IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: _____

SUPREME COURT OF NEW MEXICO
FILED

APR 13 1999

Kathleen Jo Gibson

Docket No. 25,061

TIMOTHY B. JOHNSON, Trustee for Ralph A. Bard, Jr., Trust u/a/d February 12, 1983, et al.,

Plaintiffs-Appellees,

vs.

NEW MEXICO OIL CONSERVATION COMMISSION,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
W. Byron Caton, District Judge

consolidated with:

Docket No. 25,062

TIMOTHY B. JOHNSON, Trustee for Ralph A. Bard, Jr., Trustee u/a/d February 12, 1983, et al.,

Plaintiffs-Appellees,

vs.

BURLINGTON RESOURCES OIL & GAS COMPANY,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
W. Byron Caton, District Judge

Marilyn S. Hebert, Special Assistant Attorney General
Santa Fe, NM

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Santa Fe, NM

for Appellee

OPINION

MINZNER, Chief Justice.

{1} This is an appeal from the district court's review of an order by the New Mexico Oil Conversation Commission, which increased the spacing requirements for deep wildcat gas wells in certain areas of the state. Specifically, the Commission and the real party in interest, Burlington Resources Oil & Gas Co., appeal the district court's ruling that the order is without effect as to Timothy P. Johnson and other individual holders (Holders) of working interests and operating rights affected by the order.

{2} After the Commission issued its order, Holders timely filed with the Commission an application for rehearing, but the Commission failed to act upon the application within ten days. Holders then appealed to the district court, naming the Commission and Burlington as defendants. The district court found in favor of Holders, ruling that the order, as against them, was without effect. The Commission and Burlington now appeal to this Court.

{3} The question we address in this appeal is whether the Commission violated the New Mexico Oil and Gas Act (OGA), NMSA 1978, §§ 70-2-1 to -38 (1935, as amended through 1996, prior to 1998 amendment), and its implementing regulations by issuing its order without first providing Holders with actual notice of the Commission's proceedings on Burlington's application for an increase in gas-well spacing requirements. We conclude that the Commission's order is invalid with respect to Holders, because Holders were not afforded reasonable notice of the proceedings as required by the OGA and its implementing regulations. Our conclusion that the Commission's order is invalid with respect to Holders makes it unnecessary for us to reach the question whether the Commission's order should be vacated on other grounds. We affirm the district court's judgment.

I.

{4} The parties involved in this dispute include Holders, Burlington, and the Commission. In all, Holders control over an eighty-percent working interest in the east half and southwest quarter of Section 9, Township 31 North, Range 10 West, San Juan County, New Mexico (Section 9). Burlington is also a working-interest owner in Section 9. The Commission is a creature of the OGA. See § 70-2-4. Pursuant to the OGA, the Commission regulates certain aspects of oil and gas operations throughout the state.

{5} The Oil Conservation Division, which is not a party to this suit, also is a creature of the OGA. See § 70-2-5. The Division has

> jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of [the OGA] or any other law of this state relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil or gas operations.

Section 70-2-6(A). The Commission has "concurrent jurisdiction and authority with the [D]ivision to the extent necessary for the [C]ommission to perform its duties as required by law." Section 70-2-6(B).

{6} This case concerns the Commission's modification of Oil and Gas Rule 104, which addresses the spacing of wildcat gas wells. From 1950 until the time of this suit, Rule 104 had required all wildcat gas wells in the San Juan Basin to be located on drilling tracts consisting of 160 contiguous surface acres. See Well Spacing; Acreage Requirements for Drilling Tracts, N.M. Oil Conservation Comm'n, Rule 104(c) (Jan. 1, 1950); Well Spacing; Acreage Requirements for Drilling Tracts, N.M. Oil Conservation Comm'n, Rule 104(b) (Feb. 1, 1951); Well Spacing: Acreage Requirements for Drilling Tracts, Oil Conservation Div., Energy, Minerals, & Natural Resources Dep't, 19 NMAC 15.C.104.B(2)(a) (May 25, 1964, as amended through Feb. 1, 1996, prior to June 30, 1997 amendment).

{7} Rule 104 defines "wildcat well." Since 1996, the rule has provided the following

definition for a "wildcat well" in the San Juan Basin:

> Any well which is to be drilled the spacing unit of which is a distance of 2 miles or more from:
> (i) the outer boundary of any defined pool which has produced oil or gas from the formation to which the well is projected; and
> (ii) any other well which has produced oil or gas from the formation to which the proposed well is projected . . . .

19 NMAC 15.C.104.A(1)(a) (Feb. 1, 1996).

{8} Beginning in June 1996, Burlington sent correspondence to Holders, seeking either to purchase or to farm-out Holders' acreage in Section 9, among other areas. Specifically, Burlington sought to drill high-risk deep wildcat gas wells in these areas. Burlington also planned to file an application with the Commission for the purpose of changing the Rule 104 spacing requirement from 160 to 640 acres for deep wildcat gas wells in the San Juan Basin. On February 27, 1997, Burlington filed its application, which was docketed as Commission Case No. 11745.

{9} Pursuant to Burlington's application in Case No. 11745, the Commission held a public hearing on March 19, 1997. At this hearing, Burlington's counsel informed the Commission that, by certified mail, Burlington had provided personal notice of the application and the hearing to nearly 200 operators in the San Juan Basin. For its part, the Commission provided notice by publication and afforded personal notice to 267 parties on its own mailing list. Apparently none of the Holders were on the Commission's mailing list, for none of them received personal notice from the Commission.

{10} Burlington did not provide personal notice to any of the Holders on either the application or the hearing, even though Burlington had actual knowledge of all of the Holders' names, addresses, and Section 9 interests long before it had filed its application. In fact, at the time of its filing, Burlington had been remitting overriding royalty payments to each of the Holders on a monthly basis, and Burlington had been engaged in litigation

against Holders since 1992. In addition, Burlington not only had been seeking to purchase or to farm-out Holders' acreage in Section 9, the company had also selected Section 9 as the location for one of its initial deep-drilling test wells and had prepared a detailed Authority for Expenditure for this well. Further, Burlington had maintained a computerized database of the names and addresses of Holders and could have given them actual notice of its application and the proceedings thereon. Despite Burlington's actual knowledge of and involvement with Holders and their respective Section 9 working interests, Burlington's counsel, during the Commission hearing, testified that, "to the best of [Burlington's] knowledge and belief[,] there [was] no opposition to having the Commission change [Rule 104] and allow deep gas to be developed on 640-acre spacing."

{11} During the Commission proceedings, only one party, Amoco Production Co., voiced some opposition to Burlington's application. Nonetheless, Amoco did not object to 640-acre spacing outright. Rather, believing it to be premature to establish a deep wildcat gas-well spacing order for the entire San Juan Basin, Amoco merely suggested "use of an Exploratory spacing order which would space a drillsite on 640 acres to be revisited after data was accumulated." Amoco is not a party to the suit before us.

{12} At the Commission hearing, Burlington's senior staff landman testified that Burlington had notified approximately 198 out of 315 operators in the San Juan Basin. The landman also testified that, apart from Amoco's suggestion, he was not aware of any other suggestions on Burlington's application. In fact, the landman explained, "We have received support."

{13} On June 5, 1997, the Commission entered its Order No. R-10815, which concluded, among other things, that Division Rule 104 should be amended on a permanent basis to increase the spacing requirements for deep wildcat gas wells in the San Juan Basin to 640 acres. In re Burlington Resources Oil & Gas Co., N.M. Oil Conservation Comm'n Case No. 11745 (June 5, 1997) (Order No. R-10815). On June 11, 1997—six days after the

Commission issued its order—Burlington filed an application with the Division, seeking to impose a compulsory pooling of Holders' interests in the east half and southwest quarter of Section 9 for a deep wildcat gas well proposed by Burlington. Obtaining Commission Order R-10815 was a condition precedent to Burlington's initiation of compulsory pooling proceedings against Holders, for under Rule 104 as extant prior to June 5, 1997, Burlington could not have petitioned the Division to impose a compulsory pooling order for 640 acres. See 19 NMAC 15.C.104.B(2)(a) (Feb. 1, 1996, prior to June 30, 1997 amendment) (requiring all wildcat gas wells drilled in the San Juan Basin to be located on drilling tracts of 160 contiguous surface acres).

{14} On June 24, 1997, Holders timely filed with the Commission an Application for Rehearing of Order No. R-10815. When the Commission failed to act upon the application within ten days, the application was deemed denied. See § 70-2-25(A). Holders then properly appealed to the district court, naming the Commission and Burlington as defendants. Holders also moved for a stay of Order No. R-10815 for the duration of the appeal, and the district court granted the motion as to Holders only. Rule 104 was finally amended on June 30, 1997. See 19 NMAC 15.C.104.B(2)(b) (June 30, 1997) (requiring deep wildcat gas wells drilled in the San Juan Basin to be located on drilling tracts of 640 contiguous surface acres).

{15} In its Opinion and Final Judgment, the district court found in favor of Holders, ruling that, "[k]nowing of its plan to pool the interests of [Holders] for a wildcat well on 640-acre spacing and knowing the identities and whereabouts of [Holders], Burlington's failure to provide personal notice to them of the spacing case proceeding . . . deprived [Holders] of their property without due process of law." Accordingly, the district court ruled that the order, as against Holders, was without effect. The Commission and Burlington now

appeal to this Court, which has jurisdiction under Section 70-2-25(B).[1]

II.

{16} This Court conducts a whole-record review of the Commission's factual findings. See Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992). On legal questions such as the interpretation of the OGA or its implementing regulations, we may afford some deference to the Commission, particularly if the question at hand implicates agency expertise. See generally Regents of Univ. of N.M. v. New Mexico Fed'n of Teachers, 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236. "However, the [C]ourt may always substitute its interpretation of the law for that of the [Commission] 'because it is the function of courts to interpret the law.'" Fitzhugh v. New Mexico Dep't of Labor, 1996-NMSC-044, ¶ 22, 122 N.M. 173, 922 P.2d 555 (quoting Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995)).

{17} At the outset, we note that the district court held that Holders were denied due process of law under the United States and New Mexico Constitutions because they were not given personal notice of the Commission's proceedings on Burlington's application for increased spacing requirements. We agree with the district court that the failure to provide Holders with actual notice of the proceedings on Burlington's application for increased spacing requirements is dispositive. We do not agree, however, that it is necessary to reach the question whether this failure amounts to a violation of Holders' constitutional rights to due process. "Courts will not decide constitutional questions unless necessary to a disposition of the case." Huey v. Lente, 85 N.M. 597, 598, 514 P.2d 1093, 1094 (1973); cf. Garcia v. Las Vegas Med. Ctr., 112 N.M. 441, 444, 816 P.2d 510, 513

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[1] We do not consider the effect, if any, of the changes brought about by the 1998 amendment to Section 70-2-25(B) because this appeal was taken well before the effective date of that amendment.

(Ct. App. 1991) ("There would be no need to decide what federal procedural due process required if the plaintiffs could obtain the desired relief from an [order requiring] compliance with state law."). As we explain below, our disposition in this case only requires interpretation of the OGA and the Commission's procedural rules. Nevertheless, we are guided by the canon of statutory construction that "if a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality." Huey, 85 N.M. at 598, 514 P.2d at 1094. We apply this canon to the Commission's procedural rules in the same manner that we apply it to a statute. See Wineman v. Kelly's Restaurant, 113 N.M. 184, 185, 824 P.2d 324, 325 (Ct. App. 1991) (applying a canon of construction used to interpret statutes to an interpretation of a rule adopted by the Workers' Compensation Administration). In applying this canon, we are also mindful of the holding in Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 817 P.2d 721 (1991), which relied on principles of due process to conclude that notice had been constitutionally deficient.

{18} In reaching its holding, the Uhden court noted that "[t]he essence of justice is largely procedural." Id. at 530, 817 P.2d at 723. We reaffirm this principle today. In this case, however, we do not rely on the Uhden court's constitutional rationale. Cf. State ex rel. Hughes v. City of Albuquerque, 113 N.M. 209, 210, 824 P.2d 349, 350 (Ct. App. 1991) ("[The] violation of a state law requiring specific procedures does not necessarily constitute a violation of constitutional due process."); see also Bernard Schwartz, Administrative Law § 5.2, at 204 (2d ed. 1984). Instead, we conclude that Holders are entitled to relief because the notice procedures required by the OGA and the Oil and Gas rules were not followed. See Additional Notice Requirements (Rule 1207), Oil Conservation Div., Energy, Minerals, & Natural Resources Dep't, 19 NMAC 15.N.1207.D (Feb. 1, 1996) ("Evidence of failure to provide notice as provided in this rule may, upon a proper showing be considered cause for reopening the case."); cf. Hughes, 113 N.M. at

210, 824 P.2d at 350 (concluding that a party "may be entitled to relief if the procedures mandated by city ordinance were not followed"); Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶ 15, 125 N.M. 786, 965 P.2d 370 (concluding that an administrative agency "is required to act in accordance with its own regulations"). Accordingly, we reject the Commission's contention that it provided the requisite notice for a hearing on a rule amendment, as well as Burlington's contention that Holders were not entitled to actual notice of the proceedings under the OGA.

{19} The relevant statutory notice provisions in the OGA are contained in Sections 70-2-23 and 70-2-7. Section 70-2-23 imposes a "reasonable notice" requirement for all oil and gas hearings. This section provides, in pertinent part:

> Except as provided for herein [i.e., exceptions for emergencies], before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the [D]ivision. The [D]ivision shall first give reasonable notice of such hearing (in no case less than ten days, except in an emergency) and at any such hearing any person having an interest in the subject matter of the hearing shall be entitled to be heard.

(Emphasis added).

{20} Section 70-2-7 provides: "The [Division] shall prescribe by rule its rules of order or procedure in hearings or other proceedings before it under the [OGA]." Although the text of Section 70-2-7 does not expressly mention the word "notice," the Division, pursuant to the authority in this section, has adopted rules establishing notice requirements for oil and gas hearings.

{21} In terms of publication notice for an oil and gas hearing, the Division has adopted the following rule:

> Notice of each hearing before the Commission and before a Division Examiner shall be by publication once in accordance

> with the requirements of Chapter 14, Article 11, N.M.S.A. 1978, in a newspaper of general circulation in the county, or each of the counties if there be more than one, in which any land, oil, gas, or other property which is affected may be situated.

Publication of Notice of Hearing, Oil Conservation Div., Energy, Minerals, & Natural Resources Dep't, 19 NMAC 15.N.1204 (Feb. 1, 1996). The referenced statutory provision mandates the following:

> Any notice or other written matter whatsoever required to be published in a newspaper by any law of this state, or by the order of any court of record of this state, shall be deemed and held to be a legal notice or advertisement within the meaning of [14-11-1 to 14-11-4, 14-11-7, 14-11-8 NMSA 1978].

NMSA 1978, § 14-11-1 (1937) (bracketed material in original).

{22} The Division has also adopted additional notice rules for specific situations. See 19 NMAC 15.N.1207. One such situation involves applications that may affect a property interest of other individuals or entities: "In cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities: (a) Actual notice shall be given to such individuals or entities by certified mail (return receipt requested)." 19 NMAC 15.N.1207.A(11).

{23} Pursuant to the rules promulgated under Section 70-2-7, Burlington and the Commission provided notice by publication. Although the notice by publication satisfied a necessary component of the statutory notice requirements, it was by no means sufficient. Section 7-2-23 of the OGA requires "reasonable notice" as a condition precedent to a hearing. This "reasonable notice" mandate should circumscribe whatever Division rules are promulgated for the purpose of notifying interested persons.

{24} In terms of the rules, we note that, at the time of its filing, the application, if approved, would have affected Holders' interests in Section 9. Specifically, we note that

the increased spacing requirements would have expanded the scope of Holders' production-cost liability to include proportional allocations for wildcat gas wells drilled anywhere in a 640-acre area, rather than in a mere 160-acre area, and that Holders would have been able to avoid these unforeseen allocations only if they limited their rights to obtain production royalty payments in the future. See § 70-2-17(C). Furthermore, if the Commission increased the spacing requirements, a subsequent pooling order—if granted—would have precluded the owners from drilling deep wildcat gas wells anywhere else on Section 9. See 19 NMAC 15.C.104.B(2)(b) (June 30, 1997).

{25} If Burlington succeeded in pooling Holders' Section 9 property interests, and if Holders intended to enjoy the privileges of development and ensure receipt of full royalties in the future, they would have been compelled to contribute to the drilling costs associated with Burlington's high-risk wildcat well. In fact, as Holders maintain, they would have had to bear a higher percentage of the costs in aggregate than even Burlington would have had to bear. Although Burlington was well aware of these facts, it refused to provide Holders with actual notice of the proceedings on its application for increased spacing. Given that Burlington intended to affect Holders' Section 9 property interests with a subsequent pooling order, under Rule 1207.A(11) Holders were entitled to actual notice of the spacing application. Because neither Burlington nor the Commission provided Holders with actual notice of the proceedings on the spacing application, Holders were denied the reasonable notice that the OGA and its implementing regulations required.

{26} Burlington asserts that Rule 1207.A(11) only applies to "adjudicatory" proceedings and has no application in this case because the proceedings in this case concern a rule

amendment rather than an adjudication. To support the assertion that actual notice was not required for a rule amendment, Burlington and the Commission expend much effort in distinguishing Uhden, 112 N.M. at 530, 817 P.2d at 723, on the ground that the order in that case "was not of general application, but rather pertained to a limited area . . . [and] [t]he persons affected were limited in number." Upon analysis, however, it becomes clear that this distinction is not at all dispositive. It is well established that notice requirements are determined on the basis of "'the character of the action, rather than its label.'" Miles v. Board of County Comm'rs, 1998-NMCA-118, ¶ 9, 125 N.M. 608, 964 P.2d 169 (quoting Harris v. County of Riverside, 904 F.2d 497, 501-02 (9th Cir. 1990)), cert denied, No. 25,292 (1998). As one commentator explains:

> [N]o test can draw anything like a mathematical line between rulemaking and adjudication. . . . [A]n adjudication may be based upon a new rule of law that is announced for the first time by the deciding tribunal. Conversely, a rule may have an effect on particular rights comparable to a decision in an adjudicatory proceeding involving the given parties.

Schwartz, supra, § 4.15, at 190 (footnote omitted); accord 2 Am. Jur. 2d Administrative Law § 155, at 176 (1994); 4 Jacob A. Stein et al., Administrative Law § 33.01[1], at 33-3 n.2 (1998); cf. Uhden, 112 N.M. at 532-33, 817 P.2d at 725-26 (Montgomery, J., dissenting) (asserting that "the notoriously slippery distinction between rulemaking and adjudication is not particularly helpful in this case"). On the facts presented here, we cannot conclude that the Commission's order is accurately characterized as simply a rule amendment as it applies to Holders. Moreover, neither the "reasonable notice" requirement in Section 70-2-23 of the OGA nor the notice requirements in Rule 1207.A are expressly limited to adjudications.

{27} In High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, ___

N.M. ___, 970 P.2d 599, we observed the following rules of statutory interpretation:

> The first rule is that the "plain language of a statute is the primary indicator of legislative intent." General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). Courts are to "give the words used in the statute their ordinary meaning unless the legislature indicates a different intent." State ex rel. Klineline v. Blackhurst, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). The court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." [Burroughs v. Board of County Comm'rs, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975)].

These canons of statutory construction apply to regulatory and rule interpretation as well. See Wineman, 113 N.M. at 185, 824 P.2d at 325.

{28} The language of Section 70-2-23 of the OGA plainly states that, except for emergencies, the requirement of "reasonable notice" applies to hearings regarding "any rule, regulation or order, including revocation, change, renewal or extension thereof." In addition, Rule 1207.A expressly provides that "[e]ach applicant for hearing before the Division or Commission shall give additional notice as set forth below." The rule makes no mention of "adjudication" or "rulemaking," or other words of similar import. The plain language of Rule 1207.A(11) applies to "cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities." The only limitations on the phrase "cases of applications" are the modifying phrases "not listed above" and "the outcome of which may affect a property interest of other individuals or entities." Because an application for increased spacing requirements is not listed earlier in the rule, and because the spacing order in this case clearly would affect Holders' Section 9 property interests, this case is governed by the plain language of Rule 1207.A(11).

{29} After careful review of the administrative record, we are not convinced that Burlington or the Commission have substantially complied with the "reasonable notice"

requirements of the OGA or the specific notice requirements of Rule 1207.A(11) in this case. See 19 NMAC 15.N.1207.C ("At each hearing, the applicant shall cause to be made a record . . . that the notice provisions of this Rule 1207 have been complied with . . . ."). Our conclusion that substantial compliance is lacking makes it unnecessary for us to reach the issue whether strict compliance is required in this instance. Cf. Green Valley Mobile Home Park v. Mulvaney, 1996-NMSC-037, ¶¶ 10-11, 121 N.M. 817, 918 P.2d 1317 (discussing circumstances in which strict compliance with mandatory notice provisions of a statute is required).

{30} The record shows that (1) Burlington had actual knowledge of Holders' interests in Section 9, (2) Burlington targeted Holders' interests long before it applied for increased well-spacing requirements, (3) Burlington intended to affect Holders' interests with a subsequent pooling order, (4) Burlington had actual knowledge of Holders' identities and whereabouts, and (5) Burlington had regular contacts with Holders. Under these circumstances, neither Burlington nor the Commission have shown that sending actual notice to Holders would have been more difficult than sending actual notice to the other persons with potentially affected property interests whom the company chose to notify in this case. Indeed, Burlington's prior dealings with Holders would appear to have made it easier to notify Holders than to notify others. Because Holders were not provided with actual notice under these circumstances, we conclude that Burlington and the Commission did not comply with the notice requirements of the OGA and its implementing regulations, and this failure to comply renders the Commission's order void with respect to Holders. Thus, we need not reach the issue whether the Commission's order should be voided on other grounds.

III.

{31} Because Burlington and the Commission did not comply with the notice requirements of the OGA and its implementing regulations, we conclude that the

Commission's Order No. R-10815 concerning the spacing requirements for deep wildcat gas wells in the San Juan Basin is void with respect to Holders. Accordingly, we affirm the district court's final judgment in this matter.

{32} **IT IS SO ORDERED.**

PAMELA B. MINZNER, Chief Justice

WE CONCUR:

JOSEPH F. BACA, Justice

GENE E. FRANCHINI, Justice

PATRICIO M. SERNA, Justice

BAR BULLETIN

Official Publication of the State Bar of New Mexico

What's Inside

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Law Day Activities?

Send information on your group's Law Day activities to: Editor, Bar Bulletin, P.O. Box 25883, Albuquerque, NM 87125

NOTICES

N.M. Supreme Court

Proposed Amendment of the Rules of Criminal Procedure for the District Courts

The Supreme Court is considering the proposed amendment of Rule Criminal Form 9-212 NMRA. Send written comments by April 16 to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

For your reference: The full text of the proposed amendments was published in the March 25 (Vol. 38, No. 12, p. 23) *Bar Bulletin.*

Proposed New District Court Civil and District Court Criminal Rules

The Supreme Court is considering proposed new District Court Civil and District Court Criminal rules governing public access to court records. Send written comments by April 16 to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

For your reference: The full text of the proposed amendments was published in the March 25 (Vol. 38, No. 12, pp. 23-24) *Bar Bulletin.*

Volume 125 NM Reports Available

Volume 125 of the New Mexico Reports is now available for purchase from the New Mexico Compilation Commission. The total price is $63 ($60

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Board Highlights

Following are "highlights" from the March 26 Board of Bar Commissioners meeting. The "official" meeting minutes will be printed in the *Bar Bulletin* once approved by the Board.

- The following new membership services were approved: discount office supply products through "Association Members Only;" discounts for DHL overnight delivery provider; and a revised health insurance program for members.
- The board appointed an ad hoc committee to review the structure of the Client Protection Fund; approved the appointment of a committee to develop recommendations and procedures for responding to judicial criticism; and approved the appointment of a committee to review the ABA's proposed revisions to the Rules of Professional Conduct.
- The board approved section bylaws amendment to allow State Bar sections to hold annual meetings at a time other than at the bar's annual convention.

More highlights on page 4

Official Publication
of the
State Bar of New Mexico

Contributions and announcements to the *Bar Bulletin* are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. *Editorial Policy available upon request.*

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plus 5 percent for governmental gross receipts tax). To order, send payment to the New Mexico Compilation Commission, P.O. Box 15549, Santa Fe, NM 87506-5549.

First Judicial District

Notice of Closure

The First Judicial District Court Clerk's Office will close from 1 to 5 p.m., April 13 through 15 so that court staff may attend the District Court Employee Conference.

Family Law Lunch Meeting

The First Judicial District's April Family Law brown bag lunch meeting will be at noon, April 14 in the Judicial Conference Room. Therapists from agencies in Santa Fe, Los Alamos and Española are returning to continue discussing with family law attorneys and court personnel issues of mutual interest. In addition, Judge Jim Hall will discuss representation of individuals facing contempt sanctions, and a brief status report will be made regarding the Pro Se Challenge project. Family law practitioners are urged to attend.

Pro Se Challenge Project

The First Judicial District's March Family Law Pro Se Challenge meeting will be at noon, April 20 in the Judicial Conference Room. This will be a "Wrap Up For Now" meeting for this phase of the Pro Se Challenge project. The next meeting will be in July.

Third Judicial District

Security Manual

The Third Judicial District Court has developed a Court Security Manual which will become effective April 15. It is mandatory that the members of the local bar familiarize themselves with the requirements of the manual. A copy will be available through the president of the local bar, or at the clerk's office located at 201 W. Picacho, Suite A, Las Cruces, NM 88005, for review. For more information, contact Consuelo DeLeon at 523-8272.

Fifth Judicial District

Notice of Closure

In order for the employees of the Fifth Judicial District Court of Chaves, Eddy and Lea counties to attend the 1999 District Court Employee Conference in Albuquerque, the district court clerks' offices in Roswell, Carlsbad and Lovington will observe the following work schedule:

April 6 through 15:
8 a.m. to noon
April 16:
8 a.m. to noon and 1 to 5 p.m.

Eighth Judicial District

Differential Case Management System

Beginning May 3, all civil cases filed in the Eighth Judicial District will be subject to a Differential Case Management System approved by the Supreme Court as a pilot project. Attorneys and self represented parties will be required to file a civil case information sheet with the complaint and answer; a notice of track assignment (expedited, standard or complex) will be generated by the court and mailed, together with a notice of scheduling conference; the parties will then be required to confer and submit a Scheduling Report prior to a scheduling conference. Deadlines controlling the progress of the case will be set at the scheduling conference.

Packets containing Supreme Court Order 99-8200, approving local rules LR8-401 to LR8-405 and forms 1 to 7 are available at the court clerks' offices in Taos, Raton and Clayton. For more information, contact Vivian Trujillo, 758-3173, ext. 218.

Bernalillo County Metropolitan Court

Monthly Judges Meeting

The Bernalillo County Metropolitan Court judges will conduct their monthly judges' meeting April 13 at noon, in courtroom 503 of the Metropolitan Court Building, 401 Roma NW in Albuquerque. This meeting is open to the public.

Pursuant to the Americans with Disabilities Act, the court will make reasonable accommodations for persons with a disability. Should accommodations be needed, contact the Court Administrator's Office at 841-8106.

Board Governing the Recording of Judicial Proceedings

Results of March Exam

The following individuals successfully completed the March 20 New Mexico Certified Court Reporters Examination and have received full certification.

Name	CCR#
Marie L. Encinias	121
Catherine L. McDonald	211

continued on next page

Professionalism Tips from the State Bar

With respect to my clients:

I will endeavor to achieve my client's lawful objectives in business transactions, in litigation and in all other matters, as expeditiously and economically as possible.

A Lawyer's Creed of Professionalism

LAWYERS ASSISTANCE COMMITTEE
Evening Meeting

The Lawyers' Support Group will meet at 5:30 p.m., April 15 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the third Thursday and on the first Monday of the month.

For more information, contact Bill Stratvert at 242-6845.

U.N.M. SCHOOL OF LAW
Distinguished Achievement Award

The University of New Mexico Alumni/ae Association seeks nominations for its Distinguished Achievement Award to be presented on Nov. 13. The guidelines are as follows:

1. UNM School of Law graduate or substantial connection or contribution (professor, adjunct professor, etc.) to the law school;
2. Distinguished career, legal or otherwise (i.e. private practice, government practice, judiciary, business, etc.);
3. Well known and respected in New Mexico and possibly elsewhere;
4. Many years dedicated to a legal or other career; and
5. Other community involvement (i.e. government service, charitable involvement, etc.).

Nominations from throughout New Mexico are encouraged. Up to three nominees from one source accepted. Background information on nominees and the name of the person making the nomination should be sent by May 15 to: Harvey D. Morse, Director of Development & Alumni/ae Affairs, University of New Mexico School of Law, 1117 Stanford NE, Albuquerque, NM 87131-1431; fax 277-1597.

STATE BAR NEWS

1999 LAW DAY LUNCHEON
Open Reservations

The 1999 Law Day Luncheon will be from 11:45 a.m. to 1:15 p.m., April 30 at the Hyatt Regency Hotel's Sendaro Ballroom, in Albuquerque. Donald A. Perkins will give a performance as Frederick Douglass.

The Albuquerque Bar Association, the New Mexico Women's Bar Association and the Young Lawyers Division of the State Bar of New Mexico cosponsor the luncheon. The cost is $25 per person, of which, $7 will be donated to the Center on Law and Poverty. For more information, or to make reservations, call 842-0287.

BOARD OF BAR COMMISSIONERS
March 26 Board Meeting

Highlights continued from page 1.

- President Rick Kraft reported his plans to appoint a task force to address quality of life issues for attorneys.
- The Young Lawyers Division received two IOLTA grants and two ABA grants for the YLD AIDS Panel and the Homeless Legal Clinic.
- Commissioner David Hernandez was appointed as Board of Bar Commissioner liaison to the Center for Civic Values.
- Sarah (Sally) W. Barlow of Albuquerque and Peggy J. Nelson of Taos were reappointed to the DNA People's Legal Services Board of Directors for two-year terms.
- The Annual Convention Planning Committee reported on plans for the 1999 (Oct. 21-23) convention in Santa Fe, including the introduction of Century of Achievement Awards; a wide range of CLE programs; a fundraiser for the New Mexico State Bar Foundation and Equal Access to Justice; a welcoming reception featuring a focus on multi-cultures, sponsored by the First Judicial District Bar Association; and guest and sporting events.
- The board heard a report that the articles of incorporation have been filed for the State Bar for a new non-

continued on next page

Women in the Justice System

FACTS ABOUT WOMEN AND THE LAW

Editor's Note: The American Bar Association recently released Facts About Women and the Law, *a publication addressing 113 questions about women and the legal system. The State Bar of New Mexico has made the factbook available to the media statewide, in a cooperative effort with the ABA, to continue to provide information and education to the public about the legal system. The* Bar Bulletin *will publish the questions and answers for the information of our members. Following is Question 7.*

QUESTION 7: Do women lawyers earn the pay that men do?

ANSWER: Overall, women lawyers earn less than men. This is partly because women work in less prestigious jobs, and partly because they are sometimes paid less for comparable work.

A recent survey of the Massachusetts Bar Association showed that in 1997 half of the men surveyed but only one-fifth of the women earned more than $75,999; 35 percent of men and 58 percent of women earned less than $50,000, and nearly a quarter of female respondents earned less than $25,000. The survey also showed that on average, the women lawyers billed more hours per week than the men did.

Source: Massachusetts Lawyer Weekly, May 11, 1998, Message of the President of the Women's Bar Association of Massachusetts.

profit corporation to be named the "New Mexico State Bar Foundation."
- The Special Projects, Inc. 1999 budget was approved, which includes individual program budgets for CLE, Lawyers Care, Statewide Lawyer Referral Service, Lawyer Referral for the Elderly Program, YLD public service programs, and the Bar Center.
- A new "Clients Rights and Responsibilities" public legal information pamphlet was reviewed.

Legal Assistants Division
Special Election

A special election will be held to fill the vacancy in the office of chair-elect of the division. Information, including a declaration of candidacy form, has been mailed to all members of record for the special election. Forms are due back by April 15.

Membership Services
Lending Library

The Law Practice Management Committee and the State Bar's Membership Services and Programs Department have announced the availability of legal resources and books through the State Bar's Lending Library.

The Lending Library has been greatly expanded by contributions from the Law Practice Management Committee, the Public Legal Education Committee and the Membership Services Committee.

For a complete library listing, see page 8, visit the State Bar Web site at www.nmbar.org, or call 797-6039.

Public Law Section
1999 Public Lawyer Award

The State Bar of New Mexico Public Law Section will present its fourth annual Public Lawyer Award at 4 p.m., April 30 in the Rotunda of the State Capitol in Santa Fe. Marty Daly, an Assistant New Mexico Attorney General (Civil Div.) is the recipient of the 1999 Public Lawyer Award. All bar members are invited to attend the ceremony.

Real Property, Probate and Trust Section
Opinion Letter Task Force

The Opinion Letter Task Force appointed by the Real Property, Probate and Trust Section has prepared a working draft of a long form opinion letter for use in mortgage loan transactions, together with a working draft of a statement of policy concerning lawyers' opinion letters. These were presented at the Real Property Institute in December and have been published in the current edition of the *Real Property, Probate and Trust Section Newsletter*. Members of the section will receive the newsletter automatically. Others can obtain a copy from the State Bar by contacting Tony Horvat at 797-6033 or (800) 876-6227; fax, 828-3765.

The task force is soliciting comments on the working drafts from any interested parties, such as New Mexico practitioners who have a substantial opinion letter practice. Provide written comments **no later than April 19**, by fax, 247-9109; or by e-mail, cprice@moplaw.com

Solo and Small Firm Practitioners Section
Monthly Meeting

The Solo and Small Firm Practitioners Section will meet at noon, April 20 at the Petroleum Club in Albuquerque. Speaking will be Bill Dixon, who just returned from a professional trip to Cuba and who will address "The Cuban Constitutional System: A Study in Paradox."

Members, guests and any interested member of the bar is welcome. Make reservations in advance with Helen Stirling, 243-7271, and mail a $12 check, payable to "State Bar of New Mexico," c/o Helen Stirling at 1201 Rio Grande Blvd. NW. The luncheon cost at the door is $13.

OTHER BARS

N.M. Criminal Defense Lawyers Association
Advanced Criminal Defense in Border Cases

The New Mexico Criminal Defense Lawyers Association will host "Nuevas Fronteras en Defensa Fronteriza" (Advance Criminal Defense in Border Cases) CLE from 8 a.m. to 5 p.m., May 7 at the Doña Ana Community College, 3400 South Espina, Room 77, Las Cruces. The course offers 6.8 general and 1.4 ethics MCLE credits. For registration information, call 988-8004.

N.M. Women's Bar Association
Mid-State Chapter

The Mid-State Chapter of the New Mexico Women's Bar Association will conduct a networking lunch meeting at noon, April 14 at the Cooperage, 7220 Lomas Blvd. NE, Albuquerque. Suzanne Gutters will give a short presentation on Pilates Body Strengthening Exercises.

Orders will be from the menu, with separate checks provided. Reservations must be made by April 12 by mail to P.O. Box 6972, Albuquerque, NM 87197-6972; or by fax 344-2931.

Coming Up!

APRIL 16

Committee on Women in the Profession, noon, Rodey Law Firm

APRIL 19

Law Practice Management Committee, 3:30 p.m., State Bar Center

APRIL 20

Solo and Small Firm Practitioners Section, noon, Petroleum Club

Changes or cancellations may occur.

Volunteers Needed!

Young Lawyers Division
"Ask-a-Lawyer" Call-in
Saturday, May 1, 1999

In observance of Law Day 1999, the Young Lawyers Division will host a Call-In Program in six cities on Saturday, May 1, and in Roswell on May 8, to provide legal information to the public. This is your opportunity to provide *pro bono* service to the public. You do not have to be a young lawyer to participate in this program. We only ask that you be willing to volunteer your time!

CELEBRATE YOUR FREEDOM

LAW DAY

MAY 1

1999

★

Attorneys in all practice areas, including Spanish-speaking attorneys, are needed to handle calls in all locations.

Legal Assistants are needed for intake in all locations except Albuquerque.

LOCATIONS:

❑ Albuquerque ❑ Morning (9 a.m. to noon) ❑ Afternoon (1:00 to 4:00 p.m.) ❑ Either, depending upon need.

❑ Carlsbad (9 a.m. to noon) ❑ Farmington (9 a.m. to noon) ❑ Las Cruces (9 a.m. to noon)
❑ Lea County (9 a.m. to noon) ❑ Roswell - **May 8** (9 a.m. to noon) ❑ Santa Fe (9 a.m. to noon)

OCCUPATION: ❑ Attorney ❑ Legal Assistant (❑ Spanish-speaking)

Attorneys, please indicate all areas of law for which you can answer callers' questions.

❑ Bankruptcy	❑ Business Law	❑ Civil (General)	❑ Civil Rights
❑ Contracts	❑ Criminal Law	❑ Elder Law	❑ Employment/Labor Law
❑ Estate Planning	❑ Family Law	❑ Insurance Law	❑ Landlord/Tenant
❑ Medical/Medicaid	❑ Personal Injury/Torts	❑ Real Estate	❑ Social Security
❑ Tax Law	❑ Workers' Compensation		

Name: _____

Address: _____

City/State/Zip _____ / _____ / _____

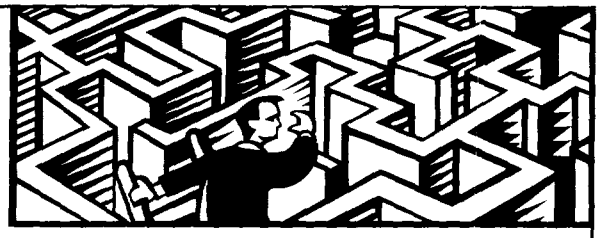
Telephone: _____ Fax: _____

PLEASE RETURN THIS FORM AS SOON AS POSSIBLE TO THE CALL-IN COORDINATOR FOR YOUR SITE.

ALBUQUERQUE: Trent Howell, 6301 Indian School Rd. NE, #800, Albuquerque, 87110; TEL. 883-8181; FAX 883-3232.
CARLSBAD: Steve Shanor, P.O. Box 2168, Carlsbad, 88221-2168; TEL. 887-3528; FAX 887-2136.
FARMINGTON: Paul Briones, 333 E. Main St., Farmington, 87401; TEL. 325-0258; FAX 325-3311.
LAS CRUCES: David Overstreet, P.O. Box 578, Las Cruces, 88004-0578; TEL. 526-6655; FAX 526-6656.
LEA COUNTY: Dianna Luce, Lea County Courthouse, Box 7c, Lovington, 88260; TEL. 396-7616, FAX 396-6313.
ROSWELL: Barbara Patterson Reddy, 400 N. Pennsylvania, #1100, Roswell, 88201; TEL. 622-6221; FAX 624-2883.
SANTA FE: Bryan Biedscheid, P.O. Box 788, Santa Fe, 87504-0788; TEL. 982-1947; FAX 986-1013.

If you have any questions or need further information, contact Trent Howell, YLD Call-In Coordinator, at 883-8181.

Know where to send those calls?



The State Bar offers several programs to help the public with their legal needs. For your convenience, a brief description of what is available is listed below. Please refer to this listing when directing individuals to contact the Bar.

STATEWIDE LAWYER REFERRAL SERVICE

505-797-6010 in Albuquerque;
1-800-876-6227 outside Albuquerque

provides referrals to attorneys throughout New Mexico for both civil and criminal cases. Attorneys charge fees on all cases referred through this service. No pro bono referrals are made. Paralegals screen the callers to determine type of case, jurisdiction, and whether the case has some legal merit.

LAWYER REFERRAL FOR THE ELDERLY

505-797-6005 in Albuquerque;
1-800-876-6657 outside Albuquerque

serves New Mexico residents who are age 55 and older who have civil problems. Services to residents of Bernalillo County are limited to those who are not eligible for assistance at the Senior Citizens' Law Office. Telephone consultations and advice are free. For matters involving more extensive legal assistance, referrals are made to attorneys in private practice. Some referrals are pro bono, and others involve arranging for the payment of attorney fees with the attorney.

AIDS HELPLINE

1-800-982-2021 statewide;
505-982-2021 Santa Fe County

provides advice, counsel and pro bono referrals to attorneys for low income persons diagnosed with HIV/AIDS.

ASK-A-LAWYER CALL-IN PROGRAM

is a twice-a-year call-in program for the public, using volunteer lawyers to provide legal information to callers. The first call-in for 1999 will be held on May 1 and will have call-in centers as follows:

May 1, 1999	Albuquerque (and statewide)	9 a.m. to noon; 1 to 4 p.m.
	Farmington	9 a.m. to noon
	Las Cruces	9 a.m. to noon
	Lea County	9 a.m. to noon
	Santa Fe	9 a.m. to noon
	Carlsbad	9 a.m. to noon
May 8, 1999	Roswell	9 a.m. to noon

Volunteer attorneys answer questions over the telephone on a variety of legal subjects. This program operates ONLY for the dates and times scheduled, and is NOT available year round.

HOMELESS LEGAL CLINIC

505-265-4143 in Albuquerque

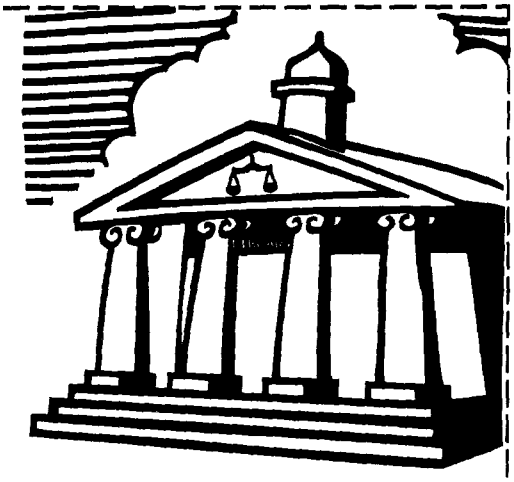
located at the Healthcare for the Homeless location, assists homeless persons on-site and makes pro bono referrals. Operates only on Friday mornings.

LAWYERS CARE

is a pro bono referral program which refers ONLY cases referred by a legal service provider. If a person is a likely Lawyers Care referral, that person should be referred to their local legal service or legal aid office for intake and screening.

LENDING LIBRARY

of the STATE BAR OF NEW MEXICO



The Law Practice Management Committee and the State Bar's Membership Services and Programs Department announce the availability of legal resources and books through the State Bar's Lending Library.

The following books and manuals are available through the Lending Library. Please indicate below which items you are interested in borrowing. Note that a refundable deposit of $10 per item is required prior to the material(s) being mailed to you. The item(s) must be returned to the State Bar within 30 days from the date checked-out.

If you have questions about the Lending Library, or if you would like to donate books or other material, contact the Membership Services and Programs Department by e-mail at lking@nmbar.org or by phone, 505-797-6000.

Please Print or Type the Following

Member Name _____ Bar ID No. _____

Phone _____ E-mail Address _____

Mailing Address _____

City, State, Zip Code _____

The following books/manuals are available on a first-come/first-served basis:

- ❑ New Mexico Trial Lawyers Association, Litigation Series, Volume 1: Complaints, General Practice Forms
- ❑ New Mexico Trial Lawyers Association, Litigation Series, Volume 2: Pleading and Practice Forms, Office Forms, Workers Compensation, Limitation and Notice Periods
- ❑ Flying Solo: A Survival Guide for the Solo Lawyer, 2nd Edition
- ❑ Getting Started: Basics for a Successful Law Firm
- ❑ Practicing Law Without Clients: Making a Living as a Freelance Lawyer
- ❑ Promoting the Adoption of Children: What Lawyers Can Do
- ❑ Thinking Person's Guide to Sobriety
- ❑ Teaching and Learning Professionalism
- ❑ How to Draft Bills Clients Rush to Pay
- ❑ How to Start and Build a Law Practice
- ❑ The Lawyers Guide to Legal Malpractice
- ❑ Running a Law Practice on a Shoestring
- ❑ The Lawyer's Guide to the Internet
- ❑ ABA - One Client at a Time - Video
- ❑ How to Manage Your Trust Account Using Quicken - Video
- ❑ Lawyers' Trust Accounts: Common Pitfalls and How to Avoid Them - Video
- ❑ 101 Practical Solutions for the Family Lawyer
- ❑ Legal Writing Style
- ❑ How to Get and Keep Good Clients
- ❑ Connecting With Your Client
- ❑ Selecting Legal Malpractice Insurance

SEND THIS COMPLETED FORM, ALONG WITH YOUR CHECK FOR THE DEPOSIT TO:
State Bar of New Mexico Membership Services & Programs, P.O. Box 25883 Albuquerque, NM 87125.
A check in the amount of $_____ ($10 per item) is included. This check will be returned upon SBNM's receipt of the item(s) in good condition and no later than 60 days from the date of the loan.

Signature _____ Today's Date _____

LEGAL EDUCATION

APRIL

16 - **Family Mediation Training**
18& UNM School of Law
23 - Sponsor(s): UNM School of Law
25 MCLE: 28 General & 2.0 Ethics
Information: (505) 277-5265

16 **Using Psychological Evaluations in Civil and Criminal Cases**
Albuquerque
Sponsor(s): SunRoads Seminars
MCLE: 4.1 General & 1.0 Ethics
Information: (505) 623-1943

23 **Poverty Law Training**
State Bar Center - Albuquerque
Sponsor(s): Continuing Legal Education of the State Bar of New Mexico, the Center for Law & Poverty and Lawyers Care
MCLE: 6.4 General & 1.0 Ethics
Information: (505) 797-6020

23 **Update on Criminal Law**
State Bar Center - Albuquerque
Sponsor(s): Continuing Legal Education, Criminal Law and Prosecutors Sections of the State Bar of New Mexico
MCLE: 6.9 General & 0.6 Ethics
Information: (505) 797-6020

24 **Legal Research on the Internet**
UNM Dane-Smith - Albuquerque
Sponsor(s): Continuing Legal Education of the State Bar of New Mexico and the UNM Law Library
MCLE: 4.0 General & 0.5 Ethics
Information: (505) 797-6020

26& **International Resources Law**
27 **and Projects**
Santa Fe
Sponsor(s): Rocky Mountain Mineral Law Foundation
MCLE: 13.8 General
Information: (303) 321-8100

30 **Current Developments in NM Water Utility Law, Regulation & Management**
State Bar Center - Albuquerque
Sponsor(s): Continuing Legal Education, Natural Resources, Energy & Environmental Law Section of the State Bar of New Mexico
MCLE: 6.1 General & 1.0 Ethics
Information: (505) 797-6020

30 **The 18th Annual Update on New Mexico Tort Law**
Sheraton Old Town - Albuquerque
Sponsor(s): NM Trial Lawyers' Foundation
MCLE: 8.1 General
Information: (505) 243-6003

30 **Children in High Conflict Divorcing Families: Developmental Issues & Family Court Interventions**
St. John's College - Santa Fe
Sponsor(s): N.M. Judicial Education Center
MCLE: 8.5 General
Information: (505) 277-5037

MAY

7 **1999 Probate, Estate Planning and Taxation Institute**
State Bar Center - Albuquerque
Sponsor(s): Continuing Legal Education, the Real Property, Probate and Trust Section and Taxation Sections of the State Bar of New Mexico
MCLE: 7.2 General & 0.6 Ethics
Information: (505) 797-6020

7 **Using Psychological Evaluations in Civil and Criminal Cases**
Las Cruces
Sponsor(s): SunRoads Seminars
MCLE: 4.1 General & 1.0 Ethics
Information: (505) 623-1943

11 **NM Sales and Use Tax for Manufactures**
Albuquerque
Sponsor(s): National Business Institute
MCLE: 8.0 General
Information: (715) 835-8525

13 - **Advanced Mediation Skills**
14 **for Workplace Disputes**
State Bar Center - Albuquerque
Sponsor(s): UNM School of Law/CLE
MCLE: 13.0 General
Information: (505) 277-5265

19 **How to Successfully Make and Manage Objections at Trial in NM**
Albuquerque
Sponsor(s): National Business Institute
MCLE: 3.5 General
Information: (715) 835-8525

20& **Natural Resources Development**
21 **and Environmental Regulation in Indian Country**
Denver, CO
Sponsor(s): Rocky Mountain Mineral Law Foundation
MCLE: 13.6 General & 1.0 Ethics
Information: (303) 321-8100

21 **School of Law Issues in NM**
Albuquerque
Sponsor(s): National Business Institute
MCLE: 6.7 General & 0.5 Ethics
Information: (715) 835-8525

21 **Expert Witnesses**
Holiday Inn Mountain View - Albuquerque
Sponsor(s): NM Trial Lawyers' Foundation
MCLE: 7.5 General
Information: (505) 243-6003

25 **5th Annual Entity Selection and Operation in NM**
Albuquerque
Sponsor(s): National Business Institute
MCLE: 8.0 General
Information: (715) 835-8525

26 **Taking Effective Depositions**
Albuquerque
Sponsor(s): Lorman Business Center
MCLE: 6.0 General & 1.2 Ethics
Information: (715) 833-3940

JUNE

1 **What About Ethics?**
Albuquerque Petroleum Club
Sponsor(s): Albuquerque Bar Association
MCLE: 3.0 General
Information: (505) 243-2615

2 **Advanced Principles of Title Insurance in NM**
Albuquerque
Sponsor(s): National Business Institute
MCLE: 6.2 General & 1.0 Ethics
Information: (715) 835-8525

11 **Workers' Compensation in NM**
Albuquerque
Sponsor(s): National Business Institute
MCLE: 6.2 General & 1.0 Ethics
Information: (715) 835-8525

NOTICES

WRITS OF CERTIORARI
AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT
EFFECTIVE APRIL 5, 1999

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

No. 25,682 State v. Evans (COA 20,051) 4/1/99
No. 25,679 State v. Miranda (COA 19,842) 3/29/99
No. 25,677 State v. Acevedo (COA 20,117) 3/29/99
No. 25,676 State v. Sanchez (COA 20,044) 3/29/99
No. 25,670 Amato v. Alcantar (COA 17,451/19,261) 3/25/99
No. 25,673 Christmas v. Northern N.M. Gas Co. (COA 18,835) 3/24/99
No. 25,672 Jacob v. Spurlin (COA 19,501) 3/23/99
No. 25,671 Ramah Navajo Sch. Bd. v. Tax. & Rev.Dept. (COA 18,909) 3/23/99
No. 25,667 Ramah Navajo Sch. Bd. v. Tax. & Rev.Dept. (COA 18,909) 3/23/99
No. 25,666 Griego v. Menapace (COA 19,973) 3/22/99
No. 25,665 Kelsey-Wood v. Pittman (COA 20,088) 3/22/99
No. 25,589 Elliott v. Birdsall (12-501) 3/19/99
No. 25,661 State v. Bonilla (COA 19,030) 3/19/99
No. 25,658 State v. Mackey (COA 20,037) 3/18/99
No. 25,657 State v. Romero (COA 19,876) 3/17/99
No. 25,656 State v. Torres (COA 20,012) 3/17/99
No. 25,653 State v. Self (COA 20,046) 3/16/99
No. 25,652 State v. Padilla (COA 19,998) 3/16/99
No. 25,650 Flores v. LeMaster (12-501) 3/15/99
No. 25,649 State v. Wilson (COA 19,975) 3/15/99
No. 25,648 Mangano v. 4th St. Revitalization (COA 19,807) 3/15/99
No. 25,645 State v. Lopez (COA 19,899) 3/15/99
No. 25,641 State v. Baca (COA 19,887) 3/11/99
No. 25,640 State v. Blackmon (COA 19,881) 3/10/99
No. 25,618 Tercero v. Roman Catholic Diocese (COA 18,717) 2/26/99
No. 25,128 State v. Moreno (COA 18,097) 4/23/98 *time to consider petition extended to 4/16/99*

CERTIORARI GRANTED AND UNDER ADVISEMENT:

No. 22,283 Martinez vs. City of Las Vegas (COA 14,647) 8/26/94 (Proceedings stayed on 11/14/94)
No. 24,257 City of Albuquerque v. Chavez (COA 16,646) 5/2/97
No. 24,362 State v. Rodriguez (COA 17,106) 6/26/97
No. 24,480 State v. Brule (COA 17,412) 7/28/97
No. 24,424 State v. Holup (COA 18,148) 7/28/97
No. 24,447 State v. Najera (COA 18,111) 7/28/97
No. 24,492 State v. Matter of Paul T. (COA 17,296) 8/6/97
No. 24,682 State v. Skinner (COA 18,493) 10/10/97
No. 24,721 State v. Pena-Martel (COA 17,676) 11/7/97
No. 24,791 Galbadon v. Erisa Mortgage Co. (COA 17,038) 11/21/97
No. 24,788 Gabaldon v. Erisa Mortgage Co. (COA 17,038) 12/2/97
No. 24,912 Morgan v. Wal-Mart Stores (COA 18,358) 2/3/98
No. 24,790 Hasse Contracting v. KBK Financial (COA 17,745) 2/25/98
No. 24,988 Kennedy v. Dexter Consol. Sch. (COA 17,710) 4/2/98
No. 25,126 State v. Montoya (COA 18,598) 5/22/98
No. 25,207 Meiboom v. Watson (COA 18,021) 7/7/98
No. 25,218 Madsen v. Scott (COA 17,211) 7/7/98
No. 25,287 Maxwell v. State (12-501) 8/6/98
No. 25,293 Diversey Corp. v. Chemsource Corp. (COA 17,671) 8/19/97
No. 25,327 State v. Kirby (COA 19,257) 9/11/98
No. 25,316 State v. Powers (COA 17,751/17,963) 9/11/98
No. 25,328 State v. Trujillo (COA 18,622) 9/15/98
No. 25,394 Nicosia v. Lash (COA 18,495) 10/28/98
No. 25,554 Chisholm v. Chisholm (COA 18,510) 2/5/99
No. 25,562 Key v. Chrysler Motors Corp. (COA 18,633) 2/12/99
No. 25,590 Yazzie v. Bitsie (COA 19,447) 3/2/99
No. 25,577 State v. Mascarenas (COA 18,871) 3/4/99

PETITIONS FOR WRIT OF CERTIORARI DENIED:

No. 25,642 Reyes v. Williams (12-501) 3/16/99
No. 25,603 State v. Coburn (COA 19,822) 3/16/99
No. 25,602 State v. Jeff M. (COA 19,223) 3/16/99
No. 25,601 State v. Aguilar (COA 18,880/18,911) 3/16/99
No. 25,628 Wrighter v. State Police (12-501) 3/17/99
No. 25,606 Perea v. Dept. of Health (COA 19,218) 3/23/99
No. 25,644 Faulconer v. Williams (12-501) 3/18/99
No. 25,614 State v. Esparza (COA 18,881) 3/18/99
No. 25,613 City of Lovington v. Franco (COA 19,858) 3/18/99
No. 25,612 State v. Romo (COA 19,905) 3/18/99
No. 25,605 State v. Martinez (COA 19,861) 3/18/99
No. 25,535 Peterson v. Parke (12-501) 3/23/99
No. 25,622 Casias v. Dairyland, Ins. Co. (COA 18,809) 3/24/99
No. 25,651 Cooper v. Smith (12-501) 3/30/99
No. 25,633 State v. Phillips (COA 19,691) 3/30/99
No. 25,632 State v. Otero (COA 19,370) 3/30/99
No. 25,600 Chavez v. Giorgi (COA 19,601) 3/30/99
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ADVANCE OPINIONS

FROM THE NEW MEXICO SUPREME COURT & COURT OF APPEALS

Certiorari Not Applied For

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FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 1999-NMCA-042
STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
RAUL URIAS,
Defendant-Appellant.
No. 18,768 (filed January 25, 1999)
APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
GARY L. CLINGMAN, District Judge

TOM UDALL
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ANN M. HARVEY
Assistant Attorney General
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for Appellee

BRUCE A. LARSEN
Hobbs, New Mexico
for Appellant

OPINION
RUDY S. APODACA
Judge

{1} Defendant appeals the trial court's judgment and sentence entered after his jury conviction for trafficking cocaine, a controlled substance. *See* NMSA 1978, § 30-31-20 (1990). He contends that the trial court erred by excluding testimony of an attorney concerning statements made by a co-defendant that exculpated Defendant. We disagree and hold that the exclusion of such testimony was not error because corroborating circumstances did not exist to show the trustworthiness of the statements. We therefore affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Before his jury trial, Defendant made an offer of proof in support of the proposed testimony concerning the co-defendant's statements. Defendant argued that the testimony was admissible under Rule 11-804 NMRA 1998 (providing hearsay exceptions where the declarant is unavailable). He reasoned that the co-defendant was unavailable and his statements subjected him to criminal liability. *See* Rule 11-804(A), (B)(3). Defendant also argued that attempts to subpoena the co-defendant were unsuccessful. Additionally, there was a bench warrant for the co-defendant because of his failure to appear in another proceeding.

{3} The attorney was sworn as a witness and testified that he formerly represented Defendant in the case resulting in this appeal. He stated that Defendant and the co-defendant came to his office together. The co-defendant visited the attorney concerning representation because he was considering firing his own counsel. The attorney stated that he began to explain possible conflict-of-interest problems in representing the two defendants for the charges pending against them. He testified that he warned the co-defendant that any statements made by him could lead to his conviction in connection with pending charges. The attorney said that the co-defendant claimed he was aware of his actions, was solely responsible for them, and wanted to come forward because Defendant was not involved in the cocaine transaction.

{4} The attorney did not believe that the attorney-client privilege protected the co-defendant's statements because the co-defendant stated that he would cooperate to absolve Defendant. Additionally, the attorney believed that the privilege ran solely to his client. The trial court, however, disagreed. The court also held that sufficient evidence did not corroborate the trustworthiness of the co-defendant's statement because the only corroborating evidence would be Defendant's confirmation. Consequently, the trial court ruled that the statements made by the co-defendant to the attorney were inadmissible.

II. DISCUSSION

A. Standard of Review

{5} In claiming reversible error, Defendant must show not only that the trial court abused its discretion in excluding the attorney's testimony but also that the error prejudiced Defendant. *See State v. Jett*, 111 N.M. 309, 312, 805 P.2d 78, 81 (1991) ("An evidentiary ruling within the discretion of the court will constitute reversible error only upon a

showing of an abuse of discretion and a demonstration that the error was prejudicial rather than harmless." (citations omitted)).

B. The Co-Defendant's Statements to the Attorney

{6} Defendant argues that the attorney's testimony concerning the co-defendant's statements was admissible under Rule 11-804(A), (B)(3). Under this rule, inculpatory declarations against interest are admissible if:

> (1) the declarant is unavailable as a witness; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true; (3) corroborating circumstances indicate the trustworthiness of the statement.

State v. Huerta, 104 N.M. 340, 342, 721 P.2d 408, 410 (Ct. App. 1986). At issue in this appeal is whether corroborating circumstances indicated the trustworthiness of the co-defendant's statements. The purpose of the corroboration requirement is to circumvent fabrication. *See State v. Anaya*, 89 N.M. 302, 304, 551 P.2d 992, 994 (Ct. App. 1976).

{7} Construction of Fed. R. Evid. 804(b)(3), which is nearly identical to Rule 11-804(B)(3), guides our analysis. *See State v. Gutierrez*, 119 N.M. 658, 660-61, 894 P.2d 1014, 1016-17 (Ct. App. 1995) (considering interpretation of Federal Rule of Evidence 804(b)(3) in applying New Mexico's hearsay exception for statements contrary to penal interest). To assess the corroborating circumstances of a statement, we evaluate:

> (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant with the accused, and (6) the nature and strength of independent evidence relevant to the conduct in question.

United States v. Lowe, 65 F.3d 1137, 1146 (4th Cir. 1995) (quoting *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)).

{8} Defendant asserts that the co-defendant's statements were tantamount to a voluntary confession made without threat or coercion in the presence of Defendant. We agree with the State, however, that Defendant's presence did not provide corroborating circumstances of trustworthiness. The co-defendant was also charged with trafficking cocaine in connection with the sale forming the basis for the charge against Defendant. Although the co-defendant's statement could have exposed him to prosecution, he fled the State's jurisdiction. *See United States v. Rhodes*, 713 F.2d 463, 473 (9th Cir. 1983) (considering declarant's unavailability due to invocation of right against self-incrimination under U.S. Const. amend. V in evaluating corroborating circumstances of trustworthiness). Fleeing the State's jurisdiction not only reduced the co-defendant's risk of prosecution but also eliminated the check of cross-examination. *See Lowe*, 65 F.3d at 1146 (considering lack of cross-examination in assessing the corroborating circumstances of a statement).

{9} According to the attorney, no threats were made against the co-defendant and he confessed because he claimed Defendant was innocent. There was no evidence adduced, however, that the attorney investigated the co-defendant's claim of sole responsibility or that he inquired if coercion or other reasons motivated the co-defendant to shield Defendant. *See id.* (implying that declarant had a motive to lie because he and defendant were members of same union). Evidently, the co-defendant only made this statement at the meeting with the attorney. *But see United States v. Brainard*, 690 F.2d 1117, 1125 (4th Cir. 1982) (holding that corroborating circumstances existed where declarant made the statements on a number of occasions).

{10} Additionally, the co-defendant made the statement to the attorney for the benefit of a co-conspirator. *See Rhodes*, 713 F.2d at 473 (holding that corroborating circumstances did not clearly indicate the trustworthiness of a statement made to an attorney for the benefit of a co-conspirator). As a result, the co-defendant had knowledge that his statement would likely be used on Defendant's behalf. *But see Brainard*, 690 F.2d at 1125 (holding that corroborating circumstances existed where declarant had no knowledge that his statements would be used to benefit defendants). The relationship between the co-defendant and Defendant as co-conspirators also detracted from the statement's reliability. *See Rhodes*, 713 F.2d at 473 (considering conspiratorial relationship between declarant and defendant in assessing corroborating circumstances).

{11} Finally, independent evidence contradicted the co-defendant's statement. *See Lowe*, 65 F.3d at 1146 ("When assessing the corroborating circumstances of a statement, a court can make an assessment of the evidence."). At trial, Agent Olguin testified that he met Defendant while making an undercover purchase of cocaine. According to Agent Olguin, Defendant was present during the transaction and discussed the quality of the cocaine with the agent. This testimony directly contradicted the co-defendant's exculpatory statements concerning Defendant.

{12} Defendant also argues that the attorney-client privilege does not preclude the testimony. Because of our holding that the testimony was inadmissible under Rule 11-804(A), (B)(3), however, we need not reach this issue.

III. CONCLUSION

{13} We conclude that corroborating circumstances did not indicate the trustworthiness of the statements. The trial court thus did not abuse its discretion in excluding the attorney's testimony concerning the co-defendant's statements. We therefore affirm the trial court's judgment and sentence.

{14} IT IS SO ORDERED.

RUDY S. APODACA, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
M. CHRISTINA ARMIJO, Judge

Certiorari Not Applied For

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FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 1999-NMCA-043

CHARLES HART,
Petitioner-Appellee,

versus

CITY OF ALBUQUERQUE, a New Mexico Municipal Corporation,
Respondent-Appellant.

No. 19,026 (filed January 21, 1999)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
W. DANIEL SCHNEIDER, District Judge

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for Appellee

ROBERT M. WHITE
City Attorney
DAVID SUFFLING
Assistant City Attorney
Albuquerque, New Mexico
for Appellant

OPINION
JAMES J. WECHSLER
Judge

{1} The City of Albuquerque (City) appeals the decision of the district court ordering the City Council to grant Mark Yancey's[1] requested zoning change from residential to commercial and finding that the City Council's decision is not supported by substantial evidence. The City contends that the district court exceeded its scope of review for a zoning appeal and that substantial evidence supports the City Council's decision. We reverse.

FACTS

{2} This case involves three vacant lots located on the northwest corner of Candelaria Road NE and Arno Street NE in the City of Albuquerque. The City annexed the lots in 1967 and zoned them single family residential (R-1). Some of the land surrounding the lots is outside City limits and zoned by Bernalillo County, and some of the land is within City limits. The general area contains mixed-use zoning—manufacturing, commercial, and residential. The lot immediately to the north is within City limits. It is zoned residential and contains a single-family home. On both sides of Arno Street farther to the north is land outside City limits and zoned commercial, but which contains some single-family residences. The land directly to the east is also outside City limits and is zoned for manufacturing. Directly to the south, within city limits and across Candelaria Road, lies the Stronghurst Addition, which consists entirely of single-family residential homes.

{3} In October 1995, Yancey filed an application for zone map amendment with the Albuquerque City Planning Department requesting that the zoning of the lots be changed from R-1 to general commercial (C-2). The Environmental Planning Commission (EPC) held a public hearing on December 21, 1995 at which Bessie Romero, owner of the single-family residence on the R-1 lot immediately to the north of the lots, spoke in opposition of the proposed change. Walter Gelb, assistant planner with the City Planning Department, prepared a staff report for the hearing which recommended against the proposed change because it was contrary to City Resolution 270-1980. Resolution 270-1980 allows for zoning changes only if the applicant demonstrates an error in the zone map or changed conditions, or that the proposed zone is more advantageous to the community. *See* Resolution 270-1980, Albuquerque, N.M. Code of Ordinances, § 1-1-2 (1994). The EPC essentially denied the proposed change, voting to "indefinitely defer [the requested] zone map amendment from R-1 to C-2 in order to allow the applicant the opportunity to pursue uses which would be more compatible with the adjacent uses."

{4} On March 21, 1996 the EPC held a second hearing on the proposed zone map amendment. The EPC voted to deny the proposed zone map amendment and made findings that the proposed change did not meet the requirements of Resolution 270-1980, had "no substantial community benefit[,] could negatively affect the abutting residential neighborhood, [and] would create a spot zone of the remaining R-1 [lot]."

{5} Yancey appealed this decision to the City Council's Land Use, Planning and Zoning Committee (LUPZC) which held a public hearing on May 29, 1996. The LUPZC heard testimony from Yancey's counsel supporting the change. Gelb spoke on behalf of the City Planning Department, stating that the proposed zone map amendment did not meet the requirements of Resolution 270-1980. Romero and her husband spoke against the proposed change. The EPC representative, Jane Brown, explained that the EPC found that the proposed change failed to comply with the requirements of Resolution 270-1980. The LUPZC upheld the EPC's decision and voted that the appeal should not be heard by the full City Council. The LUPZC adopted findings that the

[1] During pendency of this appeal, Yancey conveyed the lots to Charles Hart, who is substituted as Appellee.

proposed change did not meet the requirements of Resolution 270-1980 and that some of the uses of the proposed change "would be harmful to adjacent R-1 property." On June 3, 1996, the City Council upheld the denial of the zone map amendment, adopting the recommendation of the LUPZC.

{6} Yancey appealed the denial of the zone map amendment to the district court. The district court determined that the City Council's decision to deny the zoning change was not supported by substantial evidence and was contrary to law. The district court also made findings that Yancey had met his burden and presented sufficient evidence to support the zone map amendment. Upon its review, the district court reversed and remanded the City Council's denial of Yancey's requested zone change.

{7} The LUPZC heard the matter again on March 12, 1997 and voted to hear new evidence to determine whether the zoning change should be granted. Yancey then returned to the district court and obtained a writ of mandamus. This writ precluded the City Council from taking additional evidence or testimony and from conducting a de novo review. The writ also stated that Yancey had presented substantial evidence to support a zoning change and ordered the City Council to determine a "new zoning category" for the lots based "on the evidence contained in the original record."

{8} On May 5, 1997, the full City Council heard the matter and voted to deny Yancey's requested zone map amendment. The City Council found that the proposed "zone change is not supported" by Resolution 270-1980, that some permissive uses of C-2 zoning would be harmful to adjacent property, and that it would consider a change other than C-2. Yancey again appealed the City Council's decision to the district court. On October 22, 1997, the district court found that Yancey "met his burden, as a matter of law, under City of Albuquerque Resolution 270-1980 by presenting sufficient evidence to support the requested zone map amendment." The court also found that the City Council's denial was not supported by substantial evidence and was contrary to law. It ordered: "The decision of the Albuquerque City Council denying [Yancey's] requested zone change be *reversed* [and] [t]he City of Albuquerque is hereby directed to grant [Yancey's] requested zone change from R-1 to C-2 immediately, without additional hearing or evidence." The City appeals the district court's October 22, 1997 order.

The Scope of the District Court's Review

{9} A district court conducts a whole-record review to determine if the municipality acted fraudulently, arbitrarily, or capriciously by determining if the municipality's decision was supported by substantial evidence, was outside the scope of the agency's authority, or was contrary to law. *See* NMSA 1978, § 3-21-9 (1965);[2] Rule 1-074(Q) NMRA 1999. The court examines all evidence, both favorable and unfavorable, to determine if the municipality's decision is supported by substantial evidence. *See Huning Castle Neighborhood Ass'n v. City of Albuquerque*, 1998-NMCA-123, ¶ 8, 125 N.M. 631, 964 P.2d 192. If a district court concludes that the municipality acted fraudulently, arbitrarily, or capriciously, it is required to reverse the municipality's decision. *See id.* The district court does not determine if the opposite result is supported by substantial evidence because it may not substitute its judgment for that of the administrative body. *See Siesta Hills Neighborhood Ass'n v. City of Albuquerque*, 1998-NMCA-028, ¶ 6, 124 N.M. 670, 954 P.2d 102.

{10} In this case the district court determined not only that the City of Albuquerque's decision was not supported by substantial evidence, but also that substantial evidence supported Yancey's request for a zone map amendment. This latter finding apparently led the court to issue a writ of mandamus against the City Council, and in its October 22, 1997 decision, order the City to change the zoning of the lots from R-1 to C-2. This finding exceeded the district court's scope of authority because the court substituted its judgment for that of the City Council. *See id.* A "court cannot prescribe what zoning shall be applied to a particular property." 8A Eugene McQuillin, *The Law of Municipal Corporations* § 25.278, at 426 (Julie Rozwadowski & James Solheim eds., rev. 3d ed. 1994); *see Renick v. City of Md. Heights*, 767 S.W.2d 339, 342 (Mo. Ct. App. 1989).

{11} On appeal, the City argues that the district court improperly relied on Section 3-21-9(D) to order the change in zoning. Section 3-21-9(D) states:

> If, at the hearing [to review the municipality's decision], it appears to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse, affirm or modify the decision brought up for review.

{12} This section appears to allow greater judicial activity in zoning cases than in other administrative agency decisions. However, in *Coe v. City of Albuquerque*, 76 N.M. 771, 774, 418 P.2d 545, 547 (1966), our Supreme Court expressly determined the zoning statute to be unconstitutional to the extent that it purports to allow a district court to zone land. The *Coe* case involved a request to rezone a parcel from residential to commercial. *See id.* at 772, 418 P.2d at 546. The city commission denied the request and the petitioners filed a writ of certiorari to the district court. *See id.* at 773, 418 P.2d at 547. The district court rezoned the property from residential to commercial and the city commission appealed to the Supreme Court. *See id.* The Court interpreted the subsection

[2] The legislature revised Section 3-21-9 effective September 1, 1998. Prior to the revision an aggrieved party would file a writ of certiorari to the district court, which had discretion over whether to accept or not. As of September 1, 1998 an aggrieved party now files a notice of appeal with the district court, and a writ of certiorari to this Court.

not as limiting evidence to be received, but as effectively authorizing a trial de novo, thereby violating the constitutional doctrine of separate powers because it allowed the court to substitute its judgment for that of the administrative body. *See id.* at 773-74, 418 P.2d at 547. According to our Supreme Court, "[t]o the extent that § 14-28-16, N.M.S.A.1953 [now Section 3-21-9], purports to allow the district court to zone land, it is void as an unconstitutional delegation of power to the judiciary, contravening art. III, § 1 of the New Mexico Constitution. The trial court had no authority to rezone the property to C-1." *Id.* at 774, 418 P.2d at 547.

{13} Yancey contends that *Coe* does not apply to the present case because the rationale in *Coe* is based upon the fact that a zoning decision is legislative while more recent New Mexico cases have held that zoning decisions which apply to particular plots of land are quasi-judicial. *See West Old Town Neighborhood Ass'n v. City of Albuquerque*, 1996-NMCA-107, ¶ 11, 122 N.M. 495, 927 P.2d 529. Zoning decisions can be either legislative or quasi-judicial depending upon the impact of the zoning change. *See Miles v. Board of County Comm'rs*, 1998-NMCA-118, ¶ 11, 125 N.M. 608, 964 P.2d 169; *West Old Town Neighborhood Ass'n*, 1996-NMCA-107, ¶ 11; *Downtown Neighborhoods Ass'n v. City of Albuquerque*, 109 N.M. 186, 189, 783 P.2d 962, 965 (Ct. App. 1989). But regardless of whether the zoning decision is deemed legislative or quasi-judicial, the administrative standard of review applies. *See West Old Town Neighborhood Ass'n*, 1996-NMCA-107, ¶ 11; *Downtown Neighborhoods Ass'n*, 109 N.M. at 189, 783 P.2d at 965. The district court is not authorized to overturn a rejection of a petition for a zoning change and then order the City to rezone. The district court exceeded its authority in this instance.

{14} Yancey further claims that this Court's decision in *Clayton v. Farmington City Council*, 120 N.M. 448, 455, 902 P.2d 1051, 1058 (Ct. App. 1995), compels us to review the holding in *Coe* to allow the district court to exercise its power to order approval of a zoning request. In *Clayton*, this Court examined NMSA 1978, § 3-19-8 (1965) (appeal from a planning and platting decision) in determining the standard of review the appellate court should conduct when the statute permits de novo review in the district court. *See Clayton*, 120 N.M. at 453-55, 902 P.2d at 1056-58. Neither party raised the constitutionality of the district court's authority to conduct de novo review in a zoning case. *See id.* at 455, 902 P.2d at 1058. After conducting a de novo review, this Court concluded that the district court would have power and discretion to approve a request, but it did not "determine precisely the extent of that discretion." The Court found it unnecessary to determine the extent of the discretion because the district court upheld the administrative agency's decision. *See id.* We emphasize that unlike the situation in *Clayton*, the language ruled unconstitutional in *Coe* did not explicitly provide for de novo review.

{15} The procedure for district court review of zoning decisions under both Section 3-21-9 and Section 3-19-8 has been changed effective September 1, 1998. Both sections now follow NMSA 1978, § 39-3-1.1 (1998) for obtaining court review of an agency's decision. *See* NMSA 1978, § 3-21-9 (1998); NMSA 1978, § 3-19-8 (1998). Neither the wording ruled unconstitutional in *Coe* nor the wording interpreted in *Clayton* remains in force. In light of the change in appellate review and the fact that Section 3-21-9(D) did not explicitly provide for de novo review, we decline to examine extending the rationale of *Clayton* to Section 3-21-9(D).

Writ of Mandamus

{16} The City also argues on appeal that the district court acted improperly in issuing the writ of mandamus. Before addressing the City's challenge directly, we first comment on, without deciding, the issue of timeliness of the City's appeal on the writ of mandamus. A final judgment on a writ of mandamus is reviewable on appeal. *See* NMSA 1978, § 44-2-14 (1899); *see also Khalsa v. Levinson*, 1998-NMCA-110, ¶¶ 12-13, ___ N.M. ___, 964 P.2d 844 (final order is appealable). The City did not appeal immediately following issuance of the writ. Instead the City waited until resolution of Yancey's second appeal to the district court. Each decision by the district court, the first decision reversing the City Council's decision, the issuance of the writ of mandamus, and the second decision ordering the zoning change, was an appealable event. *Cf. State ex rel. Hyde Park Co. v. Planning Comm'n*, 1998-NMCA-146, ¶ 6, ___ N.M. ___, 965 P.2d 951 (commenting that an appeal from a writ of mandamus may be disfavored as contrary to the policy against piecemeal appeals, if writ is linked to unresolved pending issues). Regardless, we address the district court's issuance of the writ to provide direction to district courts.

{17} Mandamus is issued only when "the petitioner . . . establish[es] a clear legal right to the performance of the duty sought to be enforced. . . . [I]n order for mandamus to issue, the act to be compelled must be ministerial, constituting a nondiscretionary duty which the respondent is required to perform." *In re Grand Jury Sandoval County*, 106 N.M. 764, 766, 750 P.2d 464, 466 (Ct. App. 1988). "A ministerial duty required of a public official constitutes 'an act or thing which he is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case.'" *Id.* at 767, 750 P.2d at 467 (quoting *State ex rel. Four Corners Exploration Co. v. Walker*, 60 N.M. 459, 463, 292 P.2d 329, 332 (1956)); *cf. State ex rel. Edwards v. City of Clovis*, 94 N.M. 136, 139, 607 P.2d 1154, 1157 (1980) (upholding issuance of writ of mandamus ordering city council to enforce existing zoning ordinance).

{18} In this case, the issuance of the writ of mandamus can be traced back to the district court's exceeding its scope of review when it determined that Yancey's requested zone map amendment was supported by substantial evidence. Once the district court reversed the City's decision stating that substantial evidence did not support the decision, the City Council had an outstanding application for a zone map amendment which required action. The district court could

not issue a writ of mandamus to interfere with the City Council's legitimate exercise of its authority to act on the application. The City Council's actions were not ministerial at that point, and thus mandamus did not lie. After reversal by the district court, the City Council would necessarily follow its procedures for zoning requests, or alternately, appeal the district court's decision for review by this Court.

Whether Substantial Evidence Supports the City Council's Decision

{19} This Court conducts the same review under the same standards as the district court. Accordingly, as discussed above, "the decision of the zoning body is disturbed only . . . if the zoning authority's decision is not supported by substantial evidence." *Huning Castle Neighborhood Ass'n*, 1998-NMCA-123, ¶ 8. Therefore, we must determine if the City Council's decision to disapprove the zone map amendment is supported by substantial evidence. "Decisions of a municipality are presumably valid and the burden of proving otherwise rests upon a party seeking to void such decision." *Embudo Canyon Neighborhood Ass'n v. City of Albuquerque*, 1998-NMCA-171, ¶ 8, ___ N.M. ___, ___ P.2d ___ [No. 18,899, Vol. 37, No. 50, SBB 30]. "The party seeking to overturn such decision must establish that there is no substantial evidence to support the municipality's decision." *Id.*

{20} Resolution 270-1980 articulates the policies for approving a zone map change. It states in part:

> The following policies for deciding zone map change applications pursuant to the Comprehensive City Zoning Code are hereby adopted:
>
> A. A proposed zone change must be found to be consistent with the health, safety, morals, and general welfare of the City.
>
> B. Stability of land use and zoning is desirable; therefore, the applicant must provide a sound justification for the change. The burden is on the applicant to show why the change should be made, not on the City to show why the change should not be made.
>
> C. A proposed change shall not be in significant conflict with adopted elements of the Comprehensive Plan or other City master plans and amendments thereto including privately developed area plans which have been adopted by the City.
>
> D. The applicant must demonstrate that the existing zoning is inappropriate because;
>
> (1) there was an error when the existing zone map pattern was created, or
>
> (2) changed neighborhood or community conditions justify the change, or
>
> (3) a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan, even though (1) or (2) above do not apply.
>
> E. A change of zone shall not be approved where some of the permissive uses in the zone would be harmful to adjacent property, the neighborhood or the community.

Resolution 270-1980, § 1-1-2.

{21} After the district court's first order, the City Council conducted a full hearing on May 5, 1997. The City Council had before it the history of the zone map amendment and the records of the previous hearings of the EPC, LUPZC, and City Council. It concluded that the requested change was not supported by Resolution 270-1980 because some of the permissive uses in C-2 zoning "would be harmful to the adjacent property" contrary to Section E. Yancey contends that there was not substantial evidence to support the City Council's denial of the zone map amendment because the only evidence presented in opposition to his application was Romero's testimony that she wanted the property to retain its R-1 designation.

{22} Yancey examines the evidence presented too narrowly. While Romero and her husband apparently were the only neighbors who attended the LUPZC and City Council hearings and voiced concern about noise, lights, and traffic, the residents of the Stronghurst Addition also expressed concerns about a change in zoning for the lots. Yancey organized a meeting, held on February 20, 1996 and conducted by a facilitator, at which area residents, recognizing that a zone change might occur and be more favorable than the existing R-1 zoning, nonetheless expressed their interest that any businesses located on the lots be quiet and low traffic. In his October 26, 1995 application for zone map amendment, Yancey originally proposed that the lots be used for an automobile dealership and commercial building. At the February 20, 1996 facilitated meeting, Yancey proposed that a vinyl sign business be housed on the lots. The owner of the vinyl sign business attended the meeting and explained her business and the low impact it would have on the neighborhood. At its March 7, 1997 annual meeting, the Stronghurst Improvement Association "voted to accept C-2 zoning as an alternative to the existing R-1 zone." However, "[t]his acceptance was based on presentation of proposal for the location of a vinyl sign business."

{23} At the May 29, 1996 LUPZC meeting, the EPC representative explained that the EPC recommended against the proposed change because "the change offered no community benefit[,] could negatively affect the abutting residential neighborhood, [and] did not meet the requirements of Resolution 270-1980." The EPC was also concerned that while Yancey expected a "clean" business to use the lots, once the lots were zoned C-2, businesses that were "not so clean" also would be permitted at the lots. The City Planning Department representative agreed that the application did not meet the requirements of Resolution 270-1980.

{24} In denying the zone map amendment, the City Council appears to have been addressing the concerns of the residents that some permissible uses of C-2 zoning would be too intense for the lots. The City Council recognized that if it

approved C-2 zoning for the lots, there would be minimal restrictions on the types of business that could locate there. *See Huning Castle Neighborhood Ass'n*, 1998-NMCA-123, ¶ 14 (sustaining decisions supported by substantial evidence or reasonable inferences therefrom). It could no longer guarantee that only a quiet, low-traffic business that would not be harmful to adjacent properties would locate on the lots. Councilor Griego specifically noted that C-2 zoning allows for "radio or television stations, large signs, vehicle sales and repairs, a pawn shop and a dry cleaner, to name just a few uses that no one would want to live next to." He further elaborated that the zoning regulations are "intended to create orderly and harmonious development to promote the health and safety of the citizens [and] [p]utting in a C-2 zone next to an R-1 zone does the opposite of that." Recognizing that R-1 may no longer be the proper zoning for the lots, the City Council also adopted a finding that it would consider a zone change other than C-2 that would not be harmful to adjacent property, upon a showing of "*sufficient, competent, evidence to support the change.*" We find substantial evidence that the City Council was concerned about potential harm to neighboring residential areas in accordance with Section E of Resolution 270-1980 to support the City Council's denial of the zone map amendment. *See Embudo Canyon Neighborhood Ass'n*, 1998-NMCA-171, ¶ 8.

CONCLUSION

{25} We hold that the district court exceeded its scope of review in ordering the zoning change. We further hold that the court improperly issued the writ of mandamus. Finally, we also hold that substantial evidence supports the City Council's denial of the zone map amendment. We therefore reverse the decision of the district court.

{26} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
RICHARD C. BOSSON, Judge
M. CHRISTINA ARMIJO, Judge

Certiorari Not Applied For

TOPIC INDEX
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Forgery; and Motor Vehicle Violations
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FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 1999-NMCA-041
STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
MICHAEL MORRISON,
Defendant-Appellant.
No. 19,037 (filed January 11, 1999)
APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
PATRICK J. FRANCOEUR, District Judge

TOM UDALL
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WILLIAM MCEUEN
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for Appellee

C. BARRY CRUTCHFIELD
TEMPLEMAN AND CRUTCHFIELD
Lovington, New Mexico
for Appellant

OPINION
JAMES J. WECHSLER
Judge

{1} Defendant Michael Morrison appeals from the trial court's judgment and sentence finding him guilty of one count of forged evidence of financial responsibility in violation of NMSA 1978, § 66-5-231 (1983) of the Motor Vehicle Code (the forged evidence statute). Defendant was also convicted of operating a motor vehicle without complying with the financial responsibility statute, NMSA 1978, § 66-5-205 (1991), and operating a motor vehicle without proper equipment, contrary to NMSA 1978, § 66-3-801 (1991). These convictions are not challenged on appeal. Defendant raises two issues on appeal: (1) whether there was sufficient evidence for the trial court to find Defendant guilty of violating the forged evidence statute; and (2) whether the trial court erred in its determination that a conviction for violating the forged evidence statute is a felony as opposed to a misdemeanor.

{2} For the reasons discussed below, we reverse the trial court's determination that there was sufficient evidence to convict Defendant of violating the forged evidence statute. As a result of this conclusion, we need not reach Defendant's second issue.

FACTS AND PROCEDURAL HISTORY

{3} Defendant was charged by criminal information with one count of forged evidence (unlawfully forging evidence of financial responsibility without authority) contrary to Section 66-5-231, one count of no insurance contrary to Section 66-5-205, and one count of improper equipment contrary to Section 66-3-801. The parties stipulated that the arresting officer would have testified to the facts set forth in the magistrate court complaint. The complaint stated that on August 30, 1996, Officer Jason Green of the Hobbs Police Department observed Defendant operating a vehicle without a license plate light. Officer Green initiated a traffic stop and asked Defendant to pro-

vide proof of insurance. Defendant handed the officer a photocopy of an insurance card that Officer Green suspected of being altered. After being read his *Miranda* rights, Defendant stated that the card might have been altered by his wife and that he knew the card was not valid when he handed it to the officer. The parties also stipulated that the wife of Defendant's deceased insurance agent would have testified that Defendant did not have insurance at the time of his arrest and that the insurance card presented had been altered.

{4} The trial court heard argument as to whether the stipulated facts supported a conviction under Section 66-5-231. The parties framed the issue as whether Defendant's conduct, by presenting the insurance card knowing it was altered, but with no evidence that Defendant altered it, constituted a violation of Section 66-5-231. After a bench trial, the court found Defendant guilty of all counts. Following Defendant's conviction of violating Section 66-5-231, the State prosecuted Defendant as an habitual offender and his sentence on this count was enhanced under the habitual offender statute.

The Stipulated Facts Do Not Support a Violation of Section 66-5-231

{5} Defendant's brief in chief focuses almost entirely on the argument that Defendant did not violate Section 66-5-231 because Defendant did not file the altered insurance card with the Department of Motor Vehicles. Section 66-5-231 reads:

> Any person who forges or, without authority, signs any evidence of financial responsibility or who files or offers for filing any such evidence knowing or having reason to believe that it is forged or signed without authority shall be fined not more than one thousand dollars ($1,000) or imprisoned for not more than one year or both.

When examined in light of its component parts, however, Section 66-5-231 can be violated either by forging evidence of financial responsibility or by signing evidence of financial responsibility without authority or by filing evidence of financial responsibility knowing it is forged or signed without authority or by offering to do so. *See State v Dunsmore*, 119 N.M. 431, 433, 891 P.2d 572, 574 (Ct. App. 1995) ("The use of the disjunctive 'or' indicates that the statute may be violated by any of the enumerated methods."). The State does not contend that Defendant filed the insurance card when he presented it to the officer, and the State did not accuse Defendant of filing the document in the charging information. Therefore, the trial court could only find Defendant guilty of violating Section 66-5-231 by determining that Defendant forged the insurance card simply by presenting it to the arresting officer with the knowledge that it had been altered.

{6} In determining whether there is sufficient evidence to convict Defendant of forging the insurance card under Section 66-5-231, we first determine the meaning of the term "forges" as used by the legislature in Section 66-5-231. We then determine whether there was sufficient evidence to convict under the definition. The interpretation of the definition of the term "forges" in the forged evidence statute is a question of law that we review de novo. *See State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

A. ***Definition of "Forges" in Section 66-5-231***

{7} The State argues that the definition of "forges" in Section 66-5-231 is the same as "forgery" as defined in the general forgery statute, NMSA 1978, § 30-16-10 (1963). *See also* UJI 14-1643 NMRA 1998 (forgery; essential elements). Under the general forgery statute, a person is guilty of forgery who knowingly issues or transfers an altered document purporting to have legal efficacy with intent to injure or defraud. *See* § 30-16-10.

{8} Defendant argues, to the contrary, that there is no evidence that he forged the insurance card. Defendant apparently contends that the common law definition of forgery applies to Section 66-5-231. The common law definition of forgery, when applied to Section 66-5-231, would require that Defendant actually altered the document as opposed to having knowingly presented an altered document without having altered it himself. *Compare* 4 Charles E. Torcia, *Wharton's Criminal Law* § 476, at 71 (15th ed. 1996) ("Forgery . . . is the false making or material alteration, with intent to defraud, of a writing which, if genuine, has apparent legal efficacy."), *with State v. Baca*, 1997-NMSC-018, ¶ 18, 123 N.M. 124, 934 P.2d 1053 (holding that, under the statutory definition, a defendant can be found guilty of forgery if jury finds he knew checks were forged when he negotiated them or if he forged them himself). *See also* UJI 14-1644 NMRA 1998 (issuing or transferring a forged writing; essential elements).

{9} To ascertain the legislature's intended definition of the term "forges" in Section 66-5-231, we review the statutory history of Section 66-5-231 and the general forgery statute. *See Los Quatros, Inc. v. State Farm Life Ins. Co.*, 110 N.M. 750, 753, 800 P.2d 184, 187 (1990). We seek to interpret a statute as the legislature understood it at the time of enactment. *See State v. Yarborough*, 1996-NMSC-068, ¶ 29, 122 N.M. 596, 930 P.2d 131. In the absence of evidence to the contrary, we interpret statutes using the common law concept "most likely intended by the legislature to be embodied in the statute." *Id.* ¶ 11.

{10} The legislature enacted the predecessor to Section 66-5-231 in 1955. *See* 1955 N.M. Laws, ch. 182, § 403. At that time, there was no general forgery statute in New Mexico, only a number of enumerated crimes that involved forgery, including a separate crime for uttering or issuing a forged document. *See* NMSA 1953, §§ 40-20-1 to -18 (1853, as amended through 1893). The legislature enacted a general forgery statute in 1963 as part of the revised Criminal Code. *See* 1963 N.M. Laws, ch. 303, § 16-9. We believe, therefore, that the legislature intended to use the common law definition of forgery when it enacted the predecessor to Section 66-5-231, because no general forgery statute existed at the time.

{11} The legislature revised and reenacted Section 66-5-231 in 1983 into its present form. *See* 1983 N.M. Laws, ch. 318, § 30. When the legislature amends

a statute, we assume that it is aware of existing law. *See State v. Clah*, 1997-NMCA-091, ¶ 11, 124 N.M. 6, 946 P.2d 210. We also assume that the legislature intends to change the existing law when it enacts a new statute with substantial rewording. *See Blackwood & Nichols Co. v. New Mexico Taxation & Revenue Dep't*, 1998-NMCA-113, ¶ 15, ___ N.M. ___, 964 P.2d 137. Additionally, we strictly construe a statute which is designed to effect a change from the common law. *See State v. Bryant*, 99 N.M. 149, 150, 655 P.2d 161, 162 (Ct. App. 1982) ("A statute designed to effect a change from that which existed under the common law must be strictly construed; it must speak in clear and unequivocal terms and the presumption is that no change is intended unless the statute is explicit."). Thus, we examine the changes made in 1983 to determine if they clarified or substantially rewrote the existing law or intended to change the common law.

{12} Our review of the changes that the legislature made indicates: (1) that the term "shall forge" was changed to "forges"; (2) the words "any evidence of proof of financial responsibility" were changed to "any evidence of financial responsibility"; (3) the words "for the future" were removed; and (4) the title of the statute was changed from "Forged proof" to "Forged evidence." Other than these changes and some punctuation changes, the statute remained the same. {13} These changes made by amendment did not materially affect the substance of the statute. They indicate to us that the legislature intended to restate the existing statute in a clarified form. *Cf. Blackwood & Nichols Co.*, 1998-NMCA-113, ¶ 15 (holding that substantial revision of statute materially changed existing law, not merely clarified it). Nor do the stylistic changes evidence that the term "forges" in Section 66-5-231 was to be interpreted differently from the earlier statute which followed the common law. Nothing in the changes indicates that the legislature intended to apply the definition of forgery found in the general forgery statute to Section 66-5-231. Thus, we hold that strict construction dictates that the term "forges" is to be defined using its common law meaning.

B. *Sufficiency of the Evidence to Convict Defendant*

{14} Our review of the sufficiency of the evidence to convict Defendant of violating Section 66-5-231 consists of determining "'whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.'" *State v. Clifford*, 117 N.M. 508, 512, 873 P.2d 254, 258 (1994) (quoting *State v. Suthpin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988)). "We view the evidence in the light most favorable to supporting the verdict and resolve all conflicts and indulge all permissible inferences in favor of upholding the verdict." *Id.*

{15} Applying the interpretation discussed above to the provisions of Section 66-5-231, we conclude that in order to prove that Defendant violated the statute, the State must show that Defendant himself actually altered the insurance card. The State does not contend that the stipulated facts present such evidence. As the State relies upon a definition of forgery which does not comport with our construction of Section 66-5-231, we conclude that there was not sufficient evidence to support Defendant's conviction.

CONCLUSION

{16} We reverse the trial court's determination that there was sufficient evidence to convict Defendant of violating Section 66-5-231.

{17} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
THOMAS A. DONNELLY, Judge
RUDY S. APODACA, Judge

Certiorari Not Applied For

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 1999-NMCA-037

JANET WEST,
Worker-Appellee,
versus
HOME CARE RESOURCES, and USF&G,
Employer/Insurer-Appellants.

No. 19,061 (filed February 5, 1999)

APPEAL FROM THE NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION
ROSA Q. VALENCIA, Workers' Compensation Judge

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for Appellee

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ALICE TOMLINSON LORENZ
MILLER, STRATVERT & TORGERSON, P.A.
Albuquerque, New Mexico
for Appellants

OPINION
A. JOSEPH ALARID
Judge

{1} Home Care Resources and its Insurer, United States Fidelity and Guarantee (USF&G) (collectively Respondents), appeal from the compensation order of the Workers' Compensation Judge (WCJ) determining that Janet West (Worker) is entitled to permanent partial disability (PPD) benefits. On appeal, Respondents argue that the WCJ erred in determining how the credit for benefits previously paid should be allowed and that the Worker's claim for unpaid benefits is barred by the statute of limitations. For the reasons discussed below, we hold that the WCJ did not abuse her discretion in determining the manner in which the credit would be

applied. Accordingly, we affirm the compensation order.

FACTS

{2} We note at the outset that there were many factual issues in dispute below. However, on appeal Respondents do not challenge the facts as found by the WCJ, and thus, those facts are binding on appeal. *See Stueber v. Pickard*, 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991).

{3} Worker was employed by Home Care Resources as a Home Health Aide. On May 26, 1992, she injured her head, neck, and right shoulder when a heavy fan that had been sitting on a table fell on her. Respondents began paying her temporary total disability (TTD) benefits on May 27, 1992, the day after the accidental injury. In addition, Worker began receiving medical treatment from Dr. Quito Osuna Carr. On February 23, 1993, Dr. Carr determined Worker had attained maximum medical improvement (MMI) and had a sixteen percent impairment rating. By letter dated March 4, 1993, Respondents advised Worker that she was entitled to permanent partial disability (PPD) benefits at the rate of forty-five percent. Respondents began paying PPD benefits at that rate. The WCJ found that the parties agreed that Worker was entitled to PPD benefits at forty-five percent or $43.73 per week, for 463 future weeks, absent a change of circumstances.

{4} In March 1993, Worker filed an affidavit and petition for a partial lump-sum settlement to pay debts. Respondents stipulated to this, and an order was entered approving the lump-sum settlement. The order specifically stated that "worker shall be awarded a total sum of $2,656.00 as and for partial compensation with remaining compensation paid pursuant to the Workers' Compensation Act." Following the entry of this order, Respondents continued to pay PPD benefits. In April 1993, a second lump-sum settlement in the amount of $3,696.61 was approved by stipulation of the parties. The order approving the second lump-sum payment again stated "with remaining compensation paid pursuant to the Workers' Compensation Act." Neither of the lump-sum settlement orders specified when or how the remaining compensation payments would be made.

{5} Respondents ceased paying PPD benefits on or about April 28, 1993. Worker continued to receive treatment for her injuries from Dr. Carr and Respondents continued to pay for all the treatment ordered by Dr. Carr. Later, a dispute developed concerning medical treatment.

{6} On September 16, 1996, Worker filed a complaint with the Workers' Compensation Administration seeking enforcement of the previous lump-sum orders to the extent that they required Respondents to pay benefits, PPD benefits retroactive to the date of MMI, and a redetermination of her PPD benefits based on changes that had occurred since 1993. Respondents' formal answer raised a number of issues, including a credit for benefits previously paid, the defense of the statute of limitations, NMSA 1978, Section 52-1-31 (1987), and various issues concerning the effect of the lump-sum orders. Prior to trial, the parties stipulated that Respondents were entitled to a credit for benefits previously paid.

{7} Respondents do not challenge the WCJ's calculations concerning the amount of the credit, which included the credit for the two lump-sum distributions that had been made, and therefore we will not discuss them. However, after determining the amount of the credit, the WCJ chose to apply the credit from the date that the Respondents stopped paying PPD benefits, forward. In effect, the WCJ determined that the two lump-sum settlements constituted payments from the date Respondents stopped paying benefits, April 28, 1993, through February 13, 1996. Thus, the WCJ determined that Worker had complied with Section 52-1-31 by filing her complaint on September 26, 1996, within one year of the time that the credit ran out and thus Respondents, in effect, ceased paying compensation.

DISCUSSION

{8} On appeal, Respondents argue vehemently that the WCJ's manner of allocating credit for previous payments contravenes the provisions and policies of the Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 1993), and this Court's decision in *Paternoster v. La Cuesta Cabinets, Inc.*, 101 N.M. 773, 689 P.2d 289 (Ct. App. 1984). In addition, Respondents continue to argue that Worker's claim is barred by Section 52-1-31(A). In support of both arguments, Respondents contend that the WCJ's action is contrary to established policy and violates notions of fundamental fairness. We disagree.

{9} We begin our analysis with *Paternoster*, where this Court held that overpayments of benefits made by mistake and in good faith prior to the date of judgment should be applied as a credit against future benefits. 101 N.M. at 776-77, 689 P.2d at 292-94. We recognized that the Act did not specifically provide for such a credit, but held that it was required as a matter of fundamental fairness. Recognition of credit advanced the interests of workers by encouraging employers to make voluntary, prejudgment payments of compensation credits and advanced the interests of employers by ensuring that in the end they would pay no more than was required. *See id.* at 777, 689 P.2d at 293.

{10} In *Paternoster*, we also addressed the manner in which such credits were to be applied. The parties had agreed that the trial court's order meant that the worker would not receive any more benefits until the credit had been paid off dollar-for-dollar, a period of five years. *See id.* at 776, 689 P.2d at 292. Mindful of the strong statutory policies in favor of periodic rather than lump-sum payments, this Court noted that unless the overpayment is equal to or exceeds the value of the compensation award, the credit should be applied in such a manner as to avoid immediate termination of the worker's benefits. *See id.* at 778, 687 P.2d at 294. The "central scheme" we referred to was the clear preference of the Act for periodic rather than lump-sum payments. We went on in *Paternoster* to outline several acceptable ways in which to determine a credit for overpayment, depending on the facts and circumstances of the particular case. These included a dollar-

for-dollar credit taken off the end of the compensation period, a reduction in the amount of each payment provided that no "significant reduction" in the amount of each payment occurred, or a credit based on the number of weeks rather than a dollar-for-dollar credit. *See id.* at 779, 689 P.2d at 295. In summary, we held that the trial court had discretion to

> make an award of credit which balances the compensation goals of the Act against the principle of fundamental fairness toward the employer. The trial judge must take into account the following factors: (1) the circumstances under which overpayment occurred, and (2) the impact of a dollar-for-dollar credit on the value of periodic payments awarded to the worker.

Id. Thus, under *Paternoster*, the WCJ had wide latitude in selecting the appropriate method for applying credit for overpayment, and our view is limited to whether the WCJ has committed an abuse of that discretion.

{11} Respondents argue that Worker's claim for unpaid benefits accrued on or about April 29, 1993, when they first failed to pay benefits, and was barred approximately one year later by Section 52-1-31(A), which reads in pertinent part as follows:

> If an employer or his insurer fails or refuses to pay a worker any installment of compensation to which the worker is entitled under the Worker's Compensation Act . . . after notice has been given . . . it is the duty of the worker insisting on the payment of compensation to file a claim therefor as provided in the Worker's Compensation Act not later than one year after the failure or refusal of the employer or insurer to pay compensation. . . . if the worker fails to file a claim for compensation within the time required by this section, his claim for compensation, all his right to the recovery of compensation and the bringing of any proceeding for the recovery of compensation are forever barred.

Respondents argue that a worker's mistaken belief concerning the amount of benefits or coverage under the Act does not prevent the running of the statute of limitations. *See Coslett v. Third Street Grocery*, 117 N.M. 727, 733-34, 876 P.2d 656, 662-63 (Ct. App. 1994). In a similar vein, Respondents argue that the way the WCJ applied the credit for the lump sum payments made to Worker frustrates the purposes and policies of Section 52-1-31(A) and violates notions of fundamental fairness.

{12} We do not disagree with Respondent's citations and concerns in the abstract. In another context they would carry much force. We do disagree with their application to this case. The issue before us is simply how lump-sum payments are to be treated for the purposes of the statute of limitations. This is a wholly different issue from the more commonplace instance of an employer initially failing or refusing to provide benefits under the Act. It also raises different concerns than those inherent in lump-sum allocation cases such as *Paternoster*.

{13} In the unusual factual circumstances of this case, we hold that the WCJ did not abuse her discretion by applying the credit to the period of time in which Respondents were not in fact paying benefits. We recognize, as did the WCJ that it is customary to apportion the credit for lump-sum payments by shortening the number of weeks that compensation is paid; that is, by applying the credit at the back-end of the weekly compensation award. This generally serves the salutary purpose of ensuring that compensation payments will continue to be made biweekly, which, as Respondents recognize, is consonant with the statutory scheme. However, in this case, Respondents had in fact stopped paying benefits, and the WCJ was powerless to effect a continuation of benefits. The WCJ had to decide how to allocate the credit for lump-sum payments *without* the guidance of the policy goals spoken of in the *Paternoster* opinion. In that light, it was no abuse of discretion to depart from *Paternoster* for the specific and limited purpose of determining the running of the limitations period. Applying the credit to the time that Respondents were not paying benefits strikes us as a fair balancing of the compensation goals of the Act and the principles of fairness owed to the Respondents. Treating a lump-sum payment as though it had been periodic payments for purposes of the statute of limitations is particularly appropriate when the order approving the lump-sum payment does not specify the amount or dates of payment of the balance of compensation due.

{14} As Professor Larson notes in a discussion if the effect that voluntary payments of compensation have on calculating the limitations period: "When payment is in lump sum, the [statute of limitations] period runs not from the payment itself but from the time the last payment would have been made if the benefits had been paid periodically." 7 Arthur Larson & Lex K. Larson, Larson's Worker's Compensation Law § 78.43(a) (1998). This position has been adopted by a number of courts. *See Southern Cotton Oil Co. v. Frair*, 444 S.W.2d 556, 558 (Ark. 1969); *University of Denver v. Industrial Comm'n of Colo.*, 335 P.2d 292, 294 (Colo. 1959) (en banc); *Allen v. IBP, Inc.*, 363 N.W.2d 520, 523-24 (Neb. 1985); *Anderson v. Public Serv. Elec. & Gas Co.*, 177 A. 865, 867 (N.J. 1935); *Haney v. State Compensation Comm'r*, 76 S.E.2d 753, 755 (W. Va. 1953). As the Supreme Court of Arkansas noted:

> Let it be remembered that the lump sum payment is not an advantage to the claimant; in making this settlement, the company is not mistreated in any manner. The lump sum settlement is frequently of benefit to all parties. The claimant receives the cash, and is able to pay bills which may have accumulated during his absence from work, and the company receives the benefits of a 4% discount when the accrued compensation is paid in a lump sum. Were appellant's view to be adopted by this court, the employer would receive an additional benefit, i.e., the statute of limitations would be shortened.

Southern Cotton Oil Co., 444 S.W.2d at 559 (footnote omitted). We note also, as did the Arkansas court, that paying compensation owed in advance by means of lump-sum payment saves the company the bookkeeping and clerical expenses associated with paying compensation. *See id.* at 559 n.6a.

{15} We recognize that limitations periods are meant to "compel the exercise of a right of action within a reasonable time so that the party against whom the action is brought will have a fair opportunity to defend." *Moncor Trust Co. v. Feil*, 105 N.M. 444, 446, 733 P.2d 1327, 1329 (Ct. App. 1987) (citations omitted). The limitations period is also meant to protect a party "from being sued after evidence vanishes and memories fade." *Investment Co. of the Southwest v. Reese*, 117 N.M. 655, 662, 875 P.2d 1086, 1093 (1994). We note, however, that statutes of limitations require a party to initiate proceedings within the limitations period, not to conclude them within that time. This is not a case in which a Worker suddenly initiated proceedings years after the injury. On the contrary, as the record in this case demonstrates, Respondents were well aware of the situation, voluntarily began paying compensation to Worker the day after the accident, and in fact stipulated to the entry of two lump-sum orders that specifically directed that additional payments be made pursuant to the Act. By law, lump-sum payments require the approval of a Workers' Compensation Judge and thus require that proceedings of some type be initiated. *See* NMSA 1978, § 52-5-12 (1993). This in turn requires that the employer and insurer be notified of the petition. As a practical matter, we doubt that employers and insurers agree to payment of compensation benefits in a lump-sum unless they have already investigated the circumstances surrounding the accident and the disability. In short, Respondent's policy argument is not supported by the record in this case.

{16} In a similar vein, Respondents argue that Worker's delay in filing her claim for increased compensation until September of 1996 deprived them of any opportunity to independently investigate her medical condition during 1993, 1994, and 1995. The argument, however, ignores the record in this case. After the lump-sum payments, Worker continued to receive medical treatment from Dr. Carr, her authorized health care provider, at Respondents' expense. As Worker points out, pursuant to NMSA 1978, Section 52-10-1 (1990) and WCA Rule 11 NMAC 4.7.7, Dr. Carr was required to provide Respondents with written reports prior to being paid. Moreover, Respondents in fact sent Worker to a different physician for an Independent Medical Examination (IME) in early 1996. The physician who performed the IME included in his report a discussion of the medical records concerning Worker from 1993, 1994 and 1995. Based on the results of the IME, Respondents determined that they would no longer pay for certain medical treatments. The WCJ found that there were three changes that resulted in increased compensation: (1) In September 1996 Worker's treating physician downgraded her residual physical capacity from light to sedentary; (2) a new edition of the AMA Guides took effect, resulting in a downgrading of Worker's impairment rating; and (3) Worker turned sixty years of age in July 1997, which increased her age modification points. Respondents have not challenged on appeal the determination that Worker was entitled to benefits at an increased rate on and after September 1996.

{17} Finally, Respondents argue that the WCJ's ruling reduces the one-year statute of limitations to a fiction and leads to the absurd result of establishing a different statute of limitations for each claimant, depending on the facts of the case. However, as our Supreme Court recently pointed out in *Torres v. Plastech Corp.*, 1997-NMSC-053, ¶ 11, 124 N.M. 197, 947 P.2d 154, the statute of limitations does not begin to run on a claim until the worker is disabled. Moreover, because the Act defines four different forms of disability—total disability, temporary total disability, permanent partial disability, and scheduled injury—the event that triggers the running of the statute of limitations is different for the different forms of disability. *See id.* ¶¶ 15-27.

CONCLUSION

{18} The compensation order of the WCJ is affirmed. On remand, the WCJ shall determine the attorney fees to be awarded to Worker for the successful services of her attorney in defending this appeal.

{19} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:
RICHARD C. BOSSON, Judge
MICHAEL D. BUSTAMANTE, Judge

Certiorari Not Applied For

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FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 1999-NMCA-035
STATE OF NEW MEXICO, ex rel.
CHILDREN, YOUTH AND FAMILIES DEPARTMENT,
Petitioner-Appellee,

versus

IN THE MATTER OF RUTH ANNE E., SONYA SUE E., and BLANCA ALICIA E., Children, and concerning Lorena R. and Robert E., ROBERT E.,
Respondent-Appellant.

No. 19,266 (filed January 28, 1999)

APPEAL FROM THE CHILDREN'S COURT OF BERNALILLO COUNTY
GERALDINE E. RIVERA, Children's Court Judge

ANGELA L. ADAMS
Chief Children's Court Attorney
ROY E. STEPHENSON
Children's Court Attorney
Children, Youth & Families Dep't
Santa Fe, New Mexico
for Appellee

NANCY L. SIMMONS
Albuquerque, New Mexico
for Appellant

JUDY BAILEY
Cedar Crest, New Mexico
Guardian ad Litem for Children

OPINION
THOMAS A. DONNELLY
Judge

{1} Robert E. (Father) appeals from a judgment terminating his parental rights to his three minor children, Ruth Anne E., Sonya Sue E., and Blanca Alicia E., ages eight, six, and four, respectively. The dispositive issue presented on appeal is whether Father was deprived of an opportunity to appear or to meaningfully defend against the action to terminate his parental rights. Because we conclude that Father was denied due process of law, we reverse and remand for a new hearing on the motion to terminate Father's parental rights.

FACTS AND PROCEDURAL POSTURE

{2} On January 9, 1995, the Children, Youth and Families Department (the Department) received a report that Lorena R. (Mother) had left her three minor children with a babysitter in Albuquerque, New Mexico, and had failed to return for them. The children were placed in the temporary custody of the Department.

{3} Although the police located Mother and notified her that the children had been placed in protective custody, she did not contact the Department and she subsequently disappeared. Approximately six months later, in July 1996, Mother reappeared and indicated a desire to regain custody of her children. She stated that she had been attending a drug and rehabilitation program in Texas. Mother, however, subsequently regressed, began using drugs again, and failed to keep in contact with the children or the Department.

{4} At the time the children were initially taken into protective custody, Father was incarcerated in a Texas prison serving a sentence on a felony conviction. Father was served with a copy of the petition, alleging that the children were neglected and abused. He filed an answer asserting that he was in prison in Texas, that he was indigent, and that he wished to contest "Petitioner's Original Petition For Termination." Father's answer sought the appointment of a court-appointed attorney to represent him, and requested "that he [be permitted] to be present at any proceeding affecting the custody of [his] children as a matter of due process and equal protection of the law." Father also requested that the children's court issue an order directing that he be transported to the court so that he could "present testimony concerning the future of his natural children and defend his rights." Alternatively, Father requested that the children's court grant a continuance until "such time as [he was] released from the penitentiary and . . . able to appear in Court and defend [such] suit." The children's court appointed separate counsel to represent Father and Mother, and appointed a guardian ad litem to represent the children.

{5} The children's court issued an order directing the Bernalillo County Sheriff's Department to transport Father from the correctional facility in Texas to an adjudicatory hearing scheduled for May 16, 1995; however, the order could not be enforced.

{6} On July 30, 1997, the Department filed a motion seeking to terminate both Mother's and Father's parental rights. Father filed a response contesting the motion. The children's court scheduled a hearing on the merits for November 26, 1997, in Albuquerque. At the hearing on the merits, Father's attorney informed the children's court that Father had been released from prison but had been reincarcerated on a new charge, and that he expected to be released from

jail in the immediate future. His attorney requested that the children's court grant a continuance so that Father could appear and testify. The children's court denied the request and directed that the hearing proceed.

{7} The only witnesses who testified at the hearing on the motion to terminate parental rights were witnesses called by the Department. Neither Father nor Mother were present, although the witnesses called by the Department were cross-examined by counsel who had been appointed to represent Father and Mother. At the conclusion of the hearing, the children's court found that the children were abused and neglected, that the parental bond between the parents and the children had disintegrated, and that the parental rights of Father and Mother should be terminated.

DISCUSSION

{8} On appeal, Father asserts, among other things, that incarceration alone is insufficient to support an allegation of abandonment, that his procedural due process rights were violated because he "was never afforded an opportunity to participate in the merits of the trial involving termination of his parental rights," that he was precluded "from presenting evidence in his own defense" and that he was not given an opportunity to refute the matters presented by the Department.

{9} Before addressing the merits of Father's due process challenge, we first determine whether under the facts shown here, this Court has jurisdiction to entertain Father's appeal. The judgment terminating Father's parental rights was filed on January 13, 1998. Father's court-appointed attorney filed a notice of appeal on February 13, 1998, one day past the thirty-day deadline prescribed by Rule 12-201(A) NMRA 1999 for the filing of an appeal. No request was made by Father's attorney for an extension of time within which to file the appeal. Father urges this Court to entertain the issues raised by his appeal despite the delay in the filing of his notice of appeal. He points out that in *State v. Duran*, 105 N.M. 231, 232, 731 P.2d 374, 375 (Ct. App. 1986), this Court held that a conclusive presumption of ineffective assistance of counsel exists where a notice of appeal or a waiver of the right to appeal is not filed within the time limit prescribed by Rule 12-201(A). *Cf. State v. Peppers*, 110 N.M. 393, 398-99, 796 P.2d 614, 619-20 (Ct. App. 1990) (assuming untimely appeal was the consequence of ineffective assistance of counsel).

{10} We apply a similar result in the instant case and hold that Father's appeal should be deemed to have been timely filed. The mistake of counsel, under the circumstances existing here, should not deprive Father of appellate review on the merits. *See State ex rel. Children, Youth & Families Dep't v. Tammy S.*, 1998-NMCA-135, ¶ 20, ___ N.M. ___, ___ P.2d ___ [Ct. App. No. 19,135, filed Nov. 13, 1998] (right to effective assistance of counsel extends to cases involving termination of parental rights). *See generally In re M.D.(S).*, 485 N.W.2d 52, 54 (Wis. 1992) ("It is axiomatic that the right to be represented by appointed counsel is worthless unless that right includes the right to *effective* counsel."). Under NMSA 1978, § 32A-4-10(B) (1993), counsel is required to be appointed for a parent or guardian in cases alleging neglect and abuse of a minor. *See also* NMSA 1978, § 32A-4-29(F) (1997) (requiring appointment of counsel for an indigent parent). In termination of parental rights cases, as in criminal cases, a fundamental liberty interest is at stake. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *see also State ex rel. Children, Youth & Families Dep't v. Joe R.*, 1997-NMSC-038, ¶ 29, 123 N.M. 711, 945 P.2d 76 ("Father's rights and obligations as a parent are protected by his constitutional right to due process."); *In re Ronald A.*, 110 N.M. 454, 455, 797 P.2d 243, 244 (1990) (parents' right to custody is constitutionally protected).

{11} We turn next to Father's challenge to the validity of the order terminating his parental rights, which is grounded upon his claim of denial of due process. Father argues that he was never afforded the opportunity to participate in the proceeding involving the termination of his parental rights. More specifically, he asserts he was precluded from "presenting evidence" in defense of the allegations of neglect and abandonment.

{12} The Department urges this Court not to consider Father's due process claim, arguing that he failed to preserve such contention. The Department asserts that Father failed to sufficiently alert the children's court to his claim of denial of due process at the proceedings below. We disagree.

{13} Father's answer to the petition to terminate his parental rights alleged that he did not have "sufficient funds or assets to hire an attorney to represent [Father's] interests in this lawsuit,"attached an affidavit of indigency, and requested that the children's court appoint an attorney to represent him. The answer also requested a continuance in the termination hearing because of Father's incarceration in Texas, and stated that he "desire[d] to present testimony in his own behalf." Finally, the answer asserted that Father was entitled to be present at such proceeding "affecting the custody of [his] children as a matter of due process and equal protection of the law."

{14} On October 29, 1997, the initial hearing date scheduled by the children's court, Father's court-appointed attorney specifically informed the children's court that Father was incarcerated in Texas. Counsel requested that the hearing be commenced and then continued to a later time so that Father could participate in the proceedings. The children's court acquiesced to that request. At the continuation of the hearing one month later, Father's counsel again requested a delay in the proceedings to permit Father to take part in the proceedings. The children's court denied this request. By filing a pleading requesting the opportunity to present testimony on his own behalf and by requesting a continuance so that Father could take part in the proceedings, Father's attorney alerted the children's court to Father's desire to actively contest the charges against him.

{15} Not every act of a parent which results in the parent's incarceration constitutes a valid basis to terminate an individual's parental rights. *See In re Adoption of Doe*, 99 N.M. 278, 282, 657

P.2d 134, 138 (Ct. App. 1982). The Department argues, however, that Father's unavailability at trial was not based upon any arbitrary action of New Mexico, but rather, as a direct result of his incarceration in Texas. It concedes that, although it is preferable that a parent, alleged to have neglected or abandoned a child, be physically present at a hearing on a petition to terminate parental rights, there is no constitutional requirement requiring a parent's presence.

{16} The Department is correct that due process requirements do not mandate the personal appearance of a parent in parental termination proceedings where the parent is serving a prison sentence outside the jurisdiction where the action to terminate parental rights is pending. Although the court must utilize procedures which protect the rights of parents in hearings involving the termination of parental rights, the primary consideration must be given to the best interests of the child. *See id.* at 281, 657 P.2d at 137. Courts in a number of states have addressed the question of what procedural due process requirements are necessary when a state seeks to terminate the parental rights of a parent who is either incarcerated or is otherwise involuntarily prevented from attending the hearing. None have concluded that an individual who has been incarcerated or otherwise unable to personally appear in court has an absolute right consistent with the Due Process Clause to appear at a termination of parental rights hearing.[1] *See generally* Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. Fam. L. 757, 775-76 (1991-92) (stating "there is unanimity among the jurisdictions that have decided the issue that [prisoners incarcerated outside the state] do not have the right to be brought into the state for the termination hearing, as long as the parent is represented by counsel and provided with alternative means of participating in the hearing").

{17} Thus, while it is clear that a parent incarcerated out of state does not have an absolute right to appear at a parental rights termination hearing, this does not end our inquiry. We next address the first-impression issue of whether a parent who is prevented from attending a termination proceeding because of his or her incarceration, is entitled by due process to have the court fashion an alternative procedure to permit the parent to respond to the matters presented by the state. Procedural due process mandates that a person be accorded an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Of the states which have held that personal appearance of an incarcerated parent is not mandated in parental termination of rights proceedings, courts which have addressed this issue are not in accord as to what particular optional procedural due process safeguards must be provided to ameliorate the parents' physical absence by ensuring their participation. Rather the courts acknowledge that procedural due process is a flexible right and the amount of process due depends on the particular circumstances of each case. *See In re Welfare of HGB*, 306 N.W.2d at 825; *In re Christopher D.*, 530 N.W.2d 34, 42 (Wis. Ct. App. 1995). A number of states have held that a parent incarcerated out of state or otherwise prevented from attending a termination hearing was afforded due process under the circumstances when the parent received notice, was represented by counsel, and was given an opportunity to appear and testify by deposition: *See, e.g.*, *Pignolet*, 489 So. 2d at 591; *In re Appeal in Pima County Juvenile Action*, 638 P.2d at 1347 n.1; *People ex rel. C.G.*, 885 P.2d at 357; *In re J.S.*, 470 N.W.2d at 52; *In re J.L.D.*, 794 P.2d at 322; *In re Welfare of HGB*, 306 N.W.2d at 825; *In re James Carton K., III*, 665 N.Y.S.2d 426, 429 (N.Y. App. Div. 1997); *In re F.H.*, 283 N.W.2d at 209-10; *In re Rich, IV*, 604 P.2d at 1252-53; *Najar*, 624 S.W.2d at 387.

{18} Courts in other cases, however, have held that due process requirements necessitate more than simply providing for a parent's appearance by deposition. They required that the parent be given an opportunity to review the evidence presented by the state, to consult with his or her attorney, and then to present evidence by deposition or by telephone. *See In re Juvenile Appeal*, 446 A.2d at 811-12 (due process afforded when transcript of state's witnesses was prepared, sent to parent, parent had opportunity to review and discuss with attorney, hearing then reconvened and parent through his or her attorney is given an

[1] *See Pignolet v. State Dep't of Pensions & Sec.*, 489 So. 2d 588, 590-91 (Ala. Civ. App. 1986); *E.J.S. v. State Dep't of Health & Soc. Servs.*, 754 P.2d 749, 752 (Alaska 1988); *In re Appeal in Pima County Juvenile Action*, 638 P.2d 1346, 1347 n.1 (Ariz. Ct. App. 1981); *In re Gary U.*, 186 Cal. Rptr. 316, 318-19 (Cal. Ct. App. 1982); *People ex rel. C.G.*, 885 P.2d 355, 357 (Colo. Ct. App. 1994); *In re Juvenile Appeal*, 446 A.2d 808, 813 (Conn. 1982); *In re Heller*, 669 A.2d 25, 32 (Del. 1995); *In re F.L.S. IV*, 502 S.E.2d 256, 257 (Ga. Ct. App. 1998); *In re Baby Doe*, 936 P.2d 690, 695 (Idaho Ct. App. 1997); *In re J.S.*, 470 N.W.2d 48, 52 (Iowa Ct. App. 1991); *In re J.L.D.*, 794 P.2d 319, 322 (Kan. Ct. App. 1990); *In re S.A.D.*, 481 So. 2d 191, 193-94 (La. Ct. App. 1985); *In re Randy Scott B.*, 511 A.2d 450, 452-54 (Me. 1986); *In re Vasquez*, 501 N.W.2d 231, 233-35 (Mich. Ct. App. 1993); *In re Welfare of HGB*, 306 N.W.2d 821, 826 (Minn. 1981); *H.W.S. v. C.T.*, 827 S.W.2d 237, 242 (Mo. Ct. App. 1992); *In re L.V.*, 482 N.W.2d 250, 257-59 (Neb. 1992); *In re Raymond Dean L.*, 490 N.Y.S.2d 75, 77-78 (N.Y. App. Div. 1985); *In re F.H.*, 283 N.W.2d 202, 209-10 (N.D. 1979); *In re Rich, IV*, 604 P.2d 1248, 1252-53 (Okla. 1979); *State ex rel. Juvenile Dep't v. Stevens*, 786 P.2d 1296, 1298-99 (Or. Ct. App. 1990) (en banc); *In re A.P.*, 692 A.2d 240, 243-44 (Pa. Super. Ct. 1997); *Najar v. Oman*, 624 S.W.2d 385, 387 (Tex. Ct. App. 1981); *State ex rel. M.A.V. v. Vargas*, 736 P.2d 1031, 1033-34 (Utah Ct. App. 1987); *In re Darrow*, 649 P.2d 858, 859-61 (Wash. Ct. App. 1982); *see also In re C.J.*, 650 N.E.2d 290, 294 (Ill. App. Ct. 1995) (violation of due process necessitated reversal and remand for new termination hearing in order to provide mother meaningful opportunity to be head and defend against charges).

opportunity to cross-examine state witnesses and present testimony); *In re Baby Doe*, 936 P.2d at 693-95 (parent permitted to present testimony through telephone deposition and attorney allowed to call additional witnesses at later time if additional evidence is developed during deposition); *In re C.J.*, 650 N.E.2d at 293-94 (mother incarcerated out of state does not have right to have hearing continued until released from prison, but is entitled to review evidence by state and to present testimony on her own behalf); *In re Randy Scott B.*, 511 A.2d at 452, 454 (father testified through deposition, and father's counsel offered opportunity to reopen record after the deposition); *In re L.V.*, 482 N.W.2d at 259 (after state's evidence, testimony transcribed, parent is entitled to have deposition taken, and an opportunity to recall state's witnesses for recross-examination, and have their attorney call additional witnesses on his or her behalf); *Stevens*, 786 P.2d at 1299 (parent permitted to testify by telephone following state's presentation of any adverse witness in order for parent's counsel to be able to cross-examine effectively; parent must be able to consult with counsel); *In re Darrow*, 649 P.2d at 861 ("In those cases where the imprisoned parent's attendance cannot be procured safely and timely, the trial court should assure that the parent is afforded a full and fair opportunity to present evidence or rebut evidence presented against him. . . . [G]ranting a continuance after [the state's] case-in-chief is one means of assuring the parent's right to defend.").

{19} As observed by our Supreme Court in *Oldfield v. Benavidez*, 116 N.M. 785, 791, 867 P.2d 1167, 1173 (1994), "[t]he government has a compelling interest in the welfare of children, and the relationship between parents and their children may be investigated and terminated by the state, provided constitutionally adequate procedures are followed. *Santosky v. Kramer*, 455 U.S. 745, 766 . . . (1982)." Similarly, in *Ronald A.*, 110 N.M. at 455, 797 P.2d at 244, the Court noted: "A parent's right in custody is constitutionally protected, and actions to terminate that right must be conducted with scrupulous fairness[.]" (Citation omitted.) The Court in *Ronald A.*, 110 N.M. at 455, 797 P.2d at 244, quoted with approval this Court's decision in *In re Laurie R.*, 107 N.M. 529, 534, 760 P.2d 1295, 1300 (Ct. App. 1988), which held that "[p]rocedural due process requires notice to each of the parties of the issues to be determined and opportunity to prepare and present a case on the material issues." Similarly, in *Joe R.*, 1997-NMSC-038, ¶ 29, our Supreme Court held that a "[f]ather's rights and obligations as a parent are protected by his constitutional right to due process."

{20} In *In re Kenny F.*, 109 N.M. 472, 786 P.2d 699 (Ct. App. 1990), *overruled on other grounds by In re Adoption of J.J.B.*, 117 N.M. 31, 39, 868 P.2d 1256, 1264 (Ct. App. 1993), *aff'd*, 119 N.M. 638, 894 P.2d 994 (1995), this Court considered the question of whether a parent's rights to due process were violated in the termination of parental rights proceeding. We stated that "[t]he essence of procedural due process in this context is a fair opportunity to be heard and present a defense." *Id.* at 475, 786 P.2d at 702. In *In re Kenny F.* the State offered to transport Mother to the hearing and tried to contact her on numerous occasions to make certain she was going to be at the hearing but she did not respond to the state's offer. *See id.* Although ultimately this Court denied the mother's due process claim, our conclusion was premised upon the mother's failure to protect her own interests, despite the opportunity given to her by the state.

{21} In *Mathews* the United States Supreme Court adopted a three-part test detailing the criteria which govern the inquiry concerning whether due process has been satisfied in a particular case. *See id.*, 424 U.S. at 335; *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996); *Santosky*, 455 U.S. at 753-54; *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 37 (1981). The *Mathews* Court stated that the question of whether due process has been accorded an individual necessitates resolution of the following factors:

> First, [consideration of] the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

{22} In reviewing proceedings wherein the children's court has ordered that the parent-child relationships be terminated, we review the evidence in the light most favorable to the prevailing party to determine if the record is sufficient to establish clearly and convincingly a basis for termination. *See In re Dennis S.*, 108 N.M. 486, 487, 775 P.2d 252, 253 (Ct. App. 1989). However, in passing upon claims that the procedure utilized below resulted in a denial of procedural due process, we review such issues de novo. *See In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984); *In re Christopher D.*, 530 N.W.2d at 42 (stating "trial court's determination that [incarcerated parent] could meaningfully participate by telephone [in a termination of parental rights proceeding] is a constitutional fact. We review constitutional facts independently as conclusions of law."). *See generally* Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 17.05, at 17-21 (2d ed. 1992) ("[P]rocedure is probably always a pure question of law . . . .").

{23} Applying the balancing test set forth in *Mathews* to the record before us, we conclude that the procedures utilized in the children's court herein failed to satisfy due process requirements set forth in *Mathews*. Under the first factor, it is clear that Father's interest was significant. *See In re Ronald A.*, 110 N.M. at 455, 797 P.2d at 244 (a parent's right to custody of his or her children is constitutionally protected). Applying the second factor to the record before us, it is also evident that the risk of an erroneous deprivation of parental rights is greatly magnified unless alternative arrangements are made to permit an incarcerated parent who preserves his or her due

process right to present evidence, to consult with his or her attorney, and to confront the witnesses called by the state. *See In re Laurie R.*, 107 N.M. at 534, 760 P.2d at 1300. Under the third factor, we acknowledge the state's vital interest in protecting the welfare of children. *See Ridenour v. Ridenour*, 120 N.M. 352, 355, 901 P.2d 770, 773 (Ct. App. 1995) ("Case law . . . recognizes the state's compelling interests in the welfare of its children.").

{24} After balancing each of the factors herein, we conclude that the second factor is determinative. Here, the procedure employed by the children's court had the effect of increasing the risk of error by denying Father an opportunity to defend against the charge of neglect and abandonment.

{25} In sum, we determine that because a fundamental liberty interest is implicated in proceedings involving the termination of parental rights, a parent who is incarcerated and is unable to attend the hearing on the state's petition to terminate parental rights is entitled to more than simply the right to cross-examine witnesses or to present argument through his attorney, or to present deposition testimony—he or she has the right to meaningful participation in the hearing. This right includes the right to review the evidence presented against him or her, present evidence on his or her behalf, and an opportunity to challenge the evidence presented.

{26} Although procedural due process may be adapted to the particular circumstances of each case, the Nebraska Supreme Court, in *In re L.V.*, has cogently set forth the procedural due process required in proceedings seeking to terminate parental rights under factual circumstances analogous to the instant case. The court observed:

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

In re L.V., 482 N.W.2d at 257 (citations omitted). This enumeration of the requirements of procedural due process is consistent with the decision of our Supreme Court in *In re Ronald A.*, 110 N.M. at 455, 797 P.2d at 244, and this Court's decision in *In re Kenny F.*, 109 N.M. at 475, 786 P.2d at 702.

{27} By refusing to continue the hearing or adopt other procedures to permit Father's meaningful participation in the hearing, Father was denied an opportunity to defend against the allegations, to confront and cross-examine witnesses, and to present evidence on his behalf. As a result of the children's court's failure to implement any mechanism to allow Father to testify on his behalf, the risk of an erroneous deprivation of Father's constitutionally protected rights was greatly increased. In this case the issues before the children's court were whether Father was complying with the treatment plan and whether Father was using his best efforts to work towards a reunification of the family unit. Allegations were being made regarding Father's sincerity in regaining custody of the children and regarding Father's ability to comply with the treatment plan and regain custody of the children. Without Father being able to provide evidence on his behalf, the only evidence before the children's court was that presented by the Department whose stated goal was to terminate Father's parental rights. Under these circumstances, Father was prejudiced by his inability to meaningfully participate in the hearing or to consult with his attorney.

{28} As observed by our Supreme Court in *In re Valdez*, 88 N.M. 338, 341, 540 P.2d 818, 821 (1975), "due process is a . . . malleable principle which must be molded to the particular situation, considering both the rights of the parties and governmental interests involved." Here, although it is clear that Father could not be physically present at the proceeding, other procedures were available to permit him to participate in the proceeding. Father could have given testimony at the final hearing by telephone, or after the Department's witnesses were called, Father's deposition could have been taken so that he could have an opportunity to review such evidence and he could then be accorded an opportunity to respond. *See State ex rel. Human Servs. Dep't v. Gomez*, 99 N.M. 261, 262, 657 P.2d 117, 118 (1982) (holding telephonic hearing to determine if benefits being paid under aid to dependent children should be terminated did not violate due process requirements); *see also* Michael J. Weber, Annotation, *Permissibility of Testimony by Telephone in State Trial*, 85 A.L.R.4th 476 (1991) (concluding telephone testimony in parental termination of rights proceedings consistent with procedural due process). We note that this case is distinguishable from *Evans v. State, Taxation & Revenue Department*, 122 N.M. 216, 216, 922 P.2d 1212, 1212 (Ct. App. 1996), where the statute at issue mandated that license revocation hearings occur within the county where the offense occurred, and therefore telephonic hearings were not permitted. Here, there is not similar statutory language.

{29} Alternatively, a second continuance could have been granted for a brief period of time (thirty days or so) to see if Father was released from the Texas jail. Failing that, the children's court could have ordered that the Department present its evidence, then that the matter be briefly recessed so that Father was given an opportunity to review the evidence, discuss it with his attorney, and then the hearing be reconvened so Father could present his evidence by telephone or deposition, and an opportunity through his counsel to effectively cross-examine the Department's witnesses. We do not believe that utilization of any of these procedures utilized in other states would greatly burden the Department.

{30} We are mindful of the fact that cases involving the termination of parental rights should be expeditiously

concluded, that the need for finality in these cases is great, and that it is important that the children involved have a sense of stability and permanence in their lives. At the same time, a court cannot ignore a parent's fundamental liberty interest in the care and custody of his or her children. Thus, before a court can irrevocably sever the parent-child bond, it must ensure that the parent is given a fair opportunity to present evidence and defend his or her fundamental parental rights. Father was deprived of that opportunity here.

CONCLUSION

{31} The order terminating Father's parental rights is reversed and the matter is remanded to the children's court for a new hearing consistent with the matters stated herein.

{32} IT IS SO ORDERED.

THOMAS A. DONNELLY, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
RUDY S. APODACA, Judge

Certiorari Not Applied For

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 1999-NMCA-038

DAVID G. RAMIREZ,
Worker-Appellant,

versus

JOHNNY'S ROOFING, INC. and U.S.F. & G.,
Employer/Insurer-Appellee.

No. 19,254 (filed January 11, 1999)

APPEAL FROM THE NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION
JOSEPH N. WILTGEN, Workers' Compensation Judge

MAX HOUSTON PROCTOR
Hobbs, New Mexico
for Appellant

THOMAS R. MACK
H. BROOK LASKEY
MILLER, STRATVERT & TORGERSON, P.A.
Albuquerque, New Mexico
for Appellee

OPINION
M. CHRISTINA ARMIJO
Judge

{1} David G. Ramirez (Worker) appeals the adverse administrative disposal of his workers' compensation claim. His appeal presents three issues: (1) whether Johnny's Roofing, Inc., and U.S.F. & G. (collectively, Employer) waived their statutory right to redesignate Worker's primary health care provider by entering into a partial lump-sum settlement agreement with Worker; (2) whether Worker waived his right to raise the first issue by failing to file an objection to Employer's notice of change of health care provider; and (3) whether Worker's back surgery was reasonable and medically necessary such that Employer must pay for it. For the reasons stated below, we reverse and remand the order of the Workers' Compensation Judge (WCJ).

BACKGROUND

{2} Worker injured his back while working in October 1992. For treatment, he elected Dr. Robert Peinert, a physician with whom he had consulted on prior occasions. Dr. Peinert determined that Worker had reached maximum medical improvement (MMI) in October 1993 and authorized his return to work, albeit in a limited capacity.

{3} In September 1994, the parties settled a portion of Worker's claims against Employer. The agreement provided that Employer would pay Worker $10,000 in consideration for Worker's partial release of Employer from liability. The agreement further provided: "Medical treatment to remain open for life with Dr. Peinert or his referral."

{4} After reaching MMI, Worker continued to see Dr. Peinert regarding chronic back pain. Due to Worker's reticence regarding surgical intervention, Dr. Peinert prescribed a conservative treatment plan which failed to lessen Worker's apparent discomfort. In November 1995, Worker consented to Dr. Peinert's surgical recommendations, and the doctor planned to operate in "early February" of the next year. The surgery, however, was postponed until an Employer-ordered second opinion could be rendered and further tests could be performed. Once these consultations and tests were complete, Dr. Peinert scheduled Worker's surgery for June 1997.

{5} Until spring of 1997, Employer consistently paid for Dr. Peinert's treatment of Worker; indeed, there is no record evidence that Employer was dissatisfied with Dr. Peinert's treatment of Worker. Nonetheless, in May 1997, Employer filed a notice of change of health care provider, informing Worker

that Dr. Peinert was no longer his treating physician. Worker and Dr. Peinert disregarded this notice and proceeded with the planned back surgery. Relying upon the May 1997 change of Worker's health care provider, Employer has since refused to pay for the operation. At the hearing below, the WCJ decided in Employer's favor, finding it not liable for the costs of Worker's operation and follow-up treatment.

THE PARTIAL LUMP-SUM SETTLEMENT

{6} NMSA 1978, Section 52-5-12(C) (1990) provides for the partial lump-sum settlement of workers' compensation claims. Such agreements allow workers at MMI to receive a portion of the benefits to which they are entitled in exchange for their releasing their employers from liability for making biweekly payments for a period of time. *Accord Cabazos v. Calloway Constr.*, 118 N.M. 198, 201, 879 P.2d 1217, 1220 (Ct. App. 1994). Once reached, these agreements bind the parties in contract. *See Ratzlaff v. Seven Bar Flying Serv., Inc.*, 98 N.M. 159, 162, 646 P.2d 586, 589 (Ct. App. 1982) ("Releases, being contractual in nature, are governed by the laws of contracts[.]"). Indeed, once approved by a WCJ, they "shall not be set aside or modified except as provided in the applicable law." NMSA 1978, § 52-5-14(A) (1990). Thus, such agreements bind the parties even more strongly than would the common law of contracts. *Cf. Medina v. Sunstate Realty, Inc.*, 119 N.M. 136, 139, 889 P.2d 171, 174 (1995) ("'a written contract may be modified, rescinded or discharged by subsequent oral agreement.'" (quoting 4 Samuel Williston & Walter H.E. Jaeger, *A Treatise on the Law of Contracts*, § 591, at 203 (3d ed. 1961))). Finally, where the agreement is written and executed, the writing "is presumptively conclusive proof of a binding agreement." *Rojo v. Loeper Landscaping, Inc.*, 107 N.M. 407, 409, 759 P.2d 194, 196 (1988); *see also Cruz v. Liberty Mut. Ins. Co.*, 119 N.M. 301, 304, 889 P.2d 1223, 1226 (1995). Worker and Employer are therefore bound by the plain terms of their written Section 52-5-12(C) agreement.

{7} This appeal turns on the meaning ascribed to a single phrase contained in the parties' written agreement: "Medical treatment to stay open for life with Dr. Peinert or his referral." Worker argued at the hearing below that inclusion of this language constituted a waiver of Employer's statutory right to designate a change in Worker's primary health care provider. *See* NMSA 1978, § 52-3-15(D) (1990). The WCJ rejected this argument and ruled that Employer was not liable for the payment of the cost of surgery Dr. Peinert performed upon Worker in July 1996. We disagree and reverse the order of the WCJ.

{8} In support of the WCJ's order, Employer argues that the settlement provision is ambiguous and this Court ought, therefore, to defer to the WCJ's factual findings pertaining to its meaning. *Cf. C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 509, 817 P.2d 238, 243 (1991) (noting that ambiguity in contract is to be resolved by fact-finder). However, the threshold question of whether a contract is ambiguous is a question of law. *See id.*; *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). This Court, therefore, is not required to defer to the WCJ's conclusion that the contract provision is ambiguous. *See Fitzhugh v. New Mexico Dep't of Labor*, 1996-NMSC-044, ¶ 22, 122 N.M. 173, 922 P.2d 555. We find that the contested provision is not ambiguous; indeed, the parties drafted their contract with abundant clarity. *See, e.g., C.R. Anthony Co.*, 112 N.M. at 508 n.2, 817 P.2d at 242 n.2 ("Ambiguity . . . is best understood as a proxy for describing lack of clarity in the parties' expressions of mutual assent.").

{9} The contested provision indicates a meeting of the minds regarding Worker's future medical care. It consists of two components: (1) it states that future "[m]edical treatment" will be provided "for life"; and (2) without any separating punctuation or expression of modified intent, it states that such benefits will remain open to Worker "with Dr. Peinert or his referral." Even considering the provision in context, *i.e.*, as part of the partial settlement of Worker's claims against Employer, we discern *no* ambiguity. *See C.R. Anthony Co.*, 112 N.M. at 508-09, 817 P.2d at 242-43 (recognizing judicial retreat from strict application of "four-corners" doctrine of contract interpretation).

{10} Furthermore, Employer makes no argument for any alternative meaning with which we could animate this contractual provision. Despite Employer's assertion to the contrary, we hold that the debated provision imposes upon it an obligation to provide Worker with future medical treatment "for life with Dr. Peinert or his referral." *Cf. Vickers v. North Am. Land Devs., Inc.*, 94 N.M. 65, 68, 607 P.2d 603, 606 (1980) ("The mere fact that the parties are in disagreement on the construction to be given does not necessarily establish ambiguity.").

{11} Employer further argues that this provision is invalid as Worker paid no consideration for it. We do not agree. In consideration for the agreement, Worker released Employer from the obligation to issue biweekly payments for a period of time. This is obvious consideration. *See Hurley v. Hurley*, 94 N.M. 641, 645, 615 P.2d 256, 260 (1980), *overruled on other grounds by Ellsworth v. Ellsworth*, 97 N.M. 133, 135, 637 P.2d 564, 566 (1981); *cf. Acme Cigarette Servs., Inc. v. Gallegos*, 91 N.M. 577, 581, 577 P.2d 885, 889 (Ct. App. 1978) ("[I]n a bilateral agreement, a promise of one party may support one or more promises of the other party."). Employer's argument, therefore, appears to be that Worker tendered *insufficient* consideration. However, absent a showing of fraud, "inadequacy of consideration is not sufficient to avoid a contract." *Ratzlaff*, 98 N.M. at 164, 646 P.2d at 691; *cf. Board of Educ. v. James Hamilton Constr. Co.*, 119 N.M. 415, 419, 891 P.2d 556, 560 (Ct. App. 1994) (noting that a promise is sufficient consideration where it is "lawful, definite and possible" (quoting *Sanders v. Freeland*, 64 N.M. 149, 152, 325 P.2d 923, 925 (1958))). Employer's argument, therefore, has no merit.

{12} Employer finally argues that Worker waived his right to raise the foregoing argument when he failed to file an objection to Employer's notice of change of health care provider. In so arguing, Employer relies upon NMSA 1978, Section 52-1-49(C), (D), and (E) (1990), which provide that a party that did not choose the initial health care provider may by right file a notice of change of

is unclear whether Plaintiffs initiated arbitration proceedings. We disagree.

{15} The arbitration provision, Paragraph 7.4 of the contract, reads, in pertinent part:

> All disputes between the parties which are not settled amicably are to be resolved by binding arbitration. Such arbitration shall be submitted to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), and judgment upon the award rendered by a single arbitrator may be entered in any court having jurisdiction over the matter. . . . The failure of MANAGER to initiate arbitration proceedings within thirty (30) days after the sending of a notice of termination by K-BOB'S shall be deemed a waiver of MANAGER's right to arbitration.

{16} Plaintiffs contend that the provision was ambiguous as to how the arbitration process was to be initiated. Plaintiffs also argue that the provision was ambiguous because it did not set out the procedure for arbitration. However, the provision referenced the Commercial Arbitration Rules of the American Arbitration Association as the guiding substantive and procedural rules for the arbitration. Not only is this reference not ambiguous, but such references appear to be commonplace in arbitration provisions. *See, e.g., Board of Educ., Taos Mun. Schs. v. The Architects, Taos*, 103 N.M. 462, 464, 709 P.2d 184, 186 (1985) (quoting arbitration provision that referenced the Construction Industry Arbitration Rules); *see also* 16 Samuel Williston, *A Treatise on the Law of Contracts* § 1918B (Walter H. E. Jaeger, 3d ed. 1976 & Supp. 1998) (including the governing arbitration rules in corresponding form for drafting an arbitration provision).

{17} By focusing on the contract specifics, however, the parties fail to address the dispositive issue. Paragraph 7.4 sufficiently evinces the intent of the parties to submit disputes to arbitration. That intent is undisputed by the parties. Even if there were ambiguity in the specific rules by which arbitration was to be initiated or conducted, it would not render the arbitration provision inapplicable, but merely subject to interpretation in accordance with the customary practices of the industry. *See Mark V, Inc.*, 114 N.M. at 781, 845 P.2d at 1235 (applying a contextual approach to contract interpretations); *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 511-12, 817 P.2d 238, 245-46 (1991) (holding that contract ambiguities can be interpreted in light of relevant trade usage and practices). Although these terms are borrowed from the Uniform Commercial Code, we have not limited their application merely to the interpretation of contracts for sales and leases of goods. *See State ex rel. State Highway & Transp. Dep't. v. Garley*, 111 N.M. 383, 390, 806 P.2d 32, 39 (1991) (extending some U.C.C. provisions to all contracts); *see also* NMSA 1978, §§ 55-1-205 (1968), 55-2-102 (1961) (sales of goods), 55-2A-102 (1992), and 55-2A-103(1)(j) (1993) (lease of goods).

{18} The trial court also concluded that the contract was unfair, because Plaintiffs' remedies appeared to be more limited than Defendants' remedies. The contract specified that arbitration would be considered waived by Plaintiffs thirty days from termination of the contract, but had no similar provisions for Defendants. Also, the contract allowed Defendants to seek equitable relief during the pendency of arbitration, but made no comparable provision for Plaintiffs. On appeal, Plaintiffs argue in support of the trial court's conclusion, claiming that the provision constituted substantive unconscionability.

{19} When its terms are unreasonably favorable to one party, a contract may be held to be substantively unconscionable. *See Garley*, 111 N.M. at 389-90, 806 P.2d at 38-39; *see also Guthmann v. La Vida Llena*, 103 N.M. 506, 511, 709 P.2d 675, 680 (1985). However, the threshold for such a holding is very high, as the "terms must be such as, 'no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other.'" *Id.* (quoting *In re Friedman*, 407 N.Y.S.2d 999, 1008 (App. Div. 1978)).

{20} The terms here, while imbalanced, did not rise to a level of unconscionability. Both parties were bound to resolve disputes through arbitration. The contract provided for information-sharing by Defendants regarding the prospects of the restaurant's success prior to Plaintiffs' acquisition of interest. According to Paragraph 3.3, Defendants also were to pay all net operating losses from the time of opening until December 31, 1995, although Paragraph 4.3 allows Defendants to terminate the contract if Plaintiffs fail to break even or turn a profit from opening date until that time. Plaintiffs purchased only a 25% interest in the net profits and losses of the restaurant, leaving Defendants ultimately responsible for the majority of the investment in the franchise. Therefore, because Defendants appeared to assume a larger portion of the risk, it did not rise to the extreme of unconscionability for Defendants to preserve equitable remedies and require that Plaintiffs timely submit any claims to arbitration.

The Misrepresentation Claim Did Relate To The Contract

{21} The trial court concluded that Plaintiffs' claim of misrepresentation was not a dispute about the contract, and therefore fell outside the arbitration provision. Plaintiffs' complaint claimed the specific misrepresentation that Defendants made assurances that if Donald Monette proved unsuccessful as manager, then another of his family could replace him. Defendants, however, terminated the contract upon Donald Monette's resignation. In their complaint, Plaintiffs appeared to consider the misrepresentation to be a basis for claiming a breach of the contract, while in their response to the motion to compel arbitration, Plaintiffs appeared to consider the misrepresentation to be a basis for avoiding both arbitration and the contract.

{22} When parties agree to submit their disputes to arbitration, this applies to "any potential claims or disputes arising out of their relationships by contract or otherwise." *K.L. House Constr. Co. v. City of Albuquerque*, 91 N.M. 492, 494, 576 P.2d 752, 754 (1978). The dispute over assurances that another family member could replace Donald Monette

as manager arose from the parties' relationship by contract, even if the assurances occurred in anticipation of the contract. *See id.* (holding that disputes arising after the completion of contractual obligation were reasonably related to the contract and subject to arbitration). Plaintiffs' misrepresentation claim clearly relates to the contract, and thus the arbitration provision would apply, unless there are legal or equitable grounds for revoking the contract. *See* NMSA 1978, § 44-7-1 (1971).

{23} To the extent that Plaintiffs are claiming fraud in the inducement of the contract due to the specific misrepresentation alleged, we acknowledge that such a claim is not appropriate for arbitration. *See Shaw v. Kuhnel & Assoc., Inc.*, 102 N.M. 607, 609, 698 P.2d 880, 882 (1985). Our Supreme Court has clearly held that "[i]t is for a court to determine issues of fraud in the inducement, not an arbitrator." *Id.* While the intent of Plaintiffs' complaint appeared to claim a breach of the contract, the allegation of misrepresentation was sufficiently specific to satisfy rules of pleading. *See Maxey v. Quintana*, 84 N.M. 38, 40, 499 P.2d 256, 359 (Ct. App. 1972). By the time of the motion to compel arbitration, Plaintiffs' relied on the allegation of misrepresentation specifically to avoid the arbitration provision by claiming fraud in the inducement. On remand, the trial court shall first determine if such fraud existed, and if not, the remaining issues should proceed to arbitration. *See Shaw*, 102 N.M. at 609, 698 P.2d at 882.

CONCLUSION

{24} We affirm in part and reverse in part. The trial court erred by concluding that the arbitration provision was ambiguous and unfair and that the misrepresentation claim did not in any way relate to the contract. The trial court was correct, on the showing made below, in concluding that Charles Monette was not bound by the arbitration provision of the contract. To the extent that Plaintiffs appear to be claiming fraud in the inducement, however, that claim cannot be settled through arbitration. We remand to the trial court to determine whether Defendants committed fraud in the inducement, and if so, to provide relief accordingly. In the absence of a determination of such fraud, all of Donald Monette's remaining claims are properly within the arbitration provision and should be resolved by arbitration. Charles Monette's claims are properly before the trial court at this time.

{25} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:
THOMAS A. DONNELLY, Judge
M. CHRISTINA ARMIJO, Judge

Certiorari Not Applied For

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 1999-NMCA-039
GINA MARIE SISNEROZ, Individually, and on behalf of Pier Angelin G., a minor,
Petitioner-Appellant,

versus

RAY D. POLANCO,
Respondent-Appellee.

No. 19,371 (filed February 12, 1999)

APPEAL FROM THE DISTRICT COURT OF SOCORRO COUNTY
THOMAS G. FITCH, District Judge

PATSY D. REINARD
Socorro, New Mexico
for Appellant

JOHN R. GERBRACHT
Socorro, New Mexico
for Appellee

OPINION
RICHARD C. BOSSON
Judge

{1} This appeal involves waiver of retroactive child support under the Uniform Parentage Act, NMSA 1978, §§ 40-11-1 to -23 (1986, as amended through 1997) (UPA), and the applicability of the UPA to a claim for such child support when paternity has not been denied by the father. We also address a mother's standing to claim reimbursement for pregnancy and birthing costs when those costs have been paid by her parents who are not parties to the lawsuit. We agree with the trial court's decision to apply the UPA to the facts of this case. However, we hold that the trial court erred in concluding that Mother (1) had waived retroactive child support, and (2) did not have standing to seek reimbursement for pregnancy and birthing expenses. We also conclude that the trial court erred in awarding only $600 in attorney's fees against unpaid fees of $1890. Accordingly, we reverse and remand to the trial court for further proceedings consistent with this opinion.

BACKGROUND

{2} Petitioner Sisneroz (Mother) and Respondent Polanco (Father) are the biological parents of a girl (Child) born on December 20, 1984. Mother and Father never married. Prior to the present lawsuit, Father's paternity had not been legally adjudicated nor was any court order ever entered against Father for child support. Although paternity of Child had not been legally established, Father and Child visited each other occasionally, and Father never denied paternity. Father gave Mother $50 for Child on one occasion, and from time to time he gave Child small amounts of money for her personal use, he bought her Christmas gifts, and school clothes on two occasions, and since 1990 Father included Child under his medical and dental insurance.

{3} From January 1986, when Child was a little over a year old, until September 1992, Mother received Aid to Fami-

lies with Dependent Children (AFDC) from the New Mexico Human Services Department (HSD) for Child's support. During this time Mother relied on the promise of the HSD Child Support Enforcement Division (CSED) to bring a paternity action against Father and obtain child support from him. Mother continued to rely on CSED to do this even after she discontinued receiving AFDC. Mother testified that she filled out forms, provided answers to CSED questions, told CSED that she wanted to proceed with the case, and gave CSED "everything they asked for" for them to obtain support from Father. CSED was unsuccessful in securing child support from Father and eventually discontinued its efforts. Ultimately, Mother decided to bring her own action for paternity and support when she learned that the CSED had closed her case.

{4} Mother, on behalf of Child, filed a petition on January 9, 1997 for paternity and support, and individually on her own behalf, she sought to recover the costs of her pregnancy and birthing expenses. Father admitted paternity of Child in his formal response to the petition. After a hearing, the trial court found that Mother had waived retroactive child support for the entire period prior to filing this petition. The court also concluded that Mother did not have standing to seek reimbursement for pregnancy and birthing expenses. The court awarded Mother only a small portion of her attorney's fees incurred in this action.

DISCUSSION

Standard of Review

{5} In reviewing Mother's challenges to the trial court's findings of fact and conclusions of law, we determine whether the law has been correctly applied to the facts, viewing the evidence presented at trial and all reasonable inferences drawn therefrom in the light most favorable to the prevailing party. *See McCurry v. McCurry*, 117 N.M. 564, 567, 874 P.2d 25, 28 (Ct. App. 1994). Although the trial court found that Mother had waived child support for all the years prior to filing her petition, it did not make any factual findings to support its legal conclusion of waiver.

The Uniform Parentage Act

{6} We first consider whether the UPA applies to fathers who do not deny paternity of their children but never formally acknowledge their paternity or assume legal responsibility for their support. At trial Father argued that Mother's action was not really a paternity case because he had never denied paternity. He took the position that the UPA was inapplicable to him, and thus, he could only be sued for prospective child support, no differently from the father of a child born of married parents. A paternity action under the UPA provides for the remedy of child support retroactive to the date of a child's birth, unlike suits brought for support in which paternity is not at issue in which courts can award child support only from the date of the petition. *Compare* § 40-11-15(C) (stating that the court shall order retroactive child support) *with* NMSA 1978, §§ 40-4-11 to -11.2 (1988, as amended through 1995) (determining prospective award of child support in dissolution of marriage cases).

{7} At trial Mother argued that Father's paternity of Child, although not denied, had never been adjudicated or formally acknowledged, and therefore she was forced to bring this action to establish paternity and secure an award of retroactive child support under the UPA. She also argued that equal protection principles support the right to retroactive child support in this case. *See Padilla v. Montano*, 116 N.M. 398, 402-06, 862 P.2d 1257, 1261-65 (Ct. App. 1993) (holding that the equal protection clause prohibits a trial court from withholding from children born out-of-wedlock the right to financial support during their entire minority). The trial court rejected Father's invitation to treat more favorably those men who informally acknowledge the paternity of their children than those who do not. The court concluded that "there is a legal right to claim retroactive child support in this case," subject to the defenses of waiver and offset for certain payments allegedly made.

{8} We agree with the trial court and with Mother's argument on this issue. Children born to married parents and children born out-of-wedlock have an equal interest in financial support during their entire minority. *See id.*; *Stringer v. Dudoich*, 92 N.M. 98, 100, 583 P.2d 462, 464 (1978). When a child is born of married parents, the husband's paternity of the child is presumed. As a result, the child born to married parents has a legal right to support from both parents. *See State ex rel. Terry v. Terry*, 80 N.M. 185, 187, 453 P.2d 206, 208 (1969). Children born out-of-wedlock do not benefit from the legal presumption of paternity that children of married parents enjoy. *See Padilla*, 116 N.M. at 405, 862 P.2d at 1264. Children born out-of-wedlock must first adjudicate paternity before a court can enforce their interest in child support, and this is likely one reason why the UPA statute of limitations runs up to twenty-one years from the date of the child's birth. *See id.* at 403, 862 P.2d at 1262; *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, ¶ 8, 125 N.M. 471, 963 P.2d 548 (holding that adult son may pursue retroactive child support under the UPA).

{9} The UPA authorizes retroactive child support against a father, but the Act does not expressly create any purported defense for putative fathers who may not deny, but never formally admit their paternity, and who do not assume legal responsibility for their actions. Father never took the necessary formal steps to acknowledge paternity and accept its consequences under law. Before this lawsuit was initiated, Father and Child had no legal relationship incident to which the law could confer or impose rights and obligations. *See* § 40-11-2 (defining "parent and child relationship" as used in the UPA). The UPA provides fathers with various means of establishing legal paternity, including an attempt to enter into marriage with the mother after the child is born *and* (1) a father's acknowledgment of paternity in writing with the vital statistics bureau of the public health division of the department of health; or (2) being named on the child's birth certificate by consent; or (3) obligating oneself to support the child under a written voluntary promise or court order. *See* § 40-11-5(A)(3). Father in this case never pursued any of these alternatives set forth in the UPA to establish a pre-

sumption of paternity. The placement of Father's name on Child's birth certificate, without his consent, does not create a legal presumption of paternity. *See* § 40-11-5(A)(3)(b).

{10} It is not enough that Father admitted paternity, years after the fact, in his response to the petition in this lawsuit, nor is it sufficient that a parent-child relationship had been informally acknowledged. Under these facts, a court of law could not have compelled Father to support Child financially; a court could not have acted until "an interested party" established Father's paternity and legal liability for support. *See* § 40-11-17(A) (stating that if paternity is declared or a duty of support has been acknowledged or adjudicated under the UPA, the obligation of the father may be enforced in the same or other proceeding by any interested party). Mother attempted unsuccessfully for years to adjudicate Father's paternity through the CSED, and Father's liability for child support was never legally established. Under the facts of this case, the trial court correctly concluded that Mother's claim fell within the scope of the UPA.

Waiver of Support

{11} The trial court held that Mother had waived her statutory right to retroactive child support under the UPA. Father argues that Mother intentionally relinquished her right to retroactive child support because (1) she knew she had a right to retroactive support, and (2) she never asked Father for that support until filing this lawsuit. No New Mexico decision has addressed waiver of retroactive child support under the UPA. Mother asks us to rule as a matter of law that she could not bind her child to a waiver of retroactive child support without court appointment of a guardian ad litem and some measure of judicial approval. We do not rule on this argument because even if we assume, arguendo, that Mother could waive retroactive support for her Child, we nonetheless decide that Mother did not waive support in this case because this record does not support proof of waiver.

{12} This Court has recognized two kinds of common-law waiver in the child support context. *See McCurry*, 117 N.M. at 567-68, 874 P.2d at 28-29. First, waiver consists of "'a known legal right, relinquished for consideration, where such legal right is intended for the waivor's sole benefit and does not infringe on the rights of others.'" *Id.* at 567, 874 P.2d at 28 (quoting *Brannock v. Brannock*, 104 N.M. 385, 386, 722 P.2d 636, 637 (1986) (*Brannock I*)). Under certain circumstances, a second type of waiver sounding in equity and based on acquiescence, may arise "where the evidence shows the existence of an agreement . . . supported by consideration, and where the agreement has been acquiesced in over a period of time under circumstances giving rise to estoppel." *Id.* at 568, 874 P.2d at 29 (citing *Arnold v. Krewson*, 834 S.W.2d 229, 232 (Mo. Ct. App. 1992)).

{13} Our Supreme Court has previously stated that, "'[i]n no case will a waiver be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby, unless, by his conduct, the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.'" *Id.* at 567, 874 P.2d at 28 (quoting *Ed Black's Chevrolet Ctr., Inc. v. Melichar*, 81 N.M. 602, 604, 471 P.2d 172, 174 (1970)). Where there is no proof of an express agreement, an enforceable waiver cannot be inferred unless there are unequivocal acts or conduct showing an intent to waive. *See id.* In this case, there is no evidence of such an agreement, and there is no conduct which unequivocally demonstrates an intent to waive on the part of Mother.

{14} In addition, Mother received no consideration from Father in exchange for any purported relinquishment of retroactive child support. *Cf. Williams v. Williams*, 109 N.M. 92, 94, 96-99, 781 P.2d 1170, 1172, 1174-77 (Ct. App. 1989) (mother waived right to child support arrearages that had accrued by refusing the father court-ordered visitation); *Brannock v. Brannock*, 104 N.M. 416, 418, 722 P.2d 667, 669 (Ct. App. 1985) (custodial parent agreed that she would not take the children's father to court for court-ordered past due child support if he paid prospective child support), *aff'd*, 104 N.M. at 387, 722 P.2d at 638. The trial court made no finding that Mother had relinquished retroactive child support for consideration, and Father presented no such evidence.

{15} Retroactive child support is for the benefit of a child as well as for that child's custodian. *See Brannock I*, 104 N.M. at 386, 722 P.2d at 637 (recognizing the dual nature of child support arrearages). A parent's waiver of a child's interest in child support may infringe upon the child's rights. *See id.* This Court held in *Williams*, 109 N.M. at 99, 781 P.2d at 1177 that waiver should not be found where it infringes upon the rights of other, innocent parties. *See also McCurry*, 117 N.M. at 568, 874 P.2d at 29. Father has the burden of persuasion to show that a waiver of retroactive child support would not infringe upon Child's right to financial support throughout her entire minority. *Cf. id.* (stating the noncustodial father had the burden to show that his reductions of child support payments did not affect the best interests of his other minor children). The court made no findings that waiver would not infringe upon Child's rights and Father never requested any such findings nor presented any evidence to that effect. Thus, Father failed to establish the elements of intentional waiver: (1) a known legal right; (2) relinquished for consideration; and (3) where waiver does not infringe on the rights of others.

{16} The equitable defense of waiver by acquiescence "arises when a person knows he is entitled to enforce a right and neglects to do so for such a length of time that under the facts of the case the other party may fairly infer that he has waived or abandoned such right." *McCurry*, 117 N.M. at 568, 874 P.2d at 29. At its core, the defense of acquiescence is based on estoppel. Waiver by acquiescence requires proof of an express or implied agreement, and a trial court should not infer acquiescence from doubtful or ambiguous acts. *See id.*

{17} The trial court made no finding of estoppel or detrimental reliance by Father. Father presented no such evidence at trial. Father presented no evidence of unequivocal acts or conduct showing an

intent, on Mother's part, to waive retroactive child support and his reliance thereon. Father's evidence consisted of Mother's failure to ask Father directly for child support, and the fact that Father on occasion asked Child's maternal grandparents if Child needed anything and was told that Child was doing fine. Mother did not mislead Father into the honest belief or reliance that she had waived child support. There was no evidence that Mother affirmatively told Father she did not want his money or that he could not visit Child. *Cf. Williams*, 109 N.M. at 94, 781 P.2d at 1172 (where the mother told the father that she did not want his money or for him to ever see their child). To the contrary, Mother facilitated a relationship between Father and Child and sought to establish paternity and obtain support through the CSED. The fact that Mother waited for CSED to pursue child support against Father is not evidence of acquiescence. The court made no findings of acquiescence.

{18} For all the foregoing reasons, we reverse the trial court's decision that Mother waived retroactive child support under the UPA. We remand for a determination of child support pursuant to the New Mexico Child Support Guidelines. *See* § 40-11-15(C).

The Legal Definition of Child Support

{19} Father argues the trial court correctly concluded that he provided support to Child through his fifty-dollar payment to Mother, his gifts to Child, and his inclusion of Child in his medical insurance policy. Father notes that the medical coverage was required under the Mandatory Medical Support Act (MMSA), NMSA 1978, § 40-4C-2 (1990). We hold, as a matter of law, that Father's payments do not satisfy the requirements of the child support guidelines.

{20} Under the UPA, Section 40-11-15(C), child support is calculated pursuant to the child support guidelines at Sections 40-4-11 to -11.2 and NMSA 1978, Section 40-4-11.3 (1989). "The cost of providing medical and dental insurance for the [child] of the parties . . . shall be paid by each parent in proportion to his income, *in addition to the basic obligation.*" Section 40-4-11.1(H) (emphasis added). Father's medical coverage costs for Child are in addition to, rather than in lieu of, child support mandated by our guidelines. *See id.* (providing the method for determining basic child support at table "A," "Instructions for Worksheet A," and additionally considering insurance premiums at line 5, "Children's Health and Dental Insurance Premium"). Therefore, on remand the trial court must determine the amount of retroactive child support by applying the child support guidelines. The trial court may consider Father's payment of health and dental insurance premiums in the child support worksheet calculation, but may not substitute the insurance costs for Father's basic child support obligations.

Standing for Reimbursement of Birthing and Pregnancy Expenses

{21} We recognize the trial court's discretion to grant or deny pregnancy and birthing costs. The trial court "*may* direct the father to pay the reasonable expenses of the mother's pregnancy, birth and confinement." Section 40-11-15(C) (emphasis added). Therefore, the trial court had discretion to order, or not to order Father to pay the reasonable expenses of Mother's pregnancy, birth, and confinement. *See id.* Had the trial court denied Mother's costs by exercising that discretion, we would review that decision deferentially. *See Tedford v. Gregory*, 1998-NMCA-067, ¶ 43, 125 N.M. 206, 959 P.2d 540 (review for abuse of discretion trial court's order granting or denying an award of costs or attorney's fees). However, in this case, the trial court denied Mother's pregnancy and birthing expenses based on the erroneous legal conclusion that Mother did not have standing to seek reimbursement for the costs. This was an error of law. *See Garcia v. Sanchez*, 108 N.M. 388, 395, 772 P.2d 1311, 1318 (Ct. App. 1989) (stating that "[w]here . . . the trial court decision is grounded upon an error of law a reviewing court may properly remand the case for redetermination of the issues under correct principles of law").

{22} The trial court's holding confuses standing with real party in interest. Standing turns on whether Mother can show an "injury in fact" traceable to Father's conduct. *See Crumpacker v. DeNaples*, 1998-NMCA-169, ¶ 41, 96. P.2d 799. Real party in interest "on the other hand, entails identification of the person who possesses the particular right sought to be enforced." *Id.* (citing *Jesko v. Stauffer Chem. Co.*, 89 N.M. 786, 790, 558 P.2d 55, 59 (Ct. App. 1976)). In this case, Mother had standing to sue Father for pregnancy and birthing expenses because she incurred the responsibility for those expenses, whether to a health care provider or to her parents. *Cf. Crumpacker*, 1998-NMCA-169, ¶ 42 (holding that notwithstanding the plaintiff's bankrupt status, the plaintiff had standing to sue because she was the party who suffered the alleged injury). Mother may not have been the real party in interest, but that alone does not preclude her from maintaining this action.

{23} "Every action shall be prosecuted in the name of the real party in interest; but . . . a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought[.]" Rule 1-017(A) NMRA 1999. Under the UPA, "[a]ny interested party may bring an action for the purpose of determining the existence or nonexistence of the parent and child relationship." Section 40-11-7(A). Mother is an interested party in the action determining Father's paternity of Child, his liability for child support, and his potential liability for the costs associated with the pregnancy and birth of Child. Mother presented evidence that the hospital charged around $800 and the obstetrician charged about $720 when Child was born. Mother also testified that Child's maternal grandparents paid the pregnancy and birthing costs and that Mother always thought it was her responsibility to repay her parents.

{24} The language throughout the UPA authorizes a trial court to order a putative father to pay non-parties for costs for which he is found liable. *Cf.* § 40-11-16 (stating the court may order reasonable fees and costs to be paid by any party to certain non-parties); *and* § 40-11-17(B) (stating the court may order

support payments to be made to "a [third] person, corporation or agency designated to collect or administer such funds for the benefit of the child, upon such terms as the court deems appropriate"). "If the existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated under the Uniform Parentage Act . . ., the obligation of the father may be enforced in the same or other proceedings by any interested party." Section 40-11-17(A). Under the remedial purposes of the UPA, the language throughout the statute and the specific language found at Section 40-11-17(A), any obligation that Father may have for Mother's pregnancy and birthing costs may be enforced by Child's maternal grandparents in the same or in a subsequent proceeding. The trial court may order Father to reimburse Child's maternal grandparents directly. *See* § 40-11-15(C) (stating that the trial court's judgment order may contain any provision on "any other matter within the jurisdiction of the court").

[25] We note that Child's maternal grandparents may be joined in the claim for reimbursement of pregnancy and birthing costs under Rule 1-017(A) without prejudice to Father. *See Crumpacker*, 1998-NMCA-169, ¶ 37; *State ex rel. Salazar*, 1998-NMCA-093, ¶¶ 14-15 (stating that interest in judicial economy prevents dismissal of claim where real party in interest could be substituted without adverse affect on the respondent). Child's maternal grandparents may also be reimbursed by Mother. *See Tedford*, 1998-NMCA-067, ¶ 51 (Bosson, J., specially concurring).

[26] We reverse the trial court's legal conclusion that Mother did not have standing to seek reimbursement for pregnancy and birthing expenses. On remand, the trial court has the discretion to grant or deny those costs based upon its factual findings in this case or upon any legal defenses that may be available. *See* § 40-11-15(C).

Award of Attorney's Fees

[27] It is within the trial court's discretion to award reasonable attorney's fees in a UPA claim. *See* § 40-11-16; *Tedford*, 1998-NMCA-067, ¶¶ 42-45. We review the trial court's order denying or granting attorney's fees for an abuse of discretion. *See id.* ¶ 43. An abuse of discretion occurs if the trial court's ruling is against the logic and effect of the facts and circumstances of the case. *See id.* Therefore, the trial court's discretion is not unlimited, but must comport with the facts and circumstances in each individual case. *See id.* The trial court should consider the nature of the proceedings involved, the complexity of the case, the ability of the parties' attorneys, and the parties' economic disparities. *See id.* ¶ 44.

[28] Mother presented evidence of the economic disparity between her and Father. Mother's attorney's fees amounted to $2,904.80, of which $1,890.10 was unpaid. Based upon the facts and circumstances in this case, the complexity and confusion surrounding the law applicable to paternity cases in this jurisdiction, and considering Mother's success on appeal and the underlying remedial purpose of the UPA, we conclude that it was error to grant Mother only $600 in attorney's fees. We remand for reconsideration of a fair award.

CONCLUSION

[29] We reverse the trial court's conclusion that Mother waived retroactive child support from Father and that Mother had no standing to seek reimbursement of pregnancy and birthing costs. We remand for a calculation of retroactive child support, consideration of Mother's pregnancy and birthing costs, and a fair award of attorney's fees. We also grant Mother $1500 in reasonable attorney's fees on appeal.

[30] IT IS SO ORDERED.

RICHARD C. BOSSON, Judge

WE CONCUR:
LYNN PICKARD, Chief Judge
THOMAS A. DONNELLY, Judge

Certiorari Not Applied For

TOPIC INDEX
Appeal and Error
Standard of Review
Children
Children's Code
Judgment
Summary Judgment
Domestic Relations
Termination of Parental Rights

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 1999-NMCA-036

IN THE MATTER OF MICHAEL R.C. and HENRY A.R.C., Children,
STATE OF NEW MEXICO, ex rel.,
CHILDREN, YOUTH AND FAMILIES DEPARTMENT,
Petitioners-Appellees,
versus
ERIKA M. and HENRY R.C.,
Respondents-Appellants.

No. 19,400 (filed January 22, 1999)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
TOMMY E. JEWELL, District Judge

ANGELA L. ADAMS
Chief Children's Court Attorney
ROY E. STEPHENSON
Children's Court Attorney
Santa Fe, New Mexico
for Appellees

JANE BLOOM YOHALEM
Santa Fe, New Mexico
for Appellants

W. KAREN CANTRELL
Placitas, New Mexico
Guardian ad Litem

OPINION
LYNN PICKARD
Judge

{1} The trial court terminated the parental rights of Erika M. (Mother) to her two sons, Michael and Henry, by granting summary judgment in favor of the Children, Youth, and Families Department (the Department). Mother contends that summary judgment was inappropriate because she had raised material issues of disputed fact. We agree and reverse.

BACKGROUND

{2} The underlying facts of this case are not in dispute. Michael and Henry were taken into the Department's custody in March 1994. The Department then filed an abuse and neglect petition alleging that the children were not being adequately cared for. The petition cited injuries to Michael, the parents' lack of food and medical supplies, and possible domestic violence and sexual abuse being perpetrated by Father. Father pled no contest to child abuse and negligent endangerment. Mother pled no contest to the allegation of insufficient supervision pursuant to NMSA 1978, § 32A-4-2(C)(3) (1997) (failure to protect children when parent knew or should have known that they had been physically or sexually abused).

{3} The children were taken into a foster home, and the court implemented a treatment plan aimed at reunification of Mother and the children. Over the course of the next thirty or so months, the trial court held periodic judicial review hearings and entered judicial review orders based primarily on reports by counsel and the Department's evaluation of Mother's progress. The trial court often adopted the Department's reports as findings. The first judic[illegible] review order, entered in early 19[illegible] reflected the fact that Mother was making some effort to comply with the treatment plan and maintain contact with the children. Although this compliance was limited by Mother's difficult pregnancy with twins, the Department reported positive interaction between Mother and the boys at issue here.

{4} Two judicial reviews later in that year also reported Mother's positive interactions with the children and her diligent efforts to maintain contact with the boys. At that point, the boys were moved to a treatment foster home that could better address their behavioral disorders.

{5} Two more judicial review hearings were held in 1996. At the first, the Department's case synopsis reflected Mother's continued compliance with the treatment plan and a recommendation that steps toward reunification continue to be made. The Department recommended hands-on parenting training with the treatment foster parents. [illegible] the second judicial review hearing t[illegible] year, though, the feedback was mixed. On the one hand, some feedback noted that Mother was participating in Michael's Peanut Butter & Jelly Therapeutic Preschool and that the staff there was reporting favorably about her interactions with the boys. In contrast, a therapist's report described Mother's interaction with the children at that time as poor. In addition, the foster parents asserted that in their opinion Mother was unable to provide adequately for the children, and they expressed opposition to the reunification plan. The judicial review order resulting from this hearing again noted that Mother had made reasonable efforts to comply with treatment, and it continued the reunification plan.

{6} In 1997, the Department changed its position and proposed termination of Mother's parental rights. At that judicial review hearing, the foster parents again addressed the court, offering negative opinions about Mother's parenti[illegible] abilities. The Department also relied o[illegible] negative reports by two therapists. Reports from the Milagro program and the

Peanut Butter & Jelly School were more positive about Mother's abilities. The court adopted the Department's report as a part of its findings, and it agreed with the recommendation of termination, finding that Mother had made insufficient efforts to cooperate with the prescribed treatment plan.

{7} At the final judicial review prior to the filing of a petition to terminate Mother's parental rights, the Department noted that Mother's visits had become inconsistent and requested a finding that future efforts to assist Mother would be futile. Mother's counsel disagreed, arguing that the treatment meetings were held in Los Lunas, which made them difficult for Mother to attend. Mother also argued that the foster parents had become uncooperative and strongly encouraged the children to view them as their true parents.

{8} The Department filed a motion to terminate Mother's parental rights. The motion sought termination based on neglect and constructive abandonment pursuant to NMSA 1978, §§ 32A-4-28(B)(2) and -28(B)(3) (1997). The Department filed a motion for summary judgment, relying in part upon the opinions of a psychologist and a therapist who concluded that permanent placement with the foster parents was in the children's best interest and a social worker who suggested that Mother was unable to master necessary parenting skills. The Department also relied on the various judicial review orders that the trial court had adopted as findings. The guardian ad litem agreed with the Department's position.

{9} Mother argued, in response to the summary judgment motion, that facts were in dispute. She contended that the necessary element of disintegration of her relationship with the children was in dispute, in part due to the foster parents' interference and in part due to the differing opinions regarding whether she was bonded with the children. She also argued that her ability to care for the boys properly was in dispute.

{10} The trial court entered an order finding no genuine issue or dispute as to material facts and granting summary judgment, thereby terminating Mother's parental rights. Mother now appeals.

DISCUSSION

Standard of Review

{11} In reviewing an appeal from a grant of summary judgment, this Court examines the record to determine whether there are issues of material fact or evidence that puts a material fact in dispute. *See Silva v. Town of Springer*, 1996-NMCA-022, ¶ 5, 121 N.M. 428, 912 P.2d 304. We view the evidence in the light most favorable to requiring a trial or hearing on the merits of the case and most favorable to the party opposing summary judgment. *See Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor*, 115 N.M. 159, 163, 848 P.2d 1086, 1090 (Ct. App. 1993). If no disputed material fact exists, the moving party is entitled to judgment as a matter of law. *See* Rule 1-056(C) NMRA 1998.

{12} This Court has, in the abstract, deemed summary judgment appropriate in termination of parental rights proceedings where no genuine issues of fact are in dispute. *See State ex rel. Children, Youth & Families Dep't In re T.C.*, 118 N.M. 352, 353-54, 881 P.2d 712, 713-14 (Ct. App. 1994). In addition, our Supreme Court has upheld a summary judgment terminating the parental rights in the unique situation of a father who had murdered the child's mother and was sentenced to a lengthy period of incarceration. *See State ex rel. Children, Youth & Families Dep't v. Joe R.*, 1997-NMSC-038, ¶ 10, 123 N.M. 711, 945 P.2d 76.

{13} However, even when the facts are undisputed, if conflicting inferences can be drawn, summary judgment is improper. *See Trujillo v. Treat*, 107 N.M. 58, 59-60, 752 P.2d 250, 251-52 (Ct. App. 1988). It is important to recall that we are not dealing with a substantial evidence standard in this case. Because we are dealing with summary judgment, it is worth heeding the Supreme Court's admonition that a surmise that "'the adverse party is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him.'" *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 178 n.30, 629 P.2d 231, 254 n.30 (1980) (quoting *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 n.9 (2d Cir. 1967)).

Material Issue of Disputed Fact

{14} Mother contends that she raised material issues of disputed fact that should have defeated the Department's motion for summary judgment. Specifically, Mother claims that the children's foster parents interfered with her relationship with them such that whether she was responsible for a disintegration of the parental relationship was in dispute. The Department argues that even if this fact was in dispute, it was not material to the termination of parental rights, and therefore summary judgment was proper. The Department also claims that Mother did not allege a factual dispute regarding the neglect basis for termination.

{15} The Department's termination petition was based on both neglect and constructive abandonment. *See* §§ 32A-4-28(B)(2), (3). Those sections provide for termination when:

> (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 there is a clear showing that the efforts would be futile or when a parent has caused great bodily harm to the child or great bodily harm or death to the child's sibling; 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.

In her opposition to summary judgment, Mother claimed that issues of fact, including whether the Department had made reasonable efforts at each stage of the proceedings and whether Mother was able to care for the children properly, precluded summary judgment. The trial court's order granting summary judgment did not specify the basis on which termination was granted. On appeal, Mother contests summary judgment on both grounds.

A. Termination Based on Constructive Abandonment

{16} Mother claims that whether her relationship with her children had disintegrated, as prescribed by the statute, presented a genuine issue of material fact that should have prevented the Department's success on its summary judgment motion. She claims that to the extent that the relationship had disintegrated, it was not her fault. The disintegration of the parent-child relationship as required by subsection (b) must be the fault of the parent. *See In re Adoption of J.J.B.*, 119 N.M. 638, 648-49, 894 P.2d 994, 1004-05 (1995); *In re C.P.*, 103 N.M. 617, 621, 711 P.2d 894, 898 (Ct. App. 1985) (stating that there must be evidence that the parent-child relationship was destroyed by the parental conduct).

{17} Both Mother's and Father's affidavits alleged that the Department and the foster parents interfered with Mother's relationship with the children. Mother stated that the Department stopped her visits with the children. She also stated that she failed to appear for some of the visits as a result of the foster parents' refusal to bring the children to her. She asserts that she missed other meetings because she was given the wrong address of Michael's therapist and because treatment meetings were scheduled in Los Lunas despite Mother's inability to get there.

{18} Father's affidavit further detailed behavior of the foster parents that allegedly contributed heavily to any breakdown in the relationship between the children and Mother. For example, Father stated that the foster parents have been calling Henry "Mark," a name they planned to give him upon adoption. They had also encouraged Henry to call them "Mom" and "Dad." Mother's and Father's affidavits appear to raise factual issues for dispute. It is the Department's position, however, that these factual disputes were not material to the termination decision and therefore did not preclude summary judgment.

{19} The Department contends that the element of disintegration of the parent-child relationship can be found despite the contribution by the foster parents to the breakdown. While this is true in a termination proceeding heard by the judge who then makes findings, rules regarding what "can be found" do not apply where the issue is decided by summary judgment. The role of the foster parents and the Department in the disintegration of the relationships creates an issue upon which a finding must be made. The role of the parties in this case therefore creates a factual dispute, depending on the outcome of which it may or may not be determined that Mother was sufficiently responsible for the relationship's demise. Therefore, Mother raised a dispute of material fact sufficient to defeat termination of her parental rights by summary judgment on the basis of constructive abandonment.

B. Termination Based Upon Neglect

{20} The Department contends that summary judgment based on Mother's inability to rectify the past neglect is supported by the record. The Department claims that Mother did not specifically allege facts in opposition to summary judgment regarding this basis for termination. However, Mother's opposition does claim a factual dispute with regard to Mother's parenting abilities and whether the Department mac reasonable efforts to assist her. Mother continues to argue on appeal that her prospects for being a successful parent were in dispute, as was whether the Department's actions constituted reasonable efforts. The record supports Mother's contentions.

1. Differing Opinions of Mother's Parenting Ability

{21} Several treatment professionals were involved in this case. A psychologist, a therapist, and a social worker ultimately expressed opinions by affidavit that Mother was not capable of appropriately parenting the two boys. However, this evidence is weakened because the social worker was not the original social worker, and she had been assigned the case on December 15, 1997, after the termination proceeding had begun. Also, the doctor's and the therapist's affidavits did not speak to the issue of Mother's prospects as a suitable parent or to tl Department's efforts, but focused instead almost solely on the children's emotional states in determining their best interests.

{22} It also appears from the Department's earlier reports that the staff of the Peanut Butter & Jelly Therapeutic Preschool indicated, as did at least one of the Milagro program treatment professionals, that Mother shared a reasonably healthy relationship with the boys. These professionals were able to see Mother's interaction with the children on a more regular basis than were the psychologists. The Department's judicial review reports and the review orders that the court issued through August 1996 reflected both opinions, and those individuals who reported favorably to Mother's cause were not present for subsequent assessments. This lack of continuity casts further doubt on the court's finding that no disputed material facts existed.

2. Reasonable Efforts

{23} Mother's affidavit also calls int question whether the Department made reasonable efforts to assist her in com-

plying with the treatment plan. Section 32A-4-28(B)(2) provides that termination based on neglect requires the court to find 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." Contrary to the Department's view, it is not clear that this dispute had been resolved prior to summary judgment.

{24} The trial court stated that the question of reasonable efforts had been evaluated at each step of the proceedings, and as a result did not need to be addressed at summary judgment stage: "The court has ruled on the conduct of the Department and those orders from review proceedings, I think, eliminate the need for the court to go back and rule upon the conduct of the Department." Those previous decisions, however, were made based upon judicial review evidence which, as we discuss below, Mother had no full and fair opportunity to contest. Nor did she have incentive to do so, especially when the court was finding her in compliance with the treatment plan. Therefore, Mother's affidavit, by raising the concern that the Department set her up for failure by keeping her from the children and by holding treatment meetings where she could not attend them, put the Department's reasonable efforts in dispute. This issue should not have been decided at summary judgment.

{25} We understand the trial court's desire to resolve this kind of case expeditiously, where it may appear that termination is in the best interests of the children. However, even if the judge believes the party resisting summary judgment may not ultimately prevail at a trial on the merits, summary judgment should not be entered when there are one or more disputed material facts. *See Montoya v. Kirk-Mayer, Inc.*, 120 N.M. 550, 554, 903 P.2d 861, 865 (Ct. App. 1995). The disputed professional assessment of Mother's ability to parent, the contributions of the Department and the foster parents to the breakdown of the parent-child relationship, and the reasonableness of the Department's efforts to assist Mother were material issues that should not have been decided at the summary judgment stage under the facts of this case.

Due Process Considerations

{26} Mother also raises due process concerns, claiming that the trial court's reliance on judicial review hearings for its findings violated her due process rights. It is beyond dispute that the termination of parental rights implicates a significant deprivation of a liberty protected by due process. *See In re Adoption of J.J.B.*, 119 N.M. at 644-47, 894 P.2d at 1000-03; *In re Adoption of Kenny F.*, 109 N.M. 472, 475-76, 786 P.2d 699, 702-03 (Ct. App. 1990), *overruled on other grounds by In re Adoption of J.J.B.*, 117 N.M. 31, 39, 868 P.2d 1256, 1264 (Ct. App. 1993), *judgment aff'd by* 119 N.M. 638, 894 P.2d 994 (1995). Procedural due process in a termination of parental rights case where factual disputes exist guarantees a parent a fair opportunity to be heard and present a defense. *See In re Kenny F.*, 109 N.M. at 475, 786 P.2d at 702.

{27} The purpose of judicial review hearings is discussed in NMSA 1978, § 32A-4-25 (1997). These are periodic hearings at which dispositional judgments are reviewed. *See id.* § 32A-4-25(B). According to that section, judicial reviews are held to assess the Department's implementation of a treatment plan and a parent's progress and compliance with it. *See id.* § 32A-4-25(A). Such hearings do not conform to the constraints of a usual adversarial hearing. Cross-examination is not conducted and the rules of evidence do not apply. *See* § 32A-4-25(E). No such exceptions are found in the guiding authority for the conduct of termination hearings. *See* NMSA 1978, § 32A-4-29 (1997). Termination hearings are more formal and comply with the rules of court because of the weighty issue—final termination of parental rights—that is being considered at them.

{28} We question whether a district court, in deciding to terminate parental rights, can rely solely on facts gleaned from the judicial review hearings at which Mother did not have a full and fair opportunity to be heard. Indeed, Mother had no incentive to contest the Department's reports when they were used for their original purpose as progress reports, rather than in support of termination. However, the need to answer that question in this case is obviated by our holding above that Mother raised material factual disputes that should have defeated summary judgment. As a result of our holding, Mother will have an opportunity to be heard and present a defense.

CONCLUSION

{29} We acknowledge the possibility that, as the guardian ad litem contends, there is substantial evidence in support of the termination of Mother's parental rights. However, substantial evidence is not the appropriate standard of review in this case. We hold that summary judgment was not the appropriate means for resolving this case. Mother raised material factual disputes which should have defeated the Department's summary judgment motion. We wish to emphasize, however, that nothing in this opinion would prevent the trial court from implementing, following notice and opportunity to be heard, creative evidentiary and trial procedures designed to expedite the final resolution of these types of cases. We hold only that summary judgment, when there are disputed issues of fact, is not such a procedure. Therefore, we reverse and remand for a termination hearing at which both sides may marshall and present their evidence, following which the court may find the facts as it sees them.

{30} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:
RUDY S. APODACA, Judge
MICHAEL D. BUSTAMANTE, Judge

CLASSIFIEDS

POSITIONS

ASSISTANT DISTRICT ATTORNEY

The Fifth Judicial District Attorney's Office has an opening for an Assistant District Attorney in Roswell. Salary based upon experience. The position is available March 15, 1999. Send resume to: Thomas A. Rutledge, District Attorney, 101 S. Canal, Carlsbad, NM 88220.

ASSISTANT DISTRICT ATTORNEY I

The 11th Judicial District Attorney's office, Division I (San Juan County) has an opening for an Assistant District Attorney I. The salary is $33,317. Please send resume to: Sandra A. Price, District Attorney, 7450 E. Main St., Farmington, NM 87402. Application deadline is April 16, 1999. Equal Opportunity Employer.

ATTORNEY

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ATTORNEY

U.S. Department of Health and Human Services, Office of the General Counsel. Full-time attorney with at least 3 years legal experience to be stationed in our Dallas office and provide legal services to our Albuquerque Indian Health Service Area (AIHSA) client. Grade level GS-12 to GS-14 and salary range of $48,591 to $68,587. Client is responsible for provision of direct patient healthcare and support service to four main tribal groups in New Mexico, Texas, Colorado and Utah. Legal work consists of varied and complex legal issues requiring extensive research, analysis and evaluation of state, federal and occasionally tribal laws. May require travel to Albuquerque three times a month or more. Interested candidates should send completed application by April 16, 1999, to the attention of Jo Davis, Executive Officer, Office of the General Counsel, Region VI, United States Department of Health and Human Services, 1301 Young Street, Suite 1138, Dallas, TX 75202. A complete application consists of: 1) a resume or signed Application for Federal Employment (OF-612); 2) a legal writing sample; and 3) proof of admission to the bar of any state or the District of Columbia. Contact Jo Davis at (214) 767-2995 or (214) 767-3465 with questions.

ASSISTANT DISTRICT ATTORNEY POSITION AVAILABLE FOURTH JUDICIAL DISTRICT

Assistant District Attorney II position available in Santa Rosa, NM. Attorney must be willing to live in Santa Rosa, Guadalupe County, NM. Qualifications and salary for position are based on NM District Attorney Personnel and Compensation Plan. Please send resume to: P.O. Box 2025, Las Vegas, NM 87701; or call (505) 425-6746. EOE.

ASSISTANT DISTRICT ATTORNEY

The Eleventh Judicial District Attorney's office, Division II (McKinley County), is currently seeking applications for an Assistant District Attorney. The duties of this attorney will be primarily in the field of prosecuting misdemeanor and felony DWI cases, vehicular homicides, and related offenses. Requires computer skills and ability to work independently. Salary $37,080 to $41,000 depending on qualifications and ability. Position open until selection made. Please submit resume to: Forrest G. Buffington, District Attorney, 409 South Second St., Gallup, NM 87301.

STAFF ATTORNEY

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AV-rated firm seeking hard-working associate with an interest in helping people in the areas of negligence, products liability, malpractice and civil rights claims. Must be admitted to New Mexico Bar and have good academic background. Competitive salary. Please send CV to Box N, P.O. Box 25883, Albuquerque, NM 87125.

ASSISTANT DISTRICT ATTORNEY I OR II

The Ninth Judicial District Attorney's Office has an opening for an Assistant District Attorney I or II. This position is an entry-level position. Applicants should be licensed New Mexico attorneys. The position allows successful applicant the opportunity to handle juvenile, misdemeanor, felony criminal prosecutions through all stages of the criminal justice system. The opening is for the Clovis, New Mexico District Attorney's office. Salary based upon experience and motivation. Send resume to: Randall M. Harris, District Attorney, 700 N. Main, Suite #16, Curry County Courthouse, Clovis, NM 88101.

LEGAL SECRETARY

Sutin, Thayer & Browne, immediate, FT position; significant litigation experience helpful. Excellent with detail, organization and with clients. Solid experience with Win95 and WordPerfect; type, min. 65 wpm. Complete benefit package. Apply in writing to: HR Mgr., P.O. Box 1945, Albuquerque, NM 87103; or fax to 888-6565; or e-mail to dr@sutinfirm.com.

All advertisements must be submitted in writing, either typed or clearly printed. *Advertisement deadline is Thursday, 5:00 p.m. for the issue of the following week.* Display and classified advertising will be accepted for publication in the *Bar Bulletin*, in accordance with standards and ad rates set by the Editor and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication requests. The Editor reserves the right to review and edit classified ads, to request that an ad be revised prior to publication, or to reject ads. Advertising space for educational seminars will be provided at one-half the regular advertising rates. Rate sheets available upon request. Call (505) 797-6029 for advertising information.

BILLING PERSON
Wanted: Contract employee to do billing for sole practitioner using TABS. Call Stephen Curtis, 884-9999.

LEGAL SECRETARY
Legal secretary for busy litigation group. Must be proficient in Windows 95 and Corel WP Suite 8.0. Litigation experience required. Good attitude and excellent phone skills a must. Benefits. Salary DOE. Send resume to: Litigation Secretary, P.O. Box 25565, Albuquerque, NM 87125.

PARALEGAL
F/T position for busy complex litigation firm. Previous experience is required. Five years+ is preferred. Need a detail-oriented, team player with strong organization and motivational skills. Please send resume to Firm Administrator, P.O. Box 25245, Albuquerque, NM 87125.

PART-TIME LEGAL SECRETARY
NOB HILL AREA
Small law firm seeks part-time legal secretary with strong civil litigation experience in insurance defense work. Win95, Corel WP8.0, TimeSlips. Flex time accordance with your schedule, Mon. - Thurs., 4 hrs./day, between 8:30 a.m. - 5 p.m., 16 hrs/wk. Please send resume and references to Pat Massey, Massey & Frizzell, LLC, 3616 Campus Blvd. NE, Albuquerque, NM 87106; or fax to (505) 268-6629; or e-mail to JPMassey@thuntek.net.

FIRM ADMINISTRATOR
Mid-size, downtown Albuquerque law firm has an opening for a firm administrator. Responsible for the supervision of management information systems, facilities, personnel and accounting department. Applicants must have strong academic background and a proven track record of success. Exceptional administrative, organizational and communication skills essential. Salary DOE. Excellent benefits. All inquiries kept confidential. Please send resume and salary requirements to: W.R. Logan, President, Civerolo, Gralow & Hill, P.A., P.O. Drawer 887, Albuquerque, NM 87102.

LEGAL SECRETARY
SANDOVAL COUNTY
Sandoval County is seeking a legal secretary with 3 years experience as a legal secretary or in related field. Knowledge of Office 97, WordPerfect 8.0, Premise and Westlaw is preferred. Must be able to pass typing test at 80 wpm. Performs legal research, document and litigation preparation in support of the county attorney. Manages office work flow and administrative details. Salary minimum is $11.20 per hour DOE. Obtain applications from the Personnel Department, 711 Camino del Pueblo, Bernalillo, NM 87004. Resumes not accepted in lieu of application. Deadline to apply is April 9, 1999. Sandoval County is an EEO/AA Employer.

RECEPTIONIST/LEGAL ASSISTANT
Small personal injury firm seeking individual to answer phones and perform general office duties. Good phone and word processing skills required. Please fax resume to (505) 344-7709, Attn: Angela.

OFFICE MANAGER
For growing, 20-person firm (includes lawyers and staff). Fast-paced environment. Looking for a person with good organizational, computer and people skills. Must be flexible. Part-time possible. Fax resume and salary expectations to: Susan C. Little at 842-1177; or mail to: P.O. Box 25685, Albuquerque, NM 87125.

LEGAL SECRETARY
Small southeastern NM firm seeks legal secretary looking to relocate. Civil litigation, trial attorney. Strong clerical, computer & organizational skills needed & use of Windows95, WP. Willing to train candidate who has established secretarial skills. Benefits package included. Send resume, references included, to P.O. Box 1720, Artesia, NM, 88210, Attn: Hiring Partner.

LEGAL SECRETARY POSITIONS
Litigation Division and Municipal Affairs Division: Legal secretary positions available in the litigation division and in the municipal affairs division requiring considerable knowledge of legal terminology, litigation procedures, pleadings and other legal documents. Must have three years experience as a secretary which includes at least two years experience as a qualified legal secretary. Must pass city typing test at 50 wpm. Entry salary: $17,264. Please submit resume to: Robert M. White, City Attorney, P.O. Box 2248, Albuquerque, NM 87103. Application deadline is March 26, 1999.

Positions Wanted

CONTRACT
LEGAL RESEARCH/WRITING
J.D. available to do legal research, writing, appeals, motions and briefs, etc. Contact Sarah Reinhardt, 768-0868 (work); or by e-mail: srein6543@aol.com.

ASSOCIATE POSITION WANTED
Licensed in NM, cum laude graduate, law journal editor, clinical honors, trained mediator and 10 years of computer/network support experience. Kurt Thunberg, (505) 344-4950.

CONTRACT
LEGAL RESEARCH/WRITING
J.D. with legal research/writing business seeks attorney-clients with on-going research/writing needs. Quality work at affordable rate of $20 per hour. Westlaw proficient. All projects welcome. Resume and writing samples available upon request. Contact Mary Sinton at (505) 797-9268 (business); (505) 797-9273 (fax); mlsinton@nmia.com (e-mail).

HOUSE COUNSEL
Are you spread too thin? Need experienced part-time counsel on contract, at rates comparable to employee cost? Former: General counsel to AMAFCA and San Juan County, Bernalillo County ACA, 25 years experience and strong preventive law orientation. Kenneth McDaniel, phone/fax 298-6365.

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SUNNY OFFICE FOR LEASE
1920's home – zoned for office downtown, near courthouse, 4 offices and reception area. 1,400 sq. ft., maple floors, fireplace, waiting area, 6 off-street parking. www.sunlighthomes.com/roma.html. $1,450/mo., 902 Roma NW, 856-5888.

DOWNTOWN ALBUQUERQUE
620 Roma Avenue NW. $550 per month. Includes office, all utilities (except phones), cleaning, conference rooms, access to full library, receptionist to greet clients and take calls. A must see. Call Valerie at 243-3751.

3009 LOUISIANA
NW corner of Louisiana and Candelaria. Beautiful 16 1/2 x 12 upstairs office suite with adjoining built-in secretarial station. Bay window facing Sandias. Common reception area and kitchen. Conference room. Phone system, copier and fax machine. 889-3899.

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Prestigious Uptown location, high visibility, convenient access to I-40, companion restaurants, two-story atrium, extensive landscaping, ample parking, full-service lease. 1,474 sq. ft. available; spring 1999; 850, 2,937 and 3,787 sq. ft. available June 1999. Shared attorney space for (2) available. Call 883-9662.

OLD TOWN CENTRAL
LAW OFFICE BUILDING
2014 CENTRAL AVENUE SW
Elegant office suites available. Referrals available. Situated across from historic Old Town. Convenient location to downtown and courthouses. Free parking, library/conference room, telephones, copy machine, security system. Call Jacob Vigil at (505) 243-1706 or Wes Bobbitt at (505) 247-1133.

DOWNTOWN - ALBUQUERQUE
Beautiful Victorian red brick at 824 Gold SW, with 3 offices and reception area suite available. Building has one other lawyer tenant in adjacent suite. Manager resides on premises. All utilities paid; parking, patio, security and cleaning provided. Shown by appointment only. Call 242-6505 in Albuquerque; leave message. For rates and details, call Jose Sandoval at (505) 753-2727 in Espanola.

OFFICES FOR SALE OR LEASE
4,000 sq. ft., near courthouse. Will divide. Very reasonable prices. 889-9773.

DOWNTOWN SANTA FE
Attractive office in outstanding location. $550 per month includes ample parking, utilities, cleaning, shared storage and reception areas. Call Bill Lazar at 988-7100.

BEAUTIFUL NEW OFFICE SPACE
Executive suite off Montgomery and Jefferson with easy access to I-25. Space for one or two lawyers, plus secretary. Share conference room, reception area, fax. Call Dan Faber 830-0405.

POTPOURRI

BOOKS FOR SALE
NM Reports: vol. 21 to 97, $25 per volume or $1,520 if all are sold together. Call 753-1911.

FOR SALE
LAW LIBRARY
ALR complete, NM Reports 3-124; NM Digest 1-6 complete; Shepards Citations complete; NM Statutes 1941 & 1953; AmJur Legal Forms 2d complete; AmJur 2d complete; AmJur POF 1st, 2d, 3d complete. Price negotiable. (505) 243-0100.

FIDEL JUSTO ADELICIO PEREZ'S
LAST WILL AND TESTAMENT
Anyone with information or knowledge of the "Last Will and Testament of Fidel Justo Adelicio Perez" is asked to contact Kenneth H. Martinez, 11930 Menaul Blvd. NE, Suite 213, Albuquerque, NM 87112; telephone (505) 332-0302.

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NM Criminal Defense Lawyers Association CLE

May 7, 1999 -(8.2 CLE credits, including 1.4 Ethics)

Las Cruces, New Mexico - Dona Ana Community College, 3400 South Espina, Room 77

"NUEVAS FRONTERAS EN DEFENSA FRONTERIZA" - ADVANCED CRIMINAL DEFENSE IN BORDER CASES

8:00-8:30	REGISTRATION
8:30-9:20	"You Found What in the Trunk?" Creative defenses, investigation, imaginative motions (other than suppression issues). - Dennis Candelaria, former State PD and Las Cruces AFPD
9:20-10:10	"Call My Consulate!"Using international treaties to help your non-citizen client. Kari Converse and Marc Robert
10:25-12:05	"Beware the Men in Black" Immigration Consequences of State and Federal Convictions. - Barbara Mandel, Las Cruces AFPD; Felipe Millan, El Paso
1:15-2:45	"Don't Touch My Bags, Mr. Customs Man" Border, checkpoint and roving patrol cases - cutting edge suppression issues. State Court Perspective - Mike Lilley, Las Cruces: Federal Court Perspective - Kurt Mayer, El Paso
3:00-3:50	New Hot Topics in State Criminal Law Susan Gibbs and Chris Bulman, NM Appellate Defenders
3:50-5:00	Borderline Ethics -U.S. Magistrate Judge Joe H. Galvan; Chandler Thompson, Federal Court Interpreter; Gary Mitchell, Criminal Defense Lawyer, Ruidoso.

CLE REGISTRATION FORM : ADVANCED CRIMINAL DEFENSE IN BORDER CASES

(8.2 CLE credits, including 1.4 ethics)

NAME_____ PHONE_____

ADDRESS_____CITY_____ STATE_____ ZIP_____

___ $50 NMCDLA member who is a PD or in practice under 3 years

___ $75 NMCDLA member in private practice over 3 years

___ $175 Non-member

___ Check here if you are a current NMCDLA Member who is on the CJA Panel (CJA Approval is pending and you will be billed $75 if CLE is not approved.)

___ Enclosed is a $50 contribution to the scholarship fund.

Please complete and return this form (with check to NMCDLA) by May 4. $10 late fee. Registrations and checks may be mailed to Cathy Ansheles-NMCDLA, P.O. Box 8180, Santa Fe, NM 87504. Limited number of partial scholarships are available upon written request. For more info or to obtain a membership form, call Cathy Ansheles at (505) 988-8004.

LEGAL ASSISTANTS DIVISION CLAE REVIEW COURSE

The CLAE Review Course was held on March 4-7, 1999, and was attended by a record number of legal assistants.

The division is especially grateful to all of the CLE presenters who contributed their time and expertise: Judge Denise Barela-Shepherd, Paula Burnett, Esq., Judge Michael Bustamante, Leigh Ann Chavez, Esq., William Darling, Esq., Robert Kidd, Esq., Manuel Lucero, Esq., Merri Rudd, Esq., Judge Wendy York, and John Zavitz, Esq.

Special thanks also to the following people for their help in making the course a success: committee co-chairs Amy Bolin and Joan Poole and committee member Kathy Maddux; monitors: Anita Bardtrief, Linda Murphy, and Betty Turk; and to Peggy Aragon, LAD Administrative Assistant, and Madonna Rutherford, State Bar Director of Administration, for their assistance.

In addition, the committee extends its appreciation to all the attendees for their participation.

BANKRUPTCY	General	Ethics	Audio	Video
☐Bankruptcy 1997: The [illegible] Annual year in Review	5.4	1.2	$99	$119
[illegible]ILY/ DOMESTIC RELATIONS				
☐98 Family Law Institute	5.7	1.4	$99	$119
☐Top Ten Ways to Avoid Malpractice: Family Law	0	1.8	$39	n/a
☐Domestic Relations Practice	1.2	0	$29	n/a
ELDER LAW				
☐Aging in the New Millennium	1.8	0	$39	n/a
☐Advocating Client Rights in Long-Term Care Facilities	7.1	0.4	$89	n/a
EMPLOYMENT LAW				
☐Employment Law: What Every Practitioner Should Know	3.9	0	na	$79
ETHICS				
☐Ethics Beyond the Code	0	3.6	n/a	$79
☐Ethics in Real Property Transactions	0	1.0	$29	$39
☐96 Civil Procedure Institute - Ethics Portion	0	1.2	$29	$39
☐Procrastination & Incompetence	0	1.5	$29	n/a
☐Illegal or Excessive Fees	0	1.5	$29	n/a
☐[illegible]nflict of Interest/ [illegible]nagement of Clients [illegible]	0	1.5	$29	n/a
☐Disclosure of Confidential Information	0	1.5	$29	n/a
☐Practice and Ethical Dilemmas Facing Todays' Lawyer	1.0	1.4	$39	n/a
☐Ethical Considerations in Billing Practices	0	1.5	$29	n/a
FEDERAL				
☐Federal Trial Practice: Civil and Criminal	5.2	1.4	$99	$119
☐Nuts and Bolts of Local Federal Practice	2.8	1.0	$59	$69
HEALTH				
☐Navigating the Managed Care Maze	5.8	1.2	$99	$119
☐Hot Topics in Health Law Practice and Litigation	1.6	0.5	$39	n/a
INDIAN				
☐Jurisdictional Conflicts: A Focus on Domestic Relations Issues in Indian Country	5.1	1.0	n/a	$119
MEDIATION				
☐Effective Mediation: From Opening Statement to Settlement Agreement	6.8	1.0	$99	$119
[illegible]URAL [illegible]URCES				
☐[illegible]ater and Endangered Species Issues on the Pecos River	2.4	0	$39	n/a

PUBLIC LAW	General	Ethics	Audio	Video
☐1998 Update: State and Local Government Practice	5.6	1.0	$99	$119
REAL PROPERTY, PROBATE AND TRUST				
☐98 Annual Real Property Institute	6.8	1.0	$99	$119
☐98 Estate Planning and Probate Institute, with Malcolm Moore, Esq.	6.3	1.0	$99	$119
☐Sorting Out New Rules, Regulations in IRA's and Title Insurance	2.1	0	$39	n/a
☐Tax Considerations in Estate Planning: 98 Update	7.8	0	$99	$119
☐Real Estate Basics	1.5	0	$29	n/a
☐Wills, Trusts and Estates	1.5	0	$29	n/a
TECHNOLOGY				
☐Using the Internet to Improve Your Legal Practice	6.2	1.0	$99	$119
TRIAL				
☐Using Evidence to Win at Trial	3.9	0	n/a	$79
☐Top Ten Practice Tips for State Court	1.0	0	$29	n/a
☐Civil Trial Practice and Procedure in NM	1.2	0	$29	n/a
☐Professionalism In and Out of the Courtroom: Essential Elements of Effective Client Representation	0	1.8	$39	n/a
UPDATES				
☐Constitutional Decisions of the US Supreme Court: Review of the 96/97 Term	7.5	0	$99	$119
WORKERS' COMPENSATION				
☐98 Workers' Compensation Institute	7.5	1.0	$99	$119

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April 23

1999 Update on Criminal Law
US Supreme Court Update and Search & Seizure
Featuring: Professor Charles H. Whitebread
8:00 a.m. to 5:00 p.m.
State Bar Center
MCLE: 6.9 General & 0.6 Ethics Credits
Cost: $159 General
$139 Criminal Law and Prosecutors Law Sections
$129 Non Attorney Law Office Personnel

April 23

Poverty Law Training
8:30 a.m. to 4:45 p.m.
State Bar Center
MCLE: 6.4 General & 1.0 Ethics Credits
Cost: $129 General
$60 LREP & Lawyers Care Members & New Volunteers
$60 Non Attorney Law Office Personnel

Continuing Legal Education of The State Bar of New Mexico
CLE
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Legal Research in New Mexico and Beyond

Part 1
April 17 or May 1
Get Current on Library Resources

Part 2
April 24 or May 22 or June 12
Research on the Internet

8:30 a.m. to 12:30 p.m.
MCLE: 4.0 General and 0.5 Ethics Credits Each
Cost: $99 General

April 30

Current Developments in New Mexico Water Utility Law, Regulation & Management
8:00 a.m. to 4:30 p.m.
State Bar Center
MCLE: 6.1 General & 1.0 Ethics
Cost: $149 General
$139 Natural Resources, Energy and Environmental Section Members
$74.50 Legal Assistant Division Members
$69 Non-attorney, Water Service Providers

REGISTRATION FORM

❒ 1999 Update on Criminal Law ❒ Poverty Law Training
❒ Get Current on Library Resources (Date ____) ❒ Research on the Internet (Date ____)
❒ Current Developments in New Mexico Water Utility Law, Regulation & Management

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Please mail this form to:
CLE, P.O. Box 25883, Alb., N.M. 87125, to register for the above programs.
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