.2d 1182 (Ct. App. 1979).

Adoption of child requires notice to parents. — It is impossible to declare a child to be dependent and neglected and then place the child for adoption without notice to the parents. 1959-60 Op. Att'y Gen. No. 59-59.

District judge has no authority to sign adoption consents after declaring child dependent and neglected. 1959-60 Op. Att'y Gen. No. 59-59.

Court can make child its ward before further disposition. — District court could make a child which it found to be dependent and neglected its ward and thereafter make such disposition of the child as in its considered judgment was in the child's best

interests. New Mexico Dep't of Pub. Welfare v. Cromer, 52 N.M. 331, 197 P.2d 902 (1948).

Court not bound by any prearranged disposition by agency. — District court was not bound by any prearranged disposition of child by the department of public welfare (now human services department) since placement in any home was to be with consent of the court, and the welfare of the child was the court's paramount consideration. New Mexico Dep't of Pub. Welfare v. Cromer, 52 N.M. 331, 197 P.2d 902 (1948).

Adoption proceeding may not be circumvented. — Proceedings to determine if a child is dependent and neglected may not be used to circumvent an adoption proceeding, but where the court has announced its decision denying the petition to adopt, the welfare and best interest of the child are of paramount consideration. Herman v. McIver, 66 N.M. 36, 341 P.2d 457 (1959).

Parental right to custody can be taken away. — The state's claim that parental rights to custody of a child in need of supervision cannot be taken away absent a showing of incompetence on the part of the parent or parents is an overly narrow reading of this statute, which makes no such requirement. In re Doe, 88 N.M. 505, 542 P.2d 1195 (Ct. App. 1975).

"Reasonable efforts". — Sections 32A-4-2C, 32A-4-22C, and 32A-4-28B(2) NMSA 1978 are constitutional facially and as applied to a mother, whose parental rights were terminated without the state making reasonable efforts toward family reunification, where the mother had previously had parental rights terminated as to another child and no progress was evident in the mother's efforts to kick a 4-year drug abuse problem. State ex rel. Children, Youth & Families Dep't v. Amy B., 2003-NMCA-017, N.M. , 61 P.3d 845.

Court vested with broad discretion in placement of minors. — The court did not violate the spirit and intent of the Children's Code by placing a 16-year-old girl in the custody of a woman who had helped to rear her and had been found to be a positive influence over her where the child felt compelled to run away from her mother's household and would in all likelihood continue to refuse to live with her mother since the children's court is vested with a broad discretion in hearing and deciding matters under it. In re Doe, 88 N.M. 505, 542 P.2d 1195 (Ct. App. 1975).

Effect of agency not studying qualifications of individual awarded custody. — Contentions that no agency designated by the court had made a study of the qualifications of the woman awarded custody of a 16-year-old girl in need of supervision were never raised at the probation revocation hearing, and in awarding custody the court impliedly found the woman qualified to have custody of the girl. In re Doe, 88 N.M. 505, 542 P.2d 1195 (Ct. App. 1975).

Counsel of record entitled to notice of subsequent termination action. — The human services department was required to serve a parent's attorney with notice of the

department's action to terminate parental rights, when the attorney was representing him in a separate neglect action before the children's court. Ronald v. State ex rel. Human Servs. Dep't, 110 N.M. 454, 797 P.2d 243 (1990).

Law reviews. — For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M.L. Rev. 119 (1973).

For article, "Child Welfare Under the Indian Child Welfare Act of 1978; A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Power of court or other public agency to order medical treatment for child over parental objections not based on religious grounds, 97 A.L.R.3d 421.

Validity of state statute providing for termination of parental rights, 22 A.L.R.4th 774.

Attorneys' fees awards in parent-nonparent child custody case, 45 A.L.R.4th 212.

Foster parent's right to immunity from foster child's negligence claims, 55 A.L.R.4th 778.

Denial or restriction of visitation rights to parent charged with sexually abusing child, 1 A.L.R.5th 776.

43 C.J.S. Infants §§ 69 to 91.

32A-4-23. Disposition of a child with a mental disorder or a developmental disability in a proceeding under the Abuse and Neglect Act.

A. If in a hearing, at any stage of a proceeding on a neglect or abuse petition, the evidence indicates that a child has a mental disorder or a developmental disability, the court shall adjudicate the issue of neglect or abuse under the provisions of the Children's Code [32A-1-1 NMSA 1978].

B. When a child in department custody needs involuntary placement for residential mental health or developmental disability services as a result of a mental disorder or developmental disability, the department shall petition for that child's placement pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act [32A-6-1 NMSA 1978].

C. Any child in department custody who is placed for residential treatment or habilitation pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act shall remain in the legal custody of the department while in residential treatment or habilitation or until further order of the court.

D. A court hearing for consideration of an involuntary placement of a child for residential treatment or habilitation, when the child is subject to the provisions of the Abuse and Neglect Act, may be heard by the court as part of the abuse or neglect proceedings or may be heard in a separate proceeding. All parties to the abuse or neglect proceedings shall be provided with notice of the involuntary placement hearing.

E. A guardian ad litem appointed pursuant to the Abuse and Neglect Act shall serve as a guardian ad litem for a child for the purposes of the Children's Mental Health and Developmental Disabilities Act. When a child is fourteen years of age or older, the child shall be represented by an attorney unless, after consultation between the child and the child's attorney, the child elects to be represented by counsel appointed in the proceedings under the Children's Mental Health and Developmental Disabilities Act.

F. When a child is subject to the provisions of the Abuse and Neglect Act and is receiving residential treatment or habilitation services, any documentation required pursuant to the Children's Mental Health and Developmental Disabilities Act shall be filed with the court as part of the abuse or neglect proceeding. A review of the child's placement in a residential treatment or habilitation program shall occur in the same manner and within the same time requirements as provided in the Children's Mental Health and Developmental Disabilities Act.

G. The clerk of the court shall maintain a separate section within an abuse or neglect file for documents pertaining to actions taken under the Children's Mental Health and Developmental Disabilities Act.

H. A child subject to the provisions of the Abuse and Neglect Act who receives treatment in a residential treatment or habilitation program shall enjoy all the substantive and procedural rights set forth in the Children's Mental Health and Developmental Disabilities Act.

History: 1978 Comp., § 32A-4-23, enacted by Laws 1993, ch. 77, § 117; 1995, ch. 206, § 23; 2005, ch. 189, § 48.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, inserted "under the Abuse and Neglect Act" in the section heading, deleted former Subsection B, relating to abuse or neglect petitions, redesignated former Subsections C and D as Subsections B and C, substituted "When a child in department custody needs involuntary placement for residential" for "If the department has reason to believe that a child in department custody needs residential" in Subsection B, deleted Subsections E and F, relating to release from residential treatment or habilitation, and added Subsections D through H.

The 2005 amendment, effective June 17, 2005, in Subsection D, provided that a hearing for involuntary placement for residential treatment or habilitation may be heard in a proceeding separate from an abuse or neglect proceeding; and in Subsection E,

provided that when a child is fourteen years of age or older, the child shall be represented by an attorney, unless the child elects to be represented by counsel appointed in a proceeding under the Children's Mental Health and Developmental Disabilities Act.

32A-4-23.1. Disposition of an undocumented immigrant child in a proceeding under the Abuse and Neglect Act.

A. Whenever the court adjudicates that a child is abused or neglected, the department shall determine the child's immigration status. At the first judicial review, the department shall report the child's immigration status to the court. Services to children alleged to have been abused, neglected or abandoned must be provided without regard to the immigration status of the child except where immigration status is explicitly set forth as a statutory or regulatory condition of coverage or eligibility.

B. If the child is an undocumented immigrant, the department shall 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 permanency plan does not include reunification and the department does not recommend that the child be returned to the country of origin, the department shall determine whether the child may be eligible for special immigrant juvenile status under federal law.

C. If the child is eligible for special immigrant juvenile status, the department shall move the court for a special immigrant juvenile status order containing the necessary findings to establish that the child meets the criteria for federal special immigrant juvenile status. The department's motion shall include a statement of the express wishes of the child, as expressed by the child or the child's guardian ad litem or attorney.

D. After consultation with the child and the child's guardian ad litem or attorney, the department shall determine whether the child's best interests would be served by the filing of a petition for special immigrant juvenile status and application for adjustment of status and if in the child's best interest, within sixty days after an entry of the special immigrant juvenile status order, the department shall file a petition for special immigrant juvenile status and an application for adjustment of status on behalf of the child.

E. If a petition and application have been filed and the petition and application have not been granted by the time the child reaches eighteen years of age, 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.

F. Review hearings for the child shall be set solely for the purpose of confirming that the child continues to satisfy such requirements and determining the status of the petition and application.

G. The court's jurisdiction terminates upon the final decision of the federal authorities.

H. Retention of jurisdiction in this instance does not affect the transition services available to the child.

I. The court may not retain jurisdiction of the case after the immigrant child's twenty-first birthday.

J. In a judicial review report provided to the court for a child for whom the court has granted the special immigrant juvenile status order described in Subsection C of this section, the court shall be advised of the status of the petition and application process concerning the child.

History: 1978 Comp., § 32A-4-23.1, as enacted by Laws 2009, ch. 239, § 43.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made Laws 2009, ch. 239, § 43 effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-24. Limitations on dispositional judgments; modification, termination or extension of court orders.

A. A judgment vesting legal custody of a child in an agency shall remain in force for an indeterminate period not exceeding two years from the date entered.

B. A judgment vesting legal custody of a child in an individual, other than the child's parent or permanent guardian, shall remain in force for two years from the date entered, unless sooner terminated by court order.

C. A judgment vesting legal custody of a child in the child's parent or a permanent guardian shall remain 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.

D. At any time prior to 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 guardian ad litem.

E. Prior to the expiration of a judgment transferring legal custody to an agency, 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.

F. When a child reaches eighteen years of age, all neglect and abuse orders affecting the child then in force automatically terminate except as provided in Section 32A-4-23.1 NMSA 1978 and Subsection D of Section 32A-4-25.3 NMSA 1978. The termination of the orders shall not disqualify a child from eligibility for transitional services.

History: 1978 Comp., § 32A-4-24, enacted by Laws 1993, ch. 77, § 118; 2009, ch. 239, § 44.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, in Subsection D, after "any party", added "including the child by and through"; and in Subsection F, in the first sentence, after "automatically terminate", added the remainder of the sentence.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Federal proceeding barred. — A federal class action by mentally or developmentally disabled children against state officers was barred because the continuing jurisdiction of the children's court under this section, coupled with the mandatory six-month periodic review hearings under 32A-4-25 NMSA 1978, constituted an ongoing state judicial proceeding. J.B. v. Valdez, 186 F.3d 1280 (10th Cir. 1999).

Jurisdiction not lost by expiration of custody order. — Since the children's court had jurisdiction at the beginning of abuse and neglect proceedings, expiration of a temporary custody order did not cause the loss of the court's jurisdiction. Spear v. McDermott, 1996-NMCA-048, 121 N.M. 609, 916 P.2d 228.

32A-4-25. Periodic review of dispositional judgments.

A. The initial judicial review shall be held within sixty days of the disposition. At the initial review, the parties shall demonstrate to the court efforts made to implement the treatment plan approved by the court in its dispositional order. The court shall determine the extent to which the treatment plan has been implemented and make supplemental orders as necessary to ensure compliance with the treatment plan and the safety of the child. Prior to the initial judicial review, the department shall submit a copy of the adjudicatory order, the dispositional order and notice of the initial judicial review to the local substitute care review board for that judicial district created under the Citizen

Substitute Care Review Act [32A-8-1 NMSA 1978]. A representative of the local substitute care review board shall be permitted to attend and comment to the court.

B. Subsequent periodic reviews of dispositional orders shall be held within six months of the conclusion of the permanency hearing or, if a motion has been filed for termination of parental rights or permanent guardianship, within six months of the decision on that motion and every six months thereafter. Prior to the review, the department shall submit a progress report to the local substitute care review board for that judicial district created under the Citizen Substitute Care Review Act. Prior to any judicial review by the court pursuant to this section, the local substitute care review board may review the dispositional order or the continuation of the order and the department's progress report and report its findings and recommendations to the court. The review may be carried out by either of the following:

(1) a judicial review hearing conducted by the court; or

(2) a judicial review hearing conducted by a special master appointed by the court; provided, however, that the court approve any findings made by the special master.

C. 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, a contractor administering the local substitute care review board and the child's foster parent or substitute care provider of the time, place and purpose of any judicial review hearing held pursuant to Subsection A or B of this section.

D. At any judicial review hearing held pursuant to Subsection B of this section, the department, the child's guardian ad litem or attorney and all parties given notice pursuant to Subsection C of this section shall have the opportunity to present evidence and to cross-examine witnesses. At the hearing, the department shall show that it has made reasonable effort to implement any treatment plan approved by the court in its dispositional order and shall present a treatment plan consistent with the purposes of the Children's Code [32A-1-1 NMSA 1978] for any period of extension of the dispositional order. The respondent shall demonstrate to the court that efforts to comply with the treatment plan approved by the court in its dispositional order and efforts to maintain contact with the child were diligent and made in good faith. The court shall 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.

E. The Rules of Evidence [11-101 NMRA] shall not apply to hearings held pursuant to this section. 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.

F. At the conclusion of any hearing held pursuant to this section, the court shall make findings of fact and conclusions of law.

G. When the child is an Indian child, the court shall determine during review of a dispositional order whether the placement preferences set forth in the federal Indian Child Welfare Act of 1978 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. When placement preferences have not been followed, good cause for noncompliance shall be clearly stated and supported.

H. Based on its findings at a judicial review hearing held pursuant to Subsection B of this section, the court shall order one of the following dispositions:

(1) dismiss the action and return the child to the child's parent without supervision if the court finds that conditions in the home that led to abuse have been corrected and it is now safe for the return of the abused child;

(2) permit the child to remain with the child's parent, guardian or custodian subject to those conditions and limitations the court may prescribe, including protective supervision of the child by the department;

(3) return the child to the child's parent and place the child under the protective supervision of the department;

(4) transfer or continue legal custody of the child to:

(a) the noncustodial parent, if that is found to be in the child's best interests;

(b) a relative or other individual who, after study by the department or other agency designated by the court, is found by the court to be qualified to receive and care for the child and is appointed as a permanent guardian of the child; or

(c) the department, subject to the provisions of Paragraph (6) of this subsection;

(5) continue the child in the legal custody of the department with or without any required parental involvement in a treatment plan. Reasonable efforts shall be made to preserve and reunify the family, with the paramount concern being the child's health and safety unless the court finds that such efforts are not required. The court may determine that reasonable efforts are not required to be made when the court finds that:

(a) the efforts would be futile; or

(b) the parent, guardian or custodian has subjected the child to aggravated circumstances;

(6) make additional orders regarding the treatment plan or placement of the child to protect the child's best interests if the court determines the department has

failed in implementing any material provision of the treatment plan or abused its discretion in the placement or proposed placement of the child; or

(7) if during a judicial review the court finds that the child's parent, guardian or custodian has not complied with the court-ordered treatment plan, the court may order:

(a) the child's parent, guardian or custodian to show cause why the parent, guardian or custodian should not be held in contempt of court; or

(b) a hearing on the merits of terminating parental rights.

I. Dispositional orders entered pursuant to this section shall remain in force for a period of six months, except for orders that provide for transfer of the child to the child's noncustodial parent or to a permanent guardian.

J. The report of the local substitute care review board submitted to the court pursuant to Subsection B of this section shall become a part of the child's permanent court record.

K. When the court determines, pursuant to Paragraph (5) of Subsection H of this section, that no reasonable efforts at reunification are required, the court shall conduct, within thirty days, a permanency hearing as described in Section 32A-4-25.1 NMSA 1978. Reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

History: 1978 Comp., § 32A-4-25, enacted by Laws 1993, ch. 77, § 119; 1995, ch. 206, § 24; 1997, ch. 34, § 7; 1999, ch. 77, § 8; 2005, ch. 189, § 49; 2009, ch. 239, § 45.

ANNOTATIONS

Compiler's note. — This section was enacted by Laws 1993, ch. 77, § 119 as 32-4-23 NMSA 1978. It was recompiled by the compiler as 32A-4-25 NMSA 1978. *See* note at the beginning of the chapter.

Cross references. — For judicial review procedure, *see* Rule 10-325 NMRA.

For applicability of the Rules of Evidence, *see* Rule 11-1101 NMRA.

For the federal Indian Child Welfare Act, *see* 25 U.S.C. § 1901.

The 1995 amendment, effective July 1, 1995, inserted "a contractor administering the local substitute care review board" following "CASA" in Subsection B.

The 1997 amendment, effective July 1, 1997, rewrote former Subsection A to form present Subsections A and B, redesignated former Subsections B to I as Subsections C

to J and made minor stylistic changes in Subsections C, D, and J accordingly, and inserted "at a judicial review hearing held pursuant to Subsection B of this section" in the introductory language of Subsection H.

The 1999 amendment, effective July 1, 1999, made a minor stylistic change in Subsection C; in Subsection H(5), added the last two sentences and Subparagraphs (a) through (c); and added Subsection K.

The 2005 amendment, effective June 17, 2005, deleted former Subsection H(5)(c), which provided that the court may determine that reasonable efforts are not required to preserve and reunify the family if the parental rights of the parent to a sibling of the child have been terminated involuntarily.

The 2009 amendment, effective July 1, 2009, in Subsection C, after "notice to all parties", added "including the child by and through"; and in Subsections C and D, after "guardian ad litem", added ”or attorney".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-38.1 NMSA 1978 have been included in the annotations to this section.

Hearsay evidence. — The trial court did not err by basing its finding of futility made at a judicial review hearing on hearsay evidence. State ex rel. Children, Youth & Families Dep't v. Vanessa C., 2000-NMCA-025, 128 N.M. 701, 997 P.2d 833, cert. denied, 128 N.M. 690, 997 P.2d 822 (2000).

Federal proceeding barred. — A federal class action by mentally or developmentally disabled children against state officers was barred because the continuing jurisdiction of the children's court under 32A-4-24 NMSA 1978, coupled with the mandatory six-month periodic review hearings under this section, constituted an ongoing state judicial proceeding. J.B. v. Valdez, 186 F.3d 1280 (10th Cir. 1999).

Court's authority after child in custody of department. — Once legal custody is in the department of human services, the children's court has no authority to prohibit the department from placing physical custody of the child with any particular person. State ex rel. Human Servs. Dep't, 107 N.M. 769, 764 P.2d 1327 (Ct. App. 1988).

Sexual orientation of proposed custodian, standing alone, is not enough to support a conclusion that the person cannot provide a proper environment. State ex rel. Human Servs. Dep't, 107 N.M. 769, 764 P.2d 1327 (Ct. App. 1988).

32A-4-25.1. Permanency hearings; permanency review hearings.

A. A permanency hearing shall be commenced within six months of the initial judicial review of a child's dispositional order or within twelve months of a child entering foster care pursuant to Subsection D of this section, whichever occurs first. Prior to the initial permanency hearing, all parties to the hearing shall attend a mandatory meeting and attempt to settle issues attendant to the permanency hearing and develop a proposed treatment plan that serves the child's best interest. Prior to the initial permanency hearing, the department shall submit a progress report regarding the child to the local substitute care review board for that judicial district. The local substitute care review board may review the child's dispositional order, any continuation of that order and the department's progress report and report its findings and recommendations to the court.

B. At the permanency hearing, all parties shall have the opportunity to present evidence and to cross-examine witnesses. At the conclusion of the permanency hearing, the court shall order one of the following permanency plans for the child:

(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, provided that there is substantial evidence that none of the above plans is appropriate for the child.

C. If the court adopts a permanency plan of reunification, the court shall adopt a plan for transitioning the child home and schedule a permanency review hearing within three months. If the child is reunified, the subsequent hearing may be vacated.

D. If the court adopts a permanency plan other than reunification, the court shall determine whether the department has made reasonable efforts to identify and locate all grandparents and other relatives. The court shall also determine whether the department has made reasonable efforts to conduct home studies on any appropriate relative expressing an interest in providing permanency for the child. The court must ensure the consideration has been given to the child's familial identity and connections. If the court finds that reasonable efforts have not been made to identify or locate grandparents and other relatives or to conduct home studies on appropriate and willing relatives, the court shall 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.

E. At the permanency review hearing, all parties and the child's guardian ad litem or attorney shall have the opportunity to present evidence and cross-examine witnesses. Based on the evidence, the court shall:

(1) change the plan from reunification to one of the alternative plans provided in Subsection B of this section;

(2) dismiss the case and return custody of the child to the child's parent, guardian or custodian; or

(3) return the child to the custody of the child's parent, guardian or custodian, subject to any conditions or limitations as the court may prescribe, including protective supervision of the child by the department and continuation of the treatment plan for not more than six months, after which the case shall be dismissed. The department may seek removal of a child from the home by obtaining an order in the pending case or by seeking emergency removal under Section 32A-4-6 NMSA 1978 during the period of protective supervision if the child's best interest requires such action. When a child is removed in this situation, a permanency hearing shall be scheduled within thirty days of the child coming back into the department's legal custody.

F. The court shall hold a permanency hearing and adopt a permanency plan for a child within twelve months of the child entering foster care. For purposes of this section, a child shall be 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) sixty days after the date on which the child was removed from the home.

G. The court shall hold permanency hearings every twelve months when a child is in the legal custody of the department.

H. 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, a contractor administering the local substitute care review board and the child's foster parent or substitute care provider of the time, place and purpose of any permanency hearing or permanency review hearing held pursuant to this section.

I. The rules of evidence shall not apply to permanency hearings. The court may admit testimony by any person given notice of the permanency hearing who has information about the status of the child or the status of the treatment plan. All testimony shall be subject to cross-examination.

History: Laws 1997, ch. 34, § 8; 2005, ch. 189, § 50; 2009, ch. 239, § 46.

ANNOTATIONS

Cross references. — For permanency hearing rules, *see* Rule 10-325 NMRA.

For applicability of the Rules of Evidence, *see* Rule 11-1101 NMRA.

For the meaning of "CASA", *see* 32A-1-4 NMSA 1978.

The 2005 amendment, effective June 17, 2005, in Subsection A, provided that a permanency hearing shall be held within six month of the initial review of a dispositional order or within twelve months of a child entering foster care pursuant to Subsection E, whichever occurs first; in Subsection B, deleted the former provision which provided that during a permanency hearing, there is a rebuttable presumption that the child's best interest will be served by returning the child to his parent, guardian or custodian; in Subsection B(1) through (5), provided the plans that the court may order at a permanency hearing; deleted former Subsection C, which provided that if the presumption is not rebutted, the court could dismiss the case and return the child to his parent, guardian or custodian or return the child under conditions and limitations prescribed by the court; in Subsection C, provided that if the court orders reunification, the court shall adopt a transition plan and schedule a review hearing; deleted former Subsection D, which provided that if the presumption is rebutted, the court shall order that the child remain in legal custody of the department; in Subsection D(1) through (3), provided the dispositions that the court may make at a permanency review hearing, deleted former Subsection E, which provided that in a subsequent permanency hearing, there shall be a presumption that the child's best interest shall be served by providing for the adoption, emancipation or permanent guardianship of the child; in Subsection E, provided that the court shall adopt a permanency plan within twelve months after the child has entered foster care and provides criteria for determining the date a child enters foster care; deleted former Subsection F, which provided that if the presumption in Subsection E is not rebutted, the court shall order the adoption, emancipation or permanent guardianship of the child and efforts to reunite the child with his parent shall not be attempted; in Subsection F, provided that the court shall hold a permanency hearing every twelve months when a child is in the legal custody of the department; deleted former Subsection G, which provided that if the presumption in Subsection E is rebutted, the court shall dismiss the case and return the child to his parent, guardian or custodian or return the child to his parent, guardian or custodian under conditions and limitations; and in Subsection G, provided that the children's court attorney shall give notice of a permanency review hearing.

The 2009 amendment, effective July 1, 2009, in Subsection A, in the first sentence, changed "Subsection E" to "Subsection D"; added Subsection D; and in Subsection H, after "notice to all parties", added "including the child by and through" and after "guardian ad litem", added "or attorney".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Permanency hearings represent a critical stage. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

And hearings bear direct relation to final termination hearing. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

Factual basis for termination is largely established at permanency hearing, even though a formal final termination hearing follows. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

Rights of parents at hearing. — Parents have a due process right to fair notice and an opportunity for meaningful participation at the permanency stage, including the right to present evidence and cross examine witnesses, when their presence or additional safeguards would be useful or beneficial to the defense. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

Reunification plan. — Parents do not have an unlimited time to rehabilitate and reunite with their children. State law allows a reunification plan to be maintained for a maximum of fifteen months. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

Incarceration can be the sole legal ground for changing a permanency plan. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

A parent's absence from permanency hearings did not increase the risk of an erroneous deprivation of parental rights and deny the parent due process where the evidence at the permanency hearings and the termination of parental rights hearing was the same evidence, the parent was sentenced to a term of at least five years in federal prison and the parent had a poor parenting history and a prior incarceration. State ex rel. Children, Youth and Families Department v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796 (Ct. App. 2004).

A parent who was incarcerated and not present at the termination of parental rights hearing, but who was given the opportunity to participate in the hearing by telephone and who refused to participate in the proceedings by verbalizing profanities towards the judge and then hung up by telephone waived this right to participate in the hearing. State ex rel. Children, Youth and Families Department v. Christopher L, 2003-NMCA-068, 133 N.M. 653, 68 P.3d 199 (Ct. App. 2003).

32A-4-25.2. Transition services.

A. Prior to a child's reaching seventeen years of age, the department shall meet with the child, the child's attorney and others of the child's choosing, including biological family members, to develop a transition plan. The department shall assist the child in identifying and planning to meet the child's needs after the child's eighteenth birthday, including housing, education, employment or income, health and mental health, local opportunities for mentors and continuing support services.

B. The department shall present the child's proposed transition plan to the court at the first hearing scheduled after the child's seventeenth birthday.

C. The court shall order a transition plan for the child. The transition plan approved by the court shall be reviewed at every subsequent review and permanency hearing.

History: 1978 Comp., § 32A-4-25.2, as enacted by Laws 2009, ch. 239, § 47.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made Laws 2009, ch. 239, § 47 effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-25.3. Discharge hearing.

A. At the last review or permanency hearing held prior to the child's eighteenth birthday, the court shall review the transition plan and shall determine whether the department has made reasonable efforts to implement the requirements of Subsection B of this section.

B. The court shall determine:

(1) whether written information concerning the child's family history, the whereabouts of any sibling if appropriate and education and health records have been provided to the child;

(2) whether the child's social security card, certified birth certificate, state-issued identification card, death certificate of a parent and proof of citizenship or residence have been provided to the child;

(3) whether assistance in obtaining medicaid has been provided to the child, unless the child is ineligible for medicaid; and

(4) whether referral for a guardianship or limited guardianship if the child is incapacitated has been made.

C. If the court finds that the department has not made reasonable efforts to meet all the requirements of Subsection B of this section and that termination of jurisdiction would be harmful to the young adult, the court may continue to exercise its jurisdiction for a period not to exceed one year from the child's eighteenth birthday. The young adult must consent to continued jurisdiction of the court. The court may dismiss the case at any time after the child's eighteenth birthday for good cause.

History: 1978 Comp., § 32A-4-25.3, as enacted by Laws 2009, ch. 239, § 48.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 Laws 2009, ch. 239, § 48 effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-26. Parental responsibility.

A. The court shall order the parent to pay the reasonable costs of support and maintenance of the child that the parent is financially able to pay if a child is adjudicated to be neglected or abused and the court orders the child placed with an agency or individual other than the parent. The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment.

B. The court may enforce any of its orders issued pursuant to this section by use of its contempt power.

History: 1978 Comp., § 32A-4-26, enacted by Laws 1993, ch. 77, § 120.

32A-4-27. Intervention; persons permitted to intervene.

A. At any stage of an abuse or neglect proceeding, a person described in this subsection may be permitted to intervene as a party with a motion for affirmative relief:

(1) a foster parent whom the child has resided with for at least six months;

(2) a relative within the fifth degree of consanguinity with whom the child has resided;

(3) a stepparent with whom the child has resided; or

(4) a person who wishes to become the child's permanent guardian.

B. When determining whether a person described in Subsection A of this section should be permitted to intervene, the court shall consider:

(1) the person's rationale for the purposed intervention; and

(2) whether intervention is in the best interest of the child.

C. When the court determines that the child's best interest will be served as a result of intervention by a person described in Subsection A of this section, the court may permit intervention unless the party opposing intervention can demonstrate that a viable plan for reunification with the respondents is in progress and that intervention could impede the progress of the reunification plan.

D. The persons described in this subsection shall be permitted to intervene during any stage of an abuse or neglect proceeding:

(1) a parent of the child who is not named in the petition alleging abuse or neglect; and

(2) when the child is an Indian child, the child's Indian tribe.

E. The child's foster parent shall be permitted to intervene when:

(1) the foster parent desires to adopt the child;

(2) the child has resided with the foster parent for at least six months within the year prior to the termination of parental rights;

(3) a motion for termination of parental rights has been filed by a person other than the foster parent; and

(4) bonding between the child and the child's foster parent is alleged as a reason for terminating parental rights in the motion for termination of parental rights.

F. 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.

History: 1978 Comp., § 32A-4-27, enacted by Laws 1993, ch. 77, § 121; 1999, ch. 77, § 9.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, added Subsection F.

32A-4-28. Termination of parental rights; adoption decree.

A. In proceedings to terminate parental rights, the court shall give primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated.

B. The court shall terminate parental rights with respect to a child when:

(1) there has been an abandonment of the child by his parents;

(2) the child has been a neglected or abused child as defined in the Abuse and Neglect Act and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child. The court may find in some cases that efforts by the department or another agency are unnecessary, when:

(a) there is a clear showing that the efforts would be futile; or

(b) the parent has subjected the child to aggravated circumstances; or

(3) the child has been placed in the care of others, including care by other relatives, either by a court order or otherwise and the following conditions exist:

(a) the child has lived in the home of others for an extended period of time;

(b) the parent-child relationship has disintegrated;

(c) a psychological parent-child relationship has developed between the substitute family and the child;

(d) if the court deems the child of sufficient capacity to express a preference, the child no longer prefers to live with the natural parent;

(e) the substitute family desires to adopt the child; and

(f) a presumption of abandonment created by the conditions described in Subparagraphs (a) through (e) of this paragraph has not been rebutted.

C. A finding by the court that all of the conditions set forth in Subparagraphs (a) through (f) of Paragraph (3) of Subsection B of this section exist shall create a rebuttable presumption of abandonment.

D. The department shall not file a motion, and shall not join a motion filed by another party, to terminate parental rights when the sole factual basis for the motion is that a child's parent is incarcerated.

E. The termination of parental rights involving a child subject to the federal Indian Child Welfare Act of 1978 shall comply with the requirements of that act.

F. If the court finds that parental rights should be terminated; that the requirements for the adoption of a child have been satisfied; that the prospective adoptive parent is a party to the action; and that good cause exists to waive the filing of a separate petition for adoption, the court may proceed to grant adoption of the child, absent an appeal of the termination of parental rights. The court shall not waive any time requirements set forth in the Adoption Act [32A-5-1 NMSA 1978] unless the termination of parental rights occurred pursuant to the provisions of Paragraph (3) of Subsection B of this section. 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 set forth in the Adoption Act. Unless otherwise stipulated by all parties, an adoption decree shall take effect sixty days after the termination of parental rights, to allow the department sufficient time to provide counseling for the child and otherwise prepare the child for the adoption. The adoption decree shall conform to the requirements of the Adoption Act and shall have the same force and effect as other adoption decrees entered pursuant to that act. The court clerk shall assign an adoption case number to the adoption decree.

History: 1978 Comp., § 32A-4-28, enacted by Laws 1993, ch. 77, § 122; 1995, ch. 206, § 25; 1997, ch. 34, § 9; 1999, ch. 77, § 10; 2001, ch. 41, § 1; 2005, ch. 189, § 51.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1995 amendment, effective July 1, 1995, added Subsection B(3)(f), inserted "Subparagraphs (a) through (e) of" following "set forth in" in Subsection C, rewrote Subsection E, and made minor stylistic changes throughout the section.

The 1997 amendment, effective July 1, 1997, added "including the likelihood of the child being adopted if parental rights are terminated" at the end of Subsection A, inserted "or when a parent has caused great bodily harm to the child or great bodily harm or death to the child's sibling" near the end of Paragraph B(2), substituted "(a) through (f)" for "(a) through (e)" in Subsection C, and made minor stylistic changes in Subsections B and E.

The 1999 amendment, effective July 1, 1999, in Subsection B(2), added the Subparagraph (a) designation, deleted "or when a parent has caused great bodily harm to the child or great bodily harm or death to the child's sibling; or" from the end of Subparagraph (a), and added Subparagraphs (b) and (c).

The 2001 amendment, effective July 1, 2001, added Subsection D and renumbered the remaining subsections accordingly.

The 2005 amendment, effective June 17, 2005, deleted former Subsection B(2)(c), which provided that the court may find that efforts to assist the parent care for the child are unnecessary when the parental rights of the parent to a sibling of the child have been terminated involuntarily.

ANNOTATIONS

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-54 NMSA 1978 have been included in the annotations to this section.

Insufficient evidence for termination of parental rights. — Where CYFD claimed that the parental rights of the petitioner should be terminated, because the petitioner failed to understand the harm that had been done to the petitioner's children and because the petitioner failed to take responsibility for the causes that had prompted the department to take custody of the children; CYFD's claims were based on the facts that had initially caused CYFD to take the petitioner's children into custody; and since the time when CYFD had taken the children into custody, the petitioner had successfully addressed the petitioner's alcohol and drug dependency, the petitioner regularly attended AA meetings, the petitioner made some, but not all, required child support payments, and the petitioner complied with all other requirements of CYFD's treatment plan; the petitioner made positive behavioral changes and learned skills to manage emotional moods; the petitioner recognized that the petitioner had made some poor choices regarding the petitioner's personal life that had affected the children; and the petitioner was openly affectionate with the children and the children were attached to the petitioner, the evidence did not support a determination that the causes and conditions of abuse and neglect were unlikely to change in the foreseeable future or that the petitioner had presumptively abandoned the children. State of N.M. ex rel. CYFD v. Lance K., 2009-NMCA-054, 146 N.M. 286, 209 P.3d 778.

Best-interests-of-the-child standard. — The statutory mandate to give primary consideration to the best interests of the child in a proceeding to terminate parental rights does not deny the fundamental interests of the parents in the care, custody and control of the child. State of N.M. ex rel. CYFD v. John R., 2009-NMCA-025, 145 N.M. 636, 203 P.3d 167.

Abandonment. — Where the children, youth and families department arranged a visit between the parent and the child, and the parent could not visit at the appointed time because the parent was incarcerated in Colorado; the child moved to Georgia to live with an aunt; when the parent was released from incarceration, the CYFD attempted to set up a home visit with the parent in Colorado, but the parent refused because the parent was traveling to Georgia; the CYFD attempted to set up visits between the child and the parent in Georgia, but could not reach the parent and the parent never

attempted to reach the CYFD; when the parent returned to Colorado, the CYFD arranged for calls to the child at the aunt's home and when the parent complained that the aunt wasn't answering the calls and when the parent's comments to the child became inappropriate, the CYFD set up standing calls to the child at the child's therapists office; after the parent failed twice to reach the child at the therapist's office, the parent stopped trying and had no contact with the child for five months, the evidence showed that the parent consciously disregarded the parent's obligations to the child and as a result, the parent-child relationship disintegrated and the trial court properly terminated the parent's parental rights based on abandonment. State of N.M. ex rel. CYFD v. Benjamin O., 2009-NMCA-039, 146 N.M. 60, 206 P.3d 171.

Evidence supported presumptive abandonment. — The evidence did not support a finding that the causes and conditions of the father's neglect were unlikely to change in the foreseeable future where after the father was released from prison, he participated in all programs that CYFD recommended; he made substantial changes in this life to ensure the return of his children; and he held a stable job, established a support system, ceased to use drugs, and stayed clear of his past gang life, but the evidence supported the district court's termination of the father's parental rights based on the father's presumptive abandonment of the children where a parent-child bond with one child had disintegrated and had never existed with the other child; the children lived in the home of foster parents for an extended time and developed a parent-child relationship with the foster parents; the father had limited contact with the children during his incarceration; and the father made minimal effort to have the children placed with relatives. State of N.M. ex rel. CYFD v. Hector C, 2008-NMCA-079, 144 N.M. 222, 185 P.3d 1072, cert. denied, 2008-NMCERT-004.

In abuse and neglect or termination proceedings, translations of court documents and interpreters do not have to be provided as a matter of law to non-English speaking respondents. State of N.M. ex rel., CYFD v. William M., 2007-NMCA-055, 141 N.M. 765, 161 P.3d 262, cert. denied, 2007-NMCERT-005.

Sufficient procedural protections of non-English speaking parent. — Father, whose primary language was Spanish, was afforded adequate procedural protections to ensure that he had adequate notice and an opportunity to be heard, where the father was represented by a court-appointed attorney who spoke Spanish and could discuss the case with him; the father appeared by telephone at the adjudicatory hearing and in person at all other in-court proceedings with the assistance of a certified interpreter; CYFD used a Spanish-speaking social worker on occasion to assist in communicating with the father; and the father was apprized of the critical aspects of the case throughout the proceedings by his counsel, the department, and the court. State of N.M. ex rel., CYFD v. William M., 2007-NMCA-055, 141 N.M. 765, 161 P.3d 262, cert. denied, 2007-NMCERT-005.

Substantial evidence. — Evidence which established that the father failed to be involved in the children's lives prior to his incarceration; his failure to provide a safe and stable home by dealing in drugs in their home; his decision to leave the children's home

when they were very young; his decision to violate the terms of his probation resulting in his incarceration; his failure to provide for the children or to protect them from the mother's neglect both prior to and during his incarceration; his knowledge that the mother used drugs and had a history of neglecting her children; his failure to contact the children while incarcerated; the termination of the father's parental rights to another child under similar circumstances; the father's parole to Florida; CYFD continued to offer reunification services to the father while he was incarcerated and after he was paroled, was substantial evidence of neglect, that the father was unlikely to properly parent the children in the future, that the department made reasonable efforts to assist the father, that the father abandoned the children and that aggravated circumstance existed that made further efforts to assist the father unnecessary. State of N.M. ex rel., CYFD v. William M., 2007-NMCA-055, 141 N.M. 765, 161 P.3d 262, cert. denied, 2007-NMCERT-005.

Procedure after reversal of abuse and neglect adjudication. — After an adjudication of abuse and neglect is reversed during termination of parental rights proceedings, the district court, on remand, retains jurisdiction to determine whether the parent prevailing on appeal should regain custody of the child. The court and CYFD must put a transition plan in place to attempt to return the child to the parent. CYFD may seek a termination of parental rights by filing new or current allegations of abuse, neglect or abandonment. To prevail on new allegations, the department must demonstrate by clear and convincing evidence that the prior reversed adjudications and CYFD's own actions did not contribute to the new or current allegations of abuse or neglect against the parent. The court must determine whether the new allegations are supported by clear and convincing evidence. The court must make findings with respect to whether the new allegations are actually a result of the prior adjudication against the parent or whether the allegations actually constitute new incidences of abuse or neglect. If the court does not find clear and convincing evidence of abuse or neglect based on the new allegations, the court must expedite the transition of the child to the parent, putting in place any services or plans that may assist in the transition. If the court determines that there is clear and convincing evidence of new abuse or neglect by the parent, the court must approve a treatment plan for the parent or find that further efforts by CYFD would be futile. If a treatment plan is approved, the court must review compliance with the plan as provided in the Abuse and Neglect Act. If CYFD establishes that further efforts to assist the parent would be futile, then they may seek termination of parental rights. State of N.M. ex rel., CYFD v. Benjamin O., 2007-NMCA-070, 141 N.M. 692, 160 P.3d 601.

Constitutionality. — A similar statute was not constitutionally defective by failing to provide for a defense of mental illness. State ex rel. Human Servs. Dep't v. Cynthia Y., 106 N.M. 406, 744 P.2d 181 (Ct. App. 1987).

A similar statute was not vague or ambiguous. In re Samantha D., 106 N.M. 184, 740 P.2d 1168 (Ct. App. 1987).

No right to jury trial. — There is no right to a trial by jury in termination of parental rights proceedings provided by either the Children's Code or the state constitution. State ex rel. Children, Youth & Families Dep't v. T.J., 1997-NMCA-021, 123 N.M. 99, 934 P.2d 293.

Due process rights of parents generally. — Because the right to raise one's child is a fundamental right protected by the Fourteenth Amendment to the United States Constitution, termination proceedings must be conducted in a constitutional manner. As such, a parent's legal relationship with his or her child cannot be severed without due process of law, which requires that termination proceedings be conducted with scrupulous fairness to the parent. State ex rel. Children, Youth and Families Dep't v. Mafin M., 2003-NMSC-015, 133 N.M. 827, 70 P.3d 1266.

Due process rights of incarcerated parent in termination hearing. — 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 a hearing on a petition to terminate parental rights is entitled to procedural due process, including the right to review and challenge the evidence presented against him and to present evidence on his behalf. State ex rel. Children, Youth & Families Dep't v. Ruth Anne E., 1999-NMCA-035, 126 N.M. 670, 974 P.2d 164.

Incarcerated father's due process rights were not violated where he was given the opportunity to participate in a termination hearing via telephone, despite his insistence that he be physically present in the courtroom. State ex rel. Children, Youth & Families Dep't v. Christopher L., 2003-NMCA-068, 133 N.M. 653, 68 P.3d 199.

Effect of Child Custody Jurisdiction Act. — The former New Mexico Child Custody Jurisdiction Act (now see 40-10A-101 to 40-10A-403 NMSA 1978) does not supersede or invalidate a proceeding to terminate parental rights. Laurie R. v. New Mexico Human Servs. Dep't, 107 N.M. 529, 760 P.2d 1295 (Ct. App. 1988).

Right of custodians to termination proceedings. — That the nonparent custodians of a child were "acting as parents" pursuant to 40-10-3H NMSA 1978 because they had physical custody of the child and claimed a right to custody did not have applicability in a neglect or abuse case so as to entitle the custodians to the protections afforded in a termination of parent rights case. In re Agnes P., 110 N.M. 768, 800 P.2d 202 (Ct. App. 1990).

Parent's right to raise child to be considered. — While a court must give primary consideration to the physical, mental and emotional welfare and needs of the child, this cannot be done to the utter exclusion of consideration of the rights of a parent to raise her children. State ex rel. Department of Human Servs. v. Natural Mother, 96 N.M. 677, 634 P.2d 699 (Ct. App. 1981).

Relative merits of parental environments not considered. — The process of making a determination of termination of parental rights does not include a comparison of the

relative merits of the environments provided by the foster parents and by the natural parents. The only consideration is whether the environment provided for the children by the parents is and will be adequate. State ex rel. Department of Human Servs. v. Natural Mother, 96 N.M. 677, 634 P.2d 699 (Ct. App. 1981).

The fact that a child might be better off in a different environment is not a basis for termination of parental rights. State ex rel. Department of Human Servs. v. Williams, 108 N.M. 332, 772 P.2d 366 (Ct. App. 1989).

Mere comparative analysis of prospective homes is improper in proceedings seeking to terminate parental rights. In re Doe, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982).

Futile efforts to preserve family not required. — When it becomes clear that preserving the family is not compatible with protecting the child, further efforts at preservation are not required. Further efforts to assist the parents are not required when there is a clear showing that they would be futile. Helen F. v. State ex rel. Human Servs. Dep't, 109 N.M. 472, 786 P.2d 699 (Ct. App. 1990), overruled on other grounds, Roth v. Bookert, 117 N.M. 31, 868 P.2d 1256 (Ct. App. 1993).

"Reasonable efforts". — Sections 32A-4-2C, 32A-4-22C, and 32A-4-28B(2) NMSA 1978 are constitutional facially and as applied to a mother, whose parental rights were terminated without the state making reasonable efforts toward family reunification, where the mother had previously had parental rights terminated as to another child and no progress was evident in the mother's efforts to kick a 4-year drug abuse problem. State ex rel. Children, Youth & Families Dep't v. Amy B., 2003-NMCA-017, 133 N.M. 136, 61 P.3d 845.

Abandonment by father does not mandate termination. — When a child has been abandoned by a father, i.e., when the parental relationship between father and child is nonexistent, it is not mandatory that the court terminate parental rights. The decision rests within the judicial discretion of the court. Wasson v. Wasson, 92 N.M. 162, 584 P.2d 713 (Ct. App. 1978).

Abandonment during incarceration. — Whether "abandonment" has occurred during incarceration is a question of fact to be determined on a case by case basis. Not every act of a parent which results in incarceration, nor every criminal act perpetrated between parents, can be deemed to be abandonment as a matter of law. In re Doe, 99 N.M. 278, 657 P.2d 134 (Ct. App. 1982).

Abandonment rests upon incarceration coupled with other factors such as parental neglect, lack of affection shown toward the child, failure to contact the child, financially support the child if able to do so, as well as disregard for the general welfare of the child. In re Doe, 99 N.M. 278, 657 P.2d 134 (Ct. App. 1982).

Applicability of Americans with Disabilities Act. — Even though the federal Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) might apply in the context of abandonment under this section if, because of a violation thereof, the parent lacked responsibility for destruction of the parent-child relationship, there was no violation in this case since the mother refused to cooperate or participate voluntarily in treatment plans. State ex rel. Children, Youth & Families Dep't v. John D., 1997-NMCA-019, 123 N.M. 114, 934 P.2d 308.

Abandonment found. — Termination of a mother's parental rights was proper since the evidence established a rebuttable presumption of abandonment which the mother failed to overcome. State ex rel. Children, Youth & Families Dep't v. John D., 1997-NMCA-019, 123 N.M. 114, 934 P.2d 308.

Act of selling children constitutes abandonment of them as a matter of law. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

When father, in child's presence, murders child's mother, the district court may terminate the father's parental rights. In re Doe, 99 N.M. 278, 657 P.2d 134 (Ct. App. 1982).

Adequacy of notice when parent represented by counsel. — The human services department was required to serve a parent's attorney with notice of the department's action to terminate parental rights, when the attorney was representing him in a separate neglect action before the children's court. Ronald v. State ex rel. Human Servs. Dep't, 110 N.M. 454, 797 P.2d 243 (1990).

Assistance of counsel. — The appointment of one attorney to represent both the mother and father in a proceeding for termination of parental rights may create a conflict of interest for the attorney. State ex rel. Children, Youth & Families Dep't v. Tammy S., 1999-NMCA-009, 126 N.M. 664, 974 P.2d 158.

Efforts to assist parents. — Because parenting is a fundamental liberty interest, reasonable efforts must be made by the department to assist the parent before parental rights may be terminated. In re Elizabeth H., 2002-NMCA-061, 132 N.M. 299, 47 P.3d 859, cert. denied, 132 N.M. 397, 49 P.3d 76 (2002).

Reasonable efforts by the department to assist a parent vary with a number of factors, including the level of cooperation demonstrated by the parent and the recalcitrance of the problems that render the parent unable to provide adequate parenting. In re Elizabeth H., 2002-NMCA-061, 132 N.M. 299, 47 P.3d 859, cert. denied, 132 N.M. 397, 49 P.3d 76 (2002).

Case law. — The provisions of Section 32A-4-28B NMSA 1978 which permit the court to relieve the state of the burden of engaging in reasonable efforts to assist the parent in adjusting the conditions that render the parent unable to properly care for the child and relieve the state of the burden of proving that such efforts would not result in a change

of the conditions and causes of the neglect or abuse are not unconstitutional as denial of a parent's right to due process as a termination of parental rights hearing. State ex rel. Children, Youth and Families Department v. Amy B, 2003-NMCA-017, 133 N.M. 136, 61 P.3d 845 (Ct. App. 2003).

Department not required to assist parent where abandonment's effects are unremediable. — Where abandonment by a father is proven, and the results of the father's past conduct are not remediable, the department is not required to show that it has made efforts to assist the father in remedying the problem. State ex rel. Department of Human Servs. v. Peterson, 103 N.M. 617, 711 P.2d 894 (1985).

Notice required that parent's relation with partner is a condition of abuse and neglect. — When the behavior of a parent's partner is such that it is difficult for a person of ordinary intelligence and sensibilities to realize that the partner's self-centeredness or other characteristic is harming the child, the department must put the parent on notice that the parent's relation with the partner is a condition and cause of the abuse and neglect of the child and that a continued relation with the partner is grounds for termination of the parent's parental rights in order to satisfy the department's duty to engage in reasonable efforts to assist the parent in adjusting the conditions that render the parent unable to properly care for the child. State ex rel. CYFD v. Joseph M., 2006-NMCA-029, 139 N.M. 137, 130 P.3d 198.

Termination of parental rights because of neglect or abuse does not require a prior adjudication of neglect. State ex rel. Department of Human Servs. v. Ousley, 102 N.M. 656, 699 P.2d 129 (Ct. App. 1985).

Summary judgment improper. — In termination proceeding, mother's contentions as to alleged constructive abandonment, her fitness as a parent, and the state's efforts to assist her in complying with rehabilitation plan were material factual issues which were sufficient to defeat state's summary judgment motion. State ex rel. Children, Youth & Families Dep't v. Erika M., 1999-NMCA-036, 126 N.M. 760, 975 P.2d 373.

Plea of nolo contendere to abuse and neglect charge. — The trial court's taking judicial notice of a mother's nolo contendere plea in a prior abuse and neglect case did not deprive the mother of due process since the court heard testimony and made its findings based on the evidence presented, rather than simply relying on the prior adjudication. State v. Eventyr J., 120 N.M. 463, 902 P.2d 1066 (Ct. App. 1995).

"Neglect" by noncustodial parent. — Termination of parental rights by reason of "neglect" requires a showing by clear and convincing evidence of culpability on the part of the parent through intentional or negligent disregard of the child's well-being and proper needs. If the parents are separated and living in different communities, in order to hold a noncustodial parent responsible for the neglect of the parent having actual physical custody of the child, it must be established that the noncustodial parent knew or should have known of the condition of the child, that the child was without proper care by the custodial parent because of the faults or habits of that parent, and when

able to do so, to provide that care. Roth v. Bookert, 117 N.M. 31, 868 P.2d 1256 (Ct. App. 1993), rev'd in part on other grounds, 119 N.M. 638, 894 P.2d 994 (1995), cert. denied, 516 U.S. 860, 116 S. Ct. 168, 133 L. Ed. 2d 110 (1995).

Disintegration of parent-child relationship. — Substantial evidence beyond reasonable doubt supported court's termination of parental rights due to disintegration of parent-child relationship. Laurie R. v. New Mexico Human Servs. Dep't, 107 N.M. 529, 760 P.2d 1295 (Ct. App. 1988).

Department may not use psychologists' testimony where it sought examination. — If the human services department induces a person to be examined and counseled by psychologists, something she would not do but for such inducement, the department is estopped by such conduct to use the psychologists' testimony. State ex rel. Human Servs. Dep't v. Levario, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

State must prove one of specific statutory grounds. — In order to terminate a parent's rights, the state must plead and prove one of the specific grounds for termination set out in the statute. State ex rel. Department of Human Servs. v. Williams, 108 N.M. 332, 772 P.2d 366 (Ct. App. 1989).

Grounds for termination to be shown by clear and convincing evidence. — In proceedings seeking the termination of parental rights, the grounds for any attempted termination must be proven by clear and convincing evidence. The clear and convincing evidence standard requires proof stronger than a mere "preponderance" and yet something less than "beyond a reasonable doubt." In re Doe, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982).

Quantum of proof required concerning evidence as to parents' unfitness must be such as to clearly and convincingly show parents' unfitness. A mere preponderance of the evidence is insufficient. Huey v. Lente, 85 N.M. 597, 514 P.2d 1093 (1973).

Because of the fundamental rights involved in a termination proceeding, the burden of proof of clear and convincing evidence is something stronger than a mere preponderance and yet something less than beyond a reasonable doubt. State ex rel. Department of Human Servs. v. Natural Mother, 96 N.M. 677, 634 P.2d 699 (Ct. App. 1981).

The findings to support termination must be supported by clear and convincing evidence. State ex rel. Department of Human Servs. v. Natural Mother, 96 N.M. 677, 634 P.2d 699 (Ct. App. 1981).

A trial court's decision in termination of parental rights cases will be upheld if its findings are supported by clear and convincing evidence and if it applied the proper rule of law. State ex rel. Department of Human Servs. v. Minjares, 98 N.M. 198, 647 P.2d 400 (1982).

Evidence that the mother had continually neglected her children by failing to complete and progress in substance abuse treatment and by continuing to place herself in situations involving domestic violence and suspected criminal activity was sufficient to support a finding of neglect. State ex rel. Children, Youth & Families Dep't v. Vanessa C., 2000-NMCA-025, 128 N.M. 701, 997 P.2d 833, cert. denied, 128 N.M. 690, 997 P.2d 822 (2000).

Separate finding of parental unfitness not required for termination. — Parental unfitness is inherent in a finding by the court of any of the statutory conditions: abandonment, neglect or abuse; and no separate showing or finding by the court with reference to unfitness is necessary. Roth v. Bookert, 119 N.M. 638, 894 P.2d 994 (1995), cert. denied, 516 U.S. 860, 116 S. Ct. 168, 133 L. Ed. 2d 110 (1995).

Clear and convincing evidence necessary to support abandonment. — In proceedings seeking to terminate parental rights on grounds of abandonment, the court must be satisfied, by clear and convincing evidence, that the best interests of the child will be served by severing the parent-child relationship. In re Samantha D., 106 N.M. 184, 740 P.2d 1168 (Ct. App. 1987).

Proof of abandonment. — To prove abandonment (1) parental conduct, evidencing a conscious disregard of obligations owed to the child, and (2) that such conduct led to the disintegration of the parent-child relationship must be established; evidence of the disintegration of the parent-child relationship is of no consequence if not caused by the parent's conduct. Roth v. Bookert, 119 N.M. 638, 894 P.2d 994 (1995), cert. denied, 516 U.S. 860, 116 S. Ct. 168, 133 L. Ed. 2d 110 (1995).

The presumption of abandonment imposes on the parent against whom it is directed the burden of going forward to rebut or meet the presumption; however, it does not shift the burden of proof which remains on the person seeking termination of parental rights. Roth v. Bookert, 119 N.M. 638, 894 P.2d 994 (1995), cert. denied, 516 U.S. 860, 116 S. Ct. 168, 133 L. Ed. 2d 110 (1995).

The presumption of abandonment that arrives through the statutory factors is completely rebutted by showing that a parent lacks responsibility for the destruction of the parent-child relationship. Roth v. Bookert, 119 N.M. 638, 894 P.2d 994 (1995), cert. denied, 516 U.S. 860, 116 S. Ct. 168, 133 L. Ed. 2d 110 (1995).

Intent to abandon. — A parent need not have a subjective intent to abandon the child for abandonment to have occurred; rather, abandonment is defined by the outward behavior of the parent as perceived and interpreted by others and there is no inquiry into the parent's concealed and unexpressed intentions. Roth v. Bookert, 119 N.M. 638, 894 P.2d 994 (1995), cert. denied, 516 U.S. 860, 116 S. Ct. 168, 133 L. Ed. 2d 110 (1995).

Authority of court after mother's consent declared invalid. — Since the mother's consent to adoption has been declared invalid in keeping with the best interests of the

child, the trial court retains the power to determine custody in the absence of a legally valid consent, and it is within the authority of the trial court to continue the child in the custody of the couple seeking to adopt her. Although they lacked standing to petition the court for adoption, they were not left without remedy, since they did have standing to seek relief. In re Samantha D., 106 N.M. 184, 740 P.2d 1168 (Ct. App. 1987).

Evidence of conditions and causes of neglect and abuse. — Evidence sufficient to support finding that conditions and causes of neglect and abuse were unlikely to change. State ex rel. Human Servs. Dep't v. Wayne R.N., 107 N.M. 341, 757 P.2d 1333 (Ct. App. 1988).

Even though incarceration alone is not an appropriate reason to terminate parental rights, where the father was convicted of the murder of the mother, his subsequent long-term incarceration was sufficient to establish that the child was neglected, and that termination of his parental rights was justified. State ex rel. Children, Youth & Families Dep't v. Joe R., 1997-NMSC-038, 123 N.M. 711, 945 P.2d 76.

Evidence held sufficient to terminate parental rights. — Trial court's findings for termination of the mother's parental rights were supported by clear and convincing evidence, since the human services department made reasonable efforts to assist her in improving her ability to care for her children, which efforts proved ultimately futile. State ex rel. Human Serv. Dep't v. Dennis S., 108 N.M. 486, 775 P.2d 252 (Ct. App. 1989).

Termination of a mother's parental rights to four children was justified by clear and convincing evidence that the children were abused and neglected, the conditions and causes of the abuse and neglect were unlikely to change in the foreseeable future, and the Children, Youth and Families Department made reasonable efforts to assist the mother in adjusting the conditions which rendered her unable to properly care for the children. State v. Eventyr J., 120 N.M. 463, 902 P.2d 1066 (Ct. App. 1995).

Where department made minimal but statutorily sufficient efforts to assist mother, but there were no signs that the parent-child relationship would likely change for the better in the foreseeable future, parental rights were rightfully terminated. In re Elizabeth H., 2002-NMCA-061, 132 N.M. 299, 47 P.3d 859, cert. denied, N.M. , P.3d (2002).

Injury to child not condition precedent. — While a court may not speculate as to the future care of a child, the primary consideration is the best interests and welfare of the child, and the court should not be forced to refrain from taking action until each child suffers an injury. It is not necessary to wait until a child has been injured, since knowingly, intentionally, or negligently placing a child in danger constitutes abuse and is a ground for terminating parental rights. State ex rel. Department of Human Servs. v. Tommy A.M., 105 N.M. 664, 735 P.2d 1170 (Ct. App. 1987).

Components of "unfit" mother not required findings by trial court. — Since the ultimate fact is that a mother is unfit, the trial court is not required to make findings as to the components of "unfit" because those components are not ultimate facts. State

Health & Social Servs. Dep't v. Smith, 93 N.M. 348, 600 P.2d 294 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Appellate issue to determine substantial evidence of components of "unfit". — Having found the ultimate fact that the mother is unfit, the appellate issue does not involve the sufficiency of findings as to the components of "unfit"; rather, the appellate issue is whether there was substantial evidence of each of the components so that the finding of the ultimate fact was supported by the evidence. State Health & Social Servs. Dep't v. Smith, 93 N.M. 348, 600 P.2d 294 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Effect of abuse of sibling. — While abuse of a sibling may be insufficient to justify terminating parental rights, it is evidence that should be considered in determining whether a child has been placed in danger. State ex rel. Department of Human Servs. v. Tommy A.M., 105 N.M. 664, 735 P.2d 1170 (Ct. App. 1987).

Trial court was justified in terminating parental rights to a four-year old child who had been adjudicated as a neglected child after being diagnosed as having nonorganic failure to thrive, where there was clear and convincing evidence to support the court's finding that the conditions and causes of the neglect were unlikely to change in the foreseeable future. State ex rel. Department of Human Servs. v. Williams, 108 N.M. 332, 772 P.2d 366 (Ct. App. 1989).

Law reviews. — For note, "Family Law - A Limitation on Grandparental Rights in New Mexico: Christian Placement Service v. Gordon," see 17 N.M.L. Rev. 207 (1987).

For article, "Incorporating the Law of Criminal Procedure in Termination of Parental Rights Cases: Giving Children a Voice Through *Mathews v. Eldridge*," see 32 N.M.L. Rev. 143 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 A.L.R.4th 1203.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 A.L.R.4th 1170.

Validity and construction of surrogate parenting agreement, 77 A.L.R.4th 70.

Parent's mental deficiency as factor in termination of parental rights - modern status, 1 A.L.R.5th 469.

Parent's use of drugs as factor in award of custody of children, visitation rights, or termination of parental rights, 20 A.L.R.5th 534.

Smoking as factor in child custody and visitation cases, 36 A.L.R.5th 377.

Sufficiency of evidence to establish parent's knowledge or allowance of child's sexual abuse by another under statute permitting termination of parental rights for "allowing" or "knowingly allowing" such abuse to occur, 53 A.L.R.5th 499.

Parents' mental illness or mental deficiency as ground for termination of parental rights – constitutional issues, 110 A.L.R.5th 579.

32A-4-29. Termination procedure.

A. A motion to terminate parental rights may be filed at any stage of the abuse or neglect proceeding by a party to the proceeding.

B. The motion for termination of parental rights shall set forth:

(1) the date, place of birth and marital status of the child, if known;

(2) the grounds for termination and the facts and circumstances supporting the grounds for termination;

(3) the names and addresses of the persons or authorized agency or agency officer to whom legal custody might be transferred;

(4) whether the child resides or has resided with a foster parent who desires to adopt this child;

(5) whether the motion is in contemplation of adoption;

(6) the relationship or legitimate interest of the moving party to the child; and

(7) whether the child is subject to the federal Indian Child Welfare Act of 1978 and, if so:

(a) the tribal affiliations of the child's parents;

(b) the specific actions taken by the moving party 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 shall be attached as exhibits to the petition; and

(c) what specific efforts were made to comply with the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the appropriate Indian tribes.

C. Notice of the filing of the motion, accompanied by a copy of the motion, shall be served by the moving party on all 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 six months within the previous twelve months, the custodian of the child, any person appointed to represent any party and any other person the court orders. Service shall be in accordance with the Children's Court Rules [10-101 NMRA 1978] for the service of motions, except that foster parents and attorneys of record in this proceeding shall be served by certified mail. The notice shall state specifically that the person served shall file a written response to the motion within twenty days if the person intends to contest the termination. In any case involving a child subject to the federal Indian Child Welfare Act of 1978, notice shall also be sent by certified mail to the tribes of the child's parents and upon any "Indian custodian" as that term is defined in 25 U.S.C. Section 1903(6). Further notice shall not be required on a parent who has been provided notice previously pursuant to Section 32A-4-17 NMSA 1978 and who failed to make an appearance.

D. When a motion to terminate parental rights is filed, the moving party shall request a hearing on the motion. The hearing date shall be at least thirty days, but no more than sixty days, after service is effected upon the parties entitled to service under this section. The moving party shall 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 shall be made a part of the court record.

E. In any action for the termination of parental rights brought by a party other than the department and involving a child in the legal custody of the department, the department may:

(1) litigate a motion for the termination of parental rights that was initially filed by another party; or

(2) move that the motion for the termination of parental rights be found premature and denied.

F. When a motion to terminate parental rights is filed, the department shall perform concurrent planning.

G. When a child has been in foster care for not less than fifteen of the previous twenty-two months, the department shall file a motion to terminate parental rights, unless:

(1) a parent has made substantial progress toward eliminating the problem that caused the child's placement in foster care; it is likely that the child will be able to safely return to the parent's home within three months; and the child's return to the parent's home will be in the child's best interests;

(2) the child has a close and positive relationship with a parent and a permanent plan that does not include termination of parental rights will provide the most secure and appropriate placement for the child;

(3) the child is fourteen years of age or older, is firmly opposed to termination of parental rights and is likely to disrupt an attempt to place the child with an adoptive family;

(4) a parent is terminally ill, but in remission, and does not want parental rights to be 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 such a case, the court shall reevaluate the status of the child every ninety days unless there is a final court determination that the child cannot be placed in a family setting;

(6) grounds do not exist for termination of parental rights;

(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 termination of parental rights is not in the child's best interest.

H. For purposes of this section, a child shall be 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 sixty days after the date on which the child was removed from the home.

I. The grounds for any attempted termination shall be proved by clear and convincing evidence. In any proceeding involving a child subject to the federal Indian Child Welfare Act of 1978, the grounds for any attempted termination shall be proved beyond a reasonable doubt and shall meet the requirements set forth in 25 U.S.C. Section 1912(f).

J. When the court terminates parental rights, it shall appoint a custodian for the child and fix responsibility for the child's support.

K. In any termination proceeding involving a child subject to the federal Indian Child Welfare Act of 1978, the court shall in any termination order make specific findings that the requirements of that act have been met.

L. A judgment of the court terminating parental rights divests the parent of all legal rights and privileges and dispenses with both the necessity for the consent to or receipt of notice of any subsequent adoption proceeding concerning the child. A judgment of the court terminating parental rights shall not affect the child's rights of inheritance from and through the child's biological parents.

M. When the court denies a motion to terminate parental rights, the court shall issue appropriate orders immediately. The court shall direct the parties to file a stipulated order and interim plan or a request for hearing within thirty days of the date of the hearing denying the termination of parental rights.

History: 1978 Comp., § 32A-4-29, enacted by Laws 1993, ch. 77, § 123; 1997, ch. 34, § 10; 1999, ch. 77, § 11; 2001, ch. 315, § 1; 2003, ch. 108, § 1; 2005, ch. 189, § 52; 2009, ch. 239, § 49.

ANNOTATIONS

Cross references. — For termination procedures in adoption cases, *see* 32A-5-16 NMSA 1978.

For termination of parental rights, *see* Rule 10-330 NMRA.

For service of motions, *see* Rule 10-105 NMRA.

For motion to terminate parental rights, *see* Rule 10-470 NMRA.

For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1997 amendment, effective July 1, 1997, added "unless the court determines that the parent has not established a protected liberty interest in his relationship with the child" at the end of Subsection C; in Subsection D, in the first sentence, substituted "all other parties" for "the parents of the child, any parent who has not previously been made a party to the proceeding", deleted "the department," following "custodian of the child," and deleted "including the child's guardian ad litem,", in the second sentence, substituted "service of motions" for "service of process", in the fourth sentence, substituted "sent by certified mail to" for "served upon" and added the last sentence; inserted "but no more than sixty days," in the second sentence in Subsection H; and made minor stylistic changes in Subparagraph B(7)(b) and in Subsection D.

The 1999 amendment, effective July 1, 1999, in Subsection D, substituted "the foster parent, preadoptive parent or relative providing care for the child" for "foster parents" in the first sentence and updated a statutory reference in the last sentence.

The 2001 amendment, effective July 1, 2001, inserted Subsections J and K and redesignated subsequent subsections.

The 2003 amendment, effective June 20, 2003, substituted "foster care" for "the custody of the department" preceding "for not less" in Subsection K; added present Subsection L and redesignated former Subsections L to O as present Subsections M to P.

The 2005 amendment, effective June 17, 2005, deleted former Subsection A(1) through (3), which listed the persons and entities who could initiate a termination proceeding and provides that a motion to terminate parental rights may be made by a party to the proceeding; deleted the former requirement in Subsection B that a motion be signed, verified and filed with the court; deleted former Subsection C, which provided that a parent who has not been a party shall be named a party in the motion and shall be become a party unless the parent has not established a protected liberty interest with respect to the child; in Subsection C, provided that service shall be in accordance with the Children's Court Rules; deleted former Subsection E, which provided that if the identity or whereabouts of a person are unknown, the court could permit service by publication; deleted former Subsection F, which provided that after a motion is filed, the parent shall be advised of the right to counsel and that counsel shall be appointed upon request for any parent who cannot afford counsel or the interests of justice require the appointment; deleted former Subsection G, which provided that the court shall ensure that a guardian ad litem represents the child in all proceedings for termination of parental rights; in Subsection E, changed "custody" to "legal custody"; and in Subsection G(3), changed "thirteen years of age" to "fourteen years of age".

The 2009 amendment, effective July 1, 2009, in Subsection D, added the third and fourth sentences; added Paragraph (9) of Subsection G; and added Subsection M.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-55 NMSA 1978 have been included in the annotations to this section.

Judicial notice of case file. — If the district court feels it necessary to take judicial notice of all or part of a case file in a termination of parental rights proceeding, the court should state what information, specifically, is being judicially noticed and how the court intends to use the judicially noticed information. State of N.M. ex rel. CYFD v. Brandy S., 2007-NMCA-135, 142 N.M. 705, 168 P.3d 1129.

Required filing of termination motion. — Barring exceptional circumstances, the Abuse and Neglect Act requires a termination motion to be filed when the child has been in foster care for 15 out of 22 months. State ex rel. Children, Youth & Families Dep't. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

Timing of hearing. — Failure to hold the termination of parental rights hearing within 60 days, as required by Subsection H, does not mandate a dismissal of the motion to terminate parental rights. State ex rel. Children, Youth & Families Dep't v. Anne McD., 2000-NMCA-020, 128 N.M. 618, 995 P.2d 1060.

No right to jury trial. — There is no right to a trial by jury in termination of parental rights proceedings provided by either the Children's Code or the state constitution. State ex rel. Children, Youth & Families Dep't v. T.J., 1997-NMCA-021, 123 N.M. 99, 934 P.2d 293.

Due process rights of incarcerated parent in termination hearing. — 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 a hearing on a petition to terminate parental rights is entitled to procedural due process, including the right to review and challenge the evidence presented against him and to present evidence on his behalf. State ex rel. Children, Youth & Families Dep't v. Ruth Anne E., 1999-NMCA-035, 126 N.M. 670, 974 P.2d 164.

Waiver of objection to venue. — Mother, who appealed district court's judgment terminating her parental rights, waived her claim of improper venue, where she failed to raise her venue-statute objection at a time when any error could have been cured promptly. Helen F. v. State ex rel. Human Servs. Dep't, 109 N.M. 472, 786 P.2d 699 (Ct. App. 1990), overruled on other grounds, Roth v. Bookert, 117 N.M. 31, 868 P.2d 1256 (Ct. App. 1993).

Lack of notice of issue of continuation of parental rights violates mother's due process rights. — Since the issue of termination of parental rights was not raised in the pleadings, nor properly tried and was mentioned for the first time after closing arguments, when counsel for the father made an oral motion that the parental rights of the mother be terminated, the procedural due process rights of the mother were violated as she was never given notice that the continuation of her parental rights was at issue, she did not have a full opportunity to prepare her case and, consequently, she was not given a full and fair hearing. Thatcher v. Arnall, 94 N.M. 306, 610 P.2d 193 (1980).

Sufficiency of notice. — Although the summons served upon a father in a termination of parental rights action did not meet the requirements in the statute, there was no showing that the father was prejudiced by the various errors in the notice. Ronald A. v. State ex rel. Human Servs. Dep't, 110 N.M. 454, 794 P.2d 371 (Ct. App. 1990).

Prior proceeding concerned with the fact of neglect is not a jurisdictional bar to a later, separate termination proceeding. State ex rel. Human Servs. Dep't v. Levario, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Since neglect proceedings do not result in final judgment on merits, the department is not barred under the "judgments" rule from later bringing termination

proceedings. State ex rel. Human Servs. Dep't v. Levario, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Verification of pleadings. — Although the human services department failed to obtain the court's permission prior to filing its amended petitions to terminate parental rights, the court granted permission to file the final amended petition and verification prior to the commencement of trial. Allowance of this amendment rectified any insufficiency in the earlier pleadings not being verified. The court, therefore, was not deprived of subject matter jurisdiction. Laurie R. v. New Mexico Human Servs. Dep't, 107 N.M. 529, 760 P.2d 1295 (Ct. App. 1988).

Authority of court after mother's consent declared invalid. — Since the mother's consent to adoption has been declared invalid in keeping with the best interests of the child, the trial court retains the power to determine custody in the absence of a legally valid consent, and it is within the authority of the trial court to continue the child in the custody of the couple seeking to adopt her. Although they lacked standing to petition the court for adoption, they were not left without remedy, since they did have standing to seek relief. In re Samantha D., 106 N.M. 184, 740 P.2d 1168 (Ct. App. 1987).

Right to competent counsel. — The right of a parent to counsel includes the right to competent counsel. In a trial the 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. In re James W.H., 115 N.M. 256, 849 P.2d 1079 (Ct. App. 1993).

Right to counsel on appeal. — Mother had a right to court-appointed counsel on appeal of a decision terminating her parental rights and counsel had an obligation to present her issues in accordance with the guidelines set forth in *State v. Franklin*, 78 N.M. 127, 428 P.2d 982 (1967). State ex rel. Children, Youth & Families Dep't v. Alice P., 1999-NMCA-098, 127 N.M. 664, 986 P.2d 460, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

Rules of Civil Procedure apply in all proceedings to terminate parental rights. State ex rel. Children, Youth & Families Dep't, 118 N.M. 352, 881 P.2d 712 (Ct. App. 1994).

Summary judgment may be used to terminate parental rights where there are no issues of fact underlying the basis or termination. State ex rel. Children, Youth & Families Dep't, 118 N.M. 352, 881 P.2d 712 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 A.L.R.4th 1203.

32A-4-30. Attorney fees.

The court may order the department to pay attorney fees for the child's guardian ad litem or attorney if:

A. the child is in the legal custody of the department;

B. the child's guardian ad litem or the child, through the child's attorney:

(1) requests in writing that the department move for the termination of parental rights;

(2) gives the department written notice that if the department does not move for termination of parental rights, the guardian ad litem or the child, through the child's attorney, intends to move for the termination of parental rights and seek an award of attorney fees;

(3) successfully moves for the termination of parental rights; and

(4) applies to the court for an award of attorney fees; and

C. the department refuses to litigate the motion for the termination of parental rights or fails to act in a timely manner.

History: 1978 Comp., § 32A-4-30, enacted by Laws 1993, ch. 77, § 124; 2005, ch. 189, § 53.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, provided that the court may order the department to pay attorney fees to a child's attorney; in Subsection A, changed "custody" to "legal custody"; and in Subsections B and B(2), added "or the child, through the child's attorney".

32A-4-31. Permanent guardianship of a child.

A. In proceedings for permanent guardianship, the court shall give primary consideration to the physical, mental and emotional welfare and needs of the child. Permanent guardianship vests in the guardian all rights and responsibilities of a parent, other than those rights and responsibilities of the natural or adoptive parent, if any, set forth in the decree of permanent guardianship.

B. Any adult, including a relative or foster parent, may be considered as a permanent guardian, provided that the department grants consent to the guardianship if the child is in the legal custody of the department. An agency or institution may not be a permanent guardian. The court shall appoint a person nominated by the child, if the minor is fourteen years of age or older, unless the court finds the appointment contrary to the best interests of the child.

C. The court may establish a permanent guardianship between a child and the guardian when the prospective guardianship is in the child's best interest and when:

(1) the child has been adjudicated as an abused or neglected child;

(2) the department has made reasonable efforts to reunite the parent and child and further efforts by the department would be unproductive;

(3) reunification of the parent and child is not in the child's best interests because the parent continues to be unwilling or unable to properly care for the child; and

(4) the likelihood of the child being adopted is remote or it is established that termination of parental rights is not in the child's best interest.

History: 1978 Comp., § 32A-4-31, enacted by Laws 1993, ch. 77, § 125; 2005, ch. 189, § 54.

ANNOTATIONS

Cross references. — For the Kinship Guardianship Act, *see* 40-10B-1 NMSA 1978 et seq.

The 2005 amendment, effective June 17, 2005, in Subsection B, changed "department's custody" to "legal custody of the department".

32A-4-32. Permanent guardianship; procedure.

A. A motion for permanent guardianship may be filed by any party.

B. A motion for permanent guardianship shall set forth:

(1) the date, place of birth and marital status of the child, if known;

(2) the facts and circumstances supporting the grounds for permanent guardianship;

(3) the name and address of the prospective guardian and a statement that the person agrees to accept the duties and responsibilities of guardianship;

(4) the basis for the court's jurisdiction;

(5) the relationship of the child to the petitioner and the prospective guardian; and

(6) whether the child is subject to the federal Indian Child Welfare Act of 1978 and, if so:

(a) the tribal affiliations of the child's parents;

(b) the specific actions taken by the petitioner to notify the parents' tribe 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 shall be attached as exhibits to the petition; and

(c) what specific efforts were made to comply with the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the appropriate Indian tribes.

C. If the motion is not filed by the prospective guardian, the motion shall be verified by the prospective guardian.

D. Notice of the filing of the motion, accompanied by a copy of the motion, shall be served by the moving party on any parent who has not previously been made a party to the proceeding, the parents of the child, 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, the department, any person appointed to represent any party, including the child's guardian ad litem, and any other person the court orders provided with notice. Service shall be in accordance with the Children's Court Rules [10-101 NMRA] for the service of motions. In a case involving a child subject to the federal Indian Child Welfare Act of 1978, notice shall also be sent by certified mail to the Indian tribes of the child's parents and to any "Indian custodian" as that term is defined in 25 U.S.C. Section 1903(6). Further notice shall not be required to a parent who has been provided notice previously pursuant to Section 32A-4-17 NMSA 1978 and who failed to make an appearance.

E. The grounds for permanent guardianship shall be proved by clear and convincing evidence. The grounds for permanent guardianship shall be proved beyond a reasonable doubt and meet the requirements of 25 U.S.C. Section 1912(f) in any proceeding involving a child subject to the federal Indian Child Welfare Act of 1978.

F. A judgment of the court vesting permanent guardianship with an individual divests the biological or adoptive parent of legal custody or guardianship of the child, but is not a termination of the parent's rights. A child's inheritance rights from and through the child's biological or adoptive parents are not affected by this proceeding.

G. 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 of the child and any other provision necessary to rehabilitate the child or provide for the child's continuing safety and well-being.

H. The court shall retain jurisdiction to enforce its judgment of permanent guardianship.

I. Any party may make a motion for revocation of the order granting guardianship when there is a significant change of circumstances, including:

(1) the child's parent is able and willing to properly care for the child; or

(2) the child's guardian is unable to properly care for the child.

J. The court shall appoint a guardian ad litem for the child in all proceedings for the revocation of permanent guardianship if the child is under the age of fourteen. The court shall appoint an attorney for the child in all proceedings for the revocation of permanent guardianship if the child is fourteen years of age or older at the inception of the proceedings.

K. The court may revoke the order granting guardianship when a significant change of circumstances has been proven by clear and convincing evidence and it is in the child's best interests to revoke the order granting guardianship.

History: 1978 Comp., § 32A-4-32, enacted by Laws 1993, ch. 77, § 126; 1999, ch. 77, § 12; 2005, ch. 189, § 55; 2009, ch. 239, § 50.

ANNOTATIONS

Cross references. — For process in the Children's Court, *see* Rule 10-104 NMRA.

For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1999 amendment, effective July 1, 1999, in Subsection D, substituted "the foster parent, preadoptive parent or relative providing care for the child" for "foster parents" in the first sentence, substituted "motions" for "process" in the second sentence, and made a minor stylistic change in the last sentence.

The 2005 amendment, effective June 17, 2005, in Subsection B, deleted the former requirement that an application had to be signed, verified and filed with the court; in Subsection D, provided that service shall be in accordance with the Children's Court Rules, that in a case involving a child subject to the Indian Child Welfare Act, notice shall also be sent by certified mail to the Indian tribes of the child's parents and that further notice shall not be required to a parent who has been provided with notice previously pursuant to Section 32A-4-17 NMSA 1978 or who has failed to make an appearance; in Subsection I, deleted the former qualification that a party to the abuse or neglect proceeding, the child or a parent of the child could make a motion; and in Subsection K, changed "change of circumstance" to "significant change of circumstance".

The 2009 amendment, effective July 1, 2009, in Subsection J, after “permanent guardianship”, added the remainder of the sentence and added the last sentence.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed

on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-33. Confidentiality; records; penalty.

A. All records or information concerning a party to a neglect or abuse proceeding, including social records, diagnostic evaluations, psychiatric or psychological reports, videotapes, transcripts and audio recordings of a child's statement of abuse or medical reports incident to or obtained as a result of a neglect or abuse proceeding or that were produced or obtained during an investigation in anticipation of or incident to a neglect or abuse proceeding shall be confidential and closed to the public.

B. The records described in Subsection A of this section shall be disclosed only to the parties and:

(1) court personnel;

(2) court-appointed special advocates;

(3) the child's guardian ad litem;

(4) the attorney representing the child in an abuse or neglect action, a delinquency action or any other action under the Children's Code [32A-1-1 NMSA 1978];

(5) department personnel;

(6) any local substitute care review board or any agency contracted to implement local substitute care review boards;

(7) law enforcement officials, except when use immunity is granted pursuant to Section 32A-4-11 NMSA 1978;

(8) district attorneys, except when use immunity is granted pursuant to Section 32A-4-11 NMSA 1978;

(9) any state government social services agency in any state or when, in the opinion of the department it is in the best interest of the child, a governmental social services agency of another country;

(10) those persons or entities of an Indian tribe specifically authorized to inspect the records pursuant to the federal Indian Child Welfare Act of 1978 or any regulations promulgated thereunder;

(11) a foster parent, if the records are those of a child currently placed with that foster parent or of a child being considered for placement with that foster parent and the records concern the social, medical, psychological or educational needs of the child;

(12) school personnel involved with the child if the records concern the child's social or educational needs;

(13) health care or mental health professionals involved in the evaluation or treatment of the child, the child's parents, guardian, custodian or other family members;

(14) protection and advocacy representatives pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act and the federal Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991;

(15) children's safehouse organizations conducting investigatory interviews of children on behalf of a law enforcement agency or the department; and

(16) any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court.

C. A parent, guardian or legal custodian whose child has been the subject of an investigation of abuse or neglect where no petition has been filed shall have the right to inspect any medical report, psychological evaluation, law enforcement reports or other investigative or diagnostic evaluation; provided that any identifying information related to the reporting party or any other party providing information shall be deleted. The parent, guardian or legal custodian shall also have the right to the results of the investigation and the right to petition the court for full access to all department records and information except those records and information the department finds would be likely to endanger the life or safety of any person providing information to the department.

D. Whoever intentionally and unlawfully releases any information or records closed to the public pursuant to the Abuse and Neglect Act or releases or makes other unlawful use of records in violation of that act is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

E. The department shall promulgate rules for implementing disclosure of records pursuant to this section and in compliance with state and federal law and the Children's Court Rules [10-101 NMRA].

History: 1978 Comp., § 32A-4-33, enacted by Laws 1993, ch. 77, § 127; 2005, ch. 189, § 56; 2009, ch. 239, § 51.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

For the federal Development Disabilities Assistance and Bill of Rights act, *see* 42 U.S.C. § 6000.

For the federal Protection and Advocacy for Mentally Ill Individuals Act of 1991, *see* 42 U.S.C. § 10801.

The 2005 amendment, effective June 17, 2005, in Subsection A, deleted the former qualification that the records be in the possession of the court or the department and provided that information as well as records concerning a party that are incident to or obtained as a result of a proceeding or that were produced during an investigation are confidential; in Subsection B, provided that records may be disclosed only to the parties and the persons listed in Subsection B(1) through (16); added the attorney representing a child in an abuse or neglect action, a delinquency action or any other action under the Children's Code in Subsection B(4) as a person to whom records may be disclosed; and added Subsection F, which provided that the department shall promulgate rules for the disclosure of records.

The 2009 amendment, effective July 1, 2009, in Paragraph (9) of Subsection B, after "agency in any state", added the remainder of the sentence; and deleted former Subsection E, which provided that when a child's death is allegedly caused by abuse or neglect, the department may release information about the case after consulting with the district attorney.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-33.1. Records release when a child dies.

A. After learning that a child fatality has occurred and that there is reasonable suspicion that the fatality was caused by abuse or neglect, the department shall, upon written request to the secretary of the department, release the following information, if in the department's possession, within five business days:

(1) the age and gender of the child;

(2) the date of death;

(3) whether the child was in foster care or in the home of the child's parent or guardian at the time of death; and

(4) whether an investigation is being conducted by the department.

B. If an investigation is being conducted by the department, then a request for further information beyond that listed in Subsection A of this section shall be answered with a statement that a report is under investigation.

C. Upon completion of a child abuse or neglect investigation into a child's death, if it is determined that abuse or neglect caused the child's death, the following documents shall be released upon request:

(1) a summary of the department's investigation;

(2) a law enforcement investigation report, if in the department's possession; and

(3) a medical examiner's report, if in the department's possession.

D. Prior to releasing any document pursuant to Subsection C of this section, the department shall consult with the district attorney and shall redact:

(1) information that would, in the opinion of the district attorney, jeopardize a criminal investigation or proceeding;

(2) identifying information related to a reporting party or any other party providing information; and

(3) information that is privileged, confidential or not subject to disclosure pursuant to any other state or federal law.

E. Once documents pursuant to this section have been released by the department, the department may comment on the case within the scope of the release.

F. Information released by the department consistent with the requirements of this section does not require prior notice to any other individual.

G. Nothing in this section shall be construed as requiring the department to obtain documents not in the abuse and neglect case file.

H. A person disclosing abuse and neglect case file information as required by this section shall not be subject to suit in civil or criminal proceedings for complying with the requirements of this section.

History: 1978 Comp., § 32A-4-33.1, as enacted by Laws 2009, ch. 239, § 52.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made Laws 2009, ch. 239, § 52 effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-4-34. Duties of employees.

All employees of the department shall be trained in their legal duties to protect the constitutional and statutory rights of children and families from the initial time of contact, during the investigation and throughout any treatment.

History: Laws 2005, ch. 189, § 57.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 189 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

ARTICLE 5
Adoptions

ANNOTATIONS

Compiler's notes. — Sections 32A-5-1 to 32A-5-45 NMSA 1978 were originally enacted as 32-5-1 to 32-5-45 NMSA 1978 by Laws 1993, ch. 77, §§ 128 to 172, but since the former provisions of the Residential Treatment Program Act were compiled at that location, the sections as enacted by Chapter 77 of Laws 1993 have been recompiled to Chapter 32A NMSA 1978 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under former law have been retained whenever possible. For the Adoption Act prior to 1993, *see* 40-7-29 NMSA 1978 on New Mexico One Source of Law DVD.

32A-5-1. Short title.

Chapter 32A, Article 5 NMSA 1978 may be cited as the "Adoption Act".

History: 1978 Comp., § 32A-5-1, enacted by Laws 1993, ch. 77, § 128; 2003, ch. 294, § 1; 2003, ch. 321, § 1.

ANNOTATIONS

Cross references. — For provisions of Safe Haven for Infants Act, *see* 24-22-1 NMSA 1978.

For adult adoptions, *see* 40-14-1 to 40-14-15 NMSA 1978.

The 2003 amendment, effective July 1, 2003, substituted "Chapter 32A" for "Chapter 32". Identical amendments to this section were enacted by Laws 2003, ch. 294, § 1, and Laws 2003, ch. 321, § 1. This section is set out as amended by Laws 2003, ch. 321, § 1. *See* 12-1-8 NMSA 1978.

Equitable adoption. — New Mexico recognizes "equitable adoptions"; those that are inferred by the law in the absence of compliance with statutory requirements. However, this recognition will only be made when certain strict requirements have been satisfied, such as the formation of a legally valid agreement by the purported parent to adopt the child. Otero v. City of Albuquerque, 1998-NMCA-137, 125 N.M. 770, 965 P.2d 354.

Prerequisite for wrongful death recovery. — Child who had not been legally adopted by decedent and could not establish a basis for equitable adoption could not recover in a wrongful death action based on the accident that killed decedent. Otero v. City of Albuquerque, 1998-NMCA-137, 125 N.M. 770, 965 P.2d 354.

Law reviews. — For note, "Family Law - A Limitation on Grandparental Rights in New Mexico: Christian Placement Service v. Gordon," see 17 N.M.L. Rev. 207 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 2 Am. Jur. 2d Adoption § 1 et seq.

Required parties in adoption proceedings, 48 A.L.R.4th 860.

Action for wrongful adoption based on misrepresentation of child's mental or physical condition of parentage, 56 A.L.R.4th 375.

Attorney malpractice in connection with services related to adoption of child, 18 A.L.R.5th 892.

Adoption of child by same-sex partners, 27 A.L.R.5th 54.

"Wrongful adoption" causes of action against adoption agencies where children have or develop mental or physical problems that are misrepresented or not disclosed to adoptive parents, 74 A.L.R.5th 1.

2 C.J.S. Adoption of Persons §§ 5 to 9.

32A-5-2. Purpose.

The purpose of the Adoption Act is to:

A. establish procedures to effect a legal relationship between a parent and adopted child that is identical to that of a parent and biological child;

B. provide for family relationships that will give the adopted child protection and economic security and that will enable the child to develop physically, mentally and emotionally to the maximum extent possible; and

C. ensure due process protections.

History: 1978 Comp., § 32A-5-2, enacted by Laws 1993, ch. 77, § 129.

ANNOTATIONS

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 40-7-29 NMSA 1978 have been included in the annotations to this section.

Statutory proceeding. — Adoption, unknown at common law, is a creature of statute. Poncho v. Bowdoin, 2006-NMCA-013, 138 N.M. 857, 126 P.3d 1221.

Purpose of statutes for adoption is to make provision for the welfare of children and the legislation should be liberally construed to effect that purpose. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Adoption statutes accorded liberal construction. — Adoption statutes are enacted in favor of humanity and are to be accorded a liberal construction by the courts. Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308 (1946).

Construed to promote welfare of children. — The proper construction of New Mexico adoption statutes is such as will promote the welfare of children. Nevelos v. Railston, 65 N.M. 250, 335 P.2d 573 (1959).

Jurisdictional requirements to be strictly followed. — The power to adopt children was unknown to the common law; it is a creation of statute which may prescribe the conditions under which adoption may be legally effected. Thus, the jurisdictional requirements of the statute for this special proceeding must be strictly followed. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Equitable adoption. — New Mexico courts have recognized the doctrine of equitable adoption. Poncho v. Bowdoin, 2006-NMCA-013, 138 N.M. 857, 126 P.3d 1221.

Biological father cannot relinquish duties. — In the absence of a formal adoption under the Adoption Act, the biological father cannot voluntarily effect a relinquishment of his parental duties imposed upon him by law. Poncho v. Bowdoin, 2006-NMCA-013, 138 N.M. 857, 126 P.3d 1221.

32A-5-3. Definitions.

As used in the Adoption Act:

A. "accrediting entity" means an entity that has entered into an agreement with the United States secretary of state pursuant to the federal Intercountry Adoption Act of 2000 and regulations adopted by the United States secretary of state pursuant to that act, to accredit agencies and approve persons who provide adoption services related to convention adoptions;

B. "adoptee" means a person who is the subject of an adoption petition;

C. "adoption service" means:

(1) identifying a child for adoption and arranging the adoption of the child;

(2) securing termination of parental rights to a child or consent to adoption of the child;

(3) performing a background study on a child and reporting on the study;

(4) performing a home study on a prospective adoptive parent and reporting on the study;

(5) making determinations regarding the best interests of a child and the appropriateness of an adoptive placement for the child;

(6) performing post-placement monitoring of a child until an adoption is final; and

(7) when there is a disruption before an adoption of a child is final, assuming custody of the child and providing or facilitating the provision of child care or other social services for the child pending an alternative placement of the child;

D. "agency" means a person certified, licensed or otherwise specially empowered by law to place a child in a home in this or any other state for the purpose of adoption;

E. "agency adoption" means an adoption when the adoptee is in the custody of an agency prior to placement;

F. "acknowledged father" means a father who:

(1) acknowledges paternity of the adoptee pursuant to the putative father registry, as provided for in Section 32A-5-20 NMSA 1978;

(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: 1) has initiated an action to establish paternity; 2) is living with the adoptee at the time the adoption petition is filed; 3) has lived with the mother a minimum of ninety days during the two-hundred-eighty-day-period prior to the birth or placement of the adoptee; 4) has lived with the adoptee within the ninety days immediately preceding the adoptive placement; 5) 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 authorized agency having lawful custody of the adoptee or the adoptee's mother; 6) has continuously paid child support to the mother since the adoptee's birth in an amount at least equal to the amount provided in Section 40-4-11.1 NMSA 1978, or has brought current any delinquent child support payments; or 7) 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 old at the time of placement: 1) has initiated an action to establish paternity; 2) has lived with the adoptee within the ninety days immediately preceding the adoptive placement; 3) has continuously paid child support to the mother since the adoptee's birth in an amount at least equal to the amount provided in Section 40-4-11.1 NMSA 1978, or is making reasonable efforts to bring delinquent child support payments current; 4) has contact with the adoptee on a monthly basis when physically and financially able and when not prevented by the person or authorized agency having lawful custody of the adoptee; or 5) has regular communication with the adoptee, or with the person or agency having the 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 authorized agency having lawful custody of the adoptee;

G. "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 Section 32A-5-20 NMSA 1978;

H. "consent" means a document:

(1) signed by a biological parent whereby the parent grants consent to the adoption of the parent's child by another;

(2) whereby the department or an agency grants its consent to the adoption of a child in its custody; or

(3) signed by the adoptee if the child is fourteen years of age or older;

I. "convention adoption" means:

(1) an adoption by a United States resident of a child who is a resident of a foreign country that is a party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption; or

(2) an adoption by a resident of a foreign country that is a party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of a child who is a resident of the United States;

J. "counselor" means a person certified by the department to conduct adoption counseling in independent adoptions;

K. "department adoption" means an adoption when the child is in the custody of the department;

L. "foreign born child" means any child not born in the United States who is not a citizen of the United States;

M. "former parent" means a parent whose parental rights have been terminated or relinquished;

N. "full disclosure" means mandatory and continuous disclosure by the investigator, agency, department or petitioner throughout the adoption proceeding and after finalization of the adoption of all known, nonidentifying information regarding the adoptee, including:

(1) health history;

(2) psychological history;

(3) mental history;

(4) hospital history;

(5) medication history;

(6) genetic history;

(7) physical descriptions;

(8) social history;

(9) placement history; and

(10) education;

O. "independent adoption" means an adoption when the child is not in the custody of the department or an agency;

P. "investigator" means an individual certified by the department to conduct pre-placement studies and post-placement reports;

Q. "office" means a place for the regular transaction of business or performance of particular services;

R. "parental rights" means all rights of a parent with reference to a child, including parental right to control, to withhold consent to an adoption or to receive notice of a hearing on a petition for adoption;

S. "placement" means the selection of a family for an adoptee or matching of a family with an adoptee and physical transfer of the adoptee to the family in all adoption proceedings, except in adoptions filed pursuant to Paragraphs (1) and (2) of Subsection C of Section 32A-5-12 NMSA 1978, in which case placement occurs when the parents consent to the adoption, parental rights are terminated or parental consent is implied;

T. "post-placement report" means a written evaluation of the adoptive family and the adoptee after the adoptee is placed for adoption;

U. "pre-placement study" means a written evaluation of the adoptive family, the adoptee's biological family and the adoptee;

V. "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 three hundred 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 three hundred 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 three hundred days after the termination of cohabitation;

W. "record" means any petition, affidavit, consent or relinquishment form, transcript or notes of testimony, deposition, power of attorney, report, decree, order, judgment, correspondence, document, photograph, invoice, receipt, certificate or other printed, written, videotaped or tape-recorded material pertaining to an adoption proceeding;

X. "relinquishment" means the document by which a parent relinquishes parental rights to the department or an agency to enable placement of the parent's child for adoption;

Y. "resident" means a person who, prior to filing an adoption petition, has lived in the state for at least six months immediately preceding filing of the petition for adoption or a person who has become domiciled in the state by establishing legal residence with the intention of maintaining the residency indefinitely; and

Z. "stepparent adoption" means an adoption of the adoptee by the adoptee's stepparent when the adoptee has lived with the stepparent for at least one year following the marriage of the stepparent to the custodial parent.

History: 1978 Comp., § 32A-5-3, enacted by Laws 1993, ch. 77, § 130; 1995, ch. 206, § 26; 2001, ch. 162, § 1; 2003, ch. 294, § 2; 2003, ch. 321, § 2; 2005, ch. 189, § 58.

ANNOTATIONS

Cross references. — For the federal Intercountry Adoption Act, *see* 42 U.S.C. § 14901 et seq.

The 1995 amendment, effective July 1, 1995, added Subsections C, G, H, and W, and redesignated the remaining subsections accordingly; substituted "32A-5-2" for "32-5-20" in Subsections D, E, and S; in Subsection J, inserted "or petitioner" following "department", inserted "and after finalization of the adoption" following "proceeding", and inserted "history" in Paragraph (9); in Subsection O, substituted "32A-5-12" for "32-5-12", and made minor stylistic changes throughout the section.

The 2001 amendment, effective June 15, 2001, in Subsection D, deleted former Paragraph (5) and inserted and augmented those provisions in Paragraph (4); deleted former Subsection S, defining "putative father", and renumbered the remaining subsections accordingly.

The 2003 amendment, effective July 1, 2003, inserted a new Subsection A; redesignated former Subsection A as Subsection B; inserted a new Subsection C; redesignated the subsequent subsections accordingly; added a new Subsection I; and redesignated the subsequent subsections accordingly. Laws 2003, ch. 294, § 2 and

Laws 2003, ch. 321, § 2, enacted identical amendments to this section.The section was set out as amended by Laws 2003, ch. 321, § 2. *See* 12-1-8 NMSA 1978.

The 2005 amendment, effective June 17, 2005, defined "consent" in Subsection H(3) to include a document signed by the adoptee if the child is fourteen years of age or older and added the definition of "foreign born child" in Subsection L to mean a child not born in the United States who is a citizen of the United States.

Acknowledged father. — Where a biological father, who knew that the mother of his child was pregnant, did not register his paternity within ten days of the child's birth or file a paternity action before an adoption petition was filed, the father was not an acknowledged father and his consent was not a prerequisite to the adoption of his child. Helen G. v. Mark J.H., 2008-NMSC-002, 143 N.M. 246, 175 P.3d 914.

Time to initiate an action to establish paternity. — The legislature did not place time limitations on the initiation of a paternity action and a biological father's status as an acknowledged father does not turn on whether he initiated a paternity action prior to the time of the child's placement or prior to the filing of the adoption petition. Helen G. v. Mark J. H., 2006-NMCA-136, 140 N.M. 618, 145 P.3d 98, cert. granted, 2006-NMCERT-010, 140 N.M. 674, 146 P.3d 809.

Full disclosure means mandatory and continuous disclosure, including health, psychological, mental, medication, education, and social histories. Young v. Van Duyne, 2004-NMCA-074, 135 N.M. 695, 92 P.3d 1269.

32A-5-4. Application of the federal Indian Child Welfare Act of 1978.

The protections set forth in the federal Indian Child Welfare Act of 1978, including provisions concerning notice to the Indian child's tribe, transfer to tribal court and placement preferences, apply to all proceedings involving an Indian child under the Adoption Act.

History: 1978 Comp., § 32A-5-4, enacted by Laws 1993, ch. 77, § 131.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

32A-5-5. Indian child placement preferences.

A. In any adoptive placement of an Indian child under state law, preference shall be given, in the absence of good cause to the contrary, to a placement with:

(1) a member of the Indian child's extended family;

(2) other members of the child's Indian tribe; or

(3) other Indian families.

B. An Indian child accepted for pre-adoptive placement shall be placed in the least restrictive setting which most approximates a family in which the child's special needs, if any, may be met. The Indian child shall also be placed within reasonable proximity to the Indian child's home, taking into account special needs of the Indian child. In any foster care or pre-adoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with:

(1) a member of the Indian child's extended family;

(2) a foster home licensed, approved and specified by the Indian child's tribe;

(3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(4) an institution for children approved by the Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

C. If the placement preferences of this section are not followed or if the Indian child is placed in an institution, a plan shall be developed to ensure that the Indian child's cultural ties are protected and fostered.

History: 1978 Comp., § 32A-5-5, enacted by Laws 1993, ch. 77, § 132.

ANNOTATIONS

Cross references. — For applicability of this section where an Indian child is taken into custody pursuant to the Safe Haven for Infants Act, *see* 24-22-1 NMSA 1978.

32A-5-6. Authority of the department.

A. The department may adopt and promulgate necessary rules and forms for the administration of the Adoption Act, including rules for the assessment of fees. The rules shall not conflict with the provisions of the Adoption Act.

B. The department has the authority to provide or request additional information from an investigator or an attorney representing any person involved in any action filed pursuant to the provisions of the Adoption Act.

C. The department has the authority to intervene in any action filed pursuant to the provisions of the Adoption Act. The intervention shall be effected when legal counsel for the department files a motion for an entry of appearance and an appropriate response.

D. The department shall be served by mail by the attorney for the petitioner with copies of all pleadings filed in any action pursuant to the provisions of the Adoption Act, except for copies of the petition for adoption, the request for placement and the decree of adoption, which shall be served as provided in Section 32A-5-7 NMSA 1978.

E. The department is authorized to act as an accrediting entity on behalf of the state.

F. The department may assess fees for the cost of accrediting an agency or approving a person in matters related to convention adoptions. The department shall establish the amount of the fees by rule and the fees shall be subject to approval by the United States secretary of state. The amount of the fees shall not exceed the cost of similar services provided by the department.

History: 1978 Comp., § 32A-5-6, enacted by Laws 1993, ch. 77, § 133; 1995, ch. 206, § 27; 2003, ch. 294, § 3; 2003, ch. 321, § 3.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "which shall be served as provided in Section 32A-5-7 NMSA 1978" at the end of Subsection D.

The 2003 amendment, effective July 1, 2003, rewrote Subsection A and added Subsections E and F. Laws 2003, ch. 294, § 3 and Laws 2003, ch. 321, § 3 enacted identical amendments to this section. The section was set out as amended by Laws 2003, ch. 321, § 3. *See* 12-1-8 NMSA 1978.

32A-5-7. Clerk of the court; duties.

A. The clerk of the court shall file pleadings captioned pursuant to the provisions of Section 32A-5-9 NMSA 1978. The clerk of the court shall not file incorrectly captioned pleadings.

B. The clerk of the court shall mail a copy of the request for placement to the department within one working day of the request for placement being filed with the court. The attorney for the person requesting placement shall provide to the clerk of the court a copy of the request for placement and a stamped envelope addressed to the department as specified in department regulation.

C. The clerk of the court shall mail a copy of the petition for adoption within one working day of the petition for adoption being filed with the court. The attorney for the petitioner shall provide to the clerk of the court a copy of the petition for adoption and a stamped envelope addressed to the department as specified in department regulation.

D. The clerk of the court shall mail a copy of the decree of adoption to the department within one working day of the entry of the decree of adoption. The attorney

for the petitioner shall provide to the clerk of the court a copy of the decree of adoption and a stamped envelope addressed to the department as specified in department regulation.

E. In any adoption involving an Indian child, the clerk of the court shall provide the secretary of the interior with a copy of any decree of adoption or adoptive placement order and other information as required by the federal Indian Child Welfare Act of 1978. The attorney for the petitioner shall provide to the clerk of the court a copy of an adoption decree, an adoptive placement order, any other information required by the federal Indian Child Welfare Act of 1978 and a stamped envelope addressed to the secretary of the interior.

F. The clerk of the court shall provide a certificate of adoption with an adoptee's new name.

G. The attorney for the petitioner shall forward the certificate of adoption provided for in Subsection F of this section as follows:

(1) for a person born in the United States, to the appropriate vital statistics office of the place, if known, where the adoptee was born; or

(2) for all other persons, to the state registrar of vital statistics.

History: 1978 Comp., § 32A-5-7, enacted by Laws 1993, ch. 77, § 134; 1995, ch. 206, § 28; 2005, ch. 189, § 59.

ANNOTATIONS

Cross references. — For the Federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1995 amendment, effective July 1, 1995, substituted "32A-5-9" for "32-5-9" in Subsection A and added the second sentence in Subsection E.

The 2005 amendment, effective June 17, 2005, in Subsection F, provided that the clerk of the court shall provide a certificate of adoption with the adoptee's new name; and added Subsection G, which provided that the attorney for the petitioner shall forward the certificate of adoption as provided in Subsection G(1) and (2).

32A-5-8. Confidentiality of records.

A. Unless the petitioner agrees to be contacted or agrees to the release of the petitioner's identity to the parent and the parent agrees to be contacted or agrees to the release of the parent's identity to the petitioner, the attorneys, the court, the agency and the department shall maintain confidentiality regarding the names of the parties, unless the information is already otherwise known. After the petition is filed and prior to the

entry of the decree, the records in adoption proceedings shall be open to inspection only by the attorney for the petitioner, the department or the agency, any attorney appointed as a guardian ad litem or attorney for the adoptee, any attorney retained by the adoptee or other persons upon order of the court for good cause shown.

B. All records, whether on file with the court, an agency, the department, an attorney or other provider of professional services in connection with an adoption, are confidential and may be disclosed only pursuant to the provisions of the Adoption Act. All information and documentation provided for the purpose of full disclosure is confidential. Documentation provided for the purpose of full disclosure shall remain the property of the person making full disclosure when a prospective adoptive parent decides not to accept a placement. Immediately upon refusal of the placement, the prospective adoptive parent shall return all full disclosure documentation to the person providing full disclosure. A prospective adoptive parent shall not disclose any confidential information received during the full disclosure process, except as necessary to make a placement decision or to provide information to a child's guardian ad litem or attorney or the court.

C. All hearings in adoption proceedings shall be confidential and shall be held in closed court without admittance of any person other than parties and their counsel.

D. A person who intentionally and unlawfully releases any information or records closed to the public pursuant to the Adoption Act or releases or makes other unlawful use of records in violation of that act is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

E. Prior to the entry of the decree of adoption, the parent consenting to the adoption or relinquishing parental rights to an agency or the department shall execute an affidavit stating whether the parent will permit contact or the disclosure of the parent's identity to the adoptee or the adoptee's prospective adoptive parents.

History: 1978 Comp., § 32A-5-8, enacted by Laws 1993, ch. 77, § 135; 1995, ch. 206, § 29; 2005, ch. 189, § 60; 2009, ch. 239, § 53.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added all of the language in Subsection B following the first sentence and made a minor stylistic change in Subsection D.

The 2005 amendment, effective June 17, 2005, added Subsection D, which provided that any person who intentionally and unlawfully releases any information or records closed to the public or releases or makes other unlawful use of records is guilty of a petty misdemeanor.

The 2009 amendment, effective July 1, 2009, in Subsection A, in the last sentence, after "guardian ad litem", added "or attorney".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Restricting access to judicial records of concluded adoption proceedings, 103 A.L.R.5th 255.

32A-5-9. Caption.

The caption for adoption proceedings shall be styled "In the Matter of the Adoption Petition of (Petitioner's Name)".

History: 1978 Comp., § 32A-5-9, enacted by Laws 1993, ch. 77, § 136.

ANNOTATIONS

Cross references. — For captions of pleadings and papers filed with the children's courts, *see* Rule 10-107 NMRA.

For captions of pleadings filed in the district courts, *see* Rule 1-008.1 NMRA.

32A-5-10. Venue.

A petition for adoption may be filed in any county where:

A. a petitioner is a resident;

B. the adoptee is physically present at the time the petition is filed;

C. an office of the agency that placed the adoptee for adoption is located; or

D. the department office from which the child was placed is located.

History: 1978 Comp., § 32A-5-10, enacted by Laws 1993, ch. 77, § 137.

32A-5-11. Who may be adopted; who may adopt.

A. Any child may be adopted.

B. Residents who are one of the following may adopt:

(1) any individual who has been approved by the court as a suitable adoptive parent pursuant to the provisions of the Adoption Act; and

(2) a married individual without the individual's spouse joining in the adoption if:

(a) the nonjoining spouse is a parent of the adoptee;

(b) the individual and the nonjoining spouse are legally separated; or

(c) the failure of the nonjoining spouse to join in the adoption is excused for reasonable circumstances as determined by the court.

C. Nonresidents who meet the criteria of Subsection B of this section may adopt in New Mexico if the adoptee is a resident of New Mexico or was born in New Mexico but is less than six months of age and was placed by the department or an agency licensed by the state of New Mexico.

History: 1978 Comp., § 32A-5-11, enacted by Laws 1993, ch. 77, § 138.

ANNOTATIONS

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 40-7-33 NMSA 1978 have been included in the annotations to this section.

Provision requiring residence as mandatory. — The provision requiring adopting persons to be residents of the state was mandatory and it limited jurisdiction over adoption proceedings to those brought by residents of New Mexico. Heirich v. Howe, 50 N.M. 90, 171 P.2d 312 (1946).

Since petitioners for adoption are nonresidents, the district court lacks the necessary jurisdiction and petition to adopt must be dismissed. Heirich v. Howe, 50 N.M. 90, 171 P.2d 312 (1946).

32A-5-12. Placement for adoption; restrictions; full disclosure.

A. No petition for adoption shall be granted by the court unless the adoptee was placed in the home of the petitioner for the purpose of adoption:

(1) by the department;

(2) by an appropriate public authority of another state;

(3) by an agency; or

(4) pursuant to a court order, as provided in Section 32A-5-13 NMSA 1978.

B. The provisions of Subsection A of this section do not apply to a child in the department's custody who is being adopted pursuant to the provisions of the Abuse and Neglect Act [32A-4-1 NMSA 1978].

C. When an adoptee is not in the custody of the department or an agency, the adoption is an independent adoption and the provisions of this section and Section 32A-5-13 NMSA 1978 shall apply, except when the following circumstances exist:

(1) a stepparent of the adoptee seeks to adopt the adoptee and prior to the filing of the adoption petition, the adoptee has lived with the stepparent for at least one year since the marriage of the stepparent to the custodial parent and the family has received counseling, as provided for in Section 32A-5-22 NMSA 1978;

(2) a relative within the fifth degree of consanguinity to the adoptee or that relative's spouse seeks to adopt the adoptee, and, prior to the filing of the adoption petition, the adoptee has lived with the relative or the relative's spouse for at least one year; or

(3) a person designated to care for the adoptee in the will of the adoptee's deceased parent seeks to adopt the adoptee, and, prior to the filing of the adoption petition, the adoptee has lived with that person for at least one year.

D. All placements shall be made by the department, an agency or the parent of the adoptee pursuant to Section 32A-5-13 NMSA 1978.

E. In all adoptions, prior to any placement being made, the person making the placement shall provide full disclosure.

History: 1978 Comp., § 32A-5-12, enacted by Laws 1993, ch. 77, § 139; 1995, ch. 206, § 30.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "full disclosure" in the section heading; in Paragraph (4) of Subsection A, substituted "32A-5-13" for "32-5-13"; in Subsection C, substituted "this section and Section 32A-5-13" for "Sections 32-5-12 and 32-5-13"; in Paragraph (1) of Subsection C, substituted "32A-5-22" for "32-5-22"; at the end of Subsection D, added "pursuant to Section 32A-5-13 NMSA 1978"; and added Subsection E.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 40-7-34 NMSA 1978 have been included in the annotations to this section.

Legislative intent. — The obvious legislativeintent is two-fold: (1) to restrict the unauthorized placement of children for adoption; and (2) to provide a means whereby

the department or an authorized child placement agency could ensure the placement of adoptable children with individuals who have been found by competent authorities to be fit and proper as prospective adoptive parents. In re Doe, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982).

Section not jurisdictional limit. — There was nothing in former 40-7-34A NMSA 1978 suggesting a limitation on the children's court's jurisdiction. Section 40-7-34A NMSA 1978 was merely a statute that limited the court's power to grant a petition for adoption. If the party could not prove the facts necessary, then the statute was of no value to that party. Specifically, unless the foster parent could plead and prove that Human Services Department placed the children with her for adoption, she was not entitled to the right of adoption former 40-7-34A NMSA 1978 provided. Vest v. State ex rel. N.M. Human Servs. Dep't, 116 N.M. 708, 866 P.2d 1175 (Ct. App. 1993).

Duties of disclosure found in Subsection E. — Pre-adoption and adoption-related duties of disclosure are found in Subsection E of this section. Young v. Van Duyne, 2004-NMCA-074, 135 N.M. 695, 92 P.3d 1269.

Full disclosure means mandatory and continuous disclosure, including health, psychological, mental, medication, education, and social histories. Young v. Van Duyne, 2004-NMCA-074, 135 N.M. 695, 92 P.3d 1269.

Disclosure to adoptive parents. — Department had no duty to disclose the post-adoption information regarding the child to the adoptive parents. Young v. Van Duyne, 2004-NMCA-074, 135 N.M. 695, 92 P.3d 1269.

Effect of finality of adoption. — There is no statute or regulation that creates any duty or responsibility of the department and its employees, after an adoption is finalized, with respect to supervision, oversight, operation or maintenance of the home into which a child is placed for adoption, after an adoption becomes final. Young v. Van Duyne, 2004-NMCA-074, 135 N.M. 695, 92 P.3d 1269.

Electing to leave child with ex-spouse for extended period of time is not a "placement" for purposes of adoption. In re Doe, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982).

Stepparent adoptions. — The one-year residency provision for stepparent adoptions is not jurisdictional in nature; it is a statutory prerequisite to stepparent adoption and, therefore, the father could not challenge the adoption decree on the basis that the court lacked jurisdiction because the one-year residency requirement was not met. Webber v. Webber, 116 N.M. 47, 859 P.2d 1074 (Ct. App. 1993).

Foster placement established residence. — The fact that children had lived in their aunt's home for a year, having been placed there by their mother under a foster placement, did not prevent a finding that they were "residing" with petitioning-aunt. In re Awtrey, 114 N.M. 594, 844 P.2d 844 (Ct. App. 1992).

32A-5-13. Independent adoptions; request for placement; placement order; certification.

A. When a placement order is required, the petitioner shall file a request with the court to allow the placement. An order permitting the placement shall be obtained prior to actual placement.

B. Only a pre-placement study that has been prepared or updated within one year immediately prior to the date of placement, approving the petitioner as an appropriate adoptive parent, shall be filed with the court prior to issuance of a placement order, except as provided in Subsection C of Section 32A-5-12 NMSA 1978.

C. In order for a person to be certified to conduct pre-placement studies, the person shall meet the standards promulgated by the department. If the child is an Indian child, the person shall meet the standards set forth in the federal Indian Child Welfare Act of 1978.

D. The pre-placement study shall be conducted by an agency or a person certified by the department to conduct the study. A person or agency that wants to be certified to perform pre-placement studies shall file documents verifying their qualifications with the department. The department shall publish a list of persons or agencies certified to conduct a pre-placement study. If necessary to defray additional costs associated with compiling the list, the department may assess and charge a reasonable administrative fee to the person or agency listed.

E. When a person or agency that wants to be certified to perform pre-placement studies files false documentation with the department, the person or agency shall be subject to the provisions of Section 32A-5-42 NMSA 1978.

F. A request for placement shall be filed and verified by the petitioner and shall allege:

(1) the full name, age and place and duration of residence of the petitioner and, if married, the place and date of marriage;

(2) the date and place of birth of the adoptee, if known, or the anticipated date and place of birth of the adoptee;

(3) a detailed statement of the circumstances and persons involved in the proposed placement;

(4) if the adoptee has been born, the address where the adoptee is residing at the time of the request for placement;

(5) if the adoptee has been born, the places where the adoptee has lived within the past three years and the names and addresses of the persons with whom the

adoptee has lived. If the adoptee is in the custody of an agency or the department, the address shall be the address of the agency or the county office of the department from which the child was placed;

(6) the existence of any court orders that are known to the petitioner and that regulate custody, visitation or access to the adoptee, copies of which shall be attached to the request for placement as exhibits; if copies of any such court orders are unavailable at the time of filing the request for placement, the copies shall be filed prior to the issuance of the order of placement;

(7) that the petitioner desires to establish a parent and child relationship between the petitioner and the adoptee and that the petitioner is a fit and proper person able to care and provide for the adoptee's welfare;

(8) the relationship, if any, of the petitioner to the adoptee;

(9) whether the adoptee is subject to the federal Indian Child Welfare Act of 1978, and, if so, the petition shall allege the actions taken to comply with the federal Indian Child Welfare Act of 1978 and all other allegations required pursuant to that act;

(10) whether the adoption is subject to the Interstate Compact on the Placement of Children [32A-11-1 NMSA 1978] and what specific actions have been taken to comply with the Interstate Compact on the Placement of Children; and

(11) the name, address and telephone number of the agency or investigator who has agreed to do the pre-placement study.

G. The request for placement shall be served on all parties entitled to receive notice of the filing of a petition for adoption, as provided in Section 32A-5-27 NMSA 1978. An order allowing placement may be entered prior to service of the request for placement.

H. A hearing and the court decision on the request for placement shall occur within thirty days of the filing of the request.

I. As part of any court order authorizing placement under this section, the court shall find whether the pre-placement study complies with Section 32A-5-14 NMSA 1978 and that the time requirements concerning placement set forth in this section have been met.

History: 1978 Comp., § 32A-5-13, enacted by Laws 1993, ch. 77, § 140; 1995, ch. 206, § 31; 2001, ch. 162, § 2; 2005, ch. 189, § 61.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1995 amendment, effective July 1, 1995, substituted "32A-5-12" for "32-5-12" in Subsection B, substituted "subject to" for "sentenced pursuant to" and "32A-5-42" for "32-5-42" in Subsection E, substituted "32A-5-27" for "32-5-27" in Subsection G, substituted "32A-5-14" for "32-5-14" in Subsection I, and made minor stylistic changes throughout the section.

The 2001 amendment, effective June 15, 2001, in Subsection A, deleted the former second sentence, which read "The request shall be filed at least thirty days prior to an adoptive placement in an independent adoption proceeding"; inserted the last sentence of Subsection G; and deleted the former last two sentences of Subsection H, which contained provisions for scheduling a hearing sooner than thirty days after filing a request.

The 2005 amendment, effective June 17, 2005, in Subsection B, provided that only a pre-placement study that has been prepared or updated within one year immediately prior to the date of placement shall be filed with the court.

Failure to file a petition for adoption. — The failure to file a petition for adoption is not jurisdictional and does not render an adoption decree void. In the Matter of the Adoption Petn. of Rebecca M., 2008-NMCA-038, 143 N.M. 554, 178 P.3d 839.

Requirement to set forth information. — Former 40-7-34 NMSA 1978 required that an affidavit setting forth certain facts be filed with the petition. In this case, those facts were set forth in the petition itself, and the petition was verified by the adoptive parents. This constituted compliance with the statute. Vest v. State ex rel. N.M. Human Servs. Dep't, 116 N.M. 708, 866 P.2d 1175 (Ct. App. 1993).

32A-5-14. Pre-placement study.

A. The pre-placement study shall be performed as prescribed by department regulation and shall include at a minimum the following:

(1) an individual interview with each petitioner;

(2) a joint interview with both petitioners; if a joint interview is not conducted, an explanation shall be provided in the pre-placement study;

(3) a home visit, which shall include an interview with the petitioner's children and any other permanent residents of the petitioner's home;

(4) an interview with the adoptee, if age appropriate;

(5) an individual interview with each of the adoptee's parents; if a parent is not interviewed, an explanation shall be provided in the pre-placement study;

(6) full disclosure to the petitioner;

(7) exploration of the petitioners' philosophy concerning discussion of adoption issues with the adoptee;

(8) the initiation of a criminal records check of each petitioner;

(9) a medical certificate dated not more than one year prior to any adoptive placement assessing the petitioner's health as it relates to the petitioner's ability to care for the adoptee;

(10) a minimum of three letters of reference from individuals named by the petitioner or memoranda of the dates and contents of personal contacts with the references;

(11) a statement of the capacity and readiness of the petitioner for parenthood and the petitioner's emotional and physical health and ability to shelter, feed, clothe and educate the adoptee;

(12) verification of the petitioner's employment, financial resources and marital status;

(13) a report of a medical examination performed on the adoptee within one year prior to the proposed adoptive placement;

(14) a statement of the results of any prior pre-placement study or initiation of a pre-placement study, if any, of the petitioners done by any person; and

(15) the investigator shall attach a copy of proof of certification by the department for the investigator to conduct pre-placement studies, or if the preparer of the pre-placement study is out-of-state, the preparer shall attach a statement setting forth qualifications that are equivalent to those required of an investigator pursuant to the provisions of Section 32A-5-13 NMSA 1978 and department regulations.

B. The pre-placement study shall be completed at the cost of the petitioner.

C. Unless directed by the court, a pre-placement study is not required in cases in which the child is being adopted by a stepparent, a relative or a person named in the child's deceased parent's will pursuant to Section 32A-5-12 NMSA 1978.

D. The pre-placement study shall be filed with the court.

History: 1978 Comp., § 32A-5-14, enacted by Laws 1993, ch. 77, § 141; 1995, ch. 206, § 32.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, deleted former Paragraph (14) of Subsection A relating to a statement documenting the adoptee's family background and redesignated the remaining paragraphs accordingly, substituted "32A-5-13" for "32-5-13" in Paragraph (15) of Subsection A, and added Subsections C and D.

32A-5-14.1. Criminal history records check; background checks.

A. A nationwide criminal history records check shall be conducted on a person who files a petition to adopt a child, on prospective foster parents and on other adults residing in the prospective adoptive or foster parent's household. A person who files a petition to adopt a child shall provide the department with a set of fingerprints. The department is authorized to use the set of fingerprints to conduct a background check of the person providing the fingerprints by submitting the fingerprints to the department of public safety and the federal bureau of investigation.

B. Criminal history records obtained by the department pursuant to the provisions of this section are confidential. Criminal history records obtained pursuant to the provisions of this section shall not be used for any purpose other than conducting background checks. Criminal history records obtained pursuant to the provisions of this section and the information contained in those records shall not be released or disclosed to any other person or agency, except pursuant to a court order or with the written consent of the person who is the subject of the records.

C. A person who releases or discloses criminal history records or information contained in those records in violation of the provisions of this section is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: Laws 2003, ch. 294, § 8 and Laws 2003, ch. 321, § 8; 2005, ch. 189, § 62.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, required in Subsection A that a criminal history records check be conducted on prospective foster parents and on other adults residing in the prospective adoptive or foster parent's household.

32A-5-15. Termination of parental rights.

A. The physical, mental and emotional welfare and needs of the child shall be the primary consideration for the termination of parental rights. The court may terminate the rights of the child's parents as provided by the Adoption Act.

B. The court shall terminate parental rights with respect to a child when:

(1) the child has been abandoned by the parents;

(2) the child has been a neglected or abused child and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future; or

(3) the child has been placed in the care of others, including care by other relatives, either by a court order or otherwise, and the following conditions exist:

(a) the child has lived in the home of others for an extended period of time;

(b) the parent-child relationship has disintegrated;

(c) a psychological parent-child relationship has developed between the substitute family and the child;

(d) if the court deems the child of sufficient capacity to express a preference, the child no longer prefers to live with the natural parent;

(e) the substitute family desires to adopt the child; and

(f) a presumption of abandonment created by the conditions described in Subparagraphs (a) through (e) of this paragraph has not been rebutted.

C. A finding by the court that all of the conditions set forth in Subparagraph (a) through (e) of Paragraph (3) of Subsection B of this section exist shall create a rebuttable presumption of abandonment.

D. The termination of parental rights involving an Indian child shall comply with the requirements of the federal Indian Child Welfare Act of 1978.

History: 1978 Comp., § 32A-5-15, enacted by Laws 1993, ch. 77, § 142; 1995, ch. 206, § 33.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1995 amendment, effective July 1, 1995, substituted "the Adoption Act" for "this article" in Subsection A, in Subsection B, added Subparagraph (3)(f) and made minor stylistic changes in Subparagraphs (3)(d) and (3)(e), and inserted "Subparagraph (a) through (e) of" in Subsection C.

A biological father's conduct prior to a child's birth cannot be used as a basis for finding that the father caused the disintegration of the parent-child relationship. Helen G. v. Mark J. H., 2006-NMCA-136, 140 N.M. 618, 145 P.3d 98, cert. granted, 2006-NMCERT-010, 140 N.M. 674, 146 P.3d 809.

Criminal's consent to adoption. — Man convicted of criminal sexual penetration of a child had no constitutional right under the due process clauses of the United States or New Mexico Constitutions to withhold consent to adoption of the child conceived and born as a result of that act. Christian Child Placement Serv. of the N.M. Christian Children's Home v. Vestal, 1998-NMCA-098, 125 N.M. 426, 962 P.2d 1261.

"Neglect" by noncustodial parent. — Termination of parental rights by reason of "neglect" requires a showing by clear and convincing evidence of culpability on the part of the parent through intentional or negligent disregard of the child's well-being and proper needs. If the parents are separated and living in different communities, in order to hold a noncustodial parent responsible for the neglect of the parent having actual physical custody of the child, it must be established that the noncustodial parent knew or should have known of the condition of the child, that the child was without proper care by the custodial parent because of the faults or habits of that parent, and when able to do so, to provide that care. Roth v. Bookert, 117 N.M. 31, 868 P.2d 1256 (Ct. App. 1993), rev'd in part on other grounds, 119 N.M. 638, 894 P.2d 994 (1995), cert. denied, 516 U.S. 860, 116 S. Ct. 168, 133 L. Ed. 2d 110 (1995).

Law reviews. — For note, "Family Law - New Mexico Expands Due Process Rights of Parents in Termination of Parental Rights: In Re Ruth Anne E.," see 31 N.M.L. Rev. 439 (2001).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Legal malpractice in defense of parents at proceedings to terminate parental rights over dependent or neglected children, 18 A.L.R.5th 902.

Parent's use of drugs as factor in award of custody of children, visitation rights, or termination of parental rights, 20 A.L.R.5th 534.

Smoking as factor in child custody and visitation cases, 36 A.L.R.5th 377.

Sufficiency of evidence to establish parent's knowledge or llowance of child's sexual abuse by another under statute permitting termination of parental rights for 'allowing' or 'knowingly allowing' such abuse to occur, 53 A.L.R.5th 499.

32A-5-16. Termination procedures.

A. A proceeding to terminate parental rights may be initiated in connection with or prior to an adoption proceeding. Venue shall be in the court for the county in which the child is physically present or in the county from which the child was placed. The proceeding may be initiated by any of the following:

(1) the department;

(2) an agency; or

(3) any other person having a legitimate interest in the matter, including a petitioner for adoption, the child's guardian, the child's guardian ad litem or attorney in another action, a foster parent, a relative of the child or the child.

B. A petition for termination of parental rights shall be signed and verified by the petitioner, be filed with the court and set forth:

(1) the date, place of birth and marital status of the child, if known;

(2) the grounds for termination and the facts and circumstances supporting the grounds for termination;

(3) the names and addresses of the person, authorized agency or agency officer to whom custody might be transferred;

(4) the basis for the court's jurisdiction;

(5) that the petition is in contemplation of adoption;

(6) the relationship or legitimate interest of the applicant to the child; and

(7) whether the child is an Indian child and, if so:

(a) the tribal affiliations of the child's parents;

(b) the specific actions taken by the moving party to notify the parents' tribe and the results of the contacts, including the names, addresses, titles and telephone numbers of the persons contacted. Copies of any correspondence with the Indian tribe shall be attached as exhibits to the petition; and

(c) what specific efforts were made to comply with the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the appropriate Indian tribes.

C. Notice of the filing of the petition, accompanied by a copy of the petition, shall be served by the petitioner on the parents of the child, the child's guardian, the legal custodian of the child, the person with whom the child is residing, the individuals with whom the child has resided within the past six months and the department. Service shall be in accordance with the Rules of Civil Procedure [1-001 NMRA] for the District Courts for the service of process in a civil action in this state, with the exception that the department may be served by certified mail. The notice shall state specifically that the person served shall file a written response to the petition within twenty days if the person intends to contest the termination. In any case involving an Indian child, notice shall also be served on the child's Indian tribe pursuant to the federal Indian Child Welfare Act of 1978.

D. If the identification or whereabouts of a parent is unknown, the petitioner shall file a motion for an order granting service by publication or an order stating that service by publication is not required. A motion for an order granting service by publication shall be supported by the affidavit of the petitioner, the agency or the petitioner's attorney detailing the efforts made to locate the parent. Upon being satisfied that reasonable efforts to locate the parent have been made and that information as to the identity or whereabouts of the parent is still insufficient to effect service in accordance with SCRA, Rule 1-004 [NMRA], the court shall order service by publication or order that publication is not required because the parent's consent is not required pursuant to the provisions of Section 32A-5-19 NMSA 1978.

E. The court shall, upon request, appoint counsel for an indigent parent who is unable to obtain counsel or if, in the court's discretion, appointment of counsel for an indigent parent is required in the interest of justice. Payment for the appointed counsel shall be made by the petitioner pursuant to the rate determined by the supreme court of New Mexico for court-appointed attorneys.

F. The court shall appoint a guardian ad litem for the child in all contested proceedings for termination of parental rights. If the child is fourteen years of age or older and in the custody of the department, the child's attorney appointed pursuant to the Abuse and Neglect Act [32A-4-1 NMSA 1978] shall represent the child in any proceedings for termination of parental rights under this section.

G. Within thirty days after the filing of a petition to terminate parental rights, the petitioner shall request a hearing on the petition. The hearing date shall be at least thirty days after service is effected upon the parent of the child or completion of publication.

H. The grounds for any attempted termination shall be proved by clear and convincing evidence. In any proceeding involving an Indian child, the grounds for any attempted termination shall be proved beyond a reasonable doubt and meet the requirements set forth in the federal Indian Child Welfare Act of 1978.

I. If the court terminates parental rights, it shall appoint a custodian for the child. Upon entering an order terminating the parental rights of a parent, the court may commit the child to the custody of the department, the petitioner or an agency willing to accept custody for the purpose of placing the child for adoption. In any termination proceeding involving an Indian child, the court shall, in any termination order, make specific findings that the requirements of the federal Indian Child Welfare Act of 1978 were met.

J. A judgment of the court terminating parental rights divests the parent of all legal rights. Termination of parental rights shall not affect the child's right of inheritance through the former parent.

History: 1978 Comp., § 32A-5-16, enacted by Laws 1993, ch. 77, § 143; 1997, ch. 34, § 11; 2001, ch. 162, § 3; 2009, ch. 239, § 54.

ANNOTATIONS

Cross references. — For termination procedures in abuse and neglect cases, *see* 32A-4-29 NMSA 1978.

For process in the Children's Court, *see* 10-104 NMRA.

For Rules of Civil Procedure for the District Courts, *see* 1-001 NMRA.

For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1997 amendment, effective July 1, 1997, made a minor stylistic change in Subsection C; and in Subsection D, divided the former first sentence into the present first and second sentences by inserting the language "or an order stating that service by publication is not required. A motion for an order granting service by publication shall be", and, at the end of the third sentence, added "or order that publication is not required because the parent's consent is not required pursuant to the provisions of Section 32A-5-19 NMSA 1978".

The 2001 amendment, effective June 15, 2001, deleted "an agency" preceding "a foster parent" in Paragraph A(3); substituted "the individuals" for "any person" in Subsection C; and in Subsection E substituted "an indigent parent who is unable" for "any parent who is unable", deleted "for financial reasons" following "to obtain counsel", inserted "for an indigent parent" following "appointment of council" and inserted "pursuant to the rate determined by the supreme court of New Mexico for court-appointed attorneys" at the end of the subsection.

The 2009 amendment, effective July 1, 2009, in Paragraph (3) of Subsection A, after "guardian ad litem", added "or attorney" and in Subsection F, added the last sentence.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 32-1-55 NMSA 1978 have been included in the annotations to this section.

Waiver of objection to venue. — Mother, who appealed district court's judgment terminating her parental rights, waived her claim of improper venue, where she failed to raise her venue-statute objection at a time when any error could have been cured promptly. Helen F. v. State ex rel. Human Servs. Dep't, 109 N.M. 472, 786 P.2d 699 (Ct. App. 1990), overruled on other grounds, Roth v. Bookert, 117 N.M. 31, 868 P.2d 1256 (Ct. App. 1993); Roth v. Bookert, 117 N.M. 31, 868 P.2d 1256 (Ct. App. 1993), rev'd in

part on other grounds, 119 N.M. 638, 894 P.2d 994 (1995), cert. denied, 516 U.S. 860, 116 S. Ct. 168, 133 L. Ed. 2d 110 (1995).

Lack of notice of issue of continuation of parental rights violates mother's due process rights. — Since the issue of termination of parental rights was not raised in the pleadings, nor properly tried and was mentioned for the first time after closing arguments, when counsel for the father made an oral motion that the parental rights of the mother be terminated, the procedural due process rights of the mother were violated as she was never given notice that the continuation of her parental rights was at issue, she did not have a full opportunity to prepare her case and, consequently, she was not given a full and fair hearing. Thatcher v. Arnall, 94 N.M. 306, 610 P.2d 193 (1980).

Sufficiency of notice. — Although the summons served upon a father in a termination of parental rights action did not meet the requirements in the statute, there was no showing that the father was prejudiced by the various errors in the notice. Ronald A. v. State ex rel. Human Servs. Dep't, 110 N.M. 454, 794 P.2d 371 (Ct. App. 1990).

Prior proceeding concerned with the fact of neglect is not a jurisdictional bar to a later, separate termination proceeding. State ex rel. Human Servs. Dep't v. Levario, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Since neglect proceedings do not result in final judgment on merits, the department is not barred under the "judgments" rule from later bringing termination proceedings. State ex rel. Human Servs. Dep't v. Levario, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Verification of pleadings. — Although the human services department failed to obtain the court's permission prior to filing its amended petitions to terminate parental rights, the court granted permission to file the final amended petition and verification prior to the commencement of trial. Allowance of this amendment rectified any insufficiency in the earlier pleadings not being verified. The court, therefore, was not deprived of subject matter jurisdiction. Laurie R. v. New Mexico Human Servs. Dep't, 107 N.M. 529, 760 P.2d 1295 (Ct. App. 1988).

Authority of court after mother's consent declared invalid. — Since the mother's consent to adoption has been declared invalid in keeping with the best interests of the child, the trial court retains the power to determine custody in the absence of a legally valid consent, and it is within the authority of the trial court to continue the child in the custody of the couple seeking to adopt her. Although they lacked standing to petition the court for adoption, they were not left without remedy, since they did have standing to seek relief. In re Samantha D., 106 N.M. 184, 740 P.2d 1168 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 A.L.R.4th 1203.

32A-5-17. Persons whose consents or relinquishments are required.

A. Consent to adoption or relinquishment of parental rights to the department or an agency licensed by the state of New Mexico shall be required of the following:

(1) the adoptee, if fourteen years of age 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 proposed adoptive parent;

(4) the presumed father of the adoptee;

(5) the adoptee's acknowledged father;

(6) the department or the agency to whom the adoptee has been relinquished that has placed the adoptee for adoption or the department or the agency that has custody of the adoptee; provided, however, that the court may grant the adoption without the consent of the department or the agency if the court finds the adoption is in the best interests of the adoptee and that the withholding of consent by the department or the agency is unreasonable; and

(7) the guardian of the adoptee's parent when, pursuant to provisions of the Uniform Probate Code [45-1-101 NMSA 1978], that guardian has express authority to consent to adoption.

B. In any adoption involving an Indian child, consent to adoption by the petitioner or relinquishment of parental rights shall be obtained from an "Indian custodian", as required pursuant to the provisions of the federal Indian Child Welfare Act of 1978.

C. A consent or relinquishment executed by a parent who is a minor shall not be subject to avoidance or revocation solely by reason of the parent's minority.

History: 1978 Comp., § 32A-5-17, enacted by Laws 1993, ch. 77, § 144; 1995, ch. 206, § 34; 2005, ch. 189, § 63.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1995 amendment, effective July 1, 1995, in Subsection A, made minor stylistic changes and substituted "ten years of age or older" for "over the age of ten years" in Paragraph (1).

The 2005 amendment, effective June 17, 2005, changed "ten years" to "fourteen years" in Subsection A(1) and changed "adoptive father" to "proposed adoptive parent" in Subsection A(3).

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 40-7-35 NMSA 1978 have been included in the annotations to this section.

Consent required to alter parent-child relationship. — Courts are powerless to alter the natural parent-child relationship and create an artificial one in its stead without a consent agreement, unless circumstances exist under which consent is unnecessary or may be waived. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Since adoption may be refused to petitioners who have the strongest endorsement of the parents, it follows that the office of the requirement of consent for adoption is to indicate the willingness of the parents that the natural relationship be swept away and a new one created in its stead. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Written consent to proposed adoption, duly acknowledged before a notary public, is made the overt act by which the agreement of the parent to an adoption proceeding shall be manifested. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Consent may be implied where there is direct evidence of it. In re Garcia's Estate, 45 N.M. 8, 107 P.2d 866 (1940).

Consent to adoption not ineffective because of duress of circumstances. — See Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Consent binds no one unless court acts. — The giving of consent in an adoption case is indicative of the subjective state of mind of the parents - expressive only of the individuals and binding no one unless the court shall choose to act thereon. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

While parents have no property right in their children, as long as they properly discharge their responsibilities they are entitled to the custody and the natural affection and allegiance of their children, who should not be taken from them and given to others by adoption unless the parents have manifested their wish and agreement to do so. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Consent of offending spouse after divorce. — Where a divorce decree is rendered on the ground of cruelty to a spouse who is granted the custody of children, with the right of visitation granted the offending spouse, the consent of the latter is a necessary prerequisite to entering a decree of adoption. Onsrud v. Lehman, 56 N.M. 289, 243 P.2d 600 (1952).

Fact that one parent has been adjudged to be mentally ill by a court of competent jurisdiction does not necessarily obviate the necessity of obtaining a consent for adoption from that parent. 1959-60 Op. Att'y Gen. No. 59-59.

Notice requirements must be complied with. — A dependent and neglected child of a person who has been declared to be mentally ill by a court of competent jurisdiction may be adopted without the consent of such person, but the notice requirements imposed by certain statutes must be complied with. 1959-60 Op. Att'y Gen. No. 59-59.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 2 Am. Jur. 2d Adoption § 60 et seq.

Necessity and sufficiency of consent to adoption by spouse of adopting parent, 38 A.L.R.4th 768.

Validity and construction of surrogate parenting agreement, 77 A.L.R.4th 70.

Validity of birth parent's "blanket" consent to adoption which fails to identify adoptive parents, 15 A.L.R.5th 1.

Rights of unwed father to obstruct adoption of his child by withholding consent, 61 A.L.R.5th 151.

2 C.J.S. Adoption of Persons §§ 51 to 72.

32A-5-18. Implied consent or relinquishment.

A. A consent to adoption or relinquishment of parental rights required pursuant to the provisions of the Adoption Act shall be implied by the court if the parent, without justifiable cause, has:

(1) left the adoptee without provision for the child's identification for a period of fourteen days; or

(2) left the adoptee with others, including the other parent or an agency, without provisions for support and without communication for a period of:

(a) three months if the adoptee was under the age of six years at the commencement of the three-month period; or

(b) six months if the adoptee was over the age of six years at the commencement of the six-month period.

B. A court shall not imply consent or relinquishment under this section unless the parent whose relinquishment or consent is to be implied has been served with notice setting forth the time and place of the hearing at which the consent or relinquishment may be implied. The implication of a consent or relinquishment under this section shall

have the same effect as though the consent or relinquishment had been given voluntarily.

C. The court shall render its decision on the implied consent prior to proceeding with the adjudicatory hearing.

History: 1978 Comp., § 32A-5-18, enacted by Laws 1993, ch. 77, § 145.

ANNOTATIONS

Cross references. — For abandonment of a child, *see* 30-6-1 NMSA 1978.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 40-7-36 NMSA 1978 have been included in the annotations to this section.

Effect of implied consent. — Where petitioners filed a petition to adopt respondent's child and served respondent with a motion to imply respondent's consent to the adoption; the district court held a hearing on the consent issue and entered an order implying respondent's consent; respondent requested findings and conclusion, but did not file either; and respondent indicated that respondent would appeal the order, but no appeal was filed, the order implying respondent's consent was a final, appealable order that terminated respondent's right to participate further in the adoption proceedings and that terminated the respondent's parental rights. Homer F. v. Jeremiah E., 2009-NMCA-082, 146 N.M. 845, 215 P.3d 783.

Voluntary conduct toward child may forfeit right to consent. — The person whose consent is otherwise required may forfeit his right to withhold or grant consent upon the basis of his voluntary conduct toward the child. Since the entire right may be so lost, there is no reason why a portion of the right, the specification of the persons in whose favor consent to adoption is given, may not be the subject of voluntary waiver. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Abandonment consists of conduct on part of parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship. In re Doe, 89 N.M. 606, 555 P.2d 906 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Two elements of test of abandonment, parent's conduct as evidence of disregard for parental obligation and that disregard leading to destruction of parent-child relationship, are interdependent; both must be established if there is to be legal abandonment. In re Doe, 89 N.M. 606, 555 P.2d 906 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Abandonment is to be determined objectively, taking into account not only the verbal expressions of the natural parents but their conduct as parents as well. In re Doe, 89 N.M. 606, 555 P.2d 906 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Justifiable cause for failure to communicate and support. — Before the court issues an order granting a decree of adoption and dispensing with a parent's consent to adoption based upon a conclusion that the parent has impliedly consented to an adoption because of a failure of the parent to provide for the support and to communicate or maintain contact with the child during a certain time period, the court must also determine whether the failure of the parent to support and communicate with the child during the time period was "without justifiable cause." Such cause was established in this case since the father lost his job shortly after he separated from the mother and was unemployed at the time of the filing of the petition for adoption, the father continued to object to his son's adoption, the father attempted through counsel to obtain visitation, and the father made a written demand for the return of his son. Roth v. Bookert, 117 N.M. 31, 868 P.2d 1256 (Ct. App. 1993), rev'd in part on other grounds, 119 N.M. 638, 894 P.2d 994 (1995), cert. denied, 516 U.S. 860, 116 S. Ct. 168, 133 L. Ed. 2d 110 (1995).

Notice to parents required. — It is impossible to declare a child to be dependent and neglected and then place the child for adoption without notice to the parents. 1959-60 Op. Att'y Gen. No. 59-59.

Law reviews. — For note, "Family Law - A Limitation on Grandparental Rights in New Mexico: Christian Placement Service v. Gordon," see 17 N.M.L. Rev. 207 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adoption, 71 A.L.R.4th 305.

Comment Note: Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adoption - general principles, 82 A.L.R.5th 443.

Natural parent's indigence resulting from unemployment or underemployment as precluding finding that failure to support child waived requirement of consent to adoption, 83 A.L.R.5th 375.

32A-5-19. Persons whose consents or relinquishments are not required.

The consent to adoption or relinquishment of parental rights required pursuant to the provisions of the Adoption Act shall not be required from:

A. a parent whose rights with reference to the adoptee have been terminated pursuant to law;

B. a parent who has relinquished the child to an agency for an adoption;

C. a biological father of an adoptee conceived as a result of rape or incest;

D. a person who has failed to respond when given notice pursuant to the provisions of Section 32A-5-27 NMSA 1978; or

E. an alleged father who has failed to register with the putative father registry within ten days of the child's birth and is not otherwise the acknowledged father.

History: 1978 Comp., § 32A-5-19, enacted by Laws 1993, ch. 77, § 146; 1997, ch. 34, § 12; 2001, ch. 162, § 4.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "32A-5-27" for "32-5-27" in Subsection D, added Subsection F, and made minor stylistic changes at the end of Subsections D and E.

The 2001 amendment, effective June 15, 2001, in Subsection E, substituted "an alleged father" for "any putative father"; inserted "and is not otherwise the acknowledged father"; and deleted former Subsection F, which read "any alleged father".

Adoptee conceived as result of rape. — Man convicted of criminal sexual penetration of a child had no constitutional right under the due process clauses of the United States or New Mexico Constitutions to withhold consent to adoption of the child conceived and born as a result of that act. Christian Child Placement Serv. of the N.M. Christian Children's Home v. Vestal, 1998-NMCA-098, 125 N.M. 426, 962 P.2d 1261.

Criminal sexual penetration of 16-year-old not rape. — Child conceived as a result of fourth-degree criminal sexual penetration of a 16-year-old was not conceived "as a result of rape" authorizing dismissal of the father from adoption proceedings under Subsection C of this section. State ex rel. Children, Youth & Families Dep't v. Paul P., 1999-NMCA-077, 127 N.M. 492, 983 P.2d 1011.

32A-5-20. Putative father registry; notice; penalty.

A. The purpose of the putative father registry is to protect the parental rights of fathers who affirmatively assume responsibility for children they may have fathered and to expedite adoptions of children whose biological fathers are unwilling to assume responsibility for their children by registering with the putative father registry or otherwise acknowledging their children. The registry does not relieve the obligation of mothers to identify known fathers.

B. A putative father registry shall be established by the department of health to record the names and addresses of:

(1) any person adjudicated by a court of this state to be the father of a child;

(2) any person who has filed with the registry, before or after birth of a child out of wedlock, a notice of intent to claim paternity of the child;

(3) any person who has filed with the registry an instrument acknowledging paternity; or

(4) any person adjudicated by a court of another state or territory of the United States to be the father of an out-of-wedlock child, when a certified copy of the court order has been filed with the registry.

C. A person filing a notice of intent to claim paternity of a child or an acknowledgment of paternity shall include in the notice the following:

(1) his name;

(2) his current address;

(3) the mother's name and any other identifying information requested by the department of health; and

(4) the child's name, if known, and any other identifying information requested by the department of health.

D. If the person filing the notice of intent to claim paternity of a child or acknowledgment changes his address, the person shall notify the department of health of his new address in the manner prescribed by the department of health.

E. A person who has filed a notice of intent to claim paternity may at any time revoke a notice of intent to claim paternity previously filed. Upon receipt by the registry of the notice of revocation, the revoked notice of intent to claim paternity shall be deemed a nullity nunc pro tunc.

F. No registration fee shall be charged for registering the intent to claim paternity of a child or acknowledgment of paternity. The department of health may charge a reasonable fee as prescribed by regulation for processing searches of the putative father registry.

G. An unrevoked notice of intent to claim paternity of a child may be introduced in evidence by any party in any proceeding in which that fact may be relevant.

H. If a father-child relationship has not been established pursuant to the New Mexico Uniform Parentage Act [40-11A-101 NMSA 1978], a petitioner for adoption of or termination of parental rights regarding a child shall obtain a certificate of search of the putative father registry.

I. If a petitioner for adoption of or termination of parental rights regarding a child has reason to believe that the conception or birth of the child may have occurred in another state, the petitioner shall also obtain a certificate of search from the putative father registry, if any, in that state.

J. The department of health shall furnish to the requester a certificate of search of the registry on request of any court, a state agency, the department, the petitioner's attorney or the mother of the child. The information shall not be disclosed to any other person, except upon order of the court for good cause shown. The requester shall furnish the department with a stamped, self-addressed reply envelope.

K. A certificate provided by the department of health shall be signed on behalf of the department of health and state that:

(1) a search has been made of the registry; and

(2) a registration containing the information required to identify the registrant:

(a) has been found and is attached to the certificate of search; or

(b) has not been found.

L. A petitioner shall file the certificate of search with the district court before a proceeding for adoption of or termination of parental rights regarding a child may be concluded.

M. Subject to any rules established by the New Mexico supreme court, a certificate of search of the registry of paternity in this or another state is admissible in a proceeding for adoption of or termination of parental rights regarding a child and, if relevant, in other legal proceedings.

N. The department of health may promulgate any regulations or forms necessary to implement the provisions of this section.

O. Any person who intentionally and unlawfully releases information from the putative father registry to the public or makes any other unlawful use of the information in violation of the provisions of this section is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: 1978 Comp., § 32A-5-20, enacted by Laws 1993, ch. 77, § 147; 2009, ch. 215, § 18.

ANNOTATIONS

Cross references. — For birth registration, *see* 24-14-13 NMSA 1978.

The 2009 amendment, effective January 1, 2010, deleted former Subsection H, which provided for disclosure of the names and addresses of persons listed with the registry and added Subsections H through M.

32A-5-21. Form of consent or relinquishment.

A. Except when consent or relinquishment is implied, a consent or relinquishment by a parent shall be in writing, signed by the parent consenting or relinquishing and shall state the following:

(1) the date, place and time of execution;

(2) the date and place of birth of the adoptee and any names by which the adoptee has been known;

(3) if a consent to adoption is being executed, the identity of the petitioner, if known, or when the adoption is an independent adoption and the identity of the petitioner is unknown, how the petitioner was selected by the consenting parent;

(4) if a relinquishment of parental rights is being executed, the name and address of the agency or the department;

(5) that the person executing the consent or relinquishment has been counseled, as provided in Section 32A-5-22 NMSA 1978, by a certified counselor of the person's choice and with this knowledge the person is voluntarily and unequivocally consenting to the adoption of the named adoptee;

(6) that the consenting party has been advised of the legal consequences of the relinquishment or consent either by independent legal counsel or a judge;

(7) if the adoption is closed, that all parties understand that the court will not enforce any contact, regardless of any informal agreements that have made between the parties;

(8) that the consent to or relinquishment for adoption cannot be withdrawn;

(9) that the person executing the consent or relinquishment has received or been offered a copy of the consent or relinquishment;

(10) that a counseling narrative has been prepared pursuant to department regulations and is attached to the consent or relinquishment;

(11) that the person who performed the counseling meets the requirements set forth in the Adoption Act; and

(12) that the person executing the consent or relinquishment waives further notice of the adoption proceedings.

B. The consent of an adoptee, if fourteen years of age or older, shall be in writing, signed by the adoptee, consenting to the adoption and shall state the following:

(1) the date, place and time of execution;

(2) the date and place of birth of the adoptee and any names by which the adoptee has been known;

(3) the name of the petitioner;

(4) that the adoptee has been counseled regarding the consent pursuant to department regulation;

(5) that the adoptee has been advised of the legal consequences of the consent;

(6) that the adoptee is voluntarily and unequivocally consenting to the adoption;

(7) that the consent or relinquishment cannot be withdrawn;

(8) that a counseling narrative has been prepared pursuant to department regulation and is attached to the consent; and

(9) that the person who performed the counseling meets the requirements set forth in the Adoption Act.

C. In cases when the consent or relinquishment is in English and English is not the first language of the consenting or relinquishing person, the person taking the consent or relinquishment shall certify in writing that the document has been read and explained to the person whose consent or relinquishment is being taken in that person's first language, by whom the document was so read and explained and that the meaning and implications of the document are fully understood by the person giving the consent or relinquishment.

D. Unconditional consents or relinquishments are preferred and therefore, conditional consents or relinquishments shall be for good cause and approved by the court. However, if the condition is for a specific petitioner or the condition requires the other parent to consent before the decree of adoption is entered, the condition shall be deemed for good cause. In any event, all conditions permitted under this subsection

shall be met within one hundred eighty days of the execution of the conditional consent or relinquishment or the conclusion of any litigation concerning the petition for adoption. The court may grant an extension of this time for good cause.

E. Agency or department consents required pursuant to the provisions of Section 32A-5-17 NMSA 1978 shall state the following:

(1) the date, place and time of execution;

(2) the date and place of birth of the adoptee and any names by which the adoptee has been known;

(3) the name of the petitioner; and

(4) the consent of the agency or department.

F. A consent or relinquishment taken by an individual appointed to take consents or relinquishments by an agency shall be notarized, except that a consent or relinquishment signed in the presence of a judge need not be notarized. A hearing before the court for the purpose of taking a consent or relinquishment shall be heard by the court within seven days of request for setting.

G. No consent to adoption or relinquishment of parental rights shall be valid if executed within forty-eight hours after the adoptee's birth. Consent to adoption or relinquishment of parental rights involving an Indian child shall comply with the more stringent requirements of the federal Indian Child Welfare Act of 1978.

H. The requirements of a consent to adoption or relinquishment of parental rights involving an Indian child and the rights of a parent of an Indian child to withdraw the consent or relinquishment shall be governed by the relevant provisions of the federal Indian Child Welfare Act of 1978.

I. A consent to or relinquishment for adoption shall not be withdrawn prior to the entry of a decree of adoption unless the court finds, after notice and opportunity to be heard is afforded to the petitioner, to the person seeking the withdrawal and to the agency placing a child for adoption, that the consent or relinquishment was obtained by fraud. In no event shall a consent or relinquishment be withdrawn after the entry of a decree of adoption.

History: 1978 Comp., § 32A-5-21, enacted by Laws 1993, ch. 77, § 148; 2005, ch. 189, § 64.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 2005 amendment, effective June 17, 2005, added Subsection A(7), which provided that a consent or relinquishment shall, if the adoption is closed, that all parties understand that the court will not enforce any contract, regardless of any informal agreement between the parties; and in Subsection B, changed "over the age of ten years" to "fourteen years of age or older".

Voluntary actions by birth mother. Vigil v. Fogerson, 2006-NMCA-010, 138 N.M. 822, 126 P.3d 1186.

Counseling not grounds for reopening adoption. — The fact that the mother had not received pre-consent counseling was not a proper ground upon which to reopen an adoption. Drummond v. Drummond, 1997-NMCA-094, 123 N.M. 727, 945 P.2d 457.

Withdrawal of parental consent. — Fraud is the only expressly-stated ground in the Adoption Act upon which to base the withdrawal of parental consent prior to the entry of a final decree of adoption. State ex rel. Human Servs. Dep't in re Kira M., 118 N.M. 563, 883 P.2d 149 (1994).

The children's court has the power to grant the request of a natural parent to withdraw consent under exceptional circumstances failing outside the specific grounds enunciated in subsection F; any such order must be consistent with the best interest of the child, which must be given paramount consideration. State ex rel. Human Servs. Dep't in re Kira M., 118 N.M. 563, 883 P.2d 149 (1994).

Consent and relinquishment of parental rights complied with the requirements of this section given the extensive counseling birth mother received, the seven days between birth and the relinquishment, the legal counsel provided to her and the overall tenor of her testimony. Vigil v. Fogerson, 2006-NMCA-010, 138 N.M. 822, 126 P.3d 1186.

32A-5-22. Persons required to receive counseling; content and form of counseling.

A. Counseling required pursuant to the provisions of this section shall occur prior to:

(1) consent to the adoption; or

(2) the relinquishment of parental rights.

For good cause, the court may waive any or all counseling requirements.

B. Counseling shall be required for the following persons:

(1) the adoptee, if the adoptee is ten years of age or older;

(2) the adoptee's parent who is consenting to the adoption or relinquishing parental rights; and

(3) in a stepparent adoption, when the stepparent and the custodial parent have been married for more than one year, but less than two years:

(a) the custodial parent whose parental rights are not being terminated, but who is consenting to adoption of the adoptee by the stepparent; and

(b) the petitioning stepparent.

C. The content of the counseling shall be as follows:

(1) an adoptee who is ten years of age or older shall be counseled regarding:

(a) the adoptee's understanding of the adoption process, the consequences of the adoption and alternatives to the adoption;

(b) the adoptee's feelings and wishes regarding the adoption;

(c) the adoptee's readiness for the adoption; and

(d) any other issues relevant to the adoption, given the specific circumstances of the adoption;

(2) the adoptee's parent who is consenting to the adoption or relinquishing his parental rights shall be counseled regarding alternatives to and the consequences of adoption; and

(3) in a stepparent adoption, the custodial parent consenting to the adoption of the custodial parent's child by the stepparent and the petitioning stepparent shall be counseled regarding alternatives to adoption, the consequences of the adoption, child custody and child support.

D. The form of the counseling shall be as follows:

(1) adults required to receive counseling shall be counseled individually without the presence of any other person for a minimum of one counseling session; and

(2) for adoptees ten years of age or older and minor biological parents, there shall be a minimum of two separate counseling sessions with at least one of the sessions to be conducted without the presence of the adoptee's parent or guardian, the minor biological parent's parent or guardian or the petitioner.

E. All counseling sessions shall be conducted in the primary language of the person receiving the counseling.

F. A counseling narrative shall be prepared as prescribed by department regulation and shall be attached to the consent or relinquishment form for filing with the court.

G. Counseling may be provided by a counselor, the department or an agency.

H. A person required to receive counseling who is residing outside of New Mexico may receive counseling from a person who possesses qualifications equivalent to a person certified to perform counseling by the state of New Mexico. A person providing counseling in another state or country shall attach a statement specifying that person's qualification to perform counseling to the counseling narrative. A person providing counseling in New Mexico shall attach a copy of that person's certification to the counseling narrative.

History: 1978 Comp., § 32A-5-22, enacted by Laws 1993, ch. 77, § 149; 1995, ch. 206, § 35.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "ten years of age or older" for "older than ten years of age" in Paragraph (1) of Subsection B, rewrote Paragraph (3) of Subsection B, and rewrote Subsection G.

Due process. — Where birth father refused the offer of private counseling four times and there is no suggestion in the record that the lack of private counseling impacted his decision to relinquish his parental rights, there was substantial compliance with the statutory requirements applicable to relinquishments, and due process was satisfied. Vigil v. Fogerson, 2006-NMCA-010, 138 N.M. 822, 126 P.3d 1186.

32A-5-23. Persons who may take consents or relinquishments.

A. A consent to adoption or relinquishment of parental rights shall be signed before and approved on the record by a judge who has jurisdiction over adoption proceedings, within or without this state, and who is in the jurisdiction in which the child is present or in which the parent resides at the time it is signed.

B. No parent may relinquish parental rights to the department or an agency without the department's or the agency's consent.

C. The consent or relinquishment shall be filed with the court in which the petition for adoption has been filed before adjudication of the petition.

History: 1978 Comp., § 32A-5-23, enacted by Laws 1993, ch. 77, § 150; 1995, ch. 206, § 36; 2005, ch. 189, § 65.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "and a guardian ad litem has been appointed for any adoptee whose consent is required" and made a minor stylistic change in Paragraph (2) of Subsection A.

The 2005 amendment, effective June 17, 2005, deleted former Subsection A(2), which provided that a consent to adoption or relinquishment could be signed before and approved by an individual of appointed by the department or an agency licensed by the state when the parent is represented by counsel and a guardian ad litem has been appointed for the adoptee.

Birth parents fully understood. — Where director of private adoption agency testified that he made sure the birth parents understood the ramifications of what they were doing, that the relinquishment and consent were final and irrevocable, that they had received legal advice and counseling about all alternatives available to them, and that they agreed with the counseling narrative attached to each respective relinquishment and consent form, and he spent about an hour with the birth parents before the signing, and he did not hear any reluctance or reservations from either parent, about their course of action, the evidence supports the inference that the birth parents fully understood the consequences of the relinquishment and consent. Vigil v. Fogerson, 2006-NMCA-010, 138 N.M. 822, 126 P.3d 1186.

32A-5-24. Relinquishments to the department.

A. When a parent elects to relinquish parental rights to the department, a petition to accept the relinquishment shall be filed, unless an abuse or neglect proceeding is pending. If an abuse or neglect proceeding is pending, the relinquishment shall be heard in the context of that proceeding.

B. In all hearings regarding relinquishment of parental rights to the department, the child shall be represented by a guardian ad litem. If the child is fourteen years of age or older and in the custody of the department, the child's attorney appointed pursuant to the Abuse and Neglect Act [32A-4-1 NMSA 1978] shall represent the child in any proceeding for termination of parental rights under this section.

C. If a proposed relinquishment of parental rights is not in contemplation of adoption, the court shall not allow the relinquishment of parental rights unless it finds that good cause exists, that the department has made reasonable efforts to preserve the family and that relinquishment of parental rights is in the child's best interest. Whenever a parent relinquishes the parent's rights pursuant to this subsection, the parent shall remain financially responsible for the child. The court may order the parent to pay the reasonable costs of support and maintenance of the child. The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment.

D. When a parent relinquishes the parent's rights under this section, 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 pursuant to Section 32A-5-35 NMSA 1978. The consent for relinquishment shall be in writing and shall state that the parties understand that any informal agreement allowing contact will not be enforced by the courts.

History: 1978 Comp., § 32A-5-24, enacted by Laws 1993, ch. 77, § 151; 2005, ch. 189, § 66; 2009, ch. 239, § 55.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, added Subsection D, which provided that when a parent relinquishes parental rights, the parent shall be notified that no contract will be enforced by the court unless the parties have agreed to an open adoption and that the consent for relinquishment shall be in writing and shall state that the parties understand that any informal agreement allowing contact will not be enforced by the court.

The 2009 amendment, effective July 1, 2009, in Subsection B, added the last sentence.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-5-25. Petition; time of filing.

A. A petition for adoption shall be filed within sixty days of the adoptee's placement into the proposed adoptive home if the adoptee is under the age of one year. If the adoptee is over the age of one year at the time of placement, the petition shall be filed within one hundred twenty days of the placement. For good cause shown, the court may extend those time limits up to an additional one hundred eighty days if a request for extension is filed prior to the expiration of the initial time limits. No further extensions of time shall be granted after the one hundred eighty day extension period, unless an addendum to the pre-placement study is filed in addition to an affidavit establishing good cause for the delay in filing the adoption petition.

B. If a petition is not filed in a timely manner, any person having knowledge of the proceeding shall notify the department, which may proceed as if the adoptee were a neglected child.

History: 1978 Comp., § 32A-5-25, enacted by Laws 1993, ch. 77, § 152; 1995, ch. 206, § 37.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "adoptee's" for "child's" and "adoptee" for "child" throughout the section.

32A-5-26. Petition; content.

A petition for adoption shall be filed and verified by the petitioner and shall allege:

A. the full name, age and place and duration of residence of the petitioner and, if married, the place and date of marriage; the date and place of any prior marriage, separation or divorce; and the name of any present or prior spouse;

B. the date and place of birth of the adoptee, if known;

C. the places where the adoptee has lived within the past three years and the names and addresses of the persons with whom the adoptee has lived, unless the adoptee is in the custody of an agency or the department, in which case the petitioner shall state the name and address of the agency or the department's county office from which the child was placed;

D. the birth name of the adoptee, any other names by which the adoptee has been known and the adoptee's proposed new name; provided that in the case of an agency adoption, if the petitioner and the biological parents have not agreed to the release of the adoptee's identity to the other person, the birth name and any other names by which the adoptee has been known shall be filed with the court as separate documents at the time the petition is filed;

E. where the adoptee is residing at the time of the filing of the petition and, if the adoptee is not living with the petitioner, when the adoptee will commence living with the petitioner;

F. that the petitioner desires to establish a parent and child relationship with the adoptee and that the petitioner is a fit and proper person able to care and provide for the adoptee's welfare;

G. the existence of any court orders, including placement orders, that are known to the petitioner and that regulate custody, visitation or access to the adoptee, copies of which shall accompany and be attached to the petition as exhibits;

H. the relationship, if any, of the petitioner to the adoptee;

I. the name and address of the placing agency, if any;

J. the names and addresses of all persons from whom consents or relinquishments are required, attaching copies of those obtained and alleging the facts that excuse or imply the consents or relinquishments of the others; provided that if the petitioner has not agreed to the release of his identity to the parent or if the parent has not agreed to the release of his identity to the petitioner, the names and addresses of all persons from whom consents or relinquishments are required shall be filed with the court as separate documents at the time the petition for adoption is filed;

K. whether the adoption will be an open adoption, pursuant to the provisions of Section 32A-5-35 NMSA 1978;

L. when consent of the child's father is alleged to be unnecessary, the results of a search of the putative father registry;

M. whether the adoptee is an Indian child and, if so, the petition shall allege:

(1) the tribal affiliation of the adoptee's parents;

(2) what specific actions have been taken and by whom to notify the parents' tribe and the results of the contact, including the names, addresses, titles and telephone numbers of the persons contacted. Copies of any correspondence with the Indian tribe shall be attached as exhibits to the petition; and

(3) what specific efforts were made to comply with the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the appropriate Indian tribe;

N. whether the adoption is subject to the Interstate Compact on the Placement of Children [32A-11-1 NMSA 1978] and, if so, a copy of the interstate compact form indicating approval shall be attached as an exhibit to the petition;

O. whether the adoptee is foreign-born and, if so, copies of the child's passport and United States visa and of all documents demonstrating that the adoptee is legally free for adoption, including a certificate from the United States secretary of state that certifies that the adoption is a convention adoption;

P. whether the adoption is a convention adoption and, if so, the petition shall allege:

(1) that the country in which the child has been residing is a party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption;

(2) that the agency or person who is providing the adoption service has been approved as an accrediting entity; and

(3) that the certificate issued by the United States secretary of state that certifies the adoption as a convention adoption has been filed with the court; and

Q. the name, address and telephone number of the agency or individual who has agreed to conduct the post-placement report in accordance with Section 32A-5-31 NMSA 1978, if different than the agency or individual who prepared the pre-placement study in accordance with Section 32A-5-13 NMSA 1978.

History: 1978 Comp., § 32A-5-26, enacted by Laws 1993, ch. 77, § 153; 1995, ch. 206, § 38; 2003, ch. 294, § 4; 2003, ch. 321, § 4.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1995 amendment, effective July 1, 1995, substituted "32A-5-35" for "32-5-35" in Subsection K, substituted "32A-5-31" for "32-5-31" and "32A-5-13" for "32-5-13" in Subsection P, and made minor stylistic changes throughout the section.

The 2003 amendment, effective July 1, 2003, added "including a certificate from the United States secretary of state that certifies that the adoption is a convention adoption" at the end of Subsection O; and added a new Subsection P and redesignated former Subsection P as Subsection Q. Laws 2003, ch. 294, § 4 and Laws 2003, ch. 321, § 4 enacted identical amendments to this section. The section was set out as amended by Laws 2003, ch. 321, § 4. *See* 12-1-8 NMSA 1978.

32A-5-27. Notice of petition; form of service; waiver.

A. The petition for adoption shall be served by the petitioner on the following, unless it has been previously waived in writing:

(1) the department, by providing a copy to the court clerk for service pursuant to Section 32A-5-7 NMSA 1978;

(2) any person, agency or institution whose consent or relinquishment is required by Section 32A-5-17 NMSA 1978, unless the notice has been previously waived;

(3) any acknowledged father of the adoptee;

(4) the legally appointed custodian or guardian of the adoptee;

(5) the spouse of any petitioner who has not joined in the petition;

(6) the spouse of the adoptee;

(7) the surviving parent of a deceased parent of the adoptee;

(8) any person known to the petitioner having custody of or visitation with the adoptee under a court order;

(9) any person in whose home the child has resided for at least two months within the preceding six months;

(10) the agency or individual authorized to investigate the adoption under Section 32A-5-13 NMSA 1978; and

(11) any other person designated by the court.

B. Notice shall not be served on the following:

(1) an alleged father; and

(2) a person whose parental rights have been relinquished or terminated.

C. The petitioner shall provide the clerk of the court with a copy of the petition for adoption, to be mailed to the department pursuant to the provisions of Section 32A-5-7 NMSA 1978.

D. In an adoption in which the adoptee is an Indian child, in addition to the notice required pursuant to Subsection A of this section, notice of pendency of the adoption proceeding shall be served by the petitioner on the appropriate Indian tribe and on an "Indian custodian" pursuant to the provisions of the federal Indian Child Welfare Act of 1978.

E. The notice shall state that the person served shall respond to the petition within twenty days if the person intends to contest the adoption and shall state that the failure to so respond shall be treated as a default and the person's consent to the adoption shall not be required. Provided, however, that this provision shall not apply to an agency, the department or an investigator preparing the post-placement report pursuant to Section 32A-5-31 NMSA 1978. If an agency, the department or an investigator preparing the post-placement report wants to contest the adoption, it shall notify the court within twenty days after completion of the post-placement report.

F. Service shall be made pursuant to the Rules of Civil Procedure for the District Courts. If the whereabouts of a parent whose consent is required is unknown, the investigator, department or agency charged with investigating the adoption under Section 32A-5-13 NMSA 1978 shall investigate the whereabouts of the parent and shall file by affidavit the results of the investigation with the court. Upon a finding by the court that information as to the whereabouts of a parent has been sufficiently investigated and is still insufficient to effect service in accordance with the Rules of Civil Procedure for the District Courts, the court shall issue an order providing for service by publication.

G. As to any other person for whom notice is required under Subsection A of this section, service by certified mail, return receipt requested, shall be sufficient. If the service cannot be completed after two attempts, the court shall issue an order providing for service by publication.

H. The notice required by this section may be waived in writing by the person entitled to notice.

I. Proof of service of the notice on all persons for whom notice is required by this section shall be filed with the court before any hearing adjudicating the rights of the persons.

History: 1978 Comp., § 32A-5-27, enacted by Laws 1993, ch. 77, § 154; 2001, ch. 162, § 5.

ANNOTATIONS

Cross references. — For process in the Children's Court, *see* 10-104 NMRA.

For service of process in the district courts, *see* 1-004 NMRA.

For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 2001 amendment, effective June 15, 2001, updated the internal references throughout the section; and substituted "an alleged father" for "alleged or putative fathers" in Paragraph B(1).

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 40-7-44 NMSA 1978 have been included in the annotations to this section.

Substitute service of process by publication is inadequate in adoption proceedings. Normand ex rel. Normand v. Ray, 107 N.M. 346, 758 P.2d 296 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Required parties in adoption proceedings, 48 A.L.R.4th 860.

32A-5-28. Response to petition.

A. Any person responding to a notice of a petition for adoption shall file a verified response to the petition within the time limits specified in Section 32-5-25 [32A-5-25] NMSA 1978.

B. The verified response shall follow the Rules of Civil Procedure for the District Courts and shall allege:

(1) the existence of any court orders known to the respondent that regulate custody, visitation or access to the adoptee but have not been filed with the court at the time the response is filed and copies of which shall be attached to the response;

(2) the relationship, if any, of the respondent to the adoptee;

(3) whether the adoptee is an Indian child, and, if so, the response shall set forth all allegations required under the federal Indian Child Welfare Act of 1978;

(4) whether the adoption is subject to the Interstate Compact on the Placement of Children [32A-11-1 NMSA 1978]; and

(5) whether the adoption is an open adoption.

History: 1978 Comp., § 32A-5-28, enacted by Laws 1993, ch. 77, § 155.

ANNOTATIONS

Cross references. — For Rules of Civil Procedure for the District Courts, *see* 1-001 NMRA.

For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

32A-5-29. Custody pending decree.

Once the adoptee has been placed with the petitioner pursuant to the provisions of the Adoption Act, the petitioner shall have physical custody and control of the adoptee and shall be responsible for the care, maintenance and support of the adoptee, including all necessary medical, dental, psychological or surgical treatment, pending the further order of the court. Should the child be returned to the parents, this section shall not prohibit petitioners from seeking reimbursement for the child's expenses from the parents.

History: 1978 Comp., § 32A-5-29, enacted by Laws 1993, ch. 77, § 156.

32A-5-30. Removal of adoptee from the county.

During the pendency of an adoption proceeding, the adoptee shall not be removed from the county where the petitioner resides at the time of filing a petition for adoption for a period longer than fifteen days without the permission of the court in which the adoption is pending.

History: 1978 Comp., § 32A-5-30, enacted by Laws 1993, ch. 77, § 157; 1995, ch. 206, § 39.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "where the petitioner resides at the time of filing a petition for adoption" for "in which the adoption is pending".

32A-5-31. Post-placement report.

A. An agency or an individual with the credentials set out in Subsection C of Section 32A-5-13 NMSA 1978 shall file with the court its post-placement report of the

prospective adoptive home and the adoptee. The post-placement report shall be completed as prescribed by department regulations and shall include the following:

(1) the expressed desires of the parents as to the kind of adoptive family sought;

(2) the interaction between the adoptee and petitioner;

(3) the adjustment of the adoptee since placement;

(4) the integration and acceptance of the adoptee in the petitioner's family;

(5) the petitioner's ability to meet the physical and emotional needs of the adoptee;

(6) whether the adoptive home is a suitable home for the proposed adoption;

(7) whether the adoption is in the best interest of the adoptee;

(8) the type and frequency of post-placement services given to the petitioner;

(9) orders, judgments or decrees affecting the adoptee or children of the petitioner;

(10) property owned by the adoptee;

(11) full disclosure;

(12) the costs, expenses and professional fees connected with the adoption;

(13) other circumstances that are relevant to the adoption of the adoptee by the petitioner; and

(14) when the adoptee is placed by an agency, an itemized agency statement of all payments made to any person or entity in connection with the adoption, including the date paid, the amount paid, the payee and the purpose of the payment.

B. The post-placement report shall contain an evaluation of the proposed adoption with a recommendation as to the granting of the petition for adoption and other information required by the court.

C. Unless directed by the court, a post-placement report is not required in cases in which the child is being adopted by a stepparent, a relative or a person named in the child's deceased parent's will pursuant to Section 32A-5-12 NMSA 1978.

D. The investigation for the post-placement report shall be conducted by the department, an agency or an investigator. The department, agency or investigator conducting the post-placement report may be the same as the agency or individual conducting the pre-placement study and they shall be maintained on the same list as that compiled for pre-placement studies under Subsection D of Section 32A-5-13 NMSA 1978.

E. The department, agency or investigator shall observe the adoptee and interview the petitioner in the petitioner's home as specified in department regulations as soon as possible after the receipt of notice of the action, but in any event within thirty days after receipt of the notice.

F. For an adoptee who is under one year of age at the time of placement, the department, agency or investigator shall complete and file the written report with the court within sixty days from receipt of notice of the proceeding and for an adoptee who is one year of age or older at the time of placement, the written report shall be filed with the court within one hundred twenty days from the receipt of notice of the proceeding. Concurrently, the deliverer shall forward a copy of the report to the petitioner's attorney or to the petitioner, if not represented by counsel, and to the department if the report is not generated by the department. Upon a showing of good cause and after notice to the petitioner, the court may grant extensions of time to the department, agency or investigator to file the post-placement report so long as the report is filed at least thirty days before the hearing for the decree of adoption.

History: 1978 Comp., § 32A-5-31, enacted by Laws 1993, ch. 77, § 158; 2001, ch. 162, § 6.

ANNOTATIONS

The 2001 amendment, effective June 15, 2001, updated the internal references throughout the section; deleted "a description of" following "shall include" in Subsection A; in Subsection F, inserted "For an adoptee who is under one year of age at the time of placement" at the beginning of the subsection, substituted "for an adoptee who is one year of age or older at the time of placement, the written report shall be filed with the court within one hundred twenty days from the receipt of notice of the proceeding. Concurrently, the deliverer shall forward" for "shall deliver"; and inserted "if the report is not generated by the department" in the second sentence.

32A-5-32. Stepparent adoptions.

A. Any person may adopt his spouse's child in accordance with the provisions of the Adoption Act.

B. When the adoptee has lived with his stepparent for at least one year following the stepparent's marriage to the custodial parent:

(1) placement shall not be required pursuant to Section 32A-5-12 NMSA 1978;

(2) a pre-placement study or post-placement report shall not be required unless ordered by the court;

(3) when the stepparent and the custodial parent have been married for less than two years, counseling shall be required for the stepparent and the custodial parent;

(4) the noncustodial parent shall receive counseling unless counseling is waived;

(5) the adoptee, if ten years of age or older, shall receive counseling;

(6) a criminal records check shall be conducted on a stepparent pursuant to the provisions of Section 32A-5-14 NMSA 1978;

(7) a report of fees and charges shall not be prepared, unless ordered by the court pursuant to Section 32A-5-34 NMSA 1978;

(8) the court may waive the ninety-day period between the filing of the petition for adoption and issuance of the decree of adoption; and

(9) when adopted, the adoptee shall take the name designated in the adoption petition, so long as the petitioner's spouse and the adoptee, if ten years of age or older, consent to the name.

C. When an adoptee has not lived with the stepparent for more than one year following the stepparent's marriage to the custodial parent, the adoption shall proceed as an independent adoption.

History: 1978 Comp., § 32A-5-32, enacted by Laws 1993, ch. 77, § 159; 1995, ch. 206, § 40.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, in Subsection B, rewrote Paragraphs (1) and (2), added Paragraphs (3) through (6), redesignated former Paragraphs (3) through (5) as Paragraphs (7) through (9), and substituted "32A-5-34" for "32-5-34" in Paragraph (7) and "ten years of age or older" for "older than ten years of age" in Paragraph (9).

One-year residency requirement. — The one-year residency provision for stepparent adoptions is not jurisdictional in nature; it is a statutory prerequisite to stepparent adoption and, therefore, the father could not challenge the adoption decree on the basis that the court lacked jurisdiction because the one-year residency requirement was not met. Webber v. Webber, 116 N.M. 47, 859 P.2d 1074 (Ct. App. 1993).

32A-5-33. Appointment of guardian ad litem or attorney for the adoptee or other party.

Upon the motion of any party or upon the court's own motion, the court may appoint a guardian ad litem for the adoptee or for any person found to be incompetent or a child who is a party to the proceeding. In any contested proceeding, the court shall appoint a guardian ad litem for the adoptee. The court may appoint the child's attorney appointed pursuant to the Abuse and Neglect Act if the child is fourteen years of age or older and in the custody of the department.

History: 1978 Comp., § 32A-5-33, enacted by Laws 1993, ch. 77, § 160; 2009, ch. 239, § 56.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, in the first sentence, after ”adoptee or for any", added "person found to be" and added the last sentence.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Payment of attorneys fees. — New Mexico Supreme Court has promulgated an order adopting guidelines for the payment of attorney fees for counsel appointed by the court. See Supreme Court, Miscellaneous Order No. 8000, filed November 17, 1987. This order generally governs the method of payment of attorneys appointed to serve as a guardian ad litem in adoption proceedings and authorizes payment of their fees from funds appropriated to the administrative office of the courts. In re Stailey, 117 N.M. 199, 870 P.2d 161 (Ct. App. 1994).

32A-5-34. Fees and charges; damages.

A. Prior to the final hearing on the petition, the petitioner shall file a full accounting of all disbursements of anything of value made or agreed to be made by or on behalf of the petitioner in connection with the adoption. The accounting report shall be signed under penalty of perjury. The accounting report shall be itemized in detail and shall show the services reasonably relating to the adoption or to the placement of the child for adoption that were received by the parents of the child, by the child or by or on behalf of the petitioner. The report shall also include the dates of each payment and the names and addresses of each attorney, physician, hospital, licensed adoption agency or other person or organization who received any funds or any other thing of value from the petitioner in connection with the adoption or the placement of the child with him or who participated in any way in the handling of the funds, either directly or indirectly.

B. A prospective adoptive parent, or another person acting on behalf of a prospective adoptive parent, shall make payments for services relating to the adoption or to the placement of the adoptee for adoption for allowed expenses only to third party vendors, as reasonably practical. These payments shall consist of reasonable and actual fees or charges for:

(1) the services of an agency in connection with an adoption;

(2) medical, hospital, nursing, pharmaceutical, traveling or other similar expenses incurred by a mother or the adoptee in connection with the birth or any illness of an adoptee;

(3) reasonable counseling services relating to the adoption;

(4) living expenses of a mother and her dependent children, including the adoptee, for a reasonable time before the birth or placement of the adoptee and for no more than six weeks after the birth or placement of the adoptee;

(5) expenses incurred for the purposes of full disclosure;

(6) legal services, court costs and traveling or other administrative expenses connected with an adoption, including any legal service performed for a parent who consents to the adoption of a child or relinquishes the child to an agency;

(7) preparation of a pre-placement study and of a post-placement report during the pendency of the adoption proceeding; or

(8) any other service or expense the court finds is reasonably necessary for services relating to the adoption or to the placement of the adoptee for adoption.

C. Any person who makes payments that are not permitted pursuant to the provisions of this section is in violation of the Adoption Act and subject to the penalties set forth in Section 32A-5-42 NMSA 1978.

D. Any person who threatens or coerces a parent to complete the relinquishment of parental rights or to complete the consent to an adoption, by demanding repayment of expenses or by any other threat or coercion, shall be liable to the parent for compensatory and punitive damages.

E. The accounting required in Subsection A of this section is not applicable to stepparent adoptions or to adoptions under the provisions of the Abuse and Neglect Act [32A-4-1 NMSA 1978], unless ordered by the court.

F. Nothing in this section shall be construed to permit payment to a woman for conceiving and carrying a child.

History: 1978 Comp., § 32A-5-34, enacted by Laws 1993, ch. 77, § 161; 2001, ch. 162, § 7; 2005, ch. 189, § 67.

ANNOTATIONS

The 2001 amendment, effective June 15, 2001, in Subsection B, inserted "services relating to the adoption or to the placement of the adoptee for adoption for" in the introductory language; in Paragraph B(4), inserted "including the adoptee", substituted "or placement of the adoptee" for "of her child", and added "or placement of the adoptee" at the end of the paragraph; in Paragraph B(8), inserted "for services relating to the adoption or to the placement of the adoptee for adoption"; and updated the internal reference in Subsection C.

The 2005 amendment, effective June 17, 2005, in Subsection A, provided that the accounting report shall show services reasonably relating to the adoption or placement.

Law reviews. — For comment, "Stopping the Baby-Trade: Affirming the Value of Human Life Through the Invalidation of Surrogacy Contracts: A Blueprint for New Mexico," see 29 N.M.L. Rev. 407 (1999).

32A-5-35. Open adoptions.

A. The parents of the adoptee and the petitioner may agree to contact between the parents and the petitioner or contact between the adoptee and one or more of the parents or contact between the adoptee and relatives of the parents. An agreement shall, absent a finding to the contrary, be presumed to be in the best interests of the child and shall be included in the 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 the adoptee's siblings and a determination that the siblings' parent, guardian or custodian has consented to the agreement. The contact may include exchange of identifying or nonidentifying information or visitation between the parents or the parents' relatives or the adoptee's siblings and the petitioner or visitation between the parents or the parents' relatives or the adoptee's siblings and the adoptee. An agreement entered into pursuant to this section shall be considered an open adoption.

B. The court may appoint a guardian ad litem for the adoptee. The court shall adopt a presumption in favor of appointing a guardian ad litem for the adoptee when visitation between the biological family and the adoptee is included in an agreement; however, this requirement may be waived by the court for good cause shown. When an adoptive placement is made voluntarily through an agency or pursuant to Section 32A-5-13 NMSA 1978, the court may, in its discretion, appoint a guardian ad litem. If the child is fourteen years of age or older, the court may appoint an attorney for the child. In all adoptions other than those in which the child is placed by the department, the court may assess the parties for the cost of services rendered by the guardian ad litem or the

child's attorney. The duties of the guardian ad litem or child's attorney end upon the filing of the decree, unless otherwise ordered by the court.

C. In determining whether the agreement is in the adoptee's best interests, the court shall consider the adoptee's wishes, but the wishes of the adoptee shall not control the court's findings as to the best interests of the adoptee.

D. Every agreement entered into pursuant to provisions of this section shall contain a clause stating that the parties agree to the continuing jurisdiction of the court and to the agreement and understand and intend that any disagreement or litigation regarding the terms of the agreement shall not affect the validity of the relinquishment of parental rights, the adoption or the custody of the adoptee.

E. The court shall retain jurisdiction after the decree of adoption is entered, if the decree contains an agreement for contact, for the purpose of hearing motions brought to enforce or modify an agreement entered into pursuant to the provisions of this section. The court shall not grant a request to modify the agreement unless the moving party establishes that there has been a change of circumstances and the agreement is no longer in the adoptee's best interests.

History: 1978 Comp., § 32A-5-35, enacted by Laws 1993, ch. 77, § 162; 1995, ch. 206, § 41; 2001, ch. 162, § 8; 2005, ch. 189, § 68; 2009, ch. 239, § 57.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, in Subsection D, made a minor stylistic change and substituted "terms of the agreement shall not affect the validity of the relinquishment of parental rights, the adoption or the custody" for "terms of the agreement after the entry of the decree of adoption shall not affect the validity of the adoption or the custody".

The 2001 amendment, effective June 15, 2001, in Subsection B, substituted "included in an agreement" for "contemplated" in the second sentence and added the third sentence; added the last sentence of Subsection D; and inserted "if the decree contains an agreement for contract" in Subsection E.

The 2005 amendment, effective June 17, 2005, in Subsection A, provided that an agreement entered into pursuant to the is section shall be considered an open adoption; in Subsection B, provided that the court shall adopt a presumption in favor of appointing a guardian ad litem; that the requirement that the court adopt the presumption may be waived for good cause; that if the child is fourteen years of age or older, the court may appoint an attorney for the child; that in adoptions other than those in which the child is placed by the department, the court may assess the parties costs for the services of the child's attorney and that the duties of the child's guardian ad litem or attorney end upon the filing of the decree; and deleted the former provision in Subsection D that this

section does not apply to a biological parent who has voluntarily relinquished parental rights and consented to the adoption.

The 2009 amendment, effective July 1, 2009, in Subsection A, added the third sentence; and in the fourth sentence, in two places, after "parent's relatives", added "or the adoptee's siblings".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

Formal agreement required. — Open adoption provided by this section requires a formal agreement between birth parents and prospective adoptive parents. Vigil v. Fogerson, 2006-NMCA-010, 138 N.M. 822, 126 P.3d 1186.

32A-5-36. Adjudication; disposition; decree of adoption.

A. The court shall conduct hearings on the petition for adoption so as to determine the rights of the parties in a manner that protects confidentiality. The petitioner and the adoptee shall attend the hearing unless the court for good cause waives a party's appearance. Good cause may include burdensome travel requirements.

B. The petitioner shall file all documents required pursuant to the Adoption Act and serve the department with copies of the documents simultaneously with the request for hearing on the petition for adoption.

C. If any person who claims to be the biological father of the adoptee has appeared before the court and filed a written petition or response seeking custody and assuming financial responsibility of the adoptee, the court shall hear evidence as to the merits of the petition. If the court determines by a preponderance of the evidence that the person is not the biological father of the adoptee or that the child was conceived through an act of rape or incest, the petition shall be dismissed and the person shall no longer be a party to the adoption. If the court determines that the person is the biological father of the adoptee, the court shall further determine whether the person qualifies as a presumed or acknowledged father whose consent is necessary for adoption, pursuant to Section 32A-5-17 NMSA 1978. If the court determines that the person is the biological father, but does not qualify as a presumed or acknowledged father, the court shall adjudicate the person's rights pursuant to the provisions of the Adoption Act.

D. If the mother or father of the adoptee has appeared before the court and filed a written petition that alleges the invalidity of the mother's or father's own consent or relinquishment for adoption previously filed in the adoption proceeding, the court shall hear evidence as to the merits of the petition. If the court determines that the allegations have not been proved by a preponderance of the evidence, the petition shall be dismissed. If the court determines that the allegations of the petition are true, the

consent or relinquishment for adoption shall be held invalid, and the court shall determine, in the best interests of the adoptee, the person who shall have custody of the child.

E. The petitioner shall present and prove each allegation set forth in the petition for adoption by clear and convincing evidence.

F. The court shall grant a decree of adoption if it finds that the petitioner has proved by clear and convincing evidence that:

(1) the court has jurisdiction to enter a decree of adoption affecting the adoptee;

(2) the adoptee has been placed with the petitioner for a period of ninety days if the adoptee is under the age of one year at the time of placement or for a period of one hundred eighty days if the adoptee is one year of age or older at the time of placement, unless, for good cause shown, the requirement is waived by the court;

(3) all necessary consents, relinquishments, terminations or waivers have been obtained;

(4) the post-placement report required by Section 32A-5-31 NMSA 1978 has been filed with the court;

(5) service of the petition for adoption has been made or dispensed with as to all persons entitled to notice pursuant to provisions of Section 32A-5-27 NMSA 1978;

(6) at least ninety days have passed since the filing of the petition for adoption, except the court may shorten or waive this period of time in cases in which the child is being adopted by a stepparent, a relative or a person named in the child's deceased parent's will pursuant to provisions of Section 32A-5-12 NMSA 1978;

(7) the petitioner is a suitable adoptive parent and the best interests of the adoptee are served by the adoption;

(8) if visitation between the biological family and the adoptee is contemplated, that the visitation is in the child's best interests;

(9) if the adoptee is foreign-born, the child is legally free for adoption and a certificate issued by the United States secretary of state that certifies the adoption as a convention adoption has been filed with the court;

(10) the results of the criminal records check required pursuant to provisions of the Adoption Act [32A-5-1 NMSA 1978] have been received and considered;

(11) if the adoptee is an Indian child, the requirements set forth in the federal Indian Child Welfare Act of 1978 have been met;

(12) when the child is an Indian child, the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the appropriate Indian tribes have been followed or, if not followed, good cause for noncompliance has been clearly stated and supported, as required by the federal Indian Child Welfare Act of 1978 and provision has been made to ensure that the Indian child's cultural ties to the Indian child's tribe are protected and fostered; and

(13) if the adoption involves the interstate placement of the adoptee, the requirements of the Interstate Compact on the Placement of Children [32A-11-1 NMSA 1978] have been met.

G. In addition to the findings required by Subsection F of this section, the court in any decree of adoption shall make findings with respect to each allegation of the petition.

H. If the court determines that any of the requirements for a decree of adoption pursuant to provisions of Subsections E and F of this section have not been met or that the adoption is not in the best interests of the adoptee, the court shall deny the petition and determine, in the best interests of the adoptee, the person who shall have custody of the child.

I. The decree of adoption shall include the new name of the adoptee and shall not include any other name by which the adoptee has been known or the names of the former parents. The decree of adoption shall order that from the date of the decree, the adoptee shall be the child of the petitioner and accorded the status set forth in Section 32A-5-37 NMSA 1978.

J. A decree of adoption shall be entered within six months of the filing of the petition if the adoptee is under the age of one year at the time of placement or twelve months if the adoptee is one year of age or older at the time of placement, except that the time may be extended by the court upon request of any of the parties or upon the court's own motion for good cause shown.

K. A decree of adoption may not be attacked upon the expiration of one year from the entry of the decree; provided, however, that in any adoption involving an Indian child, the Indian child's parent or Indian custodian may petition the court pursuant to the provisions of the federal Indian Child Welfare Act of 1978 to invalidate the adoption.

L. In any adoption involving an Indian child, the clerk of the court shall provide the secretary of the interior with a copy of any decree of adoption or adoptive placement order and other information as required by the federal Indian Child Welfare Act of 1978.

History: 1978 Comp., § 32A-5-36, enacted by Laws 1993, ch. 77, § 163; 1995, ch. 206, § 42; 2003, ch. 294, § 5; 2003, ch. 321, § 5.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901.

The 1995 amendment, effective July 1, 1995, substituted "32A-5-17" for "32-5-17" near the end of Subsection C; in Subsection F, substituted "32A-5-31" for "32-5-31" in Paragraph (4), substituted "32A-5-27" for "32-5-27" in Paragraph (5), substituted "32A-5-12" for "32-5-12" in Paragraph (6), and substituted "32A-5-14" for "32-5-14" in Paragraph (10); corrected the subsection reference in Subsection G; in Subsection I, substituted "32A-5-37" for "32-5-37"; and made minor stylistic changes throughout the section.

The 2003 amendment, effective July 1, 2003, substituted "documents" for "same" near the middle of Subsection B; inserted "and a certificate issued by the United States secretary of state that certifies the adoption as a convention adoption has been filed with the court" following "free for adoption" at the end of Paragraph F(9); and substituted "the Adoption Act" for "Section 32A-5-14 NMSA 1978" following "pursuant to provisions of" near the middle of Paragraph F(10). Laws 2003, ch. 294, § 5 and Laws 2003, ch. 321, § 5 enacted identical amendments to this section. The section was set out as amended by Laws 2003, ch. 321, § 5. *See* 12-1-8 NMSA 1978.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 40-7-49 NMSA 1978 have been included in the annotations to this section.

Jurisdiction to determine custody, adoption or other disposition. — Since court had jurisdiction of the petitions relating to certain children upon the basis they were abandoned children, it was within the jurisdiction of the court: (a) to return these children to the custody of their natural parents; or, (b) to grant the petitions for the adoption of the children; or, (c) to refuse either of the foregoing, and make other temporary or permanent disposition and provision for these children, all to be determined upon one single consideration - the welfare of the children. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Personal jurisdiction required. — An integral facet of a valid adoption is the requirement that personal jurisdiction must first be acquired by the court over the parties seeking to adopt the child, over the child, and over the parents of the child, and any guardian or agency having custody or control of the child. Smith v. Bradfield, 97 N.M. 611, 642 P.2d 214 (Ct. App. 1982).

Consent considered before merits of adoption. — The court has no right to consider the merits or demerits of an adoption petition insofar as it concerns the welfare of a

child, unless it has in the first instance determined that the consent of a natural parent may be dispensed with. Nevelos v. Railston, 65 N.M. 250, 335 P.2d 573 (1959).

Parents' knowledge of identity of petitioners not condition of jurisdiction. — As the court may or may not decree adoption in favor of persons recommended by the natural parents, it seems most unlikely the legislature intended to impose as a condition to the exercise of the court's jurisdiction knowledge of the identity of petitioners in adoption on the part of the natural parents because even when that circumstance exists, and possibly the further circumstance that the natural parents have investigated the qualifications of the petitioners and given them their unqualified approval, the court may still refuse to decree adoption, the selection of a foster parent being a judicial act and the responsibility being that of the court. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Child's welfare paramount. — The paramount issue in an adoption proceeding is the welfare of the child. Smith v. Bradfield, 97 N.M. 611, 642 P.2d 214 (Ct. App. 1982).

Welfare of child not measured altogether by economic factors. — In an adoption proceeding, the welfare and best interest of a child are not measured altogether by material and economic factors; parental love and affection must find some place in the scheme. Gutierrez v. New Mexico Dep't of Pub. Welfare, 74 N.M. 273, 393 P.2d 12 (1964).

Counseling not grounds for reopening adoption. — The fact that the mother had not received pre-consent counseling was not a proper ground upon which to reopen an adoption. Drummond v. Drummond, 1997-NMCA-094, 123 N.M. 727, 945 P.2d 457.

Adoption denied where only for securing greater social security check. — Although there is no contention that the petitioner's home was not a proper one, nor is there any intimation that either the petitioner or the natural mother was not a proper person to have custody of the children, the adoption was denied as it was an adoption in name only, lacking all of the elements of the complete severance of the children's ties and relationship with their mother contemplated by the law and within the intent of New Mexico adoption statutes as it was only for the purpose of securing a greater social security check. Gutierrez v. New Mexico Dep't of Pub. Welfare, 74 N.M. 273, 393 P.2d 12 (1964).

Entry of order without effect where no adoption existed. — While an order of adoption may be entered nunc pro tunc to cure irregularities that do not affect the jurisdiction of the court, it cannot serve to bring into existence an adoption when no adoption could in fact be deemed to have existed before. Smith v. Bradfield, 97 N.M. 611, 642 P.2d 214 (Ct. App. 1982).

Authority of court after mother's consent declared invalid. — Where the mother's consent to adoption has been declared invalid in keeping with the best interests of the child, the trial court retains the power to determine custody in the absence of a legally

valid consent, and it is within the authority of the trial court to continue the child in the custody of the couple seeking to adopt her. Although they lacked standing to petition the court for adoption, they were not left without remedy, since they did have standing to seek relief. In re Samantha D., 106 N.M. 184, 740 P.2d 1168 (Ct. App. 1987).

Death of child prior to final hearing. — The granting of an adoption where the child sought to be adopted has died prior to the final hearing has no effect, as the death deprives the trial court of jurisdiction. Smith v. Bradfield, 97 N.M. 611, 642 P.2d 214 (Ct. App. 1982).

Court may grant or refuse revocation of consent prior to decree. — Prior to the entry of an adoption decree, the court may grant or refuse revocation of consent, giving due consideration to the circumstances in the particular case, as, for example, the matters giving rise to execution of consent in the first place, a showing or failure to show change of those matters; the situation of the proposed adoptive parents; the length of time which has elapsed since consent has been given; the extent to which the adoptive petitions have relied and acted upon the consent; and all those matters pertaining to the past, present and future welfare of the child. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Consent may not be arbitrarily revoked. — All that New Mexico statutes require is that consent be filed in the proceedings. Consent may not be arbitrarily revoked prior to adoption, at least where the petitioners for adoption have acted upon the consent and taken the child into their home. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Visitation rights of nonparent. — Although granting visitation in an adoption case to a nonparent does affect a parent's custody rights, this is not sufficient reason to apply a blanket rule against such decrees. If at some time the visitation is no longer in the child's best interests, the court may reconsider it. However, because granting visitation rights does infringe on a parent's custody, it is appropriate to limit this decision to situations when the party seeking visitation has acted in a custodial or parental capacity. Vest v. State ex rel. N.M. Human Servs. Dep't, 116 N.M. 708, 866 P.2d 1175 (Ct. App. 1993).

Consent presumed in child's best interest, absent fraud. — Where natural mother pled on motion to revoke consent that the consent was involuntary in that it was signed too soon after birth, while in the hospital, and while in a state of emotional upset, such petition failed to state a claim upon which relief could be granted, since legislature, by enactment of this section, created a presumption that once there has been a consent by the natural parent, absent fraud, it is in the best interests of the child to proceed with the adoption. In re Doe, 87 N.M. 253, 531 P.2d 1226 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975).

Challenges to decree. — By statutorily placing a definite time limitation for attacking adoption decrees, the legislature intended to ensure that adopted children were given status equal to that of children begotten by marriage; therefore, father's motion for relief

from judgment filed five years after the final adoption decree was entered was time-barred. Webber v. Webber, 116 N.M. 47, 859 P.2d 1074 (Ct. App. 1993).

"Exceptional circumstance" exception to one-year limitation. — Where the best interests of the child demand it, the exceptional circumstance provision of 1-060B (6) NMRA should be used to override the one-year statute of limitations on reopening an adoption decree. Drummond v. Drummond, 1997-NMCA-094, 123 N.M. 727, 945 P.2d 457.

32A-5-37. Status of adoptee and petitioner upon entry of decree of adoption.

A. Once adopted, an adoptee shall take a name designated by the petitioner, except in stepparent adoptions. In stepparent adoptions, the adoptee shall take the new name designated by the petitioner in the petition so long as the petitioner's spouse and the child, if over the age of fourteen years, consent to the new name. The name change need not be requested in the petition.

B. After adoption, the adoptee and the petitioner shall sustain the legal relation of parent and child as if the adoptee were the biological child of the petitioner and the petitioner were the biological parent of the child. The adoptee shall have all rights and be subject to all of the duties of that relation, including the right of inheritance from and through the petitioner, and the petitioner shall have all rights and be subject to all duties of that relation, including right of inheritance from and through the adoptee.

History: 1978 Comp., § 32A-5-37, enacted by Laws 1993, ch. 77, § 164; 2005, ch. 189, § 69.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, changed "ten years" to "fourteen years" and provided that the name change need not be requested in the petition in Subsection A.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 40-7-52 NMSA 1978 have been included in the annotations to this section.

Adoption, by all tests, is a status like any other relational status. — It is created by acts of the parties plus the effect of law; it is a relationship which cannot be terminated by the sole will of the parties; it is the source of a bundle of rights, duties and obligations, and is of great interest to the state. It should, then, be treated by the courts in the same way they treat other types of domestic status. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Adopted children in same legal position as those begotten by marriage. — The legislature has evinced an understanding that adopted children should be placed in the same legal position and are to receive the same consideration as children begotten by the marriage. Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308 (1948).

Adopted child on level with natural child in construing will. — Wills must be construed in harmony with the public policy of placing an adopted child on a level with natural children. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

The public policy in New Mexico is to treat adopted children the same as natural children. An adopted child is grouped with lineal descendants in determining the amount of the decedent's estate which is exempt from inheritance tax, and also imposes an inheritance tax upon estates passing to parent or parents, husband, wife, lineal descendants or legally adopted child. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Both parents must join adoption application before child heir of both. — A child adopted does not become the heir of both adopting parents unless both join in the application. Dodson v. Ward, 31 N.M. 54, 240 P. 991 (1925).

Child adopted by stepfather may not inherit from natural paternal grandparent. — Where a child was adopted by her stepfather after her natural father's death, but before her natural paternal grandmother's death, the adopted child could not inherit from her natural grandmother. Commerce Bank & Trust v. Brady, 95 N.M. 412, 622 P.2d 1032 (1981).

Challenges to decree. — By statutorily placing a definite time limitation for attacking adoption decrees, the legislature intended to ensure that adopted children were given status equal to that of children begotten by marriage; therefore, father's motion for relief from judgment filed five years after the final adoption decree was entered was time-barred. Webber v. Webber, 116 N.M. 47, 859 P.2d 1074 (Ct. App. 1993).

Visitation rights of nonparent. — Former 40-7-52 NMSA 1978 did not limit the children's court's authority to fashion a decree that is in the child's best interests and that includes, if appropriate, visitation rights for third parties with whom the child has close ties. The primary purpose of that statute was to ensure that adopted children can inherit from their adoptive parents. Vest v. State ex rel. N.M. Human Servs. Dep't, 116 N.M. 708, 866 P.2d 1175 (Ct. App. 1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 2 Am. Jur. 2d Adoption § 171 et seq.

Adoption as precluding testamentary gift under natural relative's will, 71 A.L.R.4th 374.

Postadoption visitation by natural parent, 78 A.L.R.4th 218.

Adopted child as within class named in deed or inter vivos trust instrument, 37 A.L.R.5th 237.

2 C.J.S. Adoption of Persons §§ 140 to 154.

32A-5-38. Birth certificates.

A. Within thirty days after an adoption decree becomes final, the petitioner shall prepare an application for a birth certificate in the new name of the adoptee, showing the petitioner as the adoptee's parent, and shall provide the application to the clerk of the court. The petitioner shall forward the application:

(1) for a person born in the United States, to the appropriate vital statistics office of the place, if known, where the adoptee was born; or

(2) for all other persons, to the state registrar of vital statistics. In the case of the adoption of a person born outside the United States, if requested by the petitioner, the court shall make findings, based on evidence from the petitioner and other reliable state or federal sources, on the date and place of birth of the adoptee. These findings shall be certified by the court and included with the application for a birth certificate.

B. The state registrar of vital statistics shall prepare a birth record in the new name of the adoptee in accordance with the vital statistics laws, but subject to the requirements of the Adoption Act as to the confidentiality of adoption records.

History: 1978 Comp., § 32A-5-38, enacted by Laws 1993, ch. 77, § 165; 2005, ch. 189, § 70.

ANNOTATIONS

Cross references. — For new birth certificates following adoption, legitimation and paternity determination, *see* 24-14-17 NMSA 1978.

The 2005 amendment, effective June 17, 2005, in Subsection A, changed "clerk of the court" to "petitioner".

32A-5-39. Recognition of foreign decrees.

A. Every decree or order of adoption terminating the parent-child relationship or establishing the relationship of parent and child by adoption 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 shall be recognized in this state, so that the rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree or order of adoption were issued by the courts of this state.

B. A convention adoption in a foreign country that is certified by the United States secretary of state shall be recognized as a final adoption in this state.

History: 1978 Comp., § 32A-5-39, enacted by Laws 1993, ch. 77, § 166; 2003, ch. 294, § 6; 2003, ch. 321, § 6; 2005, ch. 189, § 71.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, inserted the Subsection A designation and added Subsection B. Laws 2003, ch. 294, § 6 and Laws 2003, ch. 321, § 6 enacted identical amendments to this section. The section was set out as amended by Laws 2003, ch. 321, § 6. *See* 12-1-8 NMSA 1978.

The 2005 amendment, effective June 17, 2005, provided that every decree or order of adoption entered by a court or other entity in another country pursuant to that country's law or any convention or treaty or intercountry adoption that the United States has ratified shall be recognized in New Mexico.

32A-5-39.1. Application of the federal Intercountry Adoption Act.

The protections and requirements set forth in the federal Intercountry Adoption Act apply to all proceedings involving a convention adoption.

History: Laws 2003, ch. 294, § 7 and Laws 2003, ch. 321, § 7.

ANNOTATIONS

Cross references. — For the Intercountry Adoption Act, *see* 42 U.S.C. § 14901 et seq.

Duplicate laws. — Laws 2003, ch. 294, § 7, and Laws 2003, ch. 321, § 7, enacted identical sections of law, effective July 1, 2003. Both were compiled as 32A-5-39.1 NMSA 1978. *See* 12-1-8 NMSA 1978.

32A-5-40. Post-decree of adoption access to records.

A. After the decree of adoption has been entered, all court files containing records of judicial proceedings conducted pursuant to the provisions of the Adoption Act and records submitted to the court in the proceedings shall be kept in separate locked files withheld from public inspection. Upon application to the clerk of the court, the records shall be open to inspection by a former parent if the adoptee is eighteen years of age or older, by an adoptee if the adoptee is eighteen years of age or older at the time application is made for inspection, by the adoptive parent if the adoptee is under eighteen years of age at the time application is made for inspection, by the attorney of any party, by any agency that has exercised guardianship over or legal custody of a child who was the adoptee in the particular proceeding, by the department or by an adoptee's sibling; provided that the identity of the former parents and of the adoptee

shall be kept confidential unless the former parents and the adoptee have consented to the release of identity. In the absence of consent to release identity, the inspection shall be limited to the following nonidentifying information:

(1) the health and medical histories of the adoptee's biological parents;

(2) the health and medical history of the adoptee;

(3) the adoptee's general family background, including ancestral information, without name references or geographical designations;

(4) physical descriptions; and

(5) the length of time the adoptee was in the care and custody of persons other than the petitioner.

B. After the entry of the decree of adoption, at any time, a former parent may file with the court, with the placing agency or with the department:

(1) a consent or refusal or an amended consent or refusal to be contacted;

(2) a release of the former parent's identity to the adoptee if the adoptee is eighteen years of age or older or to the adoptive parent if the adoptee is under eighteen years of age; or

(3) information regarding the former parent's location or changes in background information.

C. Any changes to post-adoption access to records referred to in Subsection B of this section shall be filed with the court, the placing agency and the department.

D. The consent or refusal referred to in Subsection B of this section shall be honored by the court, the placing agency or the department unless for good cause the court orders to the contrary.

E. At any time, an adoptee who is eighteen years of age or older may file with the court, a placing agency or the department:

(1) information regarding the adoptee's location; or

(2) a consent or refusal regarding opening of the adoptee's adoption file to the adoptee's former parents.

F. If mutual authorizations for release of identifying information by the parties are not available, an adoptee who is eighteen years of age or older, the biological parents if the adoptee is eighteen years of age or older or the adoptive parents if the adoptee is

under the age of eighteen years may file a motion with the court to obtain the release of identifying information for good cause shown. When hearing the motion, the court shall give primary consideration to the best interests of the adoptee, but shall also give due consideration to the interests of the members of the adoptee's former and adoptive families. In determining whether good cause exists for the release of identifying information, the court shall consider:

(1) the reason the information is sought;

(2) any procedure available for satisfying the petitioner's request without disclosing the name or identity of another individual, including appointment of a confidential intermediary to contact the individual and request specific information;

(3) whether the individual about whom identifying information is sought is alive;

(4) the preference, to the extent known, of the adoptee, the adoptive parents, the former parents and other members of the adoptee's former and adoptive families and the likely effect of disclosure on those individuals;

(5) the age, maturity and expressed needs of the adoptee;

(6) the report or recommendation of any individual appointed by the court to assess the request for identifying information; and

(7) any other factor relevant to an assessment of whether the benefit to the adoptee of releasing the information sought will be greater than the benefit to any other individual of not releasing the information.

G. An adoptee shall have the right, for the purpose of enrolling in the adoptee's tribe of origin, to access information kept by the department. Information needed by an adoptee to enroll in his tribe of origin may be requested from the department by the following persons:

(1) the adoptee, after he reaches eighteen years of age;

(2) when the adoptee is a child, his adoptive parent or guardian; or

(3) an adoptee's descendant or, if the adoptee's descendant is a child, an adult representative for the descendant.

H. When the department receives a request for information regarding an adoptee's tribe of origin, the department shall examine its records to determine if the adoptee is of Indian descent. If the department establishes that an adoptee is of Indian descent, the department shall:

(1) provide the requester with the tribal affiliation of the adoptee's biological parents;

(2) submit to the tribe information necessary to establish tribal enrollment for the adoptee and to protect any rights flowing from the adoptee's tribal relationship; and

(3) provide notice to the requester of the department's submission of information to the adoptee's tribe.

History: 1978 Comp., § 32A-5-40, enacted by Laws 1993, ch. 77, § 167; 1995, ch. 206, § 43; 1997, ch. 34, § 13; 2005, ch. 189, § 72.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "a placing agency or the department" at the end of Subsection D, and added Subsections F and G.

The 1997 amendment, effective July 1, 1997, substituted "by the department or by an adoptee's sibling", for "or by the department" in the second sentence of the introductory language in Subsection A.

The 2005 amendment, effective June 17, 2005, added Subsection C to provide that any changes to post-adoption access to records shall be filed with the court, the placing agency and the department.

32A-5-41. Appointment of confidential intermediary.

A. The court may appoint a confidential intermediary to ascertain whether an individual is willing to be contacted, is willing to release his name or identity or is willing to meet or otherwise communicate about any condition that may affect the moving party's physical or mental health, upon petition to the court by:

(1) an adoptee who is eighteen years of age or older;

(2) an adoptive parent of an adoptee who is less than eighteen years of age;

(3) an adoptee's former parent, when the adoptee is eighteen years of age or older; or

(4) an adoptee's sibling.

B. The confidential intermediary shall make a reasonable effort to determine if the individual whose identity is sought by the petitioner has filed a signed document authorizing or refusing to authorize the release of the individual's name or identity.

C. When the confidential intermediary finds a signed authorization for a party to be contacted or for the release of identifying information, the intermediary shall release that information to the petitioner. Upon the petitioner's written request, the intermediary may assist the petitioner in locating the individual who authorized the release of identifying information, in ascertaining whether the individual is willing to meet or communicate with the petitioner and in facilitating a meeting or other communication.

D. When the confidential intermediary finds a signed refusal to authorize the release of identifying information, the intermediary shall report this to the petitioner and the court and shall not attempt to locate or contact the individual who has refused to authorize contact or the release of identifying information. The petitioner may then withdraw the petition or request the release of identifying information for good cause shown, pursuant to the provisions of Section 32A-5-40 NMSA 1978.

E. When the confidential intermediary does not find any documents concerning the release of identifying information or if the intermediary finds a document indicating that an individual whose identity is sought by the petitioner is undecided about whether to release identifying information, the intermediary shall make a reasonable search for and discreetly contact the individual to ascertain whether the individual is willing to release information to the petitioner or willing to meet or communicate with the petitioner, whom the intermediary may describe to the individual only in general, nonidentifying terms. When the individual consents in writing to the release of information, the intermediary shall release the information to the petitioner, and upon the mutual written request and consent of the petitioner and the individual, the intermediary shall facilitate a meeting or other communication between the petitioner and the individual. If the individual refuses to authorize the release of information sought by the petitioner, the intermediary shall report this to the petitioner and the court and the petitioner may withdraw the motion or file a motion with the court for an order to release identifying information for good cause shown, pursuant to provisions of Section 32A-5-40 NMSA 1978.

F. When an individual sought by the confidential intermediary is deceased, the intermediary shall report this to the petitioner and the court and, upon the petitioner's request, the court shall determine on the basis of the factors listed in Section 32A-5-40 NMSA 1978 whether good cause exists to release identifying information about the individual to the petitioner.

G. When an individual sought by the confidential intermediary cannot be located within a year, the intermediary shall report this to the petitioner and the court. The court may authorize an additional search for a specified period of time or determine on the basis of the factors listed in Section 32A-5-40 NMSA 1978 whether good cause exists to release identifying information about the individual to the petitioner.

H. A confidential intermediary may charge the petitioner for actual expenses incurred in providing a service requested under this section. Upon motion by the intermediary, the court may authorize a reasonable fee in addition to the expenses.

I. A confidential intermediary shall complete training provided by the department or any other entity approved by the court and shall file an oath of confidentiality in every court in which the intermediary expects to serve.

J. The confidential intermediary oath shall state:

"I, _____, signing under penalty of perjury, affirm that I have completed the requisite training for a confidential intermediary in this state.

I will not disclose to the petitioner, directly or indirectly, any identifying information in sealed records except under the conditions specified in this section.

I will conduct a reasonable search for an individual being sought and make a discreet and confidential inquiry as to whether the individual consents to the release of identifying or medical information to the petitioner or to meeting or communicating with the petitioner. I will report to the petitioner or the court the results of my search and inquiry, along with any signed request or consent I receive from the individual.

If the individual and the petitioner request and consent in writing to meet or communicate with each other, I will act in accordance with the instructions of the petitioner or the court to facilitate any meeting or communication between them.

I will not charge or accept any fee for my services except for reimbursement from the petitioner for actual expenses incurred in performing my services or as authorized by the court.

I recognize that unauthorized release of information is a violation of the Adoption Act and subjects me to penalties pursuant to the provisions of Section 32A-5-42 NMSA 1978 and may subject me to being found in contempt of court with penalties, dismissal by the court and civil liability."

History: 1978 Comp., § 32A-5-41, enacted by Laws 1993, ch. 77, § 168; 1995, ch. 206, § 44; 1997, ch. 34, § 14.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "32A-5-40" for "32-5-40" in Subsections D, E, F, and G, substituted "32A-5-42" for "32-5-42" in Subsection J, and made minor stylistic changes throughout the section.

The 1997 amendment, effective July 1, 1997, added Paragraph A(4) and made minor stylistic changes at the end of Paragraphs A(2) and A(3).

32A-5-42. Penalties.

A. Any person other than an agency who, in the regular course of business, selects an adoptive family for a prospective adoptee or arranges for the selection is guilty of a misdemeanor and subject to imprisonment in the county jail for a definite term of less than one year or to the payment of a fine of not more than one thousand dollars ($1,000), or to both, the penalties to be in the discretion of the judge, for each occurrence; provided, that the exchange of information between persons regarding the existence of a potential adoptee or potential adoptive family shall not be a violation of this section.

B. Any person who violates any provision of the Adoption Act is guilty of a misdemeanor and subject to imprisonment in the county jail for a definite term of less than one year or to the payment of a fine of not more than one thousand dollars ($1,000), or both, the penalties to be in the discretion of the judge, for each occurrence.

History: 1978 Comp., § 32A-5-42, enacted by Laws 1993, ch. 77, § 169.

32A-5-43. Purpose of subsidized adoptions.

It is the purpose of Sections 32-5-43 [32A-5-43] through 32-5-45 [32A-5-45] NMSA 1978 to encourage and promote the placement of children who are difficult to place in permanent homes through a subsidized program within the social services division of the department.

History: 1978 Comp., § 32A-5-43, enacted by Laws 1993, ch. 77, § 170.

32A-5-44. Eligibility for subsidized adoptions.

A. The social services division of the human services department may make payments to adoptive parents or to medical vendors on behalf of a child placed for adoption by the division or by an agency when the division determines that:

(1) the child is difficult to place; and

(2) the adoptive family is capable of providing the permanent family relationship needed by the child in all respects, except that the needs of the child are beyond the economic resources and ability of the family.

B. As used in Sections 32A-5-43 through 32A-5-45 NMSA 1978, a "difficult to place child" means a child who has a mental, physical or emotional disability or who is in special circumstances by virtue of age, sibling relationship or racial background.

History: 1978 Comp., § 32A-5-44, enacted by Laws 1993, ch. 77, § 171; 2007, ch. 46, § 39.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

32A-5-45. Administration of subsidized adoptions.

A. The department shall promulgate all necessary regulations for the administration of the program of subsidized adoptions or placement with permanent guardians.

B. Subsidy payments may include payments to vendors for medical and surgical expenses and payments to the adoptive parents or permanent guardians for maintenance and other costs incidental to the adoption, care, training and education of the child. The payments in any category of assistance shall not exceed the cost of providing the assistance in foster care. Payments shall not be made under this section after the child reaches eighteen years of age, except for a child who is enrolled in the medically fragile waiver program, in which case the payments may extend until the child is twenty-one years of age.

C. A written agreement between the adoptive family or permanent guardians and the department shall precede the decree of adoption or permanent guardianship. The agreement shall incorporate the terms and conditions of the subsidy plan based on the individual needs of the child within the permanent family. In cases of subsidies that continue for more than one year, there shall be an annual redetermination of the need for a subsidy. The department shall develop an appeal procedure whereby a permanent family may contest a division determination to deny, reduce or terminate a subsidy.

History: 1978 Comp., § 32A-5-45, enacted by Laws 1993, ch. 77, § 172; 2005, ch. 189, § 73.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, in Subsection B, provided that payments shall not be made after the child reaches eighteen years of age, except for a child who is enrolled in a medically fragile waiver program, in which case the payments may be extended until the child is twenty-one years of act.

ARTICLE 6
Children's Mental Health and Developmental Disabilities

32A-6-1. Repealed.

History: Laws 1995, ch. 207, § 1; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-1 NMSA 1978, as enacted by Laws 1995, ch. 207, § 1, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-2. Repealed.

History: Laws 1995, ch. 207, § 2; 1999, ch. 254, § 1; 2007, ch. 46, § 40; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-2 NMSA 1978, as enacted by Laws 1995, ch. 207, § 2, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

Compiler's notes. — Laws 2007, ch. 46, § 40 amended this section and Laws 2007, ch. 162, § 31 repealed this section. Laws 2007, ch. 46, § 40, effective June 15, 2007, made non-substantive language changes. This section was repealed by Laws 2007, ch. 162, § 31. *See* 12-1-8 NMSA 1978.

32A-6-3. Repealed.

History: Laws 1995, ch. 207, § 3; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-3 NMSA 1978, as enacted by Laws 1995, ch. 207, § 3, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-4. Repealed.

History: Laws 1995, ch. 207, § 4; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-4 NMSA 1978, as enacted by Laws 1995, ch. 207, § 4, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-5. Repealed.

History: Laws 1995, ch. 207, § 5; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-5 NMSA 1978, as enacted by Laws 1995, ch. 207, § 5, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-6. Repealed.

History: Laws 1995, ch. 207, § 6; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-6 NMSA 1978, as enacted by Laws 1995, ch. 207, § 6, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-7. Repealed.

History: Laws 1995, ch. 207, § 7; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-7 NMSA 1978, as enacted by Laws 1995, ch. 207, § 7, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-8. Repealed.

History: Laws 1995, ch. 207, § 8; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-8 NMSA 1978, as enacted by Laws 1995, ch. 207, § 8, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-9. Repealed.

History: Laws 1995, ch. 207, § 9; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-9 NMSA 1978, as enacted by Laws 1995, ch. 207, § 9, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-10. Repealed.

History: Laws 1995, ch. 207, § 10; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-10 NMSA 1978, as enacted by Laws 1995, ch. 207, § 10, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-10.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1999, ch. 254, § 5 repealed 32A-6-10.1 NMSA 1978, as enacted by Laws 1995, ch. 207, § 11, relating to resource consultants for children placed in residential treatment or habilitation programs, effective July 1, 1999. For provisions of former section, *see* New Mexico One Source of Law DVD.

32A-6-11. Repealed.

History: Laws 1995, ch. 207, § 12; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-11 NMSA 1978, as enacted by Laws 1995, ch. 207, § 12, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-11.1. Repealed.

History: Laws 1995, ch. 207, § 13; 1999, ch. 254, § 2; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-11.1 NMSA 1978, as enacted by Laws 1995, ch. 207, § 13, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-12. Repealed.

History: Laws 1995, ch. 207, § 14; 1999, ch. 254, § 3; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-12 NMSA 1978, as enacted by Laws 1995, ch. 207, § 14, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-13. Repealed.

History: Laws 1995, ch. 207, § 15; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-13 NMSA 1978, as enacted by Laws 1995, ch. 207, § 15, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-14. Repealed.

History: Laws 1995, ch. 207, § 16; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-14 NMSA 1978, as enacted by Laws 1995, ch. 207, § 16, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-15. Repealed.

History: Laws 1995, ch. 207, § 17; 1998, ch. 32, § 1; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-15 NMSA 1978, as enacted by Laws 1995, ch. 207, § 17, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-16. Repealed.

History: Laws 1995, ch. 207, § 18; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-16 NMSA 1978, as enacted by Laws 1995, ch. 207, § 18, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-17. Repealed.

History: Laws 1995, ch. 207, § 19; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-17 NMSA 1978, as enacted by Laws 1995, ch. 207, § 19, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-18. Repealed.

History: Laws 1995, ch. 207, § 20; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-18 NMSA 1978, as enacted by Laws 1995, ch. 207, § 20, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-19. Repealed.

History: Laws 1995, ch. 207, § 21; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-19 NMSA 1978, as enacted by Laws 1995, ch. 207, § 21, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-20. Repealed.

History: Laws 1995, ch. 207, § 22; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-20 NMSA 1978, as enacted by Laws 1995, ch. 207, § 22, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-21. Repealed.

History: Laws 1995, ch. 207, § 23; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-21 NMSA 1978, as enacted by Laws 1995, ch. 207, § 23, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

32A-6-22. Repealed.

History: Laws 1995, ch. 207, § 24; repealed by Laws 2007, ch. 162, § 31.

ANNOTATIONS

Repeals. — Laws 2007, ch. 162, § 31 repealed 32A-6-22 NMSA 1978, as enacted by Laws 1995, ch. 207, § 24, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on New Mexico One Source of Law DVD.

ARTICLE 6A
Children's Mental Health and Developmental Disabilities Act

32A-6A-1. Short title.

This act [32A-6A-1 to 32A-6A-30 NMSA 1978] may be cited as the "Children's Mental Health and Developmental Disabilities Act".

History: Laws 2007, ch. 162, § 1.

ANNOTATIONS

Cross references. — For Adult Mental Health and Developmental Disabilities Code, *see* 43-1-2 NMSA 1978.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, *see* the 2006 NMSA 1978 (32A-6A-1) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

Law reviews. — For article, "Treating Children Under the New Mexico Mental Health and Developmental Disabilities Code," see 10 N.M.L. Rev. 279 (1980).

For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

32A-6A-2. Purposes.

The purposes of the Children's Mental Health and Developmental Disabilities Act are to:

A. provide children with access to appropriate assessments, services and treatment;

B. provide children access to a continuum of services to address their habilitation and treatment needs;

C. provide children with access to services for identification, prevention and intervention for developmental and mental health needs;

D. promote delivery of services in a culturally appropriate, responsive and respectful manner;

E. protect the substantive and procedural rights of children regardless of service setting; and

F. encourage support for family as critical members of the treatment or habilitation team whenever clinically appropriate.

History: Laws 2007, ch. 162, § 2.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-3. Scope.

The provisions of the Children's Mental Health and Developmental Disabilities Act shall apply to all children in New Mexico except as otherwise set forth in the Children's Code [32A-1-1 NMSA 1978].

History: Laws 2007, ch. 162, § 3.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-4. Definitions.

As used in the Children's Mental Health and Developmental Disabilities Act:

A. "aversive intervention" means any device or intervention, consequences or procedure intended to cause pain or unpleasant sensations, including interventions causing physical pain, tissue damage, physical illness or injury; electric shock; isolation; forced exercise; withholding of food, water or sleep; humiliation; water mist; noxious taste, smell or skin agents; and over-correction;

B. "behavioral health services" means a comprehensive array of professional and ancillary services for the treatment, habilitation, prevention and identification of mental illnesses, behavioral symptoms associated with developmental disabilities, substance abuse disorders and trauma spectrum disorders;

C. "capacity" means a child's ability to:

(1) understand and appreciate the nature and consequences of proposed health care, including its significant benefits, risks and alternatives to proposed health care; and

(2) make and communicate an informed health care decision;

D. "chemical restraint" means a medication that is not standard treatment for the patient's medical or psychiatric condition that is used to control behavior or to restrict a patient's freedom of movement;

E. "child" means a person who is a minor;

F. "clinician" means a person whose licensure allows the person to make independent clinical decisions, including a physician, licensed psychologist, psychiatric nurse practitioner, licensed independent social worker, licensed marriage and family therapist and licensed professional clinical counselor;

G. "continuum of services" means a comprehensive array of emergency, outpatient, intermediate and inpatient services and care, including screening, early identification, diagnostic evaluation, medical, psychiatric, psychological and social service care, habilitation, education, training, vocational rehabilitation and career counseling;

H. "developmental disability" means a severe chronic disability that:

(1) is attributable to a mental or physical impairment or a combination of mental or physical impairments;

(2) is manifested before a person reaches twenty-two years of age;

(3) is expected to continue indefinitely;

(4) results in substantial functional limitations in three or more of the following areas of major life activities:

(a) self-care;

(b) receptive and expressive language;

(c) learning;

(d) mobility;

(e) self-direction;

(f) capacity for independent living; or

(g) economic self-sufficiency; and

(5) reflects a person's need for a combination and sequence of special, interdisciplinary or other supports and services that are of lifelong or extended duration that are individually planned or coordinated;

I. "evaluation facility" means a community mental health or developmental disability program, a medical facility having psychiatric or developmental disability services available or, if none of the foregoing is reasonably available or appropriate, the office of a licensed physician or a licensed psychologist, any of which shall be capable of performing a mental status examination adequate to determine the need for appropriate treatment, including possible involuntary treatment;

J. "family" means persons with a kinship relationship to a child, including the relationship that exists between a child and a biological or adoptive parent, relative of the child, a step-parent, a godparent, a member of the child's tribe or clan or an adult with whom the child has a significant bond;

K. "habilitation" means services, including behavioral health services based on evaluation of the child, that are aimed at assisting the child to prevent, correct or ameliorate a developmental disability. The purpose of habilitation is to enable the child to attain, maintain or regain maximum functioning or independence. "Habilitation" includes programs of formal, structured education and treatment and rehabilitation services;

L. "individual instruction" means a child's direction concerning a mental health treatment decision for the child, made while the child has capacity and is fourteen years of age or older, which is to be implemented when the child has been determined to lack capacity;

M. "least restrictive means principle" means the conditions of habilitation or treatment for the child, separately and in combination that:

(1) are no more harsh, hazardous or intrusive than necessary to achieve acceptable treatment objectives for the child;

(2) 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

(3) are conducted at the suitable available facility closest to the child's place of residence;

N. "legal custodian" means a biological or adoptive parent of a child unless legal custody has been vested in a person, department or agency and also includes a person appointed by an unexpired power of attorney;

O. "licensed psychologist" means a person who holds a current license as a psychologist issued by the New Mexico state board of psychologist examiners;

P. "likelihood of serious harm to self" means that it is more likely than not that in the near future a child will attempt to commit suicide or will cause serious bodily harm to the child by violent or other self-destructive means, as evidenced by behavior causing, attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm from the child;

Q. "likelihood of serious harm to others" means that it is more likely than not that in the near future the child will inflict serious bodily harm on another person or commit a criminal sexual offense, as evidenced by behavior causing, attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm from the child;

R. "mechanical restraint" means any device or material attached or adjacent to the child's body that restricts freedom of movement or normal access to any portion of the child's body and that the child cannot easily remove but does not include mechanical supports or protective devices;

S. "mechanical support" means a device used to achieve proper body position, designed by a physical therapist and approved by a physician or designed by an occupational therapist, such as braces, standers or gait belts, but not including protective devices;

T. "medically necessary services" means clinical and rehabilitative physical, mental or behavioral health services that are:

(1) essential to prevent, diagnose or treat medical conditions or are essential to enable the child to attain, maintain or regain functional capacity;

(2) delivered in the amount, duration, scope and setting that is clinically appropriate to the specific physical, mental and behavioral health care needs of the child;

(3) provided within professionally accepted standards of practice and national guidelines; and

(4) required to meet the physical, mental and behavioral health needs of the child and are not primarily for the convenience of the child, provider or payer;

U. "mental disorder" means a substantial disorder of the child's emotional processes, thought or cognition, not including a developmental disability, that impairs the child's:

(1) functional ability to act in developmentally and age-appropriate ways in any life domain;

(2) judgment;

(3) behavior; and

(4) capacity to recognize reality;

V. "mental health or developmental disabilities professional" means a person who by training or experience is qualified to work with persons with mental disorders or developmental disabilities;

W. "out-of-home treatment or habilitation program" means an out-of-home residential program that provides twenty-four-hour care and supervision to children with the primary purpose of providing treatment or habilitation to children. "Out-of-home treatment or habilitation program" includes, but is not limited to, treatment foster care, group homes, psychiatric hospitals, psychiatric residential treatment facilities and non-medical and community-based residential treatment centers;

X. "parent" means a biological or adoptive parent of a child whose parental rights have not been terminated;

Y. "physical restraint" means the use of physical force without the use of any device or material that restricts the free movement of all or a portion of a child's body;

Z. "protective devices" means helmets, safety goggles or glasses, guards, mitts, gloves, pads and other common safety devices that are normally used or

recommended for use by persons without disabilities while engaged in a sport or occupation or during transportation;

AA. "residential treatment or habilitation program" means diagnosis, evaluation, care, treatment or habilitation rendered inside or on the premises of a mental health or developmental disabilities facility, hospital, clinic, institution, supervisory residence or nursing home when the child resides on the premises and where one or more of the following measures is available for use:

(1) a mechanical device to restrain or restrict the child's movement;

(2) a secure seclusion area from which the child is unable to exit voluntarily;

(3) a facility or program designed for the purpose of restricting the child's ability to exit voluntarily; and

(4) the involuntary emergency administration of psychotropic medication;

BB. "restraint" means the use of a physical, chemical or mechanical restraint;

CC. "seclusion" means the confinement of a child alone in a room from which the child is physically prevented from leaving;

DD. "treatment" means provision of behavioral health services based on evaluation of the child, aimed at assisting the child to prevent, correct or ameliorate a mental disorder. The purpose of treatment is to enable the child to attain, maintain or regain maximum functioning;

EE. "treatment team" means a team consisting of the child, the child's parents unless parental rights have specifically been limited pursuant to an order of a court, legal custodian, guardian ad litem, treatment guardian, clinician and any other professionals involved in treatment of the child, other members of the child's family, if requested by the child, and the child's attorney if requested by the child, unless in the professional judgment of the treating clinician for reasons of safety or therapy one or more members should be excluded from participation in the treatment team; and

FF. "treatment plan" means an individualized plan developed by a treatment team based on assessed strengths and needs of the child and family.

History: Laws 2007, ch. 162, § 4; 2008, ch. 75, § 1.

ANNOTATIONS

The 2008 amendment, effective May 14, 2008, added Subsections S and Z; in Subsection W, provided that the "out-of-home treatment or habilitation program" includes psychiatric hospitals, psychiatric residential treatment facilities and non-

medical and community-based residential treatment centers; and in Subsection Y, eliminated the exclusions of holding a child to calm or comfort the child, holding a child's arm or hand to escort the child to safety, and intervening in a physical fight.

32A-6A-5. Competence.

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.

History: Laws 2007, ch. 162, § 5.

ANNOTATIONS

Cross references. — For competence applicable to the Adult Mental Health and Developmental Disabilities Code, *see* 43-1-5 NMSA 1978.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to legal representation of children, *see* the 2006 NMSA 1978 (32-6A-4) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-6. Rights related to treatment and habilitation; scope.

The rights set forth in the Children's Mental Health and Developmental Disabilities Act shall apply to a child who is physically present and receiving treatment or habilitation services in New Mexico. A child who receives treatment or habilitation services shall have rights with respect to such treatment or habilitation, regardless of where services are provided.

History: Laws 2007, ch. 162, § 6.

ANNOTATIONS

Cross references. — For right to treatment applicable to the Adult Mental Health and Developmental Disabilities Code, *see* 43-1-7 NMSA 1978.

For right to habilitation applicable to the Adult Mental Health and Developmental Disabilities Code, *see* 43-1-8 NMSA 1978.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to treatment and habilitation, *see* the 2006 NMSA 1978 (32A-6-8 and 32A-6-9) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-7. Right to individualized treatment or habilitation services and plan.

A. A child receiving mental health or habilitation services shall have the right to prompt treatment and habilitation pursuant to an individualized treatment plan and consistent with the least restrictive means principle.

B. A preliminary treatment plan shall be prepared within seven days of initial provision of mental health or habilitation services.

C. An individualized treatment or habilitation plan shall be prepared within twenty-one days of the provision of mental health or habilitation services.

D. The individualized treatment or habilitation plan shall be developed by the child's treatment team. The child and the child's legal custodian and parent shall, to the maximum extent possible, be involved in the preparation of the child's individualized treatment or habilitation plan.

E. An individualized treatment or habilitation plan shall include:

(1) a statement of the nature of the specific problem and the specific needs of the child;

(2) a statement of the least restrictive conditions necessary to achieve the purposes of treatment or habilitation;

(3) a description of intermediate and long-range goals, with the projected timetable for their attainment;

(4) a statement and rationale for the plan of treatment or habilitation for achieving these intermediate and long-range goals;

(5) specification of staff responsibility and a description of the proposed staff involvement with the child in order to attain these goals;

(6) criteria for release to less restrictive settings for treatment or habilitation, criteria for discharge and a projected date for discharge; and

(7) provision for access to cultural practices and traditional treatments in accordance with the child's assessed needs, and for an Indian child, culturally competent placement, treatment and practices and, after appropriate consent, tribal consultation.

F. A treatment or habilitation plan for a child in an out-of-home treatment or habilitation program shall be based on documented assessments that may include assessments of mental status; intellectual function; psychological status, including the use of psychological testing; psychiatric evaluation and medication; education, vocation, psychosocial assessment, physical status and the child's cultural needs.

G. The child's progress in attaining the goals and objectives set forth in the individualized treatment or habilitation plan shall be monitored and noted in the child's records, and revisions in the plan may be made as circumstances require. The members of the child's treatment team shall be informed of major changes and shall have the opportunity to participate in decisions.

History: Laws 2007, ch. 162, § 7.

ANNOTATIONS

Cross references. — For individualized treatment or habilitation plans applicable to the Adult Mental Health and Developmental Disabilities Code, *see* 43-1-9 NMSA 1978.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to individualized treatment and habilitation plans, *see* the 2006 NMSA 1978 (32A-6-10) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-8. Special rules applicable to aversive intervention.

A. An intervention expressly listed in the "aversive intervention" definition in Section 4 [32A-6A-4 NMSA 1978] of the Children's Mental Health and Developmental Disabilities Act is prohibited.

B. A treatment plan containing an aversive intervention not specifically listed in Section 4 of the Children's Mental Health and Developmental Disabilities Act shall be submitted to the human rights committee of the department of health in advance of a meeting, except in emergency situations. The human rights committee shall review the plan along with the following additional information as available:

(1) baseline or base rate data;

(2) review of the child's current situation and environment;

(3) the child's history, including previous interventions and results;

(4) the possible adverse effects, if any, of the proposed treatment plan;

(5) success and failure criteria for discontinuing the proposed aversive intervention; and

(6) a written evaluation by the clinician proposing the treatment plan or the intervention.

C. The human rights committee of the department of health shall not approve an intervention specifically listed in the definition of "aversive intervention" in Section 4 of the Children's Mental Health and Developmental Disabilities Act.

D. An invitation to participate in the review shall be extended to the child, the child's legal custodian, the clinician and any other mental health or developmental disability professional who has proposed the treatment. A written or oral presentation shall be made to the human rights commission by the mental health or developmental disability professional proposing the treatment.

E. The results of the human rights committee of the department of health review shall be reported to the clinician, the child and the child's legal custodian within three working days.

F. The department shall work in collaboration with the department of health to promulgate rules for implementing a human rights committee pursuant to this section.

History: Laws 2007, ch. 162, § 8.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-9. Restraint, generally.

A. Nothing in this section shall be interpreted to diminish the rights and protections accorded to children in hospitals or psychiatric residential treatment or habilitation facilities as provided by federal law and regulation.

B. Restraint and seclusion as provided for in this section is not considered treatment. It is an emergency intervention to be used only until the emergency ceases.

C. Nothing in this section shall prohibit the use of:

(1) mechanical supports or protective devices;

(2) a medical restraint prescribed by a physician or dentist as a health-related protective measure during the conduct of a specific medical, surgical or dental procedure; and

(3) holding a child for a very short period of time without undue force to calm or comfort the child or holding a child's hand to escort the child safely from one area to another.

History: Laws 2007, ch. 162, § 9; 2008, ch. 75, § 2.

ANNOTATIONS

The 2008 amendment, effective May 14, 2008, added Subsections A and B and Paragraphs (1) and (3) of Subsection C.

32A-6A-10. Physical restraint and seclusion.

A. When providing any treatment or habilitation, physical restraint and seclusion shall not be used unless an emergency situation arises in which it is necessary to protect a child or another from imminent, serious physical harm or unless another less intrusive, nonphysical intervention has failed or been determined ineffective.

B. A treatment and habilitation program shall provide a child and the child's legal custodian with a copy of the policies and procedures governing the use of restraint and seclusion.

C. When a child is in a restraint or in seclusion, the mental health or developmental disabilities professional shall document:

(1) any less intrusive interventions that were attempted or determined to be inappropriate prior to the incident;

(2) the precipitating event immediately preceding the behavior that prompted the use of restraint or seclusion;

(3) the behavior that prompted the use of a restraint or seclusion;

(4) the names of the mental health or developmental disabilities professional who observed the behavior that prompted the use of restraint or seclusion;

(5) the names of the staff members implementing and monitoring the use of restraint or seclusion; and

(6) a description of the restraint or seclusion incident, including the type and length of the use of restraint or seclusion, the child's behavior during and reaction to the restraint or seclusion and the name of the supervisor informed of the use of restraint or seclusion.

D. The documentation shall be maintained in the child's medical, mental health or educational record and available for inspection by the child's legal custodian.

E. The child's legal custodian shall be notified immediately after each time restraint or seclusion is used. If the legal custodian is not reasonably available, the mental health or developmental disability professional shall document all attempts to notify the legal custodian and shall send written notification within one business day.

F. After an incident of restraint or seclusion, the mental health or developmental disabilities professional involved in the incident shall conduct a debriefing with the child in which the precipitating event, unsafe behavior and preventive measures are reviewed with the intent of reducing or eliminating the need for future restraint or seclusion. The debriefing shall be documented in the child's record and incorporated into the next treatment plan review.

G. As promptly as possible, but under no circumstances later than five calendar days after a child has been subject to restraint or seclusion, the treatment team shall meet to review the incident and revise the treatment plan as appropriate. The treatment team shall identify any known triggers to the behavior that necessitated the use of restraint or seclusion and recommend preventive measures that may be used to calm the child and eliminate the need for restraint or seclusion. In a subsequent review of the treatment plan, the treatment team shall review the success or failure of preventive measures and revise the plan, if necessary, based on such review.

H. Physical restraint shall be applied only by a mental health or developmental disabilities professional trained in the appropriate use of physical restraint.

I. In applying physical restraint, a mental health or developmental disabilities professional shall use only reasonable force as is necessary to protect the child or other person from imminent and serious physical harm.

J. Seclusion shall be applied only by mental health or developmental disabilities professionals who are trained in the appropriate use of seclusion.

K. At a minimum, a room used for seclusion shall:

(1) be free of objects and fixtures with which a child could self-inflict bodily harm;

(2) provide the mental health or developmental disabilities professional an adequate and continuous view of the child from an adjacent area; and

(3) provide adequate lighting and ventilation.

L. During the seclusion of a child, the mental health or developmental disabilities professional shall:

(1) view the child placed in seclusion at all times; and

(2) provide the child placed in seclusion with:

(a) an explanation of the behavior that resulted in the seclusion; and

(b) instructions on the behavior required to return to the environment.

M. At a minimum, a mental health or developmental disabilities professional shall reassess a child in restraint or seclusion every thirty minutes.

N. The use of a mechanical restraint is prohibited in a mental health and developmental disability treatment setting unless the treatment setting is a hospital that is licensed and certified by and meets the requirements of the joint commission for the accreditation of health care organizations or a facility created pursuant to the Adolescent Treatment Hospital Act [23-9-1 NMSA 1978].

O. This section does not prohibit a mental health or developmental disabilities professional from using a mechanical support or protective device:

(1) as prescribed by a health professional; or

(2) for a child with a disability, in accordance with a written treatment plan, including but not limited to a school individualized education plan or behavior intervention plan.

History: Laws 2007, ch. 162, § 10; 2008, ch. 75, § 3.

ANNOTATIONS

The 2008 amendment, effective May 14, 2008, in Subsection A, eliminated the qualification that Subsection A applies to mental health or developmental disability settings and added authority to use restraint and seclusion in an emergency situation; and in Subsection N, permitted mechanical restraint in a hospital that is licensed or in a facility created pursuant to the Adolescent Treatment Hospital Act.

32A-6A-11. Training required for a professional who uses restraint or seclusion.

A mental health or developmental disabilities professional who administers restraint or seclusion shall receive training in current professionally accepted practices and standards regarding:

A. positive behavior interventions strategies and supports;

B. functional behavior assessment and behavior intervention planning;

C. prevention of self-injurious behaviors;

D. methods for identifying and defusing potentially dangerous behavior; and

E. restraint and seclusion, to the extent that each may be used in the treatment setting.

History: Laws 2007, ch. 162, § 11.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-12. Personal rights of a child in an out-of-home treatment or habilitation program; scope.

A. A child in an out-of-home treatment or habilitation program shall have, in addition to other rights set forth in the Children's Mental Health and Developmental Disabilities Act, the right to:

(1) be placed in a manner consistent with the least restrictive means principle;

(2) have access to the state's designated protection and advocacy system and access to an attorney of the child's choice, provided that the child is not entitled to appointment of an attorney at public expense, except as otherwise provided in Subsection C of Section 13 [32A-6A-13 NMSA 1978] of the Children's Mental Health and Developmental Disabilities Act;

(3) receive visitors of the child's own choosing on a daily basis, subject to restrictions imposed in the best interests of the child by the child's clinician for good cause. Hours during which visitors may be received shall be limited only in the interest of effective treatment and the reasonable efficiency of the program and shall be sufficiently flexible to accommodate the individual needs of the child and the child's visitors. Notwithstanding the provisions of this subsection, each child has the right to receive visits from the child's attorney, physician, psychologist, clergy, guardian ad litem, representatives from the state's protection and advocacy system or children,

youth and families department in private at any reasonable time, irrespective of visiting hours, provided the visitor shows reasonable cause for visiting at times other than normal visiting hours;

(4) have writing materials and postage stamps reasonably available for the child's use in writing letters and other communications. Reasonable assistance shall be provided for writing, addressing and posting letters and other documents upon request. The child has the right to send and receive sealed and uncensored mail. The child has the right to reasonable private access to telephones and, in cases of personal emergencies when other means of communication are not satisfactory, the child shall be afforded reasonable use of long distance calls; provided that for other than mail or telephone calls to a court, an attorney, a physician, a psychologist, a clergy, a guardian ad litem, a representative from the state's protection and advocacy system or a social worker, mailing or telephone privileges may be restricted by the child's clinician for good cause shown. A child who is indigent shall be furnished writing, postage and telephone facilities without charge;

(5) reasonable access to a legal custodian and a family member through visitation, videoconferencing, telephone access and opportunity to send and receive mail. In-person-visitation is preferred and reasonable efforts shall be made to facilitate such visitation unless the child and family choose otherwise. Access by legal custodians and family members to the child shall be limited only in the interest of effective treatment and the reasonable efficiency of the program and shall be sufficiently flexible to accommodate the individual needs of legal custodians and family members. Treatment needs that justify limitation on the access rights of a legal custodian or family member must be specifically documented by the clinician in the child's record and any such limitation automatically expires in seven days;

(6) follow or abstain from the practice of religion. The program shall provide appropriate assistance in this connection, including reasonable accommodations for religious worship and transportation to nearby religious services. A child who does not wish to participate in religious practice shall be free from pressure to do so or to accept religious beliefs;

(7) a humane psychological and physical environment. The child shall be provided a comfortable bed and adequate changes of linen and reasonable secure storage space for personal possessions. Except when curtailed for reasons of safety or therapy as documented in the child's record by the child's physician, the child shall be afforded reasonable privacy in sleeping and personal hygiene practices;

(8) reasonable daily opportunities for physical exercise and outdoor exercise and reasonable access to recreational areas and equipment, including equipment adapted to the child's developmental and physical needs;

(9) a nourishing, well-balanced, varied and appetizing diet;

(10) prompt and adequate medical attention for a physical ailment. Each child shall receive a complete physical examination upon admission, except when documentation is provided that the child has had such examination within the six months immediately prior to the current admission. Each child shall receive a complete physical examination every twelve months thereafter;

(11) a clean, safe and comfortable environment in a structure that complies with applicable fire and safety requirements;

(12) appropriate medication and freedom from unnecessary or excessive medication. Medication shall not be used as discipline, as a substitute for programs, for the convenience of staff or in quantities that interfere with the child's treatment or habilitation program. No medication shall be administered unless by written order of a clinician licensed to prescribe medication or by an oral order noted immediately in the patient's medical record and signed by that clinician within twenty-four hours. All prescriptions for psychotropic medications must be reviewed at least every thirty days. Notation of each child's medication shall be kept in the child's medical records and shall include a notation by the clinician licensed to prescribe medication of the behavioral or symptomatic baseline data upon which the medication order was made; and

(13) a free public education. The child shall be educated in regular classes with nondisabled children whenever appropriate. In no event shall a child be allowed to remain in an out-of-home treatment or habilitation program for more than ten days without receiving educational services. If the child's placement in an out-of-home treatment or habilitation program is required by an individualized education plan that conforms to the requirements of state and federal law, the sending school is responsible for the provision of education to the child. In all other situations, the local school district in which the out-of-home treatment or habilitation program is located is responsible for the provision of educational services to the child. Nothing in this subsection shall limit a child's right to public education under state, tribal or federal law.

B. A child receiving services in an out-of-home treatment or habilitation program, including but not limited to residential treatment or habilitation programs, shall be provided notice of rights immediately upon admission to such program.

History: Laws 2007, ch. 162, § 12.

ANNOTATIONS

Cross references. — For personal rights of residential clients applicable to the Adult Mental Health and Developmental Disabilities Code, *see* 43-1-6 NMSA 1978.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to personal rights of children, *see* the 2006 NMSA 1978 (32-6A-6) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-13. Legal representation of children.

A. A child shall be represented by an attorney at all commitment or treatment guardianship proceedings under the Children's Mental Health and Developmental Disabilities Act if the child is fourteen years of age or older or by a guardian ad litem if the child is under fourteen years of age.

B. When a child has not retained an attorney or a guardian ad litem in a commitment or treatment guardian proceeding and is unable to do so, the court shall appoint an attorney or a guardian ad litem to represent the child in the proceeding. Only an attorney with appropriate experience shall be appointed as an attorney or a guardian ad litem for the child. Whenever reasonable and appropriate, the court shall appoint a guardian ad litem or attorney who is knowledgeable about the child's cultural background.

C. A child of any age shall have access to the state's designated protection and advocacy system pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act and the federal Protection and Advocacy for Individuals with Mental Illness Act and access to an attorney of the child's choice regarding any matter related to the Children's Mental Health and Developmental Disabilities Act.

D. The child is not entitled to appointment of an attorney at public expense, except as set forth in Subsections A and B of this section.

E. A child shall not be represented or counseled by an attorney or guardian ad litem who has a conflict of interest, including but not limited to any conflict of interest resulting from prior representation of the child's parent, guardian, legal custodian or residential treatment or habilitation program.

History: Laws 2007, ch. 162, § 13; 2008, ch. 75, § 4.

ANNOTATIONS

Cross references. — For legal representation of clients applicable to the Mental Health and Developmental Disabilities Code, *see* 43-1-4 NMSA 1978.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to legal representation of children, *see* the 2006 NMSA 1978 (32-6A-4) on New Mexico One Source of Law DVD.

The 2008 amendment, effective May 14, 2008, in Subsection C, provided that a child shall have access to the state’s protection and advocacy system pursuant to the federal

Developmental Disabilities Assistance and Bill of Rights Act and the federal Protection and Advocacy for Individuals with Mental Illness Act regarding any matter related to the Children's Mental Health and Developmental Disabilities Act.

Pro bono representation. — In entertaining petition for pro bono appointment of attorney to represent a child, the district court was exercising jurisdiction conferred on district courts by the Children's Mental Health and Developmental Disabilities Act. In re Kleinsmith, 2005-NMCA-136, 138 N.M. 681, 124 P.3d 579.

Face-to-face representation. — Although a face-to-face meeting is preferred, an appointed attorney could have interviewed the child by telephone to carry out his responsibilities. In re Kleinsmith, 2005-NMCA-136, 138 N.M. 681, 124 P.3d 579.

32A-6A-14. Consent for services; children under fourteen years of age.

A. Except as provided in Subsection B of this section, the informed consent of a child's legal custodian shall be required before treatment or habilitation, including psychotherapy or psychotropic medications, is administered to a child under fourteen years of age.

B. A child under fourteen years of age may initiate and consent to an initial assessment with a clinician and for medically necessary early intervention service limited to verbal therapy as set forth in this section. The purpose of the initial assessment is to allow a clinician to interview the child and determine what, if any, action needs to be taken to ensure appropriate mental health or habilitation services are provided to the child. The clinician may conduct an initial assessment and provide medically necessary early intervention service limited to verbal therapy with or without the consent of the legal custodian if such service will not extend beyond two calendar weeks. If, at any time, the clinician has a reasonable suspicion that the child is an abused or neglected child, the clinician shall immediately make a child abuse and neglect report.

History: Laws 2007, ch. 162, § 14.

ANNOTATIONS

Cross references. — For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to right to education, *see* the 2006 NMSA 1978 (32-6A-7) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

Educational services. — Public schools have no constitutional or statutory obligation to provide educational services to students within private, for-profit adolescent psychiatric care and substance abuse treatment centers, but if the student is handicapped, federal law may require such education. 1988 Op. Att'y Gen. No. 88-10.

Law reviews. — For article, "Treating Children Under the New Mexico Mental Health and Developmental Disabilities Code," see 10 N.M.L. Rev. 279 (1980).

32A-6A-15. Consent for services; children fourteen years of age or older.

A. A child fourteen years of age or older is presumed to have capacity to consent to treatment without consent of the child's legal custodian, including consent for individual psychotherapy, group psychotherapy, guidance counseling, case management, behavioral therapy, family therapy, counseling, substance abuse treatment or other forms of verbal treatment that do not include aversive interventions. Nothing in this section shall be interpreted to provide a child fourteen years of age or older with independent consent rights for the purposes of the provision of special education and related services as set forth in federal law.

B. Psychotropic medications may be administered to a child fourteen years of age or older with the informed consent of the child. When psychotropic medications are administered to a child fourteen years of age or older, the child's legal custodian shall be notified by the clinician.

C. A clinician or other mental health and developmental disabilities professional shall promote the healthy involvement of a child's legal custodians and family members in developing and implementing the child's treatment plan, including appropriate participation in treatment for children fourteen years of age or older. However, nothing in this section shall limit the rights of a child fourteen years of age or older to consent to services and to consent to disclosure of mental health records.

History: Laws 2007, ch. 162, § 15.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-16. Consent for services; determination of capacity for children fourteen years of age or older.

A. When a child fourteen years of age or older has been determined according to the provisions of this section to lack capacity, the child's legal custodian may make a

mental health or habilitation decision for the child unless the child objects to such decision or the legal custodian's assumption of authority to make mental health or developmental disability treatment decisions or determination of lack of capacity. Nothing in this subsection:

(1) permits a legal custodian to consent to placement of a child in a residential treatment or habilitation program without the proper consent of the child if the child is fourteen years of age or older; or

(2) in any way, limits a child's right to involuntary commitment procedures as set forth in the Children's Mental Health and Developmental Disabilities Act.

B. The determination that a child fourteen years of age or older lacks or has recovered capacity shall be made by two clinicians, one of whom shall be a person who works with children in the ordinary course of that clinician's practice.

C. A child fourteen years of age or older shall not be determined to lack capacity solely on the basis that the child chooses not to accept the treatment recommended by the mental health or developmental disabilities professional.

D. A child fourteen years of age or older may at any time contest a determination that the child lacks capacity by a signed writing or by personally informing a clinician that the determination is contested. A clinician who is informed by a child that such determination is contested shall promptly communicate that the determination is contested to any supervising provider or institution at which the child is receiving care. Such a challenge shall prevail unless otherwise ordered by the court in a proceeding brought pursuant to the treatment guardianship provisions of the Children's Mental Health and Developmental Disabilities Act.

E. A determination of lack of capacity under the Children's Mental Health and Developmental Disabilities Act shall not be evidence of incapacity for any other purpose.

F. The legal custodian shall communicate an assumption of authority as promptly as practicable to the child fourteen years of age or older and to the clinician and to the supervising mental health or developmental disability treatment and habilitation provider.

G. If more than one legal custodian assumes authority to act as an agent, the consent of both shall be required for nonemergency treatment. In an emergency, the consent of one legal custodian is sufficient, but the treating mental health professional shall provide the other legal custodian with oral notice followed by written documentation.

H. If more than one legal custodian assumes authority to act as an agent and the legal custodians do not agree on a nonemergency mental health treatment decision and

the clinician is so informed, the clinician shall not treat the child unless a treatment guardian is appointed pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act.

I. A legal custodian shall make treatment decisions in accordance with a child's individual instructions, if any, and other wishes to the extent known to the legal custodian. Otherwise, the legal custodian shall make decisions in accordance with the legal custodian's determination of the child's best interests. In determining the child's best interests, the legal custodian shall consider the child's personal values to the extent known to the legal custodian.

J. A mental health treatment decision made by a legal custodian for a child fourteen years of age or older who has been determined to lack capacity shall not be made solely on the basis of the child's pre-existing physical or medical condition or pre-existing or projected disability.

K. A mental health treatment decision made by a legal custodian for a child fourteen years of age or older who has been determined to lack capacity is effective without judicial approval unless contested by the child.

L. If no legal custodian or agent is reasonably available to make mental health or habilitation decisions for the child, any interested party may petition for the appointment of a treatment guardian.

History: Laws 2007, ch. 162, § 16.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-17. Treatment guardianship proceedings.

A. If no legal custodian is reasonably available to make mental health decisions for a child fourteen years of age or older who has been determined to lack capacity or if a clinician who proposes a course of treatment objects to a challenge made by the child to a determination of incapacity, the clinician shall request that the children's court attorney petition the court for appointment of a treatment guardian to make a substitute decision for the child.

B. In a treatment guardian proceeding, the court shall appoint an attorney for the child unless the child already has an attorney available.

C. A petition shall be served on the child and the child's attorney. A hearing on the petition shall be held within three business days. At the hearing, the child shall be

represented by counsel and shall have the right to be present, to present witnesses and to cross-examine opposing witnesses.

D. If, after the hearing, the court finds that the child is not capable of making treatment decisions and treatment is needed, the court shall order the appointment of a treatment guardian. When appointing a treatment guardian, the court shall appoint the child's legal custodian unless the legal custodian is not readily available or the court finds that such an appointment is not in the child's best interests.

E. The treatment guardian shall make a decision on behalf of the child based on the treatment guardian's best judgment of whether the treatment appears to be in the child's best interests and is consistent with the least restrictive means principle for accomplishing the treatment objective. In making this decision, the treatment guardian shall consult with the child and consider the child's expressed opinions. The treatment guardian shall give consideration to previous decisions made by the child in similar circumstances when the child was able to make treatment decisions and shall make the decision in accordance with the values of the child if known, or in the best interests of the child if the values are not known; provided that, if the child has given an individual instruction that is available to the treatment guardian, the instruction shall be followed.

F. If a child who is not a resident of a residential treatment and habilitation program has a treatment guardian and refuses to comply with the decision of the treatment guardian, the treatment guardian may obtain an enforcement order. The enforcement order may authorize a peace officer to take the child into custody or to transport the child to an evaluation facility and may authorize the facility to forcibly administer treatment. The treatment guardian shall consult with the clinician who is proposing treatment, the child's attorney or guardian ad litem and, as deemed appropriate, interested friends or relatives of the child. The evaluation facility shall comply with the treatment guardian's decision unless the clinician finds it to be against the best interests of the child.

G. A child, physician or other professional wishing to contest the decision of the treatment guardian may do so by filing a petition with the court within three calendar days or the next business day, whichever is later, of receiving notice of the treatment guardian's decision. The child shall be represented by counsel in all proceedings before the court. The court may overrule the treatment guardian's decision if it finds that decision to be against the best interests of the child. The court shall rule within seven days of the filing of the petition.

H. If both a petition for an enforcement order and a petition to contest the treatment guardian's decision are filed, they shall be heard in the same proceeding at the same time.

I. When the court appoints a treatment guardian, it shall specify the length of time during which the treatment guardian may exercise treatment guardian powers, up to a maximum period of one year. If, at the end of the guardianship period, the treatment

guardian believes that the child still lacks capacity, the treatment guardian shall petition the court for reappointment or for appointment of a new treatment guardian. The guardianship shall be extended or a new guardian shall be appointed only if the court finds the child does not have capacity to make treatment or habilitation decisions at the time of the hearing. The court shall appoint an attorney for the child, and the child shall have the right to be present and to present evidence at all such hearings.

J. If, during the period of a treatment guardian's power, the treatment guardian, the child, the treatment provider or a member of the child's family believes that the child has regained capacity, that person may petition the court for a termination of the treatment guardianship. If the court finds the child has regained capacity, it shall terminate the power of the treatment guardian and restore to the child the power to make treatment decisions.

K. A treatment guardian shall have only those powers enumerated in the Children's Mental Health and Developmental Disabilities Act.

L. If a clinician licensed to prescribe medication believes that the administration of psychotropic medication is necessary to protect the child from serious harm that could occur while the provisions of this section are being satisfied, the licensed clinician may order or administer the medication on an emergency basis. When medication is administered to a child on an emergency basis, the clinician shall prepare and place in the child's medical records a report explaining the nature of the emergency and the reason that no treatment less restrictive than administration of psychotropic medication without proper consent would have protected the child from serious harm. When medication is administered to a child on an emergency basis, the child's legal custodian and the child's attorney or guardian ad litem shall be notified by the residential treatment or habilitation program. If the child is not in a residential setting, the clinician shall petition for a pickup order pursuant to Section 19 [32A-6A-19 NMSA 1978] of the Children's Mental Health and Developmental Disabilities Act and have the child transported to a residential facility where the medication will be administered.

History: Laws 2007, ch. 162, § 17.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-18. Individual instructions.

A. A child fourteen years of age or older who has capacity also has the right to direct the child's own treatment in the event of later incapacity. To do so, the child may give an individual instruction regarding the child's own treatment or habilitation. The individual instruction may be limited to take effect only if a specified condition arises.

B. An individual instruction shall be effective without judicial approval and shall be written and signed by the child and the child's legal custodian and signed by a witness who is at least eighteen years of age and who attests that the child and the child's legal custodian are known to the witness, that they signed the individual instruction for mental health treatment in the witness' presence and that they appear to have capacity and are not acting under duress, fraud or undue influence.

C. A witness to an individual instruction shall not be related to the child or the child's legal custodian by blood or marriage, the child's attending qualified health care professional or an owner, operator or employee of a mental health facility at which the child is receiving care or of any parent organization, subsidiary or contractor of the mental health facility.

D. If the child's legal custodian refuses to consent to the individual instruction, the child may petition the court for determination of whether the individual instruction is in the child's best interest.

E. A child's legal custodian or treatment guardian shall make treatment decisions in accordance with the child's individual instruction unless the treatment requested is infeasible or unavailable or would not offer the child any significant benefit as determined by the child's clinician.

F. The individual instruction shall be implemented by the child's legal custodian under this section only upon certification that the child lacks capacity. The instruction shall cease to be effective upon a determination that the child has recovered capacity.

G. Written certification that a child lacks or has recovered capacity or that another condition exists that affects an individual instruction shall be made according to the provisions of the Children's Mental Health and Developmental Disabilities Act. A child while having capacity may revoke all or part of an individual instruction for mental health treatment at any time and in any manner that communicates an intent to revoke.

H. The fact that a child has executed a written individual instruction for treatment shall not constitute an indication of mental illness.

I. A clinician who knows the existence of an individual instruction for mental health treatment, a revocation or a challenge to a determination or certification of lack of capacity shall obtain a copy and shall place it in the child's health care record.

J. A clinician shall disclose an individual instruction for mental health treatment to other clinicians only when it is determined that the disclosure is necessary to provide treatment in accordance with an individual instruction.

History: Laws 2007, ch. 162, § 18.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-19. Emergency mental health evaluation and care.

A. A peace officer may detain and transport a child for emergency mental health evaluation and care in the absence of a legally valid order from the court only if the peace officer:

(1) has reasonable grounds to believe the child has just attempted suicide;

(2) based upon personal observation and investigation, has reasonable grounds to believe that the child, as a result of a mental disorder, presents a likelihood of serious harm to self or others and that immediate detention is necessary to prevent such harm. The peace officer shall convey the peace officer's beliefs to the admitting physician or licensed psychologist immediately upon the officer's arrival at the evaluation facility;

(3) has certification from a clinician that the child, as a result of a mental disorder, presents a likelihood of serious harm to self or others and that immediate intervention is necessary to prevent the harm; or

(4) has an involuntary placement order issued by a tribal court that orders the child to be admitted to an evaluation facility.

B. A peace officer shall immediately transport a child detained under this section to an evaluation facility. In the case of an extreme emergency, the child may be held for a period of up to twenty-four hours in temporary emergency placement in:

(1) a foster home licensed to provide specialized or therapeutic care;

(2) a facility operated by a licensed child services agency that meets standards promulgated by the department for the care of children who present the likelihood of serious harm to themselves or others; and

(3) residential care on an emergency basis.

C. A child shall not be held for the purposes of emergency mental health evaluation or care in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged or adjudicated to be delinquent children.

D. The director of an evaluation facility shall accomplish an emergency evaluation upon the request of a child's legal custodian, a peace officer, a detention facility administrator or the administrator's designee or upon the certification of a clinician. A

court order is not required under this section. If an application is made to a court, the court's power to act in furtherance of an emergency admission shall be limited to ordering that:

(1) the child be seen by a clinician prior to transport to an evaluation facility; and

(2) a peace officer transport the child to an evaluation facility.

E. The admitting physician or licensed psychologist shall evaluate whether reasonable grounds exist to detain the child for evaluation and treatment, and, if reasonable grounds are found, the child shall be detained. If the admitting physician or licensed psychologist determines that reasonable grounds do not exist to detain the child for evaluation and treatment, the child shall not be detained but shall be released to the custody of the child's legal custodian.

F. Upon arrival at an evaluation facility, the child shall be informed orally and in writing by the evaluation facility of the purpose and possible consequences of the proceedings, the allegations in the petition, the child's right to a hearing within seven days, the child's right to counsel and the child's right to communicate with an attorney or a guardian ad litem and an independent mental health professional of the child's own choosing. A child shall have the right to receive necessary and appropriate treatment.

G. A peace officer who transports a child to an evaluation facility pursuant to the provisions of this section shall not require a court order to be reimbursed by the referring county.

H. If a child is transported to or detained at an evaluation facility and is not released to the child's legal custodian, the peace officer transporting the child shall give written notice thereof as soon as possible within twenty-four hours to the child's legal custodian, together with a statement of the reason for taking the child into custody.

History: Laws 2007, ch. 162, § 19.

ANNOTATIONS

Cross references. — For emergency mental health evaluation and care applicable to the Adult Mental Health and Developmental Disabilities Code, *see* 43-1-10 NMSA 1978.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to emergency mental health evaluation and care, *see*, the 2006 NMSA 1978 (32A-6-11) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-20. Consent to placement in a residential treatment or habilitation program; children younger than fourteen years of age.

A. A child younger than fourteen years of age shall not receive residential treatment for a mental disorder or habilitation for a developmental disability, except as provided in this section.

B. A child younger than fourteen years of age may be admitted to a residential treatment or habilitation program for a period not to exceed sixty days with the informed consent of the child's legal custodian, subject to the requirements of this section.

C. In order to admit a child younger than fourteen years of age to a residential treatment or habilitation program, the child's legal custodian shall knowingly and voluntarily execute a consent to admission document prior to the child's admission. The consent to admission document shall be in a form designated by the supreme court. The consent to admission document shall include a clear statement of the legal custodian's right to consent voluntarily to or refuse the child's admission, the legal custodian's right to request the child's immediate discharge from the residential treatment program at any time and the legal custodian's rights when the legal custodian requests the child's discharge and the child's physician, licensed psychologist or the director of the residential treatment or habilitation program determines that the child needs continued treatment. The residential treatment or habilitation program shall ensure that each statement is clearly explained in the child's and legal custodian's primary language, if that is their language of preference, and in a manner appropriate to the child's and legal custodian's developmental abilities. Each statement shall be initialed by the child's legal custodian.

D. The legal custodian's executed consent to admission document shall be filed with the child's treatment records within twenty-four hours of the time of admission.

E. Upon the filing of the legal custodian's consent to admission document in the child's hospital records, the director of the residential treatment or habilitation program or the director's designee shall, on the next business day following the child's admission, notify the district court or the special commissioner appointed pursuant to Section 32A-6A-25 NMSA 1978 regarding the admission and provide the child's name, date of birth and the date and place of admission. The court or special commissioner shall, upon receipt of notice regarding a child's admission to a residential treatment or habilitation program, establish a sequestered court file.

F. The director of a residential treatment or habilitation program or the director's designee shall, on the next business day following the child's admission, petition the court to appoint a guardian ad litem for the child. When the court receives the petition, the court shall appoint a guardian ad litem.

G. Within seven days of a child's admission to a residential treatment or habilitation program, a guardian ad litem, representing the child's best interests and in accordance

with the provisions of the Children's Mental Health and Developmental Disabilities Act [32A-6A-1 NMSA 1978], shall meet with the child, the child's legal custodian and the child's clinician. The guardian ad litem shall determine the following:

(1) whether the child's legal custodian understands and consents to the child's admission to a residential treatment or habilitation program;

(2) whether the admission is in the child's best interests; and

(3) whether the admission is appropriate for the child and is consistent with the least restrictive means principle.

H. If a guardian ad litem determines that the child's legal custodian understands and consents to the child's admission and that the admission is in the child's best interests, is appropriate for the child and is consistent with the least restrictive means principle, the guardian ad litem shall so certify on a form designated by the supreme court. The form, when completed by the guardian ad litem, shall be filed in the child's patient record kept by the residential treatment or habilitation program, and a copy shall be forwarded to the court or special commissioner within seven days of the child's admission. The guardian ad litem's statement shall not identify the child by name.

I. Upon reaching the age of fourteen, a child who was admitted to a residential treatment or habilitation program pursuant to this section may petition the district court for the records of the district court regarding all matters pertinent to the child's admission to a residential treatment or habilitation program. The district court, upon receipt of the petition and upon a determination that the petitioner is in fact a child who was admitted to a residential treatment or habilitation program, shall provide all court records regarding the admission to the petitioner, including all copies in the court's possession, unless there is a showing that release of records would cause substantial harm to the child. Upon reaching the age of eighteen, a person who was admitted to a residential or treatment or habilitation program as a child may petition the district court for such records, and the district court shall provide all court records regarding the admission to the petitioner, including all copies in the court's possession.

J. A legal custodian who consents to admission of a child to a residential treatment or habilitation program has the right to request the child's immediate discharge from the residential treatment or habilitation program, subject to the provisions of this section. If a child's legal custodian informs the director, a physician or other member of the residential treatment or habilitation program staff that the legal custodian desires the child to be discharged from the program, the director, physician or other staff shall provide for the child's immediate discharge and remit the child to the legal custodian's care. The residential treatment or habilitation program shall also notify the child's guardian ad litem. A child whose legal custodian requests the child's immediate discharge shall be discharged, except when the director of the residential treatment or habilitation program, a physician or a licensed psychologist determines that the child requires continued treatment and that the child meets the criteria for involuntary

residential treatment. In that event, the director, physician or licensed psychologist shall, on the first business day following the child's legal custodian's request for release of the child from the program, request that the children's court attorney initiate involuntary residential treatment proceedings. The children's court attorney may petition the court for such proceedings. The child has a right to a hearing regarding the child's continued treatment within seven days of the request for release.

K. A residential treatment or habilitation program shall review the admission of a child at the end of a sixty-day period after the date of initial admission, and the child's physician or licensed psychologist shall review the admission to determine whether it is in the best interests of the child to continue the admission. If the child's physician or licensed psychologist concludes that continuation of the residential treatment or habilitation program is in the child's best interests, the child's clinician shall so state in a form to be filed in the child's patient records. The residential treatment or habilitation program shall notify the guardian ad litem for the child at least seven days prior to the date that the sixty-day period is to end or, if necessary, request a guardian ad litem pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act. The guardian ad litem shall then personally meet with the child, the child's legal custodian and the child's clinician and ensure that the child's legal custodian understands and consents to the child's continued admission to the residential treatment or habilitation program. If the guardian ad litem determines that the child's legal custodian understands and consents to the child's continued admission to the residential treatment or habilitation program, that the continued admission is in the child's best interest, that the placement continues to be appropriate for the child and consistent with the least restrictive means principle and that the clinician has recommended the child's continued stay in the program, the guardian ad litem shall so certify on a form designated by the supreme court. The disposition of these forms shall be as set forth in this section, with one copy going in the child's patient record and the other being sent to the district court in a manner that preserves the child's anonymity. This procedure shall take place every sixty days following the child's last admission or a guardian ad litem's certification, whichever occurs first.

L. When a guardian ad litem determines that the child's legal custodian does not understand or consent to the child's admission to a residential treatment or habilitation program, that the admission is not in the child's best interests, that the placement is inappropriate for the child or is inconsistent with the least restrictive means principle or that the child's clinician has not recommended a continued stay by the child in the residential treatment or habilitation program, the child shall be released or involuntary placement procedures shall be initiated.

M. If the child's legal custodian is unavailable to take custody of the child and immediate discharge of the child would endanger the child, the residential treatment or habilitation program may detain the child until a safe and orderly discharge is possible. If the child's legal custodian refuses to take physical custody of the child, the residential treatment or habilitation program shall refer the case to the department for an abuse and neglect or family in need of court-ordered services investigation. The department

may take the child into protective custody pursuant to the provisions of the Abuse and Neglect Act [32A-4-1 NMSA 1978] or the Family in Need of Court-Ordered Services Act [32A-3B-1 NMSA 1978].

History: Laws 2007, ch. 162, § 20; 2008, ch. 75, § 5.

ANNOTATIONS

Compiler's note. — The Family in Need of Court-Ordered Services Act cited in Subsection M, was repealed by Laws 2005, ch. 189, § 77. For current law, *see* the Family in Need of Services Act, 32A-3A-1 NMSA 1978.

The 2008 amendment, effective May 14, 2008, changed "drastic" to "restrictive" in Paragraph (3) of Subsections G and H.

32A-6A-21. Voluntary residential treatment or habilitation for children fourteen years of age or older.

A. A child fourteen years of age or older shall not receive treatment for mental disorders or habilitation for developmental disabilities on a voluntary residential basis, except as provided in this section.

B. An admission of a child fourteen years of age or older to a residential treatment or habilitation program is voluntary when it is medically necessary and consented to by the child and the child's legal custodian as set forth in this section, provided that the admission does not exceed sixty days, subject to the requirements of this section.

C. To have a child voluntarily admitted to a residential treatment or habilitation program, the child and the child's legal custodian shall knowingly and voluntarily execute, prior to admission, a child's voluntary consent to admission document. The document shall include a clear statement of the child's right to voluntarily consent or to request an immediate discharge from the residential treatment or habilitation program at any time; and the child's rights when the child requests a discharge and the child's physician, licensed psychologist or the director of the residential treatment or habilitation program determines the child needs continued treatment. The residential treatment or habilitation program shall ensure that each statement is clearly explained in the child's and legal custodian's primary language, if that is their language of preference, and in a manner appropriate to the child's and legal custodian's developmental abilities, and each statement shall be initialed by the child and the child's legal custodian.

D. A child who is admitted on a voluntary basis has a right to an attorney. Prior to admission, the residential treatment or habilitation program shall inform the child's legal custodian of the child's right to an independent attorney within seventy-two hours. If the child's legal custodian is unable to obtain an independent attorney, the legal custodian may petition the court to appoint an attorney for the child. If the child's legal custodian obtains an independent attorney for the child, the legal custodian shall notify the

residential treatment or habilitation program of that attorney's name within seventy-two hours of the child's voluntary admission.

E. The child's executed voluntary consent to admission document shall be filed in the child's treatment record within twenty-four hours of the time of admission.

F. Upon the filing of the child's voluntary consent to admission document in the child's treatment record, the director of the residential treatment or habilitation program or the director's designee shall, on the next business day following the child's admission, notify the district court or the special commissioner of the admission, giving the child's name, date of birth and the date and place of admission. Upon receipt of notice of a child's voluntary admission to a residential treatment or habilitation program, the court or special commissioner shall establish a sequestered court file.

G. If within seventy-two hours of the child's voluntary admission the child has not met with an independent attorney and the child's legal custodian has not notified the residential treatment or habilitation program of the name of the child's independent attorney, the residential treatment or habilitation program shall during the next business day petition the court to appoint an attorney. When the court receives the petition, the court shall appoint an attorney.

H. If within seventy-two hours of the child's voluntary admission the child has met with an independent attorney or the child's legal custodian has notified the residential treatment or habilitation program of the name of the child's independent attorney, the residential treatment or habilitation program shall during the next business day notify the court or the special commissioner of the name of the child's independent attorney.

I. Within seven days of the admission, an attorney representing the child pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act shall meet with the child. At the meeting with the child, the attorney shall explain to the child the following:

(1) the child's right to an attorney;

(2) the child's right to terminate the child's voluntary admission and the procedures to effect termination;

(3) the effect of terminating the child's voluntary admission and options of the clinician and other interested parties to petition for an involuntary admission; and

(4) the child's rights under the provisions of the Children's Mental Health and Developmental Disabilities Act, including the right to:

(a) legal representation;

(b) a presumption of competence;

(c) receive daily visitors of the child's choice;

(d) receive and send uncensored mail;

(e) have access to telephones;

(f) follow or abstain from the practice of religion;

(g) a humane and safe environment;

(h) physical exercise and outdoor exercise;

(i) a nourishing, well-balanced, varied and appetizing diet;

(j) medical treatment;

(k) educational services;

(l) freedom from unnecessary or excessive medication;

(m)individualized treatment and habilitation; and

(n) participation in the development of the individualized treatment plan and access to that plan on request.

J. If the attorney determines that the child understands the child's rights and that the child voluntarily and knowingly desires to remain as a patient in a residential treatment or habilitation program, the attorney shall so certify on a form designated by the supreme court. The form, when completed by the attorney, shall be filed in the child's patient record at the residential treatment or habilitation program, and a copy shall be forwarded to the court or special commissioner within seven days of the child's admission. The attorney's statement shall not identify the child by name.

K. Upon reaching the age of fourteen, a child who was a voluntary admittee to a residential treatment or habilitation program may petition the district court for the records of the court regarding all matters pertinent to the child's voluntary admission to a residential treatment or habilitation program. The court, upon receipt of the petition and upon a determination that the petitioner was in fact the child who was a voluntary admittee to a residential treatment or habilitation program, shall give all court records regarding the admission to the petitioner, including all copies in the court's possession unless there is a showing that provision of records would cause substantial harm to the child. A person who was admitted to a residential or treatment or habilitation program as a child, upon reaching the age of eighteen, may petition the district court for such records and the district court shall provide all court records regarding the admission to the petitioner, including all copies in the court's possession.

L. Any child voluntarily admitted to a residential treatment or habilitation program has the right to an immediate discharge from the residential treatment or habilitation program upon the child's request, except as provided in this section. If a child informs the director, clinician or other member of the residential treatment or habilitation program staff that the child desires to be discharged from the voluntary program, the director, clinician or other staff member shall provide for the child's immediate discharge. The residential treatment or habilitation program shall not require that the child's request be in writing. Upon the request, the residential treatment or habilitation program shall notify the child's legal custodian to take custody of the child and remit the child to the legal custodian's care. The residential treatment or habilitation program shall also notify the child's attorney. If the child's legal custodian is unavailable to take custody of the child and immediate discharge of the child would endanger the child, the residential treatment or habilitation program may detain the child until a safe and orderly discharge is possible. If the child's legal custodian refuses to take physical custody of the child, the residential treatment or habilitation program shall refer the case to the department for an abuse and neglect or family in need of court-ordered services investigation. The department may take the child into protective custody pursuant to the provisions of the Abuse and Neglect Act [32A-4-1 NMSA 1978] or the Family in Need of Court-Ordered Services Act [32A-3B-1 NMSA 1978]. A child requesting immediate discharge shall be discharged, except in those situations when the director of the residential treatment or habilitation program, a physician or a licensed psychologist determines that the child requires continued treatment and that the child meets the criteria for involuntary residential treatment or habilitation services as otherwise provided under the Children's Mental Health and Developmental Disabilities Act. In that event, the director, physician or licensed psychologist, after making the determination, shall, on the first business day following the child's request for release from the voluntary program, request that the child's court attorney initiate involuntary placement proceedings. The child's court attorney may petition for such a placement. The child has a right to a hearing on the child's continued treatment within five days of the child's request for release.

M. A child who is voluntarily admitted to a residential treatment or habilitation program shall have the child's voluntary admission reviewed at the end of a sixty-day period from the date of the child's initial admission to the program. The review shall be accomplished by having the child's physician or licensed psychologist review the child's treatment and determine whether it would be in the best interests of the child to continue the voluntary admission. If the child's physician or licensed psychologist concludes that continuation of treatment is in the child's best interests, the child's clinician shall so state in a form to be filed in the child's patient record. The residential treatment or habilitation program shall notify the child's attorney at least seven days prior to the date that the sixty-day period is to end or, if necessary, request an attorney pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act. The attorney shall then personally meet with the child and ensure that the child understands the child's rights as set forth in this section, that the child understands the method for voluntary termination of the child's admission and that the child knowingly and voluntarily consents to the child's continued treatment. If the

attorney determines that the child understands these rights and that the child voluntarily and knowingly desires to remain in the residential treatment or habilitation program and that the clinician has recommended the continued stay in the program, the attorney shall so certify on a form designated by the supreme court. The disposition of these forms shall be as set forth in this section, with one copy going in the child's patient record and the other being sent to the district court in a manner that preserves the child's anonymity. This procedure shall take place every sixty days from the last admission or attorney's certification, whichever comes first.

N. If the attorney determines that the child does not voluntarily desire to remain in the program or if the child's clinician has not recommended continued stay by the child in the residential treatment or habilitation program, the child shall be released pursuant to the involuntary placement procedures set forth in this section and the Children's Mental Health and Developmental Disabilities Act shall be followed.

History: Laws 2007, ch. 162, § 21.

ANNOTATIONS

Cross references. — For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to voluntary treatment, *see* the 2006 NMSA 1978 (32A-6-12) on New Mexico One Source of Law DVD.

Compiler's note. — The Family in Need of Court-Ordered Services Act cited in Subsection L, was repealed by Laws 2005, ch. 189, § 77. For current law, *see* the Family in Need of Services Act, 32A-3A-1 NMSA 1978.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

In entertaining petition for pro bono appointment of attorney to represent a child, the district court was exercising jurisdiction conferred on district courts by the Children's Mental Health and Developmental Disabilities Act. In re Kleinsmith, 2005-NMCA-136, 138 N.M. 681, 124 P.3d 579.

Absence of statement required by Subsection J of this section would have indicated to the district court that the appointed attorney had not complied with the district court's order, and in such a case, it was not necessary to support the order to show cause with a sworn affidavit. In re Kleinsmith, 2005-NMCA-136, 138 N.M. 681, 124 P.3d 579.

Telephone interview permissible. — Although a face-to-face meeting is preferred, an appointed attorney could have interviewed the child by telephone to carry out his responsibilities under Subsection I of this section. In re Kleinsmith, 2005-NMCA-136, 138 N.M. 681, 124 P.3d 579.

32A-6A-22. Involuntary residential treatment.

A. A child may not receive treatment for mental disorders or habilitation for developmental disabilities on an involuntary residential basis except as provided in this section.

B. A child afforded rights under the Children's Mental Health and Developmental Disabilities Act shall be advised of those rights at that child's first appearance before the court on a petition under that act.

C. A child has the right to be placed in a residential treatment or habilitation program only when the placement is medically necessary.

D. A person who believes that a child, as a result of a mental disorder or developmental disability, is in need of residential mental health or developmental disabilities services may request that a children's court attorney file a petition with the court for the child's involuntary placement. The petition shall include a detailed description of the symptoms or behaviors of the child that support the allegations in the petition, a list of prospective witnesses for involuntary placement and a summary of matters to which they will testify. The petition should also contain a discussion of the alternatives to residential care that have been considered and the reasons for rejecting the alternatives. A copy of the petition shall be served upon the child, the child's legal custodian and the child's attorney or guardian ad litem.

E. The court shall, upon receiving the petition, appoint counsel for the child unless the child has retained an attorney or an attorney or guardian ad litem has been appointed pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act. The attorney or guardian ad litem shall represent the child at all stages of the proceedings.

F. If, after interviewing the child, the child's attorney or guardian ad litem determines that the child understands the child's rights and desires to waive the child's presence at the hearing on the issue of involuntary placement, the attorney or guardian ad litem shall submit a verified written statement to the court explaining the attorney's or guardian ad litem's understanding of the child's intent. If the court is satisfied that the child has voluntarily and knowingly waived the child's right to be present at the hearing, the child may be involuntarily placed in a residential treatment or habilitation program at a hearing at which the child is not present. By waiving the right to be present at the involuntary placement hearing, the child waives no other rights.

G. An involuntary placement hearing shall be held within seven days of the emergency admission of the child to a residential treatment or habilitation program under this section. An involuntary placement hearing shall be held within five days from a child's declaration that the child desires to terminate the child's voluntary admission to a residential treatment or habilitation program if the child's clinician has assessed and documented that involuntary placement is necessary.

H. At the involuntary placement hearing, the child shall:

(1) at all times be represented by counsel;

(2) have the right to present evidence, including the testimony of a mental health and developmental disabilities professional of the child's own choosing;

(3) have the right to cross-examine witnesses;

(4) have the right to a complete record of the proceedings; and

(5) have the right to an expeditious appeal of an adverse ruling.

I. The legal custodian of a child involved in an involuntary placement hearing shall have automatic standing as witnesses and shall be allowed to testify by telephone or through a written affidavit if circumstances make personal testimony too burdensome.

J. The court shall include in its findings either a statement of the child's legal custodian's opinion about whether the child should be involuntarily placed in a residential treatment or habilitation program, a statement detailing the efforts made to ascertain the legal custodian's opinion or a statement of why it was not in the child's best interests to have the legal guardian involved.

K. The court shall make an order involuntarily placing the child in a residential treatment or habilitation program upon a showing by clear and convincing evidence that:

(1) as a result of mental disorder or developmental disability the child needs the treatment or habilitation services proposed;

(2) as a result of mental disorder or developmental disability the child is likely to benefit from the treatment or habilitation services proposed;

(3) the proposed involuntary placement is consistent with the treatment or habilitation needs of the child; and

(4) the proposed involuntary placement is consistent with the least restrictive means principle.

L. If the court determines that the child does not meet the criteria for involuntary placement set forth in this section, it may order the child to undergo nonresidential treatment or habilitation as may be appropriate and necessary or it may order no treatment. If the court determines that the child should not be involuntarily placed in a residential treatment or habilitation program and if the child's legal custodian refuses to take custody of the child, the court shall refer the case to the department for an abuse and neglect investigation. The department may take the child into custody pursuant to

the provisions of the Abuse and Neglect Act [32A-4-1 NMSA 1978] or the Family in Need of Court-Ordered Services Act [32A-3B-1 NMSA 1978].

M. A child receiving involuntary residential treatment or habilitation services for a mental disorder or developmental disability under this section shall have a right to periodic review of the child's involuntary placement at the end of every involuntary placement period. An involuntary placement period shall not exceed sixty days. At the expiration of an involuntary placement period, the child may continue in residential care only after a new involuntary placement hearing and entry of a new order of involuntary placement for one involuntary placement period. Nothing set forth in the Children's Mental Health and Developmental Disabilities Act prohibits a child, who has been involuntarily placed and thereafter discharged and released, from subsequently voluntarily consenting to admission under the provisions of that act.

N. If the person seeking the involuntary placement of a child to a residential treatment or habilitation program believes that the child is likely to cause serious bodily harm to self or to others during the period that would be required to hold an involuntary placement hearing as provided in this section, the child may be admitted to residential care on an emergency basis. If the child is admitted on an emergency basis, appointment of counsel and other procedures shall then take place as provided elsewhere in this section.

History: Laws 2007, ch. 162, § 22

ANNOTATIONS

Cross references. — For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to involuntary, *see* the 2006 NMSA 1978 (32A-6-13) on New Mexico One Source of Law DVD.

Compiler's note. — The Family in Need of Court-Ordered Services Act cited in Subsection L, was repealed by Laws 2005, ch. 189, § 77. For current law, *see* the Family in Need of Services Act, 32A-3A-1 NMSA 1978.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

Decisions under prior law. — In light of the similarity of the provisions, annotations decided under former 43-1-16.1 NMSA 1978 have been included in the annotations to this section.

Children's court is presumed to know what evidence is necessary to find child "committable," in order that the court may be able to make the necessary finding that the child is not committable. State v. Doe, 98 N.M. 567, 650 P.2d 851 (Ct. App. 1982).

Court may find child "not committable". — Where, no matter how the defendant's problems might be classified, there is no available program or facility that can adequately treat him, the court can find that he is not "committable." State v. Doe, 98 N.M. 567, 650 P.2d 851 (Ct. App. 1982).

Private attorney may petition a court for involuntary commitment of a minor to a mental health facility. 1988 Op. Att'y Gen. No. 88-02.

Law reviews. — For article, "Treating Children Under the New Mexico Mental Health and Developmental Disabilities Code," see 10 N.M.L. Rev. 279 (1980).

For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

32A-6A-23. Liability of persons providing treatment or habilitation services.

A. A person providing mental health and developmental disability services to a child and a treatment facility providing mental health and developmental disability services to a child shall not be liable if:

(1) the child does not require detention, treatment or services;

(2) the admission or treatment was made solely on the basis of misrepresentations by a child seeking treatment or habilitation services or by a child's legal custodian, provided the professional or the facility's staff acted in good faith; or

(3) the admission was made solely on the basis of reliance upon a tribal court order, provided the mental health or developmental professional or the facility's staff acted in good faith.

B. Nothing in the Children's Mental Health and Developmental Disabilities Act shall be construed to relieve any professional or facility from liability for negligence or intentional misconduct in the diagnosis, treatment or services provided to any child.

C. Nothing in the Children's Mental Health and Developmental Disabilities Act shall be construed to relieve any professional or facility from a duty pursuant to reporting laws relating to the detection of child abuse.

History: Laws 2007, ch. 162, § 23.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-24. Disclosure of information.

A. Except as otherwise provided in the Children's Mental Health and Developmental Disabilities Act, a person shall not, without the authorization of the child, disclose or transmit any confidential information from which a person well-acquainted with the child might recognize the child as the described person or any code, number or other means that could be used to match the child with confidential information regarding the child.

B. When the child is under fourteen years of age, the child's legal custodian is authorized to consent to disclosure on behalf of the child. Information shall also be disclosed to a court-appointed guardian ad litem without consent of the child or the child's legal custodian.

C. A child fourteen years of age or older with capacity to consent to disclosure of confidential information shall have the right to consent to disclosure of mental health and habilitation records. A legal custodian who is authorized to make health care decisions for a child has the same rights as the child to request, receive, examine, copy and consent to the disclosure of medical or other health care information when evidence exists that such a child whose consent to disclosure of confidential information is sought does not have capacity to give or withhold valid consent and does not have a treatment guardian appointed by a court. If the legal custodian is not authorized to make decisions for a child under the Children's Mental Health and Developmental Disabilities Act, the person seeking authorization shall petition the court for the appointment of a treatment guardian to make a decision for such a child.

D. Authorization from the child or legal custodian for a child less than fourteen years of age shall not be required for the disclosure or transmission of confidential information when the disclosure or transmission:

(1) is necessary for treatment of the child and is made in response to a request from a clinician;

(2) 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;

(3) is determined by a clinician not to cause substantial harm to the child and a summary of the child's assessment, treatment plan, progress, discharge plan and other information essential to the child's treatment is made to a child's legal custodian or guardian ad litem;

(4) is to the primary caregiver of the child and the information disclosed was necessary for the continuity of the child's treatment in the judgment of the treating clinician who discloses the information;

(5) is to an insurer contractually obligated to pay part or all of the expenses relating to the treatment of the child at the residential facility. The information disclosed

shall be limited to data identifying the child, facility and treating or supervising physician and the dates and duration of the residential treatment. It shall not be a defense to an insurer's obligation to pay that the information relating to the residential treatment of the child, apart from information disclosed pursuant to this section, has not been disclosed to the insurer;

(6) is to a protection and advocacy representative pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act and the federal Protection and Advocacy for Individuals with Mental Illness Act; or

(7) is pursuant to a court order issued for good cause shown after notice to the child and the child's legal custodian and opportunity to be heard is given. Before issuing an order requiring disclosure, the court shall find that:

(a) other ways of obtaining the information are not available or would not be effective; and

(b) the need for the disclosure outweighs the potential injury to the child, the clinician-child relationship and treatment services.

E. A disclosure ordered by the court shall be limited to the information that is essential to carry out the purpose of the disclosure. Disclosure shall be limited to those persons whose need for the information forms the basis for the order. An order by the court shall include such other measures as are necessary to limit disclosure for the protection of the child, including sealing from public scrutiny the record of a proceeding for which disclosure of a child's record has been ordered.

F. An authorization given for the transmission or disclosure of confidential information shall not be effective unless it:

(1) is in writing and signed; and

(2) contains a statement of the child's right to examine and copy the information to be disclosed, the name or title of the proposed recipient of the information and a description of the use that may be made of the information.

G. The child has a right of access to confidential information about the child and has the right to make copies of information about the child and submit clarifying or correcting statements and other documentation of reasonable length for inclusion with the confidential information. The statements and other documentation shall be kept with the relevant confidential information, shall accompany it in the event of disclosure and shall be governed by the provisions of this section to the extent the statements or other documentation contain confidential information. Nothing in this subsection shall prohibit the denial of access to the records when a physician or other mental health or developmental disabilities professional believes and notes in the child's medical records

that the disclosure would not be in the best interests of the child. In all cases, the child has the right to petition the court for an order granting access.

H. Information concerning a child disclosed under this section shall not be released to any other person, agency or governmental entity or placed in files or computerized data banks accessible to any persons not otherwise authorized to obtain information under this section. Notwithstanding the confidentiality provisions of the Delinquency Act [32A-2-1 NMSA 1978] and the Abuse and Neglect Act [32A-4-1 NMSA 1978], information disclosed under this section shall not be re-released without the express consent of the child or legal custodian authorized under the Children's Mental Health and Developmental Disabilities Act to give consent and any other consent necessary for redisclosure in conformance with state and federal law, including consent that may be required from the professional or the facility that created the document.

I. Nothing in the Children's Mental Health and Developmental Disabilities Act shall limit the confidentiality rights afforded by federal statute or regulation.

J. The department shall promulgate rules for implementing disclosure of records pursuant to this section and in compliance with state and federal law and the Children's Court Rules [10-101 NMRA].

History: Laws 2007, ch. 162, § 24; 2008, ch. 75, § 6.

ANNOTATIONS

Cross references. — For the federal Developmental Disabilities Assistance and Bill of Rights Act, *see* 42 U.S.C. § 6001.

For the federal Protection and Advocacy for Mentally Ill Individuals Act of 1991, *see* 42 U.S.C. § 10801.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to disclosure of information, *see* the 2006 NMSA 1978 (32A-6-15) on New Mexico One Source of Law DVD.

The 2008 amendment, effective May 14, 2008, in Subsection D, provided that authorization from the legal custodian for a child less than fourteen year of age shall not be required if the listed conditions apply.

32A-6A-25. Special commissioner.

A court may conduct the proceedings required by the Children's Mental Health and Developmental Disabilities Act or may, by general or special order, appoint a special commissioner to do so. The special commissioner shall be a licensed attorney. Upon conclusion of the hearing, the special commissioner shall file findings and recommendations with the court promptly.

History: Laws 2007, ch. 162, § 25.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-26. Transportation.

When a child is to be placed in a residential treatment or habilitation program or to be returned to the program during placement, the court ordering the placement or authorizing the return of the child may direct the sheriff, the New Mexico state police or other appropriate persons to furnish suitable transportation in order to effect the placement or return by contacting the department for directions as to the destination of the child.

History: Laws 2007, ch. 162, § 26.

ANNOTATIONS

Cross references. — For transportation applicable to the Adult Mental Health and Developmental Disabilities Code, *see* 43-1-22 NMSA 1978.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to transportation, *see* the 2006 NMSA 1978 (32A-6-18) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-27. Violation of a child's rights.

A child who believes that rights established by the Children's Mental Health and Developmental Disabilities Act or by the constitution of the United States or the constitution of New Mexico have been violated shall have a right to petition the court for redress. The child shall be represented by counsel. The court shall grant relief as is appropriate, subject to the provisions of the Tort Claims Act [41-4-1 NMSA 1978].

History: Laws 2007, ch. 162, § 27.

ANNOTATIONS

Cross references. — For violation of clients' rights applicable to the Adult Mental Health and Developmental Disabilities Code, see 43-1-23 NMSA 1978.

For provisions of the 1995 "Children's Mental Health and Developmental Disabilities Act, relating to violation of children's rights, *see* the 2006 NMSA 1978 (32A-6-19) on New Mexico One Source of LawDVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-28. Cost of care.

An indigent child may receive care and treatment at a state-operated facility without charge. The governing authorities of the facility may require payment for the cost of care and treatment from others pursuant to established fee schedules based on ability to pay.

History: Laws 2007, ch. 162, § 28.

ANNOTATIONS

Cross references. — For cost of care applicable to the Adult Mental Health and Developmental Disabilities Code, *see* 43-1-25 NMSA 1978.

For provisions of the 1995 Children's Mental Health and Developmental Disabilities Act, relating to cost of care, *see* the , 2006 NMSA 1978 (32A-6-20) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

32A-6A-29. Recognition of tribal court involuntary placement orders.

A. Notwithstanding the provisions of any other law to the contrary, an involuntary placement order for a child issued by a tribal court shall be recognized and enforced by the district court for the judicial district in which the tribal court is located. The involuntary placement order shall be filed with the clerk of the district court. The tribal court, as the court of original jurisdiction, shall retain jurisdiction and authority over the child.

B. A child placed in an evaluation facility pursuant to the provisions of this section shall be subject to the continuing jurisdiction of the tribal court; provided that any decisions regarding discharge or release of the child from the evaluation facility shall be made by the administrator of that facility. Prior to discharging or releasing the child, the facility shall:

(1) make custody arrangements with the child's legal custodian; and

(2) establish a plan for the child's aftercare.

C. When an Indian child is placed in an evaluation facility pursuant to the provisions of this section, any outpatient treatment of the Indian child shall be provided in the same manner as treatment would be provided for any other child.

D. When an Indian child requires emergency treatment or habilitation, that treatment or habilitation shall be provided pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act.

E. An Indian child residing on or off a reservation, as a citizen of this state, shall have the same right to services available to other children of the state.

History: Laws 2007, ch. 162, § 29.

ANNOTATIONS

Cross references. — For provisions of the 1995 "Children's Mental Health and Developmental Disabilities Act, relating to tribal court involuntary placement orders, *see* the 2006 NMSA 1978 (32A-6-21) on New Mexico One Source of Law DVD.

Effective dates. — Laws 2007, ch. 162 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

Temporary provision. — Laws 2007, ch. 162, § 30, provided that the department of health shall promulgate rules for the operation of a human rights committee charged with review and evaluation of a treatment plan that includes aversive intervention.

Law reviews. — For article, "Problems in the Application of Full Faith and Credit for Indian Tribes," see 7 N.M.L. Rev. 133 (1977).

32A-6A-30. Rules.

The department shall promulgate rules for the operation of out-of-home treatment and habilitation programs identified as psychiatric residential treatment facilities or non-medical community-based residential programs in keeping with the purposes of the Children's Mental Health and Developmental Disabilities Act and in conformance with applicable federal law and regulation.

History: Laws 2008, ch. 75, § 7.

ANNOTATIONS

Effective dates. — Laws 2008, ch. 75 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 14, 2008, 90 days after the adjournment of the legislature.

ARTICLE 7
Juvenile Parole Board

32A-7-1. Repealed.

History: 1978 Comp., § 32A-7-1, enacted by Laws 1993, ch. 77, § 194; repealed by Laws 2009, ch. 239, § 70.

ANNOTATIONS

Repeals. — Laws 2009, ch. 239, § 70 repealed 32A-7-1 NMSA 1978, as enacted by Laws 1993, ch. 77, § 194, relating to the short title, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on New Mexico One Source of Law DVD.

32A-7-2. Repealed.

History: 1978 Comp., § 32A-7-2, enacted by Laws 1993, ch. 77, § 195; repealed by Laws 2009, ch. 239, § 70.

ANNOTATIONS

Repeals. — Laws 2009, ch. 239, § 70 repealed 32A-7-2 NMSA 1978, as enacted by Laws 1993, ch. 77, § 195, relating to juvenile parole board, terms and director, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on New Mexico One Source of Law DVD.

32A-7-3. Repealed.

History: 1978 Comp., § 32A-7-3, enacted by Laws 1993, ch. 77, § 196; repealed by Laws 2009, ch. 239, § 70.

ANNOTATIONS

Repeals. — Laws 2009, ch. 239, § 70 repealed 32A-7-3 NMSA 1978, as enacted by Laws 1993, ch. 77, § 196, relating to removal and vacancies, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on New Mexico One Source of Law DVD.

32A-7-4. Repealed.

History: 1978 Comp., § 32A-7-4, enacted by Laws 1993, ch. 77, § 197; repealed by Laws 2009, ch. 239, § 70.

ANNOTATIONS

Repeals. — Laws 2009, ch. 239, § 70 repealed 32A-7-4 NMSA 1978, as enacted by Laws 1993, ch. 77, § 197, relating to qualifications of board, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on New Mexico One Source of Law DVD.

32A-7-5. Repealed.

History: 1978 Comp., § 32A-7-5, enacted by Laws 1993, ch. 77, § 198; repealed by Laws 2009, ch. 239, § 70.

ANNOTATIONS

Repeals. — Laws 2009, ch. 239, § 70 repealed 32A-7-5 NMSA 1978, as enacted by Laws 1993, ch. 77, § 198, relating to the chairperson, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on New Mexico One Source of Law DVD.

32A-7-6. Repealed.

History: 1978 Comp., § 32A-7-6, enacted by Laws 1993, ch. 77, § 199; repealed by Laws 2009, ch. 239, § 70.

ANNOTATIONS

Repeals. — Laws 2009, ch. 239, § 70 repealed 32A-7-6 NMSA 1978, as enacted by Laws 1993, ch. 77, § 199, relating to powers and duties of the board, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on New Mexico One Source of Law DVD.

32A-7-7. Repealed.

History: 1978 Comp., § 32A-7-7, enacted by Laws 1993, ch. 77, § 200; repealed by Laws 2009, ch. 239, § 70.

ANNOTATIONS

Repeals. — Laws 2009, ch. 239, § 70 repealed 32A-7-7 NMSA 1978, as enacted by Laws 1993, ch. 77, § 200, relating to compensation, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on New Mexico One Source of Law DVD.

32A-7-8. Repealed.

History: 1978 Comp., § 32A-7-8, enacted by Laws 1993, ch. 77, § 201; 2003, ch. 225, § 17; repealed by Laws 2009, ch. 239, § 70.

ANNOTATIONS

Repeals. — Laws 2009, ch. 239, § 70 repealed 32A-7-8 NMSA 1978, as enacted by Laws 1993, ch. 77, § 201, relating to parole eligibility, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on New Mexico One Source of Law DVD.

32A-7-9. Repealed.

History: 1978 Comp., § 32A-7-9, enacted by Laws 1993, ch. 77, § 202; repealed by Laws 2009, ch. 239, § 70.

ANNOTATIONS

Repeals. — Laws 2009, ch. 239, § 70 repealed 32A-7-9 NMSA 1978, as enacted by Laws 1993, ch. 77, § 202, relating to access, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on New Mexico One Source of Law DVD.

ARTICLE 7A
Juvenile Public Safety Advisory Board

32A-7A-1. Short title.

Chapter 32A, Article 7A NMSA 1978 may be cited as the "Juvenile Public Safety Advisory Board Act".

History: 1978 Comp., § 32A-7A-1, as enacted by Laws 2009, ch. 239, § 58.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-7A-2. Juvenile public safety advisory board; terms; director.

A. The "juvenile public safety advisory board" is created, consisting of seven members appointed by the governor. The board is administratively attached to the department. The terms of members of the board shall be six years.

B. A director shall be appointed by the governor as the administrative officer of the juvenile public safety advisory board. The director shall employ other staff as necessary to carry out the duties of the board. Employees shall be employed in classified positions and shall be subject to the provisions of the Personnel Act [10-9-1 NMSA 1978].

History: 1978 Comp., § 32A-7A-2, as enacted by Laws 2009, ch. 239, § 59.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-7A-3. Board; removal; vacancies.

A member of the juvenile public safety advisory board may be removed by the governor as provided in Article 5, Section 5 of the constitution of New Mexico. Vacancies shall be filled by the governor for the remainder of the unexpired term.

History: 1978 Comp., § 32A-7A-3, as enacted by Laws 2009, ch. 239, § 60.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-7A-4. Board; qualifications.

Members of the juvenile public safety advisory board shall be persons qualified by education or professional training in such fields as criminology, education, health, psychology, psychiatry, law, social work or sociology for children and youth. The membership shall be reasonably representative of the various geographic regions of the state.

History: 1978 Comp., § 32A-7A-4, as enacted by Laws 2009, ch. 239, § 61.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-7A-5. Board; chair.

A. The governor shall designate one member of the juvenile public safety advisory board to serve as chair.

B. The chair may designate two members of the board to serve as regional vice chairs.

History: 1978 Comp., § 32A-7A-5, as enacted by Laws 2009, ch. 239, § 62.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-7A-6. Board; powers and duties.

A. The juvenile public safety advisory board shall:

(1) advise the department on release decisions, including the criteria to be used to grant release and participation in decisions to grant or deny release;

(2) meet with the secretary of children, youth and families or the secretary's designee a minimum of twice each year for the purpose of reviewing the activities of the department;

(3) visit each facility for adjudicated delinquent children operated by the department at least once each year and on or before June 30 of each year, submit a written report to the governor and the secretary regarding conditions relating to the care and treatment of youth assigned to the facilities and any other matters pertinent in the judgment of the board;

(4) make recommendations to the secretary of children, youth and families and the director of the juvenile justice division of the department concerning programs and facilities for adjudicated delinquent children; and

(5) adopt rules and regulations as may be necessary for the effectual discharge of duties of the board.

B. Within forty days of a juvenile's arrival at a facility, the juvenile public safety advisory board shall conduct an initial assessment of the juvenile. At regularly scheduled intervals thereafter, the board shall conduct administrative reviews to assess the juvenile's progress or lack thereof. After each administrative review, the board shall prepare a report of the juvenile offender's progress with recommendations as to readiness for release or appropriateness of programming.

History: 1978 Comp., § 32A-7A-6, as enacted by Laws 2009, ch. 239, § 63.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-7A-7. Board; compensation.

The members of the juvenile public safety advisory board shall receive per diem and mileage as provided for nonsalaried public officers in the Per Diem and Mileage Act [10-8-1 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

History: 1978 Comp., § 32A-7A-7, as enacted by Laws 2009, ch. 239, § 64.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-7A-8. Access.

The juvenile public safety advisory board shall have access at reasonable times to any adjudicated delinquent child and any records pertaining to the child for whom the

department is considering release or who has requested release pursuant to procedures established by the department. The agency or facility to which legal custody was transferred shall also provide the board with facilities for communicating with and interviewing children.

History: 1978 Comp., § 32A-7A-8, as enacted by Laws 2009, ch. 239, § 65.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 239, § 72 made this section effective July 1, 2009.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

ARTICLE 8
Citizens Substitute Care Review Act

ANNOTATIONS

Compiler's notes. — Sections 32A-8-1 to 32A-8-7 NMSA 1978 were originally enacted as 32-8-1 to 32-8-7 NMSA 1978 by Laws 1993, ch. 77, §§ 203 to 209. The sections as enacted by Chapter 77 of Laws 1993 were recompiled to Chapter 32A NMSA 1978 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under former law have been retained whenever possible.

32A-8-1. Short title.

Chapter 32 [32A], Article 8 NMSA 1978 may be cited as the "Citizen Substitute Care Review Act".

History: 1978 Comp., § 32A-8-1, enacted by Laws 1993, ch. 77, § 203.

32A-8-2. Purpose of act.

The purpose of the Citizen Substitute Care Review Act is to provide a permanent system for independent and objective monitoring of children placed in the custody of the department.

History: 1978 Comp., § 32A-8-2, enacted by Laws 1993, ch. 77, § 204.

32A-8-3. Implementation of act.

The department of finance and administration shall maintain and fund a contract with a nonprofit organization having a demonstrated knowledge of the problem of children in substitute care and the issues in permanency planning to operate a statewide system of local substitute care review boards.

History: 1978 Comp., § 32A-8-3, enacted by Laws 1993, ch. 77, § 205.

32A-8-4. State advisory committee; members; compensation; responsibilities.

A. A state advisory committee shall be composed of three persons with expertise in the area of substitute care, appointed by the secretary of finance and administration, and also one representative of each local substitute care review board. Each local board shall select its representative to the state advisory committee in accordance with procedures established by that committee. No person employed by the department or a district court may serve on the state advisory committee.

B. Terms of office of local substitute care review board members of the state advisory committee shall be coterminous with their terms as members of the local boards. Terms of office of members who are appointed by the secretary of finance and administration shall be for three years; provided, however, that appointment of the first state advisory committee members shall be to staggered terms so that one member shall serve for a term of three years, one member shall serve for a term of two years and one member shall serve for a term of one year. The term of each member shall expire on June 30 of the appropriate year. In the event that a vacancy occurs among the members of the state advisory committee appointed by the secretary of finance and administration, the secretary shall appoint another person to serve the unexpired portion of the term.

C. The state advisory committee shall select a chairperson, a vice chairperson, an executive committee and other officers as it deems necessary.

D. The state advisory committee shall meet no less than twice annually and more frequently upon the call of the chairperson or as the executive committee may determine. The state advisory committee is authorized to adopt reasonable rules relating to the functions and procedures of the local substitute care review boards and the state advisory committee in accordance with the duties of the boards as provided in the Citizen Substitute Care Review Act [this article]. These rules shall include guidelines for the determination of the appropriate type of review and the information needed for all cases to be monitored by the local substitute care review boards. The state advisory committee shall review and coordinate the activities of the local substitute care review boards and make recommendations to the department, the courts and the legislature, on or before January 1 of each year, regarding statutes, policies and procedures relating to substitute care.

E. State advisory committee members shall receive per diem and mileage as provided for nonsalaried public officers in the Per Diem and Mileage Act [10-8-1 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

History: 1978 Comp., § 32A-8-4, enacted by Laws 1993, ch. 77, § 206.

32A-8-5. Local boards; appointments; exclusion; terms; training; compensation; meetings.

A. The contractor, selected by the department of finance and administration pursuant to the provisions of Section 32-8-3 [32A-8-3] NMSA 1978, shall establish and maintain local substitute care review boards to review, as provided in the Citizen Substitute Care Review Act [this article], the disposition of children in the custody of the department prior to judicial review. Each board shall, to the maximum extent feasible, represent the various socioeconomic, racial and ethnic groups of the community that they serve.

B. Criteria for membership and tenure on local substitute care review boards shall be determined by the state advisory committee, after consultation with the department of finance and administration and the contractor. No person employed by the department of finance and administration, the department or a district court may serve on a local substitute care review board.

C. Each local substitute care review board shall elect a chairperson, a vice chairperson and other officers as it deems necessary.

D. Local substitute care review board members may receive per diem and mileage as provided for nonsalaried public officers in the Per Diem and Mileage Act [10-8-1 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

History: 1978 Comp., § 32A-8-5, enacted by Laws 1993, ch. 77, § 207.

32A-8-6. Citizen review board reviews of dispositional judgments.

A. Prior to any judicial review by the court pursuant to Section 32-4-23 [32A-4-25] NMSA 1978, the local substitute care review board shall review any dispositional order or the continuation of the order and the department's progress report on the child and submit a report to the court. The parties in the children's court proceedings shall be given prior notice of the review board meeting and be afforded the opportunity to participate fully in the meeting.

B. The report of the local substitute care review board submitted to the court pursuant to this section shall become a part of the child's permanent court record.

History: 1978 Comp., § 32A-8-6, enacted by Laws 1993, ch. 77, § 208.

ANNOTATIONS

Compiler's note. — Laws 1993, ch. 77, § 119, enacted as 32-4-23 NMSA 1978, was recompiled as 32A-4-25 NMSA 1978 by the compiler. *See* note at the beginning of this article.

32A-8-7. Temporary provisions; transfer; funds; contracts.

A. On the effective date of the Children's Code [32A-1-1 NMSA 1978], all records, personnel, money, property, equipment and supplies of the department relating to the Citizen Substitute Care Review Act shall be transferred to the department of finance and administration.

B. On the effective date of the Children's Code, all appropriations, contract funds and funds for contract administration and staff, the cost of advisory committee per diem and travel, training and all other costs relating to the Citizen Substitute Care Review Act shall be transferred from the department to the department of finance and administration.

C. On the effective date of the Children's Code all existing rules and regulations, contracts and agreements in effect with the department for providing a statewide system of local substitute care review boards shall be binding and effective on the department of finance and administration.

History: 1978 Comp., § 32A-8-7, enacted by Laws 1993, ch. 77, § 209.

ANNOTATIONS

Compiler's notes. — The effective date of the 1993 version of the Children's Code is July 1, 1993, pursuant to Laws 1993, ch. 77, § 236. For the prior version of the Children's Code, *see* the 1992 NMSA 1978 on New Mexico One Source of Law DVD.

ARTICLE 9
Children's Shelter Care

ANNOTATIONS

Compiler's notes. — Sections 32A-9-1 to 32A-9-7 NMSA 1978 were originally recompiled from 32-2A-1 to 32-2A-7 NMSA 1978 to 32-9-1 to 32-9-7 NMSA 1978 by Laws 1993, ch. 77, § 210. The sections as enacted by Chapter 77 of Laws 1993 were recompiled to Chapter 32A NMSA 1978 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under former law have been retained whenever possible.

32A-9-1. Short title.

Sections 1 through 7 [32A-9-1 to 32A-9-7 NMSA 1978] of this act may be cited as the "Children's Shelter Care Act".

History: 1978 Comp., § 32-2A-1, enacted by Laws 1978, ch. 108, § 1; recompiled as 1978 Comp., § 32A-9-1 by Laws 1993, ch. 77, § 210.

32A-9-2. Legislative findings and purpose.

A. The legislature finds and declares that appropriate and distinct programs of supervision and care for children are required to fulfill the purposes of the Children's Code [32A-1-1 NMSA 1978]; that many children are needlessly detained in secured facilities on charges for acts that would not be criminal if they were committed by an adult; that these children would benefit from either immediate return to the family or placement in shelter-care homes or nonsecured shelter-care facilities; and that certain alleged delinquents will benefit from nonsecured placements and do not require secure detention.

B. The purpose of the Children's Shelter Care Act is:

(1) to provide funding for the establishment of shelter-care facilities or programs; and

(2) to divert children out of the juvenile justice system and provide for their supervision and care in community-based shelter-care homes and facilities when the immediate return to the child's family is not feasible or when intervention programs alone are not sufficient for the care and treatment of the child.

History: 1978 Comp., § 32-2A-2, enacted by Laws 1978, ch. 108, § 2; recompiled as 1978 Comp., § 32A-9-2 by Laws 1993, ch. 77, § 210.

32A-9-3. Definitions.

As used in the Children's Shelter Care Act:

A. "child" means an individual who is less than eighteen years old;

B. "alleged child in need of supervision" means a child who is charged with an offense applicable only to children or not classified as criminal;

C. "child in need of supervision" means a child found by the children's court or family court division of the district court to:

(1) have committed an offense applicable only to children or not classified as criminal; and

(2) be in need of care or rehabilitation;

D. "alleged delinquent child" means a child charged with an act that would be designated as a crime under the Criminal Code [30-1-1 NMSA 1978] if committed by an adult;

E. "community-based shelter-care facility" means a physically nonrestrictive home or living facility to be used as a temporary living place for a child eligible under Section 32-2A-6 [32A-9-6] NMSA 1978, pending the return of such child to his family or his placement in a residential facility designed for long-term placement;

F. "programs of supervision and care" includes programs, placements and services designed to serve as alternatives to the physical detention of alleged children in need of supervision, alleged delinquent children and children in need of supervision; and

G. "department" means the children, youth and families department.

History: 1978 Comp., § 32-2A-3, enacted by Laws 1978, ch. 108, § 3; 1983, ch. 180, § 1; 1992, ch. 57, § 34; recompiled as 1978 Comp., § 32A-9-3 by Laws 1993, ch. 77, § 210.

ANNOTATIONS

Cross references. — For children, youth and families department, *see* 9-2A-1 NMSA 1978.

32A-9-4. Rules and regulations; promulgation.

The department shall promulgate necessary rules, regulations, standards and procedures to carry out the purposes of the Children's Shelter Care Act.

History: 1978 Comp., § 32-2A-4, enacted by Laws 1978, ch. 108, § 4; recompiled as 1978 Comp., § 32A-9-4 by Laws 1993, ch. 77, § 210.

32A-9-5. Community-based shelter-care facilities.

The department shall establish and support community-based shelter-care facilities and programs of supervision and care, and shall support existing community-based shelter-care facilities and other programs of supervision and care.

History: 1978 Comp., § 32-2A-5, enacted by Laws 1978, ch. 108, § 5; recompiled as 1978 Comp., § 32A-9-5 by Laws 1993, ch. 77, § 210.

32A-9-6. Eligibility of child for placement.

A child is eligible to be placed in a community-based shelter-care facility provided for under Section 5 [32A-9-5 NMSA 1978] of the Children's Shelter Care Act if:

A. the child is an alleged child in need of supervision; a child in need of supervision; or

B. the child is an alleged delinquent child and there is no probable cause to believe that the child will injure others or himself, run away or be taken away so as to be unavailable for proceedings of the court or its officers.

History: 1978 Comp., § 32-2A-6, enacted by Laws 1978, ch. 108, § 6; recompiled as 1978 Comp., § 32A-9-6 by Laws 1993, ch. 77, § 210.

32A-9-7. Report to the governor and the legislature.

The department shall provide an annual report to the governor and the legislature concerning the projects and programs funded under the Children's Shelter Care Act. The report shall include:

A. a description of the community-based shelter-care facilities and programs of care and supervision funded pursuant to the Children's Shelter Care Act;

B. an accounting of expenditures;

C. an analysis of the effectiveness of the community-based shelter-care facilities and programs of care and supervision funded pursuant to that act; and

D. a description of procedures employed by the department in awarding grants, and auditing, monitoring and evaluating facilities and programs.

History: 1978 Comp., § 32-2A-7, enacted by Laws 1978, ch. 108, § 7; recompiled as 1978 Comp., § 32A-9-7 by Laws 1993, ch. 77, § 210.

ARTICLE 10
Interstate Compact on Juveniles

32A-10-1. Interstate Compact on Juveniles. (Contingent repeal, see note.)

The Interstate Compact on Juveniles is entered into with all other jurisdictions legally joining therein in a form substantially as follows:

INTERSTATE COMPACT ON JUVENILES

Article 1 - Findings and Purposes

A. Juveniles who are not under proper supervision and control, or who have absconded, escaped or run away, are likely to endanger their own health, morals and

welfare and the health, morals and welfare of others. The cooperation of the states party to this compact is therefore necessary to provide for the welfare and protection of juveniles and of the public with respect to:

(1) cooperative supervision of delinquent juveniles on probation or parole;

(2) the return from one state to another of delinquent juveniles who have escaped or absconded;

(3) the return from one state to another of nondelinquent juveniles who have run away from home; and

(4) additional measures for the protection of juveniles and of the public which any two or more of the party states may find desirable to undertake cooperatively.

B. In carrying out the provisions of this compact, the party states shall be guided by the noncriminal, reformative and protective policies which guide their laws concerning delinquent, neglected or dependent juveniles generally. It shall be the policy of the states party to this compact to cooperate and observe their respective responsibilities for the prompt return and acceptance of juveniles and delinquent juveniles who become subject to the provisions of this compact. The provisions of this compact shall be reasonably and liberally construed to accomplish the foregoing purposes.

Article 2 - Existing Rights and Remedies

All remedies and procedures provided by this compact shall be in addition to, and not in substitution for, other rights, remedies and procedures, and shall not be in derogation of parental rights and responsibilities.

Article 3 - Definitions

For the purposes of this compact:

A. "delinquent juvenile" means any juvenile who has been adjudged delinquent and who, at the time the provisions of this compact are invoked, is still subject to the jurisdiction of the court that has made such adjudication or to the jurisdiction or supervision of an agency or institution pursuant to an order of the court;

B. "probation or parole" means any kind of conditional release of juveniles authorized under the laws of the states party to this compact;

C. "court" means any court having jurisdiction over delinquent, neglected or dependent children;

D. "state" means any state, territory or possession of the United States, the District of Columbia and the commonwealth of Puerto Rico; and

E. "residence" or any variant thereof means a place at which a home or regular place of abode is maintained.

Article 4 - Return of Runaways

A. The parent, guardian, person or agency entitled to legal custody of a juvenile who has not been adjudged delinquent but who has run away without the consent of the parent, guardian, person or agency may petition the appropriate court in the demanding state for the issuance of a requisition for his return. The petition shall state the name and age of the juvenile, the name of the petitioner and the basis of entitlement to the juvenile's custody, the circumstances of his running away, his location if known at the time application is made and other facts as may tend to show that the juvenile who has run away is endangering his own welfare or the welfare of others and is not an emancipated minor. The petition shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the document or documents on which the petitioner's entitlement to the juvenile's custody is based, such as birth certificates, letters of guardianship or custody decrees. Further affidavits and other documents as deemed proper may be submitted with the petition. The judge of the court to which this application is made may hold a hearing thereon to determine whether, for the purposes of this compact, the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has, in fact, run away without consent, whether or not he is an emancipated minor and whether or not it is in the best interest of the juvenile to compel his return to the state.

B. If the judge determines, either with or without a hearing, that the juvenile should be returned, he shall present to the appropriate court or to the executive authority of the state where the juvenile is alleged to be located a written requisition for the return of the juvenile. The requisition shall set forth the name and age of the juvenile, the determination of the court that the juvenile has run away without the consent of a parent, guardian, person or agency entitled to his legal custody and that it is in the best interest and for the protection of the juvenile that he be returned. If a proceeding for the adjudication of the juvenile as a delinquent, neglected or dependent juvenile is pending in the court at the time when the juvenile runs away, the court may issue a requisition for the return of the juvenile upon its own motion, regardless of the consent of the parent, guardian, person or agency entitled to legal custody, reciting therein the nature and circumstances of the pending proceeding. The requisition shall in every case be executed in duplicate and shall be signed by the judge. One copy of the requisition shall be filed with the compact administrator of the demanding state, there to remain on file subject to the provisions of law governing records of such court.

C. Upon the receipt of a requisition demanding the return of a juvenile who has run away, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing him to take into

custody and detain the juvenile. The detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No juvenile detained upon such order shall be delivered over to the officer whom the court demanding him has appointed to receive him unless he is first taken forthwith before a judge of a court in the state, who shall inform him of the demand made for his return and who may appoint counsel or guardian ad litem for him. If the judge of such court finds that the requisition is in order, he shall deliver the juvenile over to the officer whom the court demanding him has appointed to receive him. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

D. Upon reasonable information that a person is a juvenile who has run away from another state party to this compact without the consent of a parent, guardian, person or agency entitled to his legal custody, the juvenile may be taken into custody without a requisition and brought forthwith before a judge of the appropriate court who may appoint counsel or guardian ad litem for the juvenile and who shall determine after a hearing whether sufficient cause exists to hold the person, subject to the order of the court, for his own protection and welfare, for a time not exceeding ninety days as will enable his return to another state party to this compact pursuant to a requisition for his return from a court of that state.

E. If, at the time when a state seeks the return of a juvenile who has run away, there is pending in the state wherein he is found any criminal charge, or any proceeding to have him adjudicated a delinquent juvenile for an act committed in such state, or if he is suspected of having committed within such state a criminal offense of an act of juvenile delinquency, he shall not be returned without the consent of such state until discharged from prosecution or other form of proceeding, imprisonment, detention or supervision for such offense or juvenile delinquency.

F. The duly accredited officers of any state party to this compact, upon the establishment of their authority and the identity of the juvenile being returned, shall be permitted to transport the juvenile through all states party to this compact without interference. Upon his return to the state from which he ran away, the juvenile shall be subject to further proceedings as may be appropriate under the laws of that state.

G. The state to which a juvenile is returned under this article shall be responsible for payment of the transportation costs of the return.

H. As used in this article, "juvenile" means any person who is a minor under the law of the state of residence of the parent, guardian, person or agency entitled to the legal custody of the minor.

Article 5 - Return of Escapees and Absconders

A. The appropriate person or authority from whose probation or parole supervision a delinquent juvenile has absconded or from whose institutional custody he has escaped shall present to the appropriate court or to the executive authority of the state where the

delinquent juvenile is alleged to be located a written requisition for the return of the delinquent juvenile. The requisition shall state the name and age of the delinquent juvenile, the particulars of his adjudication as a delinquent juvenile, the circumstances of the breach of the terms of his probation or parole or of his escape from an institution or agency vested with his legal custody or supervision and the location of the delinquent juvenile, if known at the time the requisition is made. The requisition shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the judgment, formal adjudication or order of commitment which subjects the delinquent juvenile to probation or parole or to the legal custody of the institution or agency concerned. Further affidavits and other documents deemed proper may be submitted with the requisition. One copy of the requisition shall be filed with the compact administrator of the demanding state, there to remain on file subject to the provisions of law governing records of the appropriate court.

B. Upon the receipt of a requisition demanding the return of a delinquent juvenile who has absconded or escaped, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing him to take into custody and detain the delinquent juvenile. The detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No delinquent juvenile detained upon such order shall be delivered over to the officer whom the appropriate person or authority demanding him has appointed to receive him unless he is first taken forthwith before a judge, of an appropriate court in the state, who shall inform him of the demand made for his return and who may appoint counsel or guardian ad litem for him. If the judge of such court finds that the requisition is in order, he shall deliver the delinquent juvenile over to the officer whom the appropriate person or authority demanding him has appointed to receive him. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

C. Upon reasonable information that a person is a delinquent juvenile who has absconded while on probation or parole or escaped from an institution or authority vested with his legal custody or supervision in any state party to this compact, the person may be taken into custody in any other state party to this compact without a requisition. But in such event, he must be taken forthwith before a judge of the appropriate court who may appoint counsel or guardian ad litem for the person and who shall determine, after a hearing, whether sufficient cause exists to hold the person subject to the order of the court for a time not exceeding ninety days as will enable his detention under a detention order issued on a requisition pursuant to this article.

D. If, at the time when a state seeks the return of a delinquent juvenile who has either absconded while on probation or parole or escaped from an institution or agency vested with his legal custody or supervision, there is pending in the state wherein he is detained any criminal charge or any proceeding to have him adjudicated a delinquent juvenile for an act committed in such state, or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of such state until discharged from prosecution or other

form of proceeding, imprisonment, detention or supervision for such offense or juvenile delinquency.

E. The duly accredited officers of any state party to this compact, upon the establishment of their authority and the identity of the delinquent juvenile being returned, shall be permitted to transport the delinquent juvenile through all states party to this compact without interference. Upon his return to the state from which he escaped or absconded, the delinquent juvenile shall be subject to further proceedings as may be appropriate under the laws of that state.

F. The state to which a delinquent juvenile is returned under this article shall be responsible for the payment of the transportation costs of the return.

Article 6 - Voluntary Return Procedure

A. Any delinquent juvenile who has absconded while on probation or parole or escaped from an institution or agency vested with his legal custody or supervision in any state party to this compact, and any juvenile who has run away from any state party to this compact who is taken into custody without a requisition in another state party to this compact under the provisions of Article 4B or Article 5C, may consent to his immediate return to the state from which he absconded, escaped or ran away. The consent shall be given by the juvenile or delinquent juvenile and his counsel or guardian ad litem, if any, by executing or subscribing a writing, in the presence of a judge of the appropriate court, which states that the juvenile or delinquent juvenile and his counsel or guardian ad litem, if any, consent to his return to the demanding state. Before the consent is executed or subscribed, however, the judge, in the presence of counsel or guardian ad litem, if any, shall inform the juvenile or delinquent juvenile of his rights under this compact.

B. When the consent has been duly executed, it shall be forwarded to and filed with the compact administrator of the state in which the court is located and the judge shall direct the officer having the juvenile or delinquent juvenile in custody to deliver him to the duly accredited officer or officers of the state demanding his return, and shall cause to be delivered to such officer or officers a copy of the consent. The court may, however, upon the request of the state to which the juvenile or delinquent juvenile is being returned, order him to return unaccompanied to such state and shall provide him with a copy of such court order; in such event a copy of the consent shall be forwarded to the compact administrator of the state to which the juvenile or delinquent juvenile is ordered to return.

Article 7 - Cooperative Supervision of Probationers and Parolees

A. The duly constituted judicial and administrative authorities of a state party to this compact, herein called "sending state," may permit any delinquent juvenile within the state placed on probation or parole to reside in any other state party to this compact, herein called "receiving state," while on probation or parole, and the receiving state shall

accept the delinquent juvenile if the parent, guardian or person entitled to the legal custody of the delinquent juvenile is residing or undertakes to reside within the receiving state. Before granting such permission, opportunity shall be given to the receiving state to make investigations it deems necessary. The authorities of the sending state shall send to the authorities of the receiving state copies of pertinent court orders, social case studies and all other available information which may be of value to and assist the receiving state in supervising a probationer or parolee under this compact. A receiving state, in its discretion, may agree to accept supervision of a probationer or parolee in cases where the parent, guardian or person entitled to the legal custody of the delinquent juvenile is not a resident of the receiving state, and if so accepted, the sending state may transfer supervision accordingly.

B. Each receiving state will assume the duties of visitation and supervision over any such delinquent juvenile and, in the exercise of those duties, will be governed by the same standards of visitation and supervision that prevail for its own delinquent juveniles released on probation or parole.

C. After consultation between the appropriate authorities of the sending state and the receiving state as to the desirability and necessity of returning such a delinquent juvenile, the duly accredited officers of a sending state may enter a receiving state and there apprehend and retake any such delinquent juvenile on probation or parole. For that purpose, no formalities will be required other than establishing the authority of the officer and the identity of the delinquent juvenile to be retaken and returned. The decision of the sending state to retake a delinquent juvenile on probation or parole shall be conclusive upon, and not reviewable within, the receiving state, but if, at the time the sending state seeks to retake a delinquent juvenile on probation or parole, there is pending against him within the receiving state any criminal charge or any proceeding to have him adjudicated a delinquent juvenile for any act committed in such state, or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment, detention or supervision for the offense or juvenile delinquency. The duly accredited officers of the sending state shall be permitted to transport delinquent juveniles being so returned through all states party to this compact without interference.

D. The sending state shall be responsible under this article for paying the costs of transporting any delinquent juvenile to the receiving state or of returning any delinquent juvenile to the sending state.

Article 8 - Responsibility for Costs

A. The provisions of Articles 4G, 5F and 7D of this compact shall not be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs or responsibilities therefor.

B. Nothing in this compact shall be construed to prevent any party state or subdivision thereof from asserting any right against any person, agency or other entity in regard to costs for which the party state or subdivision thereof may be responsible pursuant to Articles 4G, 5F or 7D of this compact.

Article 9 - Detention Practices

To every extent possible, it shall be the policy of states party to this compact that no juvenile or delinquent juvenile shall be placed or detained in any prison, jail or lockup nor be detained or transported in association with criminal, vicious or dissolute persons.

Article 10 - Supplementary Agreements

The duly constituted administrative authorities of a state party to this compact may enter into supplementary agreements with any other state or states party hereto for the cooperative care, treatment and rehabilitation of delinquent juveniles whenever they find that such agreements will improve the facilities or programs available for such care, treatment and rehabilitation. The care, treatment and rehabilitation may be provided in an institution located within any state entering into the supplementary agreement. Supplementary agreements shall:

A. provide the rates to be paid for the care, treatment and custody of such delinquent juveniles, taking into consideration the character of facilities, services and subsistence furnished;

B. provide that the delinquent juvenile shall be given a court hearing prior to his being sent to another state for care, treatment and custody;

C. provide that the state receiving the delinquent juvenile in one of its institutions shall act solely as agent for the state sending the delinquent juvenile;

D. provide that the sending state shall at all times retain jurisdiction over delinquent juveniles sent to an institution in another state;

E. provide for reasonable inspection of such institutions by the sending state;

F. provide that the consent of the parent, guardian, person or agency entitled to the legal custody of the delinquent juvenile shall be secured prior to his being sent to another state; and

G. make provision for other matters and details as necessary to protect the rights and equities of the delinquent juveniles and of the cooperating states.

Article 11 - Acceptance of Federal and Other Aid

Any state party to this compact may accept any donations, gifts and grants of money, equipment and services from the federal or any local government, or any agency thereof, and from any person, firm or corporation, for any of the purposes and functions of this compact, and may receive and utilize them subject to the terms, conditions and regulations governing the donations, gifts and grants.

Article 12 - Compact Administrators

Each state party to this compact shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.

Article 13 - Execution of Compact

This compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within the state, the form or execution to be in accordance with the laws of the executing state.

Article 14 - Renunciation

This compact shall continue in force and remain binding upon each executing state until renounced by it. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto. The duties and obligations of a renouncing state under Article 7 hereof shall continue as to parolees and probationers residing therein at the time of withdrawal until retaken or finally discharged. Supplementary agreements entered into under Article 10 hereof shall be subject to renunciation as provided by the supplementary agreements, and shall not be subject to the six months' renunciation notice of the present article.

Article 15 - Severability

The provisions of this compact are severable, and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States, or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact is held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: 1953 Comp., § 13-16-1, enacted by Laws 1973, ch. 238, § 1; recompiled as 1978 Comp., § 32A-10-1 by Laws 1993, ch. 77, § 211.

ANNOTATIONS

Compiler's notes. — Laws 2003, ch. 48 provided that 32A-10-1 to 32A-10-8 NMSA 1978, relating to the Interstate Compact on Juveniles, are repealed effective the later of July 1, 2004 or enactment of the Interstate Compact for Juveniles into law by the thirty-fifth state. As of March 10, 2006, 26 states had enacted the compact into law. For provisions of former sections, *see* the 2003 NMSA 1978 on New Mexico One Source of Law DVD.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Extradition of juveniles, 73 A.L.R.3d 700.

32A-10-2. Interstate rendition amendment. (Contingent repeal, see note.)

The interstate rendition amendment to the Interstate Compact on Juveniles is entered into with all other jurisdictions legally joining therein in a form substantially as follows:

AMENDMENT TO INTERSTATE COMPACT ON JUVENILES CONCERNING INTERSTATE RENDITION OF JUVENILES ALLEGED TO BE DELINQUENT

A. This amendment shall provide additional remedies, and shall be binding only as among and between those party states which specifically execute the same.

B. All provisions and procedures of Articles 5 and 6 of the Interstate Compact on Juveniles shall be construed to apply to any juvenile charged with being a delinquent by reason of a violation of any criminal law. Any juvenile charged with being a delinquent by reason of violating any criminal law shall be returned to the requesting state upon a requisition to the state where the juvenile may be found. A petition in such case shall be filed in a court of competent jurisdiction in the requesting state where the violation of a criminal law is alleged to have been committed. The petition may be filed regardless of whether the juvenile has left the state before or after the filing of the petition. The requisition described in Article 5 of the compact shall be forwarded by the judge of the court in which the petition has been filed.

History: 1953 Comp., § 13-16-2, enacted by Laws 1973, ch. 238, § 2; recompiled as 1978 Comp., § 32A-10-2 by Laws 1993, ch. 77, § 211.

ANNOTATIONS

Compiler's notes. — Laws 2003, ch. 48 provided that 32A-10-1 to 32A-10-8 NMSA 1978, relating to the Interstate Compact on Juveniles, are repealed effective the later of July 1, 2004 or enactment of the Interstate Compact for Juveniles into law by the thirty-fifth state. As of March 10, 2006, 26 states had enacted the compact into law. For

provisions of former sections, *see* the 2003 NMSA 1978 on New Mexico One Source of Law DVD.

32A-10-3. Out-of-state confinement amendment. (Contingent repeal, see note.)

The out-of-state confinement amendment to the Interstate Compact on Juveniles is entered into with all other jurisdictions legally joining therein in a form substantially as follows:

AMENDMENT TO INTERSTATE COMPACT ON JUVENILES CONCERNING OUT-OF-STATE CONFINEMENT

A. Whenever the duly constituted judicial or administrative authorities in a sending state determine that confinement of a probationer or reconfinement of a parolee is necessary or desirable, the officials may direct that the confinement or reconfinement be in an appropriate institution for delinquent juveniles within the territory of the receiving state, the receiving state to act in that regard solely as agent for the sending state.

B. Escapees and absconders who would otherwise be returned pursuant to Article 5 of the compact may be confined or reconfined in the receiving state pursuant to this amendment. In any such case, the information and allegations required to be made and furnished in a requisition pursuant to Article 5 shall be made and furnished, but in place of the demand pursuant to Article 5, the sending state shall request confinement or reconfinement in the receiving state. Whenever applicable, detention orders as provided in Article 5 may be employed pursuant to this subarticle preliminary to disposition of the escapee or absconder.

C. The confinement or reconfinement of a parolee, probationer, escapee or absconder pursuant to this amendment shall require the concurrence of the appropriate judicial or administrative authorities of the receiving state.

D. As used in this amendment:

(1) "sending state" means sending state as that term is used in Article 7 of the compact, or the state from which a delinquent juvenile has escaped or absconded within the meaning of Article 5 of the compact; and

(2) "receiving state" means any state, other than the sending state, in which a parolee, probationer, escapee or absconder may be found, provided that said state is a party to this amendment.

E. Every state which adopts this amendment shall designate at least one of its institutions for delinquent juveniles as a "compact institution" and shall confine persons therein as provided in Subarticle A hereof unless the sending and receiving

states in question make specific contractual arrangements to the contrary. All states party to this amendment shall have access to compact institutions at all reasonable hours for the purpose of inspecting the facilities thereof and for the purpose of visiting the state's delinquents confined in the institution.

F. Persons confined in compact institutions pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed from the compact institution for transfer to an appropriate institution within the sending state, for return to probation or parole, for discharge or for any purpose permitted by the laws of the sending state.

G. All persons confined in a compact institution pursuant to the provisions of this amendment shall be treated in a reasonable and humane manner. The fact of confinement or reconfinement in a receiving state shall not deprive any person so confined or reconfined of any rights which the person would have had if confined or reconfined in an appropriate institution of the sending state; nor shall any agreement to submit to confinement or reconfinement pursuant to the terms of this amendment be construed as a waiver of any rights which the delinquent would have had if he had been confined or reconfined in any appropriate institution of the sending state except that the hearing or hearings, if any, to which a parolee, probationer, escapee or absconder may be entitled, prior to confinement or reconfinement, by the laws of the sending state may be had before the appropriate judicial or administrative officers of the receiving state. In this event, said judicial and administrative officers shall act as agents of the sending state after consultation with appropriate officers of the sending state.

H. Any receiving state incurring costs or other expenses under this amendment shall be reimbursed in the amount of such costs or other expenses by the sending state unless the states concerned specifically otherwise agree. Any two or more states party to this amendment may enter into supplementary agreements determining a different allocation of costs among themselves.

I. This amendment shall take initial effect when entered into by any two or more states party to the compact and shall be effective as to those states which have specifically enacted this amendment. Rules and regulations necessary to effectuate the terms of this amendment may be promulgated by the appropriate officers of those states which have enacted this amendment.

History: 1953 Comp., § 13-16-3, enacted by Laws 1973, ch. 238, § 3; recompiled as 1978 Comp., § 32A-10-3 by Laws 1993, ch. 77, § 211.

ANNOTATIONS

Compiler's notes. — Laws 2003, ch. 48 provided that 32A-10-1 to 32A-10-8 NMSA 1978, relating to the Interstate Compact on Juveniles, are repealed effective the later of July 1, 2004 or enactment of the Interstate Compact for Juveniles into law by the thirty-fifth state. As of March 10, 2006, 26 states had enacted the compact into law. For

provisions of former sections, *see* the 2003 NMSA 1978 on New Mexico One Source of Law DVD.

32A-10-4. Compact administrator. (Contingent repeal, see note.)

The secretary of children, youth and families is the compact administrator of the Interstate Compact on Juveniles and, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms of the compact. The compact administrator may cooperate with all departments and agencies of this state and its political subdivisions in facilitating the proper administration of the compact and any amendments or supplementary agreements thereunder entered into by this state.

History: 1953 Comp., § 13-16-4, enacted by Laws 1973, ch. 238, § 4; 1988, ch. 101, § 28; 1992, ch. 57, § 35; recompiled as 1978 Comp., § 32A-10-4 by Laws 1993, ch. 77, § 211.

ANNOTATIONS

Cross references. — For children, youth and families department, *see* 9-2A-1 NMSA 1978 et seq.

Compiler's notes. — Laws 2003, ch. 48 provided that 32A-10-1 to 32A-10-8 NMSA 1978, relating to the Interstate Compact on Juveniles, are repealed effective the later of July 1, 2004 or enactment of the Interstate Compact for Juveniles into law by the thirty-fifth state. As of March 10, 2006, 26 states had enacted the compact into law. For provisions of former sections, *see* the 2003 NMSA 1978 on New Mexico One Source of Law DVD.

32A-10-5. Supplementary agreements. (Contingent repeal, see note.)

The compact administrator of the Interstate Compact on Juveniles may enter into supplementary agreements with appropriate officials of other states pursuant to the compact. If any supplementary agreement requires or contemplates the use of any institution or facility of this state or requires or contemplates the provision of any service by this state, it shall not become effective until approved by the head of the agency under whose jurisdiction the institution or facility is operated or whose agency will be charged with rendering the service.

History: 1953 Comp., § 13-16-5, enacted by Laws 1973, ch. 238, § 5; recompiled as 1978 Comp., § 32A-10-5 by Laws 1993, ch. 77, § 211.

ANNOTATIONS

Compiler's notes. — Laws 2003, ch. 48 provided that 32A-10-1 to 32A-10-8 NMSA 1978, relating to the Interstate Compact on Juveniles, are repealed effective the later of July 1, 2004 or enactment of the Interstate Compact for Juveniles into law by the thirty-fifth state. As of March 10, 2006, 26 states had enacted the compact into law. For provisions of former sections, *see* the 2003 NMSA 1978 on New Mexico One Source of Law DVD.

32A-10-6. Financial arrangements. (Contingent repeal, see note.)

Subject to legislative appropriations, the compact administrator of the Interstate Compact on Juveniles shall arrange for any payments necessary to discharge any financial obligations imposed upon this state by the compact or any supplementary agreement entered into thereunder. The children, youth and families department shall supervise out-of-state probationers and parolees residing in New Mexico under the provisions of Article 7 of the compact.

History: 1953 Comp., § 13-16-6, enacted by Laws 1973, ch. 238, § 6; 1988, ch. 101, § 29; 1992, ch. 57, § 36; recompiled as 1978 Comp., § 32A-10-6 by Laws 1993, ch. 77, § 211.

ANNOTATIONS

Cross references. — For children, youth and families department, *see* 9-2A-1 NMSA 1978 et seq.

Compiler's notes. — Laws 2003, ch. 48 provided that 32A-10-1 to 32A-10-8 NMSA 1978, relating to the Interstate Compact on Juveniles, are repealed effective the later of July 1, 2004 or enactment of the Interstate Compact for Juveniles into law by the thirty-fifth state. As of March 10, 2006, 26 states had enacted the compact into law. For provisions of former sections, *see* the 2003 NMSA 1978 on New Mexico One Source of Law DVD.

32A-10-7. Other departments and agencies. (Contingent repeal, see note.)

The departments and agencies of this state and its political subdivisions shall enforce the Interstate Compact on Juveniles and do all things appropriate to the effectuation of its purposes and intent within their respective jurisdictions. The New Mexico boys' school at Springer and the girls' welfare home at Albuquerque are designated as "compact institutions" under the provisions of the out-of-state confinement amendment to the compact. In addition to any institution in which the authorities of this state may otherwise confine or order the confinement of a delinquent juvenile, they may confine or order the confinement of a delinquent juvenile in a compact institution within another party state pursuant to the out-of-state confinement amendment to the compact.

History: 1953 Comp., § 13-16-7, enacted by Laws 1973, ch. 238, § 7; recompiled as 1978 Comp., § 32A-10-7 by Laws 1993, ch. 77, § 211.

ANNOTATIONS

Compiler's notes. — Laws 2003, ch. 48 provided that 32A-10-1 to 32A-10-8 NMSA 1978, relating to the Interstate Compact on Juveniles, are repealed effective the later of July 1, 2004 or enactment of the Interstate Compact for Juveniles into law by the thirty-fifth state. As of March 10, 2006, 26 states had enacted the compact into law. For provisions of former sections, *see* the 2003 NNSA 1978 on New Mexico One Source of Law DVD.

32A-10-8. Additional procedures. (Contingent repeal, see note.)

In addition to any procedure provided in Articles 4 and 6 of the Interstate Compact on Juveniles for the return of any runaway juvenile, the particular states, the juvenile or his parents, the courts or other legal custodian involved may agree upon and adopt any other plan or procedure authorized under the laws of this state and other respective party states for the return of any runaway juvenile.

History: 1953 Comp., § 13-16-8, enacted by Laws 1973, ch. 238, § 8; recompiled as 1978 Comp., § 32A-10-8 by Laws 1993, ch. 77, § 211.

ANNOTATIONS

Compiler's notes. — Laws 2003, ch. 48 provided that 32A-10-1 to 32A-10-8 NMSA 1978, relating to the Interstate Compact on Juveniles, are repealed effective the later of July 1, 2004 or enactment of the Interstate Compact for Juveniles into law by the thirty-fifth state. As of March 10, 2006, 26 states had enacted the compact into law. For provisions of former sections, *see* the 2003 NMSA 1978 on New Mexico One Source of Law DVD.

32A-10-9. Interstate Compact for Juveniles. (Contingent effective — See note.)

The Interstate Compact for Juveniles is enacted into law and entered into on behalf of New Mexico with any and all other states legally joining therein in a form substantially as follows:

THE INTERSTATE COMPACT FOR JUVENILES

ARTICLE I - Purpose

A. The compacting states to this interstate compact recognize that each state is responsible for the proper supervision or return of juveniles, delinquents and status offenders who are on probation or parole and who have absconded, escaped or run

away from supervision and control and in doing so have endangered their own safety and the safety of others. The compacting states also recognize that each state is responsible for the safe return of juveniles who have run away from home and in doing so have left their state of residence. The compacting states also recognize that congress, by enacting the Crime Control Act, 4 U.S.C. Section 112 (1965), has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime.

B. It is the purpose of this compact, through means of joint and cooperative action among the compacting states, to:

(1) ensure that the adjudicated juveniles and status offenders subject to this compact are provided adequate supervision and services in the receiving state as ordered by the adjudicating judge or parole authority in the sending state;

(2) ensure that the public safety interests of the citizens, including the victims of juvenile offenders, in both the sending and receiving states are adequately protected;

(3) return juveniles who have run away, absconded or escaped from supervision or control or have been accused of an offense to the state requesting their return;

(4) make contracts for the cooperative institutionalization in public facilities in member states for delinquent youth needing special services;

(5) provide for the effective tracking and supervision of juveniles;

(6) equitably allocate the costs, benefits and obligations of the compacting states;

(7) establish procedures to manage the movement between states of juvenile offenders released to the community under the jurisdiction of courts, juvenile departments or any other criminal or juvenile justice agency that has jurisdiction over juvenile offenders;

(8) ensure immediate notice to jurisdictions where defined offenders are authorized to travel or to relocate across state lines;

(9) establish procedures to resolve pending charges against juvenile offenders prior to transfer or release to the community under the terms of this compact;

(10) establish a system of uniform data collection on information pertaining to juveniles subject to this compact that allows access by authorized juvenile justice and criminal justice officials, and regular reporting of compact activities to heads of state executive, judicial and legislative branches and juvenile and criminal justice administrators;

(11) monitor compliance with rules governing interstate movement of juveniles and initiate interventions to address and correct noncompliance;

(12) coordinate training and education regarding the regulation of interstate movement of juveniles for officials involved in that activity; and

(13) coordinate the implementation and operation of the compact with the Interstate Compact on the Placement of Children [32A 11-1 NMSA 1978], the Interstate Compact for Adult Offender Supervision [31-5-20 NMSA 1978] and other compacts affecting juveniles, particularly in those cases where concurrent or overlapping supervision issues arise.

C. It is the policy of the compacting states that the activities conducted by the interstate commission created herein are the formation of public policies and therefore are public business. Furthermore, the compacting states shall cooperate and observe their individual and collective duties and responsibilities for the prompt return and acceptance of juveniles subject to the provisions of this compact.

D. The provisions of this compact shall be reasonably and liberally construed to accomplish the purposes and policies of the compact.

ARTICLE II - Definitions

As used in this compact, unless the context clearly requires a different construction:

A. "bylaws" means those bylaws established by the interstate commission for its governance or for directing or controlling its actions or conduct;

B. "commissioner" means the voting representative of each compacting state appointed pursuant to Article III of this compact;

C. "compact administrator" means the individual in each compacting state appointed pursuant to the terms of this compact, responsible for the administration and management of the state's supervision and transfer of juveniles subject to the terms of this compact, the rules adopted by the interstate commission and policies adopted by the state council under this compact;

D. "compacting state" means any state that has enacted the enabling legislation for this compact;

E. "court" means any court having jurisdiction over delinquent, neglected or dependent children;

F. "deputy compact administrator" means the individual, if any, in each compacting state appointed to act on behalf of a compact administrator pursuant to the terms of this compact and who is responsible for the administration and management of

the state's supervision and transfer of juveniles subject to the terms of this compact, the rules adopted by the interstate commission and the policies adopted by the state council under this compact;

G. "interstate commission" means the interstate commission for juveniles created by Article III of this compact;

H. "juvenile" means a person defined as a juvenile in any member state or by the rules of the interstate commission, including:

(1) an accused delinquent, who is a person charged with an offense that, if committed by an adult, would be a criminal offense;

(2) an adjudicated delinquent, who is a person found to have committed an offense that, if committed by an adult, would be a criminal offense;

(3) an accused status offender, who is a person charged with an offense that would not be a criminal offense if committed by an adult;

(4) an adjudicated status offender, who is a person found to have committed an offense that would not be a criminal offense if committed by an adult; and

(5) a non-offender, who is a person in need of supervision who has not been accused or adjudicated as a status offender or delinquent;

I. "noncompacting state" means any state that has not enacted the enabling legislation for this compact;

J. "probation or parole" means any kind of supervision or conditional release of juveniles authorized under the laws of the compacting states;

K. "rule" means a written statement by the interstate commission promulgated pursuant to Article VI of this compact that is of general applicability, that implements, interprets or prescribes a policy or provision of the compact or an organizational, procedural or practice requirement of the commission, and that has the force and effect of statutory law in a compacting state. "Rule" includes the amendment, repeal or suspension of an existing rule; and

L. "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa and the Northern Marianas Islands.

ARTICLE III - Interstate Commission for Juveniles

A. The compacting states hereby create the "interstate commission for juveniles". The commission shall be a body corporate and joint agency of the compacting states.

The commission shall have all the responsibilities, powers and duties set forth herein, and additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact.

B. The interstate commission shall consist of commissioners appointed by the appropriate appointing authority in each state pursuant to the rules and requirements of each compacting state and in consultation with the "state council for interstate juvenile supervision" created hereunder. The commissioner shall be the compact administrator, deputy compact administrator or designee from that state who shall serve on the interstate commission in such capacity under or pursuant to the applicable law of the compacting state.

C. In addition to the commissioners who are the voting representatives of each state, the interstate commission shall include individuals who are not commissioners, but who are members of interested organizations. Noncommissioner members shall include a member of the national organizations of governors, legislators, state chief justices, attorneys general, a member of the interstate compact for adult offender supervision, a member of the interstate compact for the placement of children, juvenile justice and juvenile corrections officials and crime victims. All noncommissioner members of the interstate commission shall be ex-officio, nonvoting members. The interstate commission may provide in its bylaws for additional ex-officio, nonvoting members, including members of other national organizations, in such numbers as shall be determined by the commission.

D. Each compacting state represented at any meeting of the interstate commission is entitled to one vote. A majority of the compacting states shall constitute a quorum for the transaction of business, unless a larger quorum is required by the bylaws of the interstate commission.

E. The interstate commission shall meet at least once each calendar year. The chairperson may call additional meetings and, upon the request of a simple majority of the compacting states, shall call additional meetings. Public notice shall be given of all meetings and meetings shall be open to the public.

F. The interstate commission shall establish an executive committee, which shall include commission officers, members and others as determined by the bylaws. The executive committee shall have the power to act on behalf of the interstate commission during periods when the interstate commission is not in session, with the exception of rulemaking and amendments to the compact. The executive committee shall oversee the day-to-day activities managed by an executive director and interstate commission staff, administer enforcement and compliance with the provisions of the compact, bylaws and rules, and perform other duties as directed by the interstate commission or set forth in the bylaws.

G. Each member of the interstate commission shall have the right and power to cast a vote to which that compacting state is entitled and to participate in the business and affairs of the interstate commission. A member shall vote in person and shall not delegate a vote to another compacting state. However, a commissioner, in consultation with the state council, shall appoint another authorized representative, in the absence of the commissioner from that state, to cast a vote on behalf of the compacting state at a specified meeting. The bylaws may provide for members' participation in meetings by telephone or other means of telecommunication or electronic communication.

H. The interstate commission's bylaws shall establish conditions and procedures under which the interstate commission shall make its information and official records available to the public for inspection or copying. The interstate commission may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests.

I. Public notice shall be given of all meetings and all meetings shall be open to the public, except as set forth in the rules or as otherwise provided in the compact. The interstate commission and any of its committees may close a meeting to the public when a determination is made by a two-thirds' vote that an open meeting would be likely to:

(1) relate solely to the interstate commission's internal personnel practices and procedures;

(2) disclose matters specifically exempted from disclosure by statute;

(3) disclose trade secrets or commercial or financial information that is privileged or confidential;

(4) involve accusing a person of a crime or formally censuring a person;

(5) disclose information of a personal nature when disclosure would constitute a clearly unwarranted invasion of personal privacy;

(6) disclose investigative records compiled for law enforcement purposes;

(7) disclose information contained in or related to examination reports, operating reports or condition reports prepared by, prepared on behalf of or prepared for the use of the interstate commission with respect to a regulated person or entity for the purpose of regulation or supervision of the person or entity;

(8) disclose information, the premature disclosure of which would significantly endanger the stability of a regulated person or entity; or

(9) specifically relate to the interstate commission's issuance of a subpoena or its participation in a civil action or other legal proceeding.

J. For every meeting closed pursuant to the provisions of Subsection I of this article, the interstate commission's legal counsel shall publicly certify that, in the legal counsel's opinion, the meeting may be closed to the public and shall reference each relevant provision set forth in Subsection I of this article. The interstate commission shall keep minutes that fully and clearly describe all matters discussed in a meeting and shall provide a full and accurate summary of actions taken and the reasons therefore, including a description of each of the views expressed on an item and the record of a roll call vote. All documents considered in connection with an action shall be identified in the minutes.

K. The interstate commission shall collect standardized data concerning the interstate movement of juveniles, as directed through its rules, which shall specify the data to be collected, the means of collection, data exchange and reporting requirements. The methods of data collection, data exchange and reporting shall, insofar as it is reasonably possible, conform to up-to-date technology and coordinate with information functions used by the appropriate repository of records.

ARTICLE IV - Powers and Duties of the Interstate Commission

The interstate commission shall:

A. provide for dispute resolution among compacting states;

B. promulgate rules to effect the purposes and obligations enumerated in this compact, which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact;

C. oversee, supervise and coordinate the interstate movement of juveniles subject to the terms of this compact and any bylaws adopted and rules promulgated by the interstate commission;

D. enforce compliance with compact provisions, the rules promulgated by the interstate commission and bylaws, using all necessary and proper means, including the use of judicial process;

E. establish and maintain offices that shall be located within one or more of the compacting states;

F. purchase and maintain insurance and bonds;

G. borrow, accept, hire or contract for personnel services;

H. establish and appoint committees and hire staff that it deems necessary for carrying out its functions, including an executive committee that shall have the power to act on behalf of the interstate commission in carrying out its powers and duties;

I. elect or appoint officers, attorneys, employees, agents or consultants and to fix their compensation, define their duties and determine their qualifications; and to establish the interstate commission's personnel policies and programs relating to conflicts of interest, rates of compensation and qualifications of personnel;

J. accept any and all donations and grants of money, equipment, supplies, materials and services and to receive, utilize and dispose of same;

K. lease, purchase, accept contributions or donations of, or otherwise to own, hold, improve or use any property, real, personal or mixed;

L. sell, convey, mortgage, pledge, lease, exchange, abandon or otherwise dispose of any property, real, personal or mixed;

M. establish a budget and make expenditures and levy dues as provided in Article VIII of this compact;

N. sue and be sued;

O. adopt a seal and bylaws governing the management and operation of the interstate commission;

P. perform functions as may be necessary or appropriate to achieve the purposes of this compact;

Q. report annually to the legislatures, governors, judiciary and state councils of the compacting states concerning the activities of the interstate commission during the preceding year. The reports shall also include recommendations that may have been adopted by the interstate commission;

R. coordinate education, training and public awareness regarding the interstate movement of juveniles for officials involved in that activity;

S. establish uniform standards for the reporting, collecting and exchanging of data; and

T. maintain its corporate books and records in accordance with the bylaws.

ARTICLE V - Organization and Operation of the Interstate Commission

A. The interstate commission shall, by a majority of the members present and voting, within twelve months after the first interstate commission meeting, adopt bylaws to govern its conduct as may be necessary or appropriate to carry out the purposes of the compact, including:

(1) establishing the fiscal year of the interstate commission;

(2) establishing an executive committee and other committees as may be necessary;

(3) providing for the establishment of committees governing general or specific delegation of any authority or function of the interstate commission;

(4) providing reasonable procedures for calling and conducting meetings of the interstate commission and ensuring reasonable notice of those meetings;

(5) establishing the titles and responsibilities of the officers of the interstate commission;

(6) providing a mechanism for concluding the operations of the interstate commission and the return of surplus funds that may exist upon the termination of the compact after the payment and reserving of all of its debts and obligations;

(7) providing "start-up" rules for initial administration of the compact; and

(8) establishing standards and procedures for compliance and technical assistance in carrying out the compact.

B. The interstate commission shall, by a majority of the members, elect annually from among its members a chairperson and a vice chairperson, each of whom shall have such authority and duties as may be specified in the bylaws. The chairperson or, in the chairperson's absence or disability, the vice chairperson shall preside at all meetings of the interstate commission. The officers elected shall serve without compensation or remuneration from the interstate commission; provided that, subject to the availability of budgeted funds, the officers shall be reimbursed for ordinary and necessary costs and expenses incurred by them in the performance of their duties and responsibilities as officers of the interstate commission.

C. The interstate commission, through its executive committee, shall appoint or retain an executive director, upon terms and conditions and for compensation as the interstate commission may deem appropriate. The executive director shall serve as secretary to the interstate commission, shall not be a member and shall hire and supervise other staff as may be authorized by the interstate commission.

D. The commission's executive director and employees shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of or relating to any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, or that the person had a reasonable basis for believing occurred within the scope of commission employment, duties or responsibilities; provided that the person shall not be protected from suit or liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of the person.

E. The liability of any commissioner, or the employee or agent of a commissioner, acting within the scope of the person's employment or duties for acts, errors or omissions occurring within the person's state may not exceed the limits of liability set forth under the constitution and laws of that state for state officials, employees and agents. Nothing in this subsection shall be construed to protect the person from suit or liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of the person.

F. The interstate commission shall defend the executive director or the employees or representatives of the interstate commission and, subject to the approval of the attorney general of the state represented by a commissioner of a compacting state, shall defend the commissioner or the commissioner's representatives or employees in a civil action seeking to impose liability arising out of an actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of interstate commission employment, duties, or responsibilities; provided that the actual or alleged act, error or omission did not result from intentional or willful and wanton misconduct on the part of the person.

G. The interstate commission shall indemnify and hold the commissioner of a compacting state, the commissioner's representatives or employees or the interstate commission's representatives or employees, harmless in the amount of a settlement or judgment obtained against a person arising out of an actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that the person had a reasonable basis for believing occurred within the scope of interstate commission employment, duties or responsibilities; provided that the actual or alleged act, error or omission did not result from intentional or willful and wanton misconduct on the part of the person.

ARTICLE VI - Rulemaking Functions of the Interstate Commission

A. The interstate commission shall promulgate and publish rules in order to effectively and efficiently achieve the purposes of the compact.

B. Rulemaking shall occur pursuant to the criteria set forth in this article and the bylaws and rules adopted pursuant thereto. Rulemaking shall substantially conform to the principles of the "Model State Administrative Procedures Act", 1981 Act, Uniform Laws Annotated, Vol. 15, p.1 (2000), or other administrative procedures act, as the interstate commission deems appropriate, consistent with due process requirements under the United States constitution as now or hereafter interpreted by the United States supreme court. All rules and amendments shall become binding as of the date specified, as published with the final version of the rule as approved by the interstate commission.

C. When promulgating a rule, the interstate commission shall, at a minimum:

(1) publish the proposed rule's entire text stating the reasons for that proposed rule;

(2) allow and invite persons to submit written data, facts, opinions and arguments, which information shall be added to the record and be made publicly available;

(3) provide an opportunity for an informal hearing if petitioned by ten or more persons; and

(4) promulgate a final rule and its effective date, if appropriate, based on input from state or local officials or interested parties.

D. Allow, not later than sixty days after a rule is promulgated, an interested person to file a petition in the United States district court for the District of Columbia or in the federal district court where the interstate commission's principal office is located for judicial review of the rule. If the court finds that the interstate commission's action is not supported by substantial evidence in the rulemaking record, the court shall hold the rule unlawful and set it aside. For purposes of this subsection, evidence is substantial if it would be considered substantial evidence under the Model State Administrative Procedures Act.

E. If a majority of the legislatures of the compacting states rejects a rule, those states may, by enactment of a statute or resolution in the same manner used to adopt the compact, cause the rule to have no further force and effect in any compacting state.

F. The existing rules governing the operation of the interstate compact on juveniles superseded by this act shall be null and void twelve months after the first meeting of the interstate commission created hereunder.

G. Upon determination by the interstate commission that a state of emergency exists, it may promulgate an emergency rule that shall become effective immediately upon adoption, provided that the usual rule making procedures provided hereunder shall be retroactively applied to the rule as soon as reasonably possible, but no later than ninety days after the effective date of the emergency rule.

ARTICLE VII - Oversight, Enforcement and Dispute Resolution by The Interstate Commission

A. The interstate commission shall oversee the administration and operations of the interstate movement of juveniles subject to this compact in the compacting states and shall monitor activities being administered in noncompacting states that may significantly affect compacting states.

B. The courts and executive agencies in each compacting state shall enforce this compact and shall take all actions necessary and appropriate to effectuate the

compact's purposes and intent. The provisions of this compact and the rules promulgated hereunder shall be received by all the judges, public officers, commissions and departments of the state government as evidence of the authorized statute and administrative rules. All courts shall take judicial notice of the compact and the rules. In a judicial or administrative proceeding in a compacting state pertaining to the subject matter of this compact that may affect the powers, responsibilities or actions of the interstate commission, it shall be entitled to receive all service of process in the proceeding and shall have standing to intervene in the proceeding for all purposes.

C. The compacting states shall report to the interstate commission on all issues and activities necessary for the administration of the compact as well as issues and activities pertaining to compliance with the provisions of the compact and its bylaws and rules.

D. The interstate commission shall attempt, upon the request of a compacting state, to resolve any disputes or other issues that are subject to the compact and that may arise among compacting states and between compacting and noncompacting states. The commission shall promulgate a rule providing for both mediation and binding dispute resolution for disputes between the compacting states.

E. The interstate commission, in the reasonable exercise of its discretion, shall enforce the provisions and rules of this compact using any or all means set forth in Article XI of this compact.

ARTICLE VIII - Finance

A. The interstate commission shall pay or provide for the payment of the reasonable expenses of its establishment, organization and ongoing activities.

B. The interstate commission shall levy on and collect an annual assessment from each compacting state to cover the cost of the internal operations and activities of the interstate commission and its staff, which must be in a total amount sufficient to cover the interstate commission's annual budget as approved each year. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the interstate commission, taking into consideration the population of each compacting state and the volume of interstate movement of juveniles in each compacting state and shall promulgate a rule binding upon all compacting states that governs the assessment.

C. The interstate commission shall not incur obligations of any kind prior to securing the funds adequate to meet the same; nor shall the interstate commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state.

D. The interstate commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the interstate commission shall be subject to the audit and accounting procedures established under its bylaws. However,

all receipts and disbursements of funds handled by the interstate commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the interstate commission.

ARTICLE IX - The State Council

Each member state shall create a "state council for interstate juvenile supervision". While each state may determine the membership of its own state council, its membership must include at least one representative from the legislative, judicial and executive branches of government, victims groups and the compact administrator, deputy compact administrator or designee. Each compacting state retains the right to determine the qualifications of the compact administrator or deputy compact administrator. Each state council will advise and may exercise oversight and advocacy concerning that state's participation in interstate commission activities and other duties as may be determined by that state, including development of policy concerning operations and procedures of the compact within that state.

ARTICLE X - Compacting States, Effective Date and Amendment

A. Any state is eligible to become a compacting state. The compact shall become effective and binding upon legislative enactment of the compact into law by no less than thirty-five of the states. The initial effective date shall be the later of July 1, 2004 or upon enactment into law by the thirty-fifth jurisdiction. Thereafter, it shall become effective and binding as to any other compacting state upon enactment of the compact into law by that state. The governors of noncompacting states or their designees shall be invited to participate in the activities of the interstate commission on a nonvoting basis prior to adoption of the compact by all states and territories of the United States.

B. The interstate commission may propose amendments to the compact for enactment by the compacting states. An amendment shall not become effective and binding upon the interstate commission and the compacting states unless and until it is enacted into law by unanimous consent of the compacting states.

ARTICLE XI - Withdrawal, Default, Termination and Judicial Enforcement

A. Once effective, the compact shall continue in force and remain binding upon each and every compacting state; provided that a compacting state may withdraw from the compact by specifically repealing the statute that enacted the compact into law. The effective date of withdrawal is the effective date of the repeal. The withdrawing state shall immediately notify the chairperson of the interstate commission in writing upon the introduction of legislation repealing this compact in the withdrawing state. The interstate commission shall notify the other compacting states of the withdrawing state's intent to withdraw within sixty days of its receipt thereof. The withdrawing state is responsible for all assessments, obligations and liabilities incurred through the effective date of withdrawal, including any obligations, the performance of which extend beyond the effective date of withdrawal. Reinstatement following withdrawal of a compacting state

shall occur upon the withdrawing state reenacting the compact or upon a later date as determined by the interstate commission.

B. If the interstate commission determines that a compacting state has at any time defaulted in the performance of its obligations or responsibilities under this compact, or the bylaws or duly promulgated rules, the interstate commission may impose any or all of the following penalties:

(1) remedial training and technical assistance as directed by the interstate commission;

(2) alternative dispute resolution;

(3) fines, fees and costs in amounts as are deemed to be reasonable as fixed by the interstate commission; and

(4) suspension or termination of membership in the compact, which shall be imposed only after all other reasonable means of securing compliance under the bylaws and rules have been exhausted and the interstate commission has therefore determined that the offending state is in default. Immediate notice of suspension shall be given by the interstate commission to the governor, the chief justice or the chief judicial officer of the state, the majority and minority leaders of the defaulting state's legislature and the state council.

C. The grounds for default include failure of a compacting state to perform obligations or responsibilities imposed upon it by this compact, the bylaws or duly promulgated rules and any other grounds designated in commission bylaws and rules. The interstate commission shall immediately notify the defaulting state in writing of the penalty imposed by the interstate commission and of the default pending a cure of the default. The commission shall stipulate the conditions and the time period within which the defaulting state must cure its default. If the defaulting state fails to cure the default within the time period specified by the interstate commission, the defaulting state shall be terminated from the compact upon an affirmative vote of a majority of the compacting states and all rights, privileges and benefits conferred by this compact shall be terminated from the effective date of termination.

D. Within sixty days of the effective date of termination of a defaulting state, the interstate commission shall notify the governor, the chief justice or chief judicial officer of the state, the majority and minority leaders of the defaulting state's legislature and the state council of the termination.

E. The defaulting state is responsible for all assessments, obligations and liabilities incurred through the effective date of termination, including any obligations that extend beyond the effective date of termination.

F. The interstate commission shall not bear any costs relating to the defaulting state unless otherwise mutually agreed upon in writing between the interstate commission and the defaulting state.

G. Reinstatement following termination of a compacting state requires both a reenactment of the compact by the defaulting state and the approval of the interstate commission pursuant to the rules.

H. The interstate commission may, by majority vote of the members, initiate legal action in the United States district court for the District of Columbia or, at the discretion of the interstate commission, in the federal district where the interstate commission has its offices, to enforce compliance with the provisions of the compact, its duly promulgated rules and bylaws, against any compacting state in default. In the event judicial enforcement is necessary, the prevailing party shall be awarded all costs of the litigation, including reasonable attorneys fees.

I. The compact dissolves effective upon the date of the withdrawal or default of the compacting state, which reduces membership in the compact to one compacting state. Upon the dissolution of this compact, the compact becomes null and void and shall be of no further force or effect, and the business and affairs of the interstate commission shall be concluded and any surplus funds shall be distributed in accordance with the bylaws.

ARTICLE XII - Severability and Construction

A. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision is deemed unenforceable, the remaining provisions of the compact shall be enforceable.

B. The provisions of this compact shall be liberally construed to effectuate its purposes.

ARTICLE XIII - Binding Effect of Compact and Other Laws

A. Nothing herein prevents the enforcement of any other law of a compacting state that is not inconsistent with this compact. All compacting states' laws other than state constitutions and other interstate compacts conflicting with this compact are superseded to the extent of the conflict.

B. All lawful actions of the interstate commission, including all rules and bylaws promulgated by the interstate commission, are binding upon the compacting states.

C. All agreements between the interstate commission and the compacting states are binding in accordance with their terms.

D. Upon the request of a party to a conflict over meaning or interpretation of interstate commission actions, and upon a majority vote of the compacting states, the interstate commission may issue advisory opinions regarding the meaning or interpretation.

E. In the event a provision of this compact exceeds the constitutional limits imposed on the legislature of a compacting state, the obligations, duties, powers or jurisdiction sought to be conferred by the provision upon the interstate commission shall be ineffective and the obligations, duties, powers or jurisdiction shall remain in the compacting state and shall be exercised by the agency to which the obligations, duties, powers or jurisdiction are delegated by law in effect at the time this compact becomes effective.

ARTICLE XIV - Repeal

Sections 32A-10-1 through 32A-10-8 NMSA 1978 (being Laws 1973, Chapter 238, Sections 1 through 8, as amended) are repealed.

History: *Laws 2003, ch. 48, § 1.*

ANNOTATIONS

Compiler's notes. *— Laws 2003, ch. 48, art. X, provided that this compact becomes effective the later of July 1, 2004, or enactment of the compact into law by the thirty-fifth jurisdiction. As of March 10, 2006, 26 states had enacted the compact into law.*

ARTICLE 11
Interstate Compact on Placement of Children

ANNOTATIONS

Compiler's notes. — Sections 32A-11-1 to 32A-11-7 NMSA 1978 were originally recompiled from 32-4-1 to 32-4-7 NMSA 1978 to 32-11-1 to 32-11-7 NMSA 1978 by Laws 1993, ch. 77, § 212, and were subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible.

32A-11-1. Interstate compact.

The Interstate Compact on the Placement of Children is hereby enacted into law and entered into with all other jurisdictions legally joining therein in form substantially as follows:

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

Article 1 - Purpose and Policy

It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

A. each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care;

B. the appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with requirements for the protection of the child;

C. the proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made; and

D. appropriate jurisdictional arrangements for the care of children will be promoted.

Article 2 - Definitions

As used in this compact:

A. "child" means a person who by reason of minority is legally subject to parental, guardianship or similar control;

B. "sending agency" means a party state, officer or employee thereof; a political subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings or causes to be sent or brought any child to another party state;

C. "receiving state" means the state to which a child is sent, brought or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons; and

D. "placement" means the arrangement for the care of the child in a family, free or boarding home or in a child-placement agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, or any hospital or other medical facility.

Article 3 - Conditions for Placement

A. No sending agency shall send, bring or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

B. Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring or place the child in the receiving state. The notice shall contain:

(1) the name, date and place of birth of the child;

(2) the identity and address or addresses of the parents or legal guardian;

(3) the name and address of the person, agency or institution to or with which the sending agency proposes to send, bring or place the child; and

(4) a full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

C. Any public officer or agency in a receiving state which is in receipt of a notice pursuant to Paragraph B of this article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

D. The child shall not be sent, brought or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

Article 4 - Penalty for Illegal Placement

The sending, bringing or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any such punishment or penalty, any such violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit or other legal authorization held by the sending agency which empowers or allows it to place or care for children.

Article 5 - Retention of Jurisdiction

A. The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or his transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by a receiving state sufficient to deal with an act of delinquency or crime committed therein.

B. When the sending agency is a public agency, it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of such case by the latter as agency for the sending agency.

C. Nothing in this compact shall be construed to prevent a private charitable agency authorized to place children in the receiving state from performing services or acting as agent in that state for a private charitable agency of the sending state; nor to prevent the agency in the receiving state from discharging, on behalf of the sending agency, the financial responsibility for the support and maintenance of a child who has been placed, without relieving the responsibility set forth in Paragraph A of Article 5 hereof.

Article 6 - Institutional Care of Delinquent Children

A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this compact but no such placement shall be made unless the child is given a court hearing after notice to the parent or guardian with opportunity to be heard, prior to his being sent to such other party jurisdiction for institutional care, and the court finds that:

A. equivalent facilities for the child are not available in the sending agency's jurisdiction; and

B. institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship.

Article 7 - Compact Administrator

The executive head of each jurisdiction party to this compact shall designate an officer who shall be general coordinator of activities under this compact in his jurisdiction and who, acting jointly with like officers of other party jurisdictions, shall have power to promulgate rules and regulations to carry out more effectively the terms and provisions of the compact.

Article 8 - Limitations

This compact shall not apply to:

A. the sending or bringing of a child into a receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state; or

B. any placement, sending or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between said states which has the force of law.

Article 9 - Enactment and Withdrawal

This compact shall be open to joinder by any state, territory or possession of the United States, the District of Columbia, the commonwealth of Puerto Rico, and with the consent of congress, the government of Canada or any province thereof. It shall become effective with respect to any such jurisdiction when such jurisdiction has entered the same into law. Withdrawal from this compact shall be by the enactment of a statute repealing the same, but shall not take effect until two years after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.

Article 10 - Construction and Severability

The provisions of this compact shall be liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable, and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any party state or of the United States, or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state party thereto, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: 1953 Comp., § 13-16A-1, enacted by Laws 1977, ch. 151, § 1; recompiled as 1978 Comp., § 32A-11-1 by Laws 1993, ch. 77, § 212.

32A-11-2. Financial responsibility; default in compact.

Financial responsibility for any child placed pursuant to the provisions of the Interstate Compact on the Placement of Children shall be determined in accordance with the provisions of Article 5 thereof in the first instance. However, in the event of

partial or complete default of performance thereunder, the provisions of the New Mexico law fixing responsibility for the support of children also may be invoked.

History: 1953 Comp., § 13-16A-2, enacted by Laws 1977, ch. 151, § 2; recompiled as 1978 Comp., § 32A-11-2 by Laws 1993, ch. 77, § 212.

32A-11-3. Notices; health and social services department [human services department].

The "appropriate public authorities" as used in Article 3 of the Interstate Compact on the Placement of Children shall, with reference to New Mexico, mean the health and social services department [human services department], and said department shall receive and act with reference to notices required by said Article 3.

History: 1953 Comp., § 13-16A-3, enacted by Laws 1977, ch. 151, § 3; recompiled as 1978 Comp., § 32A-11-3 by Laws 1993, ch. 77, § 212.

ANNOTATIONS

Bracketed material. — The health and social services department has been abolished, and its functions have been transferred, in part, to the human services department, pursuant to Laws 1977, ch. 252, §§ 3, 5. *See* 9-8-3 NMSA 1978. The bracketed material was inserted by the compiler and is not a part of the law.

32A-11-4. "Appropriate authority"; health and social services department [human services department].

As used in Paragraph A of Article 5 of the Interstate Compact on the Placement of Children, the phrase, "appropriate authority in the receiving state," with reference to New Mexico shall mean the health and social services department [human services department].

History: 1953 Comp., § 13-16A-4, enacted by Laws 1977, ch. 151, § 4; recompiled as 1978 Comp., § 32A-11-4 by Laws 1993, ch. 77, § 212.

ANNOTATIONS

Bracketed material. — The health and social services department has been abolished, and its functions have been transferred, in part, to the human services department, pursuant to Laws 1977, ch. 252, §§ 3, 5. *See* 9-8-3 NMSA 1978. The bracketed material was inserted by the compilerand is not a part of the law.

32A-11-5. Financial commitment; approval.

The officers and agencies of the state and of its political subdivisions having authority to place children are hereby empowered to enter into agreements with appropriate officers or agencies of or in other party states pursuant to Paragraph B of Article 5 of the Interstate Compact on the Placement of Children. Any such agreement which contains a financial commitment or imposes a financial obligation on the state or political subdivision or agency thereof shall not be binding unless it has the approval in writing of the secretary of finance and administration and of the chief local fiscal officer in the case of a political subdivision of the state.

History: 1953 Comp., § 13-16A-5, enacted by Laws 1977, ch. 151, § 5; 1983, ch. 301, § 73; recompiled as 1978 Comp., § 32A-11-5 by Laws 1993, ch. 77, § 212.

32A-11-6. Court jurisdiction in placement of delinquent children.

Any court having jurisdiction to place delinquent children may place such a child in an institution in another state pursuant to Article 6 of the Interstate Compact on the Placement of Children and shall retain jurisdiction as provided in Article 5 thereof.

History: 1953 Comp., § 13-16A-6, enacted by Laws 1977, ch. 151, § 6; recompiled as 1978 Comp., § 32A-11-6 by Laws 1993, ch. 77, § 212.

32A-11-7. Governor.

As used in Article 7 of the Interstate Compact on the Placement of Children, the term "executive head" means the governor. The governor is hereby authorized to appoint a compact administrator in accordance with the terms of said Article 7.

History: 1953 Comp., § 13-16A-7, enacted by Laws 1977, ch. 151, § 7; recompiled as 1978 Comp., § 32A-11-7 by Laws 1993, ch. 77, § 212.

ARTICLE 12
Residential Treatment Program

ANNOTATIONS

Compiler's notes. — Sections 32A-12-1 and 32A-12-2 NMSA 1978 were originally recompiled from 32-5-1 and 32-5-2 NMSA 1978 to 32-12-1 and 32-12-2 NMSA 1978 by Laws 1993, ch. 77, § 213, and were subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible.

32A-12-1. Residential treatment program established.

A. There is established within the children, youth and families department a residential treatment program for youths. The program shall be for the purpose of providing residential treatment or therapeutic group home care to youths. Residential treatment services shall be provided to youths who are determined to be in need of such services pursuant to Section 43-1-16 or 43-1-16.1 NMSA 1978.

B. Services shall be provided through a grant or contract with local community providers who have demonstrated the capability of providing such services. All program facilities used for provision of residential treatment or therapeutic group home care shall meet all applicable licensing requirements.

C. Contracts may be let to out-of-state providers only upon a finding by the secretary of children, youth and families that appropriate in-state providers are not available.

D. The secretary of human services and the secretary of children, youth and families shall execute an agreement specifying the manner in which clients and funds in the custody of the human services department shall be transferred to the children, youth and families department for treatment and the ongoing responsibilities of each agency toward the clients served.

History: Laws 1979, ch. 227, § 1; 1983, ch. 93, § 1; 1992, ch. 57, § 37; recompiled as 1978 Comp., § 32A-12-1 by Laws 1993, ch. 77, § 213.

ANNOTATIONS

Cross references. — For children, youth and families department, *see* 9-2A-1 NMSA 1978.

Compiler's notes. — Sections 43-1-16 and 43-1-16.1 NMSA 1978, referred to in Subsection A, were repealed in 1993. For present comparable provisions, *see* 32A-6-12 and 32A-6-13 NMSA 1978.

32A-12-2. Residential treatment programs; rules.

The secretary of children, youth and families shall adopt rules to provide for:

A. minimum standards that shall be met by a residential treatment program, including a requirement that the program make reasonable provisions for adequate physical space for a school district to provide the required free appropriate public education;

B. procedures and forms for applying for a departmental grant or contract;

C. procedures and criteria for review and approval or denial of such applications;

D. procedures for approval of facilities and programs in or through which services are to be performed;

E. procedures and specifications of programmatic and financial information to be reported by residential treatment programs to the children, youth and families department for purposes of evaluating the effectiveness of programs funded by the department; and

F. procedures for review of potential clients for residential treatment or therapeutic group home care.

History: Laws 1979, ch. 227, § 2; 1992, ch. 57, § 38; recompiled as 1978 Comp., § 32A-12-2 by Laws 1993, ch. 77, § 213; 2009, ch. 162, § 2.

ANNOTATIONS

Cross references. — For children, youth and families department, *see* 9-2A-1 NMSA 1978 et seq.

The 2009 amendment, effective July 1, 2009, in Subsection A, after "residential treatment program", added the remainder of the sentence.

ARTICLE 13
Juvenile Assistance Programs

ANNOTATIONS

Compiler's notes. — Sections 32A-13-1 to 32A-13-3 NMSA 1978 were originally recompiled from 32-6-1 to 32-6-3 NMSA 1978 to 32-13-1 to 32-13-3 NMSA 1978 by Laws 1993, ch. 77, § 214, and were subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible.

32A-13-1. Purpose.

The legislature finds that juvenile crime is steadily increasing and that a reliable process of disposition of juvenile offenders and the availability of treatment alternatives is likely to decrease repeated criminal activity. The legislature further finds that there is a need for a community-based system for juveniles which would provide reintegration assistance, diagnostic evaluations and referral to community-based treatment programs for courts, district attorneys and other service agencies. Two programs related to such a system and associated with the judicial and criminal justice systems have been tested for the past three years. They have been found to be successful in providing evaluation

and treatment and have shown significant reduction of repeated criminal activity. These programs are the forensic evaluation program and the wilderness experience program.

History: Laws 1979, ch. 300, § 1; recompiled as 1978 Comp., § 32A-13-1 by Laws 1993, ch. 77, § 214.

32A-13-2. Juvenile forensic evaluation program.

A. There is created within the children, youth and families department the "juvenile forensic evaluation program". The program shall be staffed by juvenile forensic evaluation teams and shall provide evaluation of children alleged or found to be in need of supervision and alleged delinquents upon request of the court, law enforcement agencies and juvenile probation officers.

B. The juvenile forensic evaluation teams shall recommend referral of children alleged or found to be in need of supervision or alleged delinquents to the children, youth and families department, department of health or human services department or recommend any other appropriate legal disposition based on the diagnostic evaluation. Juvenile forensic evaluation teams shall follow the juvenile in each stage of treatment, utilizing a data management system established by the children, youth and families department, and shall provide information upon request to state agencies, pursuant to applicable confidentiality provisions pertaining to children.

History: Laws 1979, ch. 300, § 2; 1989, ch. 328, § 11; 1992, ch. 57, § 39; recompiled as 1978 Comp., § 32A-13-2 by Laws 1993, ch. 77, § 214.

ANNOTATIONS

Cross references. — For children, youth and families department, *see* 9-2A-1 NMSA 1978.

32A-13-3. Wilderness experience program.

A wilderness experience program shall be provided by the children, youth and families department as needed for the treatment of children alleged or found to be delinquent or in need of supervision. This program shall work in conjunction with the other forensic programs and criminal justice agencies throughout the state by providing a wilderness-based evaluation and treatment experience for juveniles. It shall be the responsibility of this program to provide, in conjunction with the juvenile forensic evaluation program, programming for juveniles referred from criminal justice agencies and diagnosed as in need of such treatment. The wilderness experience program staff shall make comprehensive reports based on the evaluation of individuals during the treatment experience and shall make recommendations for further treatment and referral to other service programs as necessary.

History: Laws 1979, ch. 300, § 3; 1988, ch. 101, § 30; 1992, ch. 57, § 40; recompiled as 1978 Comp., § 32A-13-3 by Laws 1993, ch. 77, § 214.

ANNOTATIONS

Cross references. — For children, youth and families department, *see* 9-2A-1 NMSA 1978.

ARTICLE 14
Missing Child Reporting

ANNOTATIONS

32A-14-1. Repealed.

History: Laws 1987, ch. 25, § 1; recompiled as 1978 Comp., § 32A-14-1 by Laws 1993, ch. 77, § 215; repealed by Laws 2010, ch. 33, § 15.

ANNOTATIONS

Repeals. — Laws 2010, ch. 33, § 15 repealed 32A-14-1 NMSA 1978, as enacted by Laws 1987, ch. 25, § 1, the short title of the Missing Child Reporting Act, effective May 19, 2010. For provisions of former section, *see* the 2009 NMSA 1978 on New Mexico One Source of Law DVD.

32A-14-2. Repealed.

History: Laws 1987, ch. 25, § 2; recompiled as 1978 Comp., § 32A-14-2 by Laws 1993, ch. 77, § 215; repealed by Laws 2010, ch. 33, § 15.

ANNOTATIONS

Repeals. — Laws 2010, ch. 33, § 15 repealed 32A-14-2 NMSA 1978, as enacted by Laws 1987, ch. 25, § 2, relating to the definitions of the Missing Child Reporting Act, effective May 19, 2010. For provisions of former section, *see* the 2009 NMSA 1978 on New Mexico One Source of Law DVD.

32A-14-3. Repealed.

History: Laws 1987, ch. 25, § 3; recompiled as 1978 Comp., § 32A-14-3 by Laws 1993, ch. 77, § 215; 2001, ch. 187, § 1; repealed by Laws 2010, ch. 33, § 15.

ANNOTATIONS

Repeals. — Laws 2010, ch. 33, § 15 repealed 32A-14-3 NMSA 1978, as enacted by Laws 1987, ch. 25, § 3, relating to missing child reports, law enforcement agencies and duties, effective May 19, 2010. For provisions of former section, *see* the 2009 NMSA 1978 on New Mexico One Source of Law DVD. For present comparable provisions, *see* 29-15-7.1 NMSA 1978.

32A-14-4. Repealed.

History: Laws 1987, ch. 25, § 4; recompiled as 1978 Comp., § 32A-14-4 by Laws 1993, ch. 77, § 215; repealed by Laws 2010, ch. 33, § 15.

ANNOTATIONS

Repeals. — Laws 2010, ch. 33, § 15 repealed 32A-14-4 NMSA 1978, as enacted by Laws 1987, ch. 25, § 4, relating to birth records of missing children and the state registrar's duties, effective May 19, 2010. For provisions of former section, *see* the 2009 NMSA 1978 on New Mexico One Source of Law DVD. For present comparable provisions, *see* 29-15-7.2 NMSA 1978.

ARTICLE 15
Children's and Juvenile Facility Criminal Records Screening

ANNOTATIONS

Compiler's notes. — Sections 32A-15-1 to 32A-15-4 NMSA 1978 were originally recompiled from 32-9-1 to 32-9-4 NMSA 1978 to 32-15-1 to 32-15-4 NMSA 1978 by Laws 1993, ch. 77, § 216, and were subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible.

32A-15-1. Short title.

Chapter 32A, Article 15 NMSA 1978 may be cited as the "New Mexico Children's and Juvenile Facility and Program Criminal Records Screening Act".

History: Laws 1985, ch. 103, § 1 and Laws 1985, ch. 140, § 1; 1978 Comp., § 24-18-1, recompiled as 1978 Comp., § 32-9-1; recompiled as 1978 Comp., § 32A-15-1 by Laws 1993, ch. 77, § 216; 2003, ch. 261, § 1; 2005, ch. 189, § 74.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, substituted "Chapter 32A, Article 15 NMSA 1978" for "This act" at the beginning of the section.

The 2005 amendment, effective June 17, 2005, changed the name of the act to the New Mexico Children's and Juvenile Facility and Program Criminal Records Screening Act.

32A-15-2. Purpose.

The purpose of the New Mexico Children's and Juvenile Facility and Program Criminal Records Screening Act is to comply with the provisions of Public Law 98-473 and Public Law 108-36 and to protect the safety and welfare of children.

History: Laws 1985, ch. 103, § 2 and Laws 1985, ch. 140, § 2; 1978 Comp., § 24-18-2, recompiled as 1978 Comp., § 32-9-2; recompiled as 1978 Comp., § 32A-15-2 by Laws 1993, ch. 77, § 216; 2005, ch. 189, § 75.

ANNOTATIONS

Cross references. — For Public Law 98-473, which refers to the Continuing Appropriations, 1985 - Comprehensive Crime Control Act of 1984, *see* 98 Stat. 1837.

The 2005 amendment, effective June 17, 2005, changed the name of the act. added the reference to Public Law 108-36 and added the purpose to protect the safety and welfare of children.

32A-15-3. Criminal history records check; background checks.

A. Nationwide criminal history record checks shall be conducted on all operators, staff and employees and prospective operators, staff and employees of child care facilities, including every facility or program that has primary custody of children for twenty hours or more per week, and juvenile detention, correction or treatment facilities. Nationwide criminal history record checks shall also be conducted on all prospective foster or adoptive parents and other adult relatives and non-relatives residing in the prospective foster or adoptive parent's household. The objective of conducting the record checks is to protect the children involved and promote the children's safety and welfare while receiving service from the facilities and programs.

B. The department shall fingerprint all operators, staff and employees and prospective operators, staff and employees of child care facilities and all prospective foster or adoptive parents and other adult relatives and non-relatives residing in the prospective foster or adoptive parent's household. The department shall conduct a background check of all operators, staff and employees and prospective operators, staff and employees of child care facilities and all prospective foster or adoptive parents and other adult relatives and non-relatives residing in the prospective foster or adoptive

parent's household and shall submit a fingerprint card for those individuals to the department of public safety and the federal bureau of investigation for this purpose.

C. Criminal history records obtained by the department pursuant to the provisions of this section are confidential. The department is authorized to use criminal history records obtained from the federal bureau of investigation to conduct background checks on prospective operators, staff and employees of child care facilities and foster parents.

D. Criminal history records obtained pursuant to the provisions of this section shall not be used for any purpose other than conducting background checks. Criminal history records obtained pursuant to the provisions of this section and the information contained in those records shall not be released or disclosed to any other person or agency, except pursuant to a court order or with the written consent of the person who is the subject of the records.

E. A person who releases or discloses criminal history records or information contained in those records in violation of the provisions of this section is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: Laws 1985, ch. 103, § 3 and Laws 1985, ch. 140, § 3; 1978 Comp., § 24-18-3, recompiled as 1978 Comp., § 32-9-3; recompiled as 1978 Comp., § 32A-15-3 by Laws 1993, ch. 77, § 216; 1999, ch. 146, § 1; 2003, ch. 261, § 2; 2005, ch. 189, § 76.

ANNOTATIONS

Laws 1985, ch. 103, § 3 and Laws 1985, ch. 140, § 3, enacted identical sections.

The 1999 amendment, effective July 1, 1999, added "Background Checks" in the section heading, substituted "the" for "such" in Subsection A and added Subsection B.

The 2003 amendment, effective July 1, 2003, substituted "conducting the record checks is to protect" for "protecting" following "The objective of" near the beginning of the second sentence of Subsection A; rewrote Subsection B; and added Subsections C, D and E.

The 2005 amendment, effective June 17, 2005, provided in Subsection A that nationwide criminal history record checks shall be conducted on all prospective foster or adoptive parents and other adult relatives and non-relatives residing in the prospective foster or adoptive parent's household; and provided in Subsection B that the department shall fingerprint and conduct a background check of all adoptive parents and other adult relatives and non-relatives residing in the prospective foster or adoptive parent's household.

32A-15-4. Procedures.

By December 31, 1993, procedures shall be established by regulation to provide for employment history and background checks for all present and prospective personnel identified in Section 32-9-3 [32A-15-3] NMSA 1978:

A. by the secretary of children, youth and families for child care facilities and juvenile detention and correction facilities; and

B. by the secretary of health for health and treatment facilities.

History: Laws 1985, ch. 103, § 4 and Laws 1985, ch. 140, § 4; 1978 Comp., § 24-18-4, recompiled as 1978 Comp., § 32-9-4; recompiled as 1978 Comp., § 32A-15-4 by Laws 1993, ch. 77, § 216; 1993, ch. 263, § 1.

ANNOTATIONS

Laws 1985, ch. 103, § 4 and Laws 1985, ch. 140, § 4, enacted identical sections.

The 1993 amendment, effective July 1, 1993, substituted "December 31, 1993" for "September 9, 1985" at the beginning and "Section 32-9-3 NMSA 1978" for "Section 3 of the New Mexico Children's and Juvenile Facility Criminal Records Screening Act" at the end of the introductory language; rewrote Subsection A, which read "by the secretary of human services for child care facilities"; deleted "and environment" following "health" in Subsection B; and deleted former Subsection C, which read "by the secretary of corrections for juvenile detention and correction facilities."

ARTICLE 16
Child Development

ANNOTATIONS

Compiler's notes. — Sections 32A-16-1 to 32A-16-4 NMSA 1978 were originally recompiled from 32-10-1 to 32-10-4 NMSA 1978 to 32-16-1 to 32-16-4 NMSA 1978 by Laws 1993, ch. 77, § 217, and were subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible.

32A-16-1. Office created; director appointed.

The "office of child development" is created within the children, youth and families department. The executive and administrative head of the office of child development is the "director of child development". The director shall be appointed by the secretary of children, youth and families based upon the recommendations of the child development board.

History: Laws 1989, ch. 290, § 1; 1992, ch. 57, § 44; recompiled as 1978 Comp., § 32A-16-1 by Laws 1993, ch. 77, § 217.

ANNOTATIONS

Cross references. — For children, youth and families department, *see* 9-2A-1 NMSA 1978.

32A-16-2. Director; duties.

The director of child development shall:

A. employ and discharge personnel necessary for the operation of the office of child development;

B. carry out the policies of the child development board;

C. prepare financial reports and budget requests for presentation to the children, youth and families department;

D. administrate the licensure procedures and program criteria developed by the child development board;

E. assure and work to foster coordination between all state agencies dealing with childcare; and

F. identify all sources of child development licensure preparation and training, disseminate information and coordinate resources to meet child development licensure and training needs.

History: Laws 1989, ch. 290, § 2; 1991, ch. 167, § 1; 1992, ch. 57, § 45; recompiled as 1978 Comp., § 32A-16-2 by Laws 1993, ch. 77, § 217.

ANNOTATIONS

Cross references. — For children, youth and families department, *see* 9-2A-1 NMSA 1978.

32A-16-3. Child development board created; composition.

A. There is created the "child development board". The board shall consist of seven members appointed by the governor no more than four of which shall be affiliated with the same political party. Members shall have knowledge and experience in early childhood development and education.

B. The terms of the members of the board shall be for four years; provided, as determined by lot at the first meeting of the board, two members shall serve an initial term of two years; three members an initial term of three years and two members an initial term of four years, thereafter, all members shall be appointed for terms of five years.

C. Members of the board shall receive no compensation other than per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 NMSA 1978].

D. Vacancies on the board shall be filled by the appointing authority for the remainder of the unexpired term.

History: Laws 1989, ch. 290, § 3; recompiled as 1978 Comp., § 32A-16-3 by Laws 1993, ch. 77, § 217.

32A-16-4. Powers and duties of the board.

The child development board shall:

A. recommend to the secretary of children, youth and families the hiring of a director of child development;

B. consider and adopt licensure requirements, policies and procedures for individuals working in licensed or registered health facilities with children from birth to age five; provided that such licensure requirements shall not apply to individuals working in group homes pursuant to Section 9-8-13 NMSA 1978;

C. consider and make recommendations to the public education department regarding additional licensure requirements for public school personnel working with public school children up to age eight;

D. work with other state agencies to promote a uniform and comprehensive method of licensing child care personnel;

E. develop and adopt policies and procedures for the office of child development;

F. develop levels of licensure for nonpublic school personnel depending upon the age of children served, the training facility used and the program in which the individual is employed;

G. work with the department of health to develop levels of licensure for nonpublic school personnel serving children who are developmentally delayed or at risk for developmental delay, birth through two years;

H. develop and adopt program criteria for state-funded preschool programs serving children from birth to age five; provided that criteria shall not apply to programs serving children who have a developmental delay or are at risk for developing a delay, birth through two years, and programs serving children who have a developmental delay, three through five years; and

I. work with other state agencies to monitor the implementation of state-funded preschool program criteria.

History: Laws 1989, ch. 290, § 4; 1991, ch. 167, § 2; 1992, ch. 57, § 46; recompiled as 1978 Comp., § 32A-16-4 by Laws 1993, ch. 77, § 217; 2007, ch. 46, § 41.

ANNOTATIONS

Cross references. — For secretary of children, youth and families department, *see* 9-2A-6 NMSA 1978.

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

ARTICLE 17
Family Support

ANNOTATIONS

Compiler's notes. — Sections 32A-17-1 to 32A-17-6 NMSA 1978 were originally enacted as 32-17-1 to 32-17-6 NMSA 1978 by Laws 1993, ch. 77, §§ 218 to 223, and were subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible.

32A-17-1. Short title.

Chapter 32A, Article 17 NMSA 1978 may be cited as the "Family Support Act".

History: 1978 Comp., § 32A-17-1, enacted by Laws 1993, ch. 77, § 218; 2005, ch. 68, § 5.

ANNOTATIONS

Compiler's notes. — Sections 32A-17-1 to 32A-17-6 NMSA 1978 were originally enacted as 32-17-1 to 32-17-6 NMSA 1978 by Laws 1993, ch. 77, §§ 218 to 223, and were subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible. The short

title of the Family Preservation Act was changed in 2005 to the Family Support Act. A new Family Preservation Act was enacted by Laws 2005, ch. 68 and compiled as Sections 40-15-1 through 40-15-4 NMSA 1978.

The 2005 amendment, effective June 17, 2005, changed the name of the act.

32A-17-2. Definition.

As used in the Family Support Act, "family support services" means short-term, intensive services, provided to a family whose child may reasonably be expected to face out-of-home placement, that are designed to teach a family new skills to help the family remain intact and able to care for the child at home.

History: 1978 Comp., § 32A-17-2, enacted by Laws 1993, ch. 77, § 219; 2005, ch. 68, § 6.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, changed the name of the act and changes the defined term to "family support services".

32A-17-3. Eligibility.

Family support services may be provided, considering available resources, to a family whose child is at risk for placement as:

A. an abused child;

B. a neglected child;

C. a child of a family in need of services;

D. an emotionally disturbed child; or

E. a delinquent child.

History: 1978 Comp., § 32A-17-3, enacted by Laws 1993, ch. 77, § 220; 2005, ch. 68, § 7.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, changed "family preservation services" to "family support services".

32A-17-4. Service delivery.

A. The department shall coordinate and implement the provision of family support services. The public education department shall assist the department by identifying children in public schools who are at risk for the purpose of making family support services available to the families of those children. The department shall ensure the statewide quality of family support services by:

(1) providing standards and policies for family support services that are family-centered and that identify family strengths;

(2) monitoring the provision of family support services to ensure that the services satisfy standards established by the department;

(3) providing training for persons who provide family support services; and

(4) establishing a standardized intake process for the purpose of rapidly assessing the needs of a child and family referred for family support services.

B. A person who works in a family support services program shall:

(1) provide family support services in the family's home or any other natural setting;

(2) provide direct crisis intervention and therapeutic services, to be available twenty-four hours per day, seven days a week, as needed for each family;

(3) assist with the solution of practical problems that contribute to family stress, so as to affect improved parental performance and enhanced functioning of the family unit; and

(4) arrange for additional assistance, to the extent of available resources, for the family, including housing, child care, education and training, emergency cash grants, state and federally funded public assistance or any other basic support or social service appropriate for the family.

History: 1978 Comp., § 32A-17-4, enacted by Laws 1993, ch. 77, § 221; 2005, ch. 68, § 8.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, changed "family preservation services" to "family support services".

32A-17-5. Qualifications.

A person who provides family support services shall have appropriate training, experience, supervision and continuing education to carry out the person's duties.

History: 1978 Comp., § 32A-17-5, enacted by Laws 1993, ch. 77, § 222; 2005, ch. 68, § 9.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, change "family preservation services" to "family support services".

32A-17-6. Evaluation.

The secretary of the department shall conduct an annual evaluation of family support services, and the data collected during the evaluation shall be compiled in a manner that promotes comparison with data collected from similar programs in other states.

History: 1978 Comp., § 32A-17-6, enacted by Laws 1993, ch. 77, § 223; 2005, ch. 68, § 10.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, changed "family preservation services" to "family support services".

ARTICLE 18
Training for Cultural Recognition

ANNOTATIONS

Compiler's notes. — Sections 32A-18-1 to 32A-18-4 NMSA 1978 were originally enacted as 32-18-1 to 32-18-4 NMSA 1978 by Laws 1993, ch. 77, §§ 224 to 227, and were subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible.

32A-18-1. Cultural recognition.

A. A person who serves as a judge, prosecutor, child's attorney, guardian ad litem, treatment guardian, court appointed attorney, court appointed special advocate, foster parent, mental health commissioner or mental health treatment service provider for a child subject to an abuse or neglect petition, a family in need of services petition or a mental health placement shall receive periodic training, to the extent of available resources, to develop his knowledge about children, the physical and psychological formation of children and the impact of ethnicity on a child's needs. Institutions that serve children and their families shall, considering available resources, provide similar training to institutional staff.

B. The training shall include study of:

(1) cross-cultural dynamics and sensitivity;

(2) child development;

(3) family composition and dynamics;

(4) parenting skills and practices;

(5) culturally appropriate treatment plans; and

(6) alternative health practices.

History: 1978 Comp., § 32A-18-1, enacted by Laws 1993, ch. 77, § 224; 1995, ch. 206, § 45; 1999, ch. 254, § 4; 2009, ch. 239, § 66.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, inserted "resource consultant" following "guardian ad litem" in Subsection A.

The 1999 amendment, effective July 1, 1999, deleted "resource consultant" following "ad litem" in Subsection A.

The 2009 amendment, effective July 1, 2009, in Subsection A, after "prosecutor", added "child's attorney".

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

32A-18-2. Coordination of training.

The department shall coordinate the training required pursuant to the provisions of Section 32-18-1 [32A-18-1] NMSA 1978.

History: 1978 Comp., § 32A-18-2, enacted by Laws 1993, ch. 77, § 225.

32A-18-3. Delinquency proceeding; training required for person who represents a child.

A person who represents a child during a delinquency proceeding shall participate in the training required pursuant to the provisions of Section 32-18-1 [32A-18-1] NMSA 1978.

History: 1978 Comp., § 32A-18-3, enacted by Laws 1993, ch. 77, § 226.

32A-18-4. Cultural awareness; culturally appropriate placements.

A. An Indian child placed in foster care, preadoptive placement, adoptive placement or a secure facility shall be allowed to maintain the child's cultural ties and shall be permitted to participate in activities that strengthen cultural awareness.

B. An Indian child placed in a secure facility shall be permitted to participate in activities that strengthen cultural awareness. A representative of the child's culture shall be allowed access to the secure facility to provide activities that strengthen cultural awareness; provided that the activities are restricted to the premises of the secure facility.

C. Upon determining that a placement out of the home is medically necessary for an Indian child, the interagency behavioral health purchasing collaborative and its contractors shall make reasonable efforts to place the child with a licensed residential treatment center, group home or treatment foster care home that provides culturally competent care and access to appropriate cultural practices, including traditional treatment, as determined in consultation with the child's tribe.

History: 1978 Comp., § 32A-18-4, enacted by Laws 1993, ch. 77, § 227; 2005, ch. 188, § 1.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, added Subsection C to require that the interagency behavioral health purchasing collaborative and its contractors make a reasonable effort to place an Indian child with a center or home that provides culturally competent care and access to appropriate cultural practices, including traditional treatment, as determined in consultation with the child’s tribe.

ARTICLE 19
Quality Assurance Office

ANNOTATIONS

Compiler's notes. — Section 32A-19-1 NMSA 1978 was originally enacted as 32-19-1 NMSA 1978 by Laws 1993, ch. 77, § 228, and was subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible.

32A-19-1. Quality assurance office.

A. The department shall maintain a quality assurance office under the office of the secretary [secretary of the children youth and families department].

B. The purpose of the quality assurance office shall be to facilitate department efforts to efficiently implement the purposes of the Children's Code [32A-1-1 NMSA 1978].

C. In order to measure the quality of services provided, to facilitate satisfactory outcomes for children and families that receive services and to provide a continuing opportunity to improve service delivery, the quality assurance office shall:

(1) monitor the system for receiving and resolving complaints and grievances;

(2) perform periodic investigations and evaluations to assure compliance with the Children's Code and other applicable state and federal laws and regulations;

(3) facilitate monitoring of indicators of the department's performance to determine whether the department is:

(a) providing children and families with individualized, needs-based service plans;

(b) providing services in a timely manner; and

(c) in compliance with applicable state and federal laws and regulations;

(4) identify any deficiencies and recommend corrective action to the secretary of the department;

(5) have access to any records maintained by the department, including confidential information; and

(6) promote continuous improvement of all department processes serving children and families.

D. The quality assurance office shall contribute to and facilitate the publication of public reports assessing the performance of the department. The reports shall not disclose the identity of any individual mentioned in the report, including children or families that receive or are eligible for services or any department employee.

History: 1978 Comp., § 32A-19-1, enacted by Laws 1993, ch. 77, § 228; 1997, ch. 34, § 15.

ANNOTATIONS

Bracketed material. — The bracketed material in Subsection A was inserted by the compiler since "secretary" is not a defined term in this article; the bracketed material is not a part of the law.

The 1997 amendment, effective July 1, 1997, deleted "By August 1, 1993" from the beginning of Subsection A; substituted "implement" for "achieve" in Subsection B; in Subsection C, substituted "monitor the system" for "establish an accessible system" in Paragraph (1), substituted "facilitate monitoring of" for "monitor" in Paragraph (3), and added Paragraph (6); substituted "contribute to and facilitate the publication of" for "annually produce" in the first sentence of Subsection D; and made minor stylistic changes throughout the section.

ARTICLE 20
Uniform Case Numbering

ANNOTATIONS

Compiler's notes. — Section 32A-20-1 NMSA 1978 was originaly enacted as 32-20-1 NMSA 1978 by Laws 1993, ch. 77, § 229 and was subsequently recompiled at this location in 1993 in order to retain a historical link between the pre-July 1, 1993 law and the judicial precedents decided under that law. Citations to decisions under prior law have been retained whenever possible.

32A-20-1. Uniform case numbering system.

A. As used in this section, "uniform case numbering system" means a system of referring to cases of alleged child abuse or neglect, including child sexual abuse, to allow only one numerical designation to be assigned to each case of child abuse or neglect. The uniform case numbering system shall provide for uniform reference to each case by all state agencies and organizations supported by state funds.

B. In any investigation, intervention or disposition of a case involving child abuse or neglect, including child sexual abuse, a uniform case number shall be assigned to the investigation and shall be maintained and referred to by all persons or agencies having occasion to become involved in any way in the investigation, intervention or disposition of the case.

C. A uniform case numbering system shall be devised, proposed and, after opportunity for public input, adopted by:

(1) the department;

(2) the secretary of public safety or his designee;

(3) the secretary of the department or his designee;

(4) the secretary of health or his designee;

(5) the superintendent of public instruction or his designee;

(6) the chief justice of the supreme court or his designee; and

(7) a representative of the elected or appointed district attorneys.

D. The data collected in connection with the uniform case numbering system shall be limited to the names of the alleged offender and alleged victim, the date of the alleged occurrence and a unique case number which encodes the county of the alleged offense, the type of alleged offense and the case disposition, if known. The names of the alleged offender and alleged victim shall be purged as soon as the uniform case number is disseminated to all agencies involved in investigation and rehabilitative service provision in that case, or within six months of the date the uniform case number is assigned, whichever is first.

History: 1978 Comp., § 32A-20-1, enacted by Laws 1993, ch. 77, § 229.

ARTICLE 21
Emancipation of Minors

32A-21-1. Short title.

Sections 47 through 53 [32A-21-1 to 32A-21-7 NMSA 1978] of this act may be cited as the "Emancipation of Minors Act".

History: Laws 1995, ch. 206, § 47.

32A-21-2. Legislative findings and purpose.

It is the purpose of the Emancipation of Minors Act to provide a clear statement defining emancipation and its consequences and to permit an emancipated minor to obtain a court declaration of his status.

History: Laws 1995, ch. 206, § 48.

32A-21-3. Emancipated minors; description.

An emancipated minor is any person sixteen years of age or older who:

A. has entered into a valid marriage, whether or not the marriage was terminated by dissolution;

B. is on active duty with any of the armed forces of the United States of America; or

C. has received a declaration of emancipation pursuant to the Emancipation of Minors Act.

History: Laws 1995, ch. 206, § 49.

32A-21-4. Emancipation by declaration.

Any person sixteen years of age or older may be declared an emancipated minor for one or more of the purposes enumerated in the Emancipation of Minors Act if he is willingly living separate and apart from his parents, guardian or custodian, is managing his own financial affairs and the court finds it in the minor's best interest.

History: Laws 1995, ch. 206, § 50.

32A-21-5. Over the age of majority; purpose.

An emancipated minor shall be considered as being over the age of majority for one or more of the following purposes:

A. consenting to medical, dental or psychiatric care without parental consent, knowledge or liability;

B. his capacity to enter into a binding contract;

C. his capacity to sue and be sued in his own name;

D. his right to support by his parents;

E. the rights of his parents to his earnings and to control him;

F. establishing his own residence;

G. buying or selling real property;

H. ending all vicarious liability of the minor's parents, guardian or custodian for the minor's torts; provided that nothing in this section shall affect any liability of a parent, guardian, custodian, spouse or employer of a minor imposed by the Motor Vehicle Code [66-1-1 NMSA 1978] or any vicarious liability that arises from an agency relationship; or

I. enrolling in any school or college.

History: Laws 1995, ch. 206, § 51.

ANNOTATIONS

Cross references. — For consent to medical care by emancipated minors, *see* 24-10-1 NMSA 1978.

32A-21-6. Public entitlement of emancipated minors.

A declared emancipated minor shall not be denied benefits from any public entitlement program to which he may have been entitled in his own right prior to the declaration of emancipation.

History: Laws 1995, ch. 206, § 52.

32A-21-7. Declaration of Emancipation; petition; contents; notice; mandate.

A. A minor may petition the children's court of the district in which he resides for a declaration of emancipation as described in the Emancipation of Minors Act. The petition shall be verified and shall set forth with specificity the facts bringing the minor within the provisions of the Emancipation of Minors Act.

B. Before the petition is heard, notice shall be given to the minor's parents, guardian or custodian in accordance with the Rules of Civil Procedure for the District Courts [1-001 NMRA].

C. If the court finds that the minor is sixteen years of age or older and is a person described under Section 48 [32A-21-2 NMSA 1978] of this act, the court may grant the petition unless, after having considered all of the evidence introduced at the hearing, it finds that granting the petition would be contrary to the best interests of the minor.

D. If the petition is sustained, the court shall immediately issue a declaration of emancipation containing specific findings of fact and one or more purposes of the emancipation, which shall be filed by the county clerk.

E. If the petition is denied, the minor has a right to file a petition for a writ of mandamus.

F. If the petition is sustained, the parents, guardian or custodian of the minor has a right to file a petition for a writ of mandamus if he appeared in the proceeding and opposed the granting of the petition.

G. A declaration of emancipation granted in accordance with the Emancipation of Minors Act shall be conclusive evidence that the minor is emancipated.

History: Laws 1995, ch. 206, § 53.

ARTICLE 22
Children's Cabinet Act

32A-22-1. Short title.

This act may be cited as the "Children's Cabinet Act".

History: Laws 2005, ch. 64, § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 64 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-22-2. Children's cabinet created.

A. The children's cabinet is created and is administratively attached to the office of the governor. The children's cabinet shall meet at least six times each year.

B. The children's cabinet shall consist of the following members:

(1) the governor;

(2) the lieutenant governor;

(3) the secretary of children, youth and families;

(4) the secretary of corrections;

(5) the secretary of human services;

(6) the secretary of labor;

(7) the secretary of health;

(8) the secretary of finance and administration;

(9) the secretary of economic development;

(10) the secretary of public safety;

(11) the secretary of aging and long-term services;

(12) the secretary of Indian affairs; and

(13) the secretary of public education.

C. Each year the children's cabinet shall select the governor or lieutenant governor to be the chairperson.

History: Laws 2005, ch. 64, § 2.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 64 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-22-3. Powers; duties; goals.

A. The children's cabinet shall study and make recommendations for the design of a coordinated system to maximize outcomes among children and youth under age twenty-one, particularly those in disadvantaged situations, in the following areas:

(1) physical and mental health fitness;

(2) family and community safety and support;

(3) preparedness for and success in school;

(4) successful transition to meaningful and purposeful adulthood and employment; and

(5) valued contributions to and active participation in communities.

B. Departments participating in the children's cabinet may enter into joint powers agreements pursuant to the Children's Cabinet Act.

C. At least twice each year, the children's cabinet shall meet with parents, children, youth, educators, public officials and representatives of faith-based organizations, community-based organizations, philanthropic organizations, public schools and public school districts, colleges and universities, health care providers, nonprofit organizations, youth service providers, political subdivisions, the interim legislative health and human services committee and the legislative education study committee. The children's cabinet may coordinate with these persons as needed to design or implement the coordinated system.

D. By September 1 of each year, the children's cabinet shall report and make recommendations to the governor and the legislature, including:

(1) a child and youth report card that identifies the status and well-being of children and youth, including special target populations of children and youth that are disproportionately at risk, based on the outcomes in Subsection A of this section; and

(2) a child and youth policy and inventory budget identifying state programs and initiatives that affect the well-being of children and youth, including proposed budget allocations toward the outcome areas in Subsection A of this section based on age, ethnicity and special target populations as determined by the children's cabinet.

History: Laws 2005, ch. 64, § 3.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 64 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-22-4. Children's cabinet department liaisons.

Each member of the children's cabinet shall name an employee to serve as a liaison to ensure coordination and communication among departments and agencies and to address cross-jurisdictional issues in an efficient, effective and expeditious manner.

History: Laws 2005, ch. 64, § 4.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 64 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

ARTICLE 23
Pre-Kindergarten Act

32A-23-1. Short title.

This act may be cited as the "Pre-Kindergarten Act".

History: Laws 2005, ch. 170, § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-23-2. Findings and purpose.

The legislature finds that:

A. special needs are present among the state's population of four-year-old children and those needs warrant the provision of pre-kindergarten programs;

B. participation in quality pre-kindergarten has a positive effect on children's intellectual, emotional, social and physical development; and

C. pre-kindergarten will advance governmental interests and childhood development and readiness.

History: Laws 2005, ch. 170, § 2.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-23-3. Definitions.

As used in the Pre-Kindergarten Act:

A. "community" means an area defined by school district boundaries, tribal boundaries or joint boundaries of a school district and tribe or any combination of school districts and tribes;

B. "departments" means the children, youth and families department and the public education department acting jointly;

C. "early childhood development specialist" means the adult responsible for working directly with four-year-old children in implementing pre-kindergarten services;

D. "eligible provider" means a person licensed by the children, youth and families department that provides early childhood developmental readiness services or preschool special education, or is a public school, tribal program or head start program;

E. "pre-kindergarten" means a voluntary developmental readiness program for children who have attained their fourth birthday prior to September 1; and

F. "tribe" means an Indian nation, tribe or pueblo located in New Mexico.

History: Laws 2005, ch. 170, § 3.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-23-4. Voluntary pre-kindergarten; interagency cooperation; contracts; contract monitoring; research.

A. The children, youth and families department and the public education department shall cooperate in the development and implementation of a voluntary program for the provision of pre-kindergarten services throughout the state. The pre-kindergarten program shall address the total developmental needs of preschool children, including physical, cognitive, social and emotional needs, and shall include health care, nutrition, safety and multicultural sensitivity.

B. The departments shall collaborate on promulgating rules on pre-kindergarten services, including state policies and standards and shall review the process for contract awards and for the expenditure and use of contract funds.

C. The departments shall monitor pre-kindergarten contracts to ensure the effectiveness of child-centered, developmentally appropriate practices and outcomes. The departments shall assign staff to work on the development and implementation of the program and on the monitoring of contract awards. The early childhood training and technical assistance programs of the children, youth and families department and assigned staff from the public education department staff shall provide technical assistance to eligible providers.

D. The departments shall provide an annual report to the governor and the legislature on the progress of the state's voluntary pre-kindergarten program.

History: Laws 2005, ch. 170, § 4.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-23-5. Pre-kindergarten; eligibility.

Pre-kindergarten services may be provided by public schools or eligible providers on a per-child reimbursement rate in communities with the highest percentage of public elementary schools that are designated as Title 1 schools and that serve the highest percentage of public elementary students who are not meeting the proficiency component required for calculating adequate yearly progress.

History: Laws 2005, ch. 170, § 5.

ANNOTATIONS

Cross reference. — For Title 1 schools, *see* 20 U.S.C. Sections 6301 *et seq.*

Effective dates. — Laws 2005, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

ANNOTATIONS

32A-23-6. Requests for proposals; contracts for services.

A. Each department shall publish a request for proposals for pre-kindergarten services.

B. Eligible providers shall submit proposals for pre-kindergarten services to each department. An eligible provider proposal shall include a description of the services that will be provided, including:

(1) how those services meet children, youth and families department standards;

(2) the number of four-year-old children the eligible provider can serve;

(3) site and floor plans and a description of the facilities;

(4) revenue sources and amounts other than state funding available for the pre-kindergarten program;

(5) a description of the qualifications and experience of the early childhood development staff for each site;

(6) the plan for communicating with and involving parents in the pre-kindergarten program;

(7) how those services meet the continuum of services to children; and

(8) other relevant information requested by the departments.

C. The public education department shall accept and evaluate proposals from school districts for funding for pre-kindergarten. The children, youth and families department shall accept and evaluate proposals from other eligible providers.

D. For funding purposes, proposals shall be evaluated on the percentage and number of public elementary schools in the community that are not meeting the proficiency component required for calculating adequate yearly progress and that are serving children, at least sixty-six percent of whom live within the attendance zone of a Title 1 elementary school. Additional funding criteria include:

(1) the number of four-year-olds residing in the community and the number of four-year-olds proposed to be served;

(2) the adequacy and capacity of pre-kindergarten facilities in the community;

(3) language and literacy services in the community;

(4) the cultural, historic and linguistic responsiveness to the community;

(5) parent education services available for parents of four-year-olds in the community;

(6) the qualifications of eligible providers in the community;

(7) staff professional development plans;

(8) the capacity of local organizations and persons interested in and involved in programs and services for four-year-olds and their commitment to work together;

(9) the extent of local support for pre-kindergarten services in the community; and

(10) other relevant criteria specified by joint rule of the departments.

E. A contract with an eligible provider shall specify and ensure that funds shall not be used for any religious, sectarian or denominational purposes, instruction or material.

History: Laws 2005, ch. 170, § 6.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-23-7. Program funding.

The children, youth and families department shall reimburse eligible providers that are not offered in a public school. The public education department shall reimburse eligible providers that are public school programs.

History: Laws 2005, ch. 170, § 7.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

32A-23-8. Funds created; administration.

A. The "public pre-kindergarten fund" is created as a nonreverting fund in the state treasury. The fund shall consist of appropriations, income from investment of the fund, gifts, grants and donations. The fund shall be administered by the public education department, and money in the fund is appropriated to the department to carry out the provisions of the Pre-Kindergarten Act. Disbursements from the fund shall be by warrant of the secretary of finance and administration upon vouchers signed by the secretary of public education or the secretary's authorized representative. The department may use up to ten percent of the money in the fund each year for administrative expenses.

B. The "children, youth and families pre-kindergarten fund" is created as a nonreverting fund in the state treasury. The fund shall consist of appropriations, income from investment of the fund, gifts, grants and donations. The fund shall be administered by the children, youth and families department, and money in the fund is appropriated to the department to carry out the provisions of the Pre-Kindergarten Act. Disbursements from the fund shall be by warrant of the secretary of finance and administration upon vouchers signed by the secretary of children, youth and families or the secretary's authorized representative. The department may use up to ten percent of the money in the fund each year for administrative expenses.

History: Laws 2005, ch. 170, § 8.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

Temporary provisions. — Laws 2005, ch. 170, § 9 provided that any money appropriated for pre-kindergarten programs in fiscal years 2005 through 2007 shall be divided equally between the public education department and the children, youth and families department.

ARTICLE 24
Child Helmet Safety Act

32A-24-1. Short title.

This act [Chapter 32A, Article 24 NMSA 1978} may be cited as the "Child Helmet Safety Act".

History: Laws 2007, ch. 66, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 66, § 6 made the act effective July 1, 2007.

32A-24-2. Definitions.

As used in the Child Helmet Safety Act:

A. "bicycle" means a human-powered vehicle with two wheels in tandem designed to transport, by the act of pedaling, one or more persons seated on one or more saddle seats on its frame and includes a human-powered vehicle designed to transport by the act of pedaling, which has more than two wheels when the vehicle is used on a public roadway, public bicycle path or other public road or right of way, including a tricycle;

B. "minor" means a person under eighteen years of age;

C. "operator" means a person under eighteen years of age who travels on a bicycle seated on a saddle seat from which that person is intended to and can pedal the bicycle, or who propels himself by way of using inline skates, roller skates, a skateboard or a scooter;

D. "passenger" means a person under eighteen years of age who travels on a bicycle or scooter in any manner except as an operator;

E. "protective helmet" means a piece of headgear that meets or exceeds the impact standard for protective helmets set by the United States consumer product safety commission federal safety standard and those standards developed by the American national standards institute, the Snell memorial foundation or the American society for testing and materials;

F. "public bicycle path" means a right of way under the jurisdiction and control of the state or a local political subdivision for use primarily by bicyclists and pedestrians;

G. "public roadway" means a right of way under the jurisdiction and control of the state or a local political subdivision for use primarily by motor vehicular traffic;

H. "public skateboard park" means an area of public property set aside, designed and maintained for recreation by persons using bicycles, scooters, skateboards or skates;

I. "scooter" means a wheeled vehicle, regardless of the number or placement of those wheels, that has handlebars, designed to be stood on by the operator or passenger and used to glide or propel the operator or passenger over the ground;

J. "skateboard" means a set of wheels attached to a platform or flat surface, regardless of the number or placement of those wheels, and used to glide or propel the operator over the ground; and

K. "skates" means a pair of devices worn on the feet with a set of wheels attached and used to glide or propel the user over the ground and may be either inline or roller, but "skates" does not include a pair of devices, similar to a pair of common shoes, that has one or more wheels embedded in the sole of each device.

History: Laws 2007, ch. 66, § 2.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 66, § 6 made the act effective July 1, 2007.

32A-24-3. Helmet use requirements; civil penalty.

A. It is unlawful for a parent or legal guardian of a minor to knowingly permit that minor to operate or be a passenger on a bicycle, skates, scooter or skateboard unless that minor wears a well-fitted protective bicycle helmet, fastened securely upon the head with the straps of the helmet.

B. Except as provided in Subsection C of this section, a parent or legal guardian found guilty of violating Subsection A of this section shall pay a civil penalty of not more than ten dollars ($10.00). Magistrate and municipal courts shall have concurrent jurisdiction.

C. If a violation of Subsection A of this section is a first offense, the magistrate or municipal court may issue a verbal warning or require, in lieu of the fine imposed in Subsection B of this section, that the person found in violation provide proof that a protective helmet has been purchased for use by the minor found on the bicycle, skates, scooter or skateboard without a protective helmet.

D. A municipal court may issue only a verbal warning for a first or later violation.

History: Laws 2007, ch. 66, § 3.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 66, § 6 made the act effective July 1, 2007.

32A-24-4. Equipment sales or rentals.

A person engaged in the business of renting bicycles, skates, scooters or skateboards shall provide a protective helmet to a minor who will be an operator of or passenger on a rented bicycle, skates, scooter or skateboard if the minor does not already have a helmet in the minor's possession. A reasonable fee may be charged for the protective helmet rental.

History: Laws 2007, ch. 66, § 4.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 66, § 6 made the act effective July 1, 2007.

32A-24-5. Negligence.

Failure to wear a protective helmet shall not limit or apportion damages.

History: Laws 2007, ch. 66, § 5.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 66, § 6 made the act effective July 1, 2007.