Official Publication of the State Bar of New Mexico

BAR BULLETIN

January 11, 2017 • Volume 56, No. 2

Barn, by Christopher Owen Nelson (see page 3) Waxlander Gallery, Santa Fe

Inside This Issue

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See page 6 for details.

STATE BAR of NEW MEXICO

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3
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Cover Artist: Christopher Owen Nelson's work has been strongly focused in the greater southwestern region. As a Colorado native, he studied fine arts at Rocky Mountain College of Art and Design. He combines elements of his skills like painting, construction and song writing to tell his story. Recently, Nelson's achievements in the arts have been featured in several national publications including *Western Art Collector*, *Luxe Interiors and Design*, *Western Art and Architecture*, *Santa Fean* magazine and *American Art Collector*. To view more of his work, visit www.chrisnelsonfineart.com.

Notices

Court News

New Mexico Supreme Court Board of Legal Specialization

Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicant's qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Trial Specialist—Civil Law
J. Edward Hollington

First Judicial District Court

New Policy for Lighters and Matches

Effective Jan. 1, cigarette lighters and/or matches are not be allowed in the courthouse. They should be left in the car or they will be confiscated.

Second Judicial District Court

Exhibit Destruction

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits, the Second Judicial District Court will destroy exhibits filed with the Court, the Civil cases for the years of 1988 to the end of 2006 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Feb. 4. Those with cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.–5 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

13th Judicial District Court

New Clerk's Office Hours

The 13th Judicial District Court has new clerk's office hours. Beginning Jan. 3, the clerk's office in Cibola, Sandoval and Valencia counties is open to the public from 9 a.m.-noon and 1-5 p.m., Monday to Friday.

Professionalism Tip

Lawyer's Preamble:

As a lawyer, I will strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, I will comply with the letter and spirit of the disciplinary standards applicable to all lawyers, and I will also conduct myself in accordance with the Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts, and any other person involved in the legal system, including the general public.

Bernalillo County Metropolitan Court

Notices of Mass Reassignment

Bernalillo County Metropolitan Court Chief Judge Henry A. Alaniz announced a mass reassignment of cases in Division II as a result of the recent election of Judge-elect Christine E. Rodriguez. Pursuant to Rule 23-109 NMRA, effective Dec. 19, all Criminal Court cases previously assigned to Judge Chris J. Schultz were reassigned to Judge-elect Rodriguez. Parties who have not yet exercised a peremptory excusal, pursuant to Supreme Court Rule 7-106 NMRA, will have 10 business days from Dec. 19 to excuse Judge-elect Rodriguez.

Chief Judge Alaniz announced the mass reassignment of cases in Division III as a result of the recent election of Judge-Elect Renée Torres. Pursuant to Rule 23-109 NMRA, Chief Judge Alaniz announced that effective Dec. 30, all Criminal Court cases previously assigned to Judge R. John Duran will be reassigned to Judge-elect Torres. Parties who have not yet exercised a peremptory excusal, pursuant to Supreme Court Rule 7-106 NMRA, will have 10 business days from Dec. 30 to excuse Judge-elect Torres.

U.S. District Court, District of New Mexico

Federal Bar Dues for the District of New Mexico

Attorney federal bar dues ($25) will be collected for calendar year 2017. Delinquent payments for prior years must still be made in order to maintain good standing. For information on making payments and checking on bar status, visit www.nmd.uscourts.gov/admissions.

State Bar News

Attorney Support Groups

- Feb. 6, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Feb. 13, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Feb. 20, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month but will not meet in January due to Martin Luther King Jr. Day.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

2017 Licensing Notification

Due by Feb. 1

2017 State Bar licensing fees and certifications were due Dec. 31, 2016, and must be completed by Feb. 1, 2017, to avoid non-compliance and related late fees. Complete annual licensing requirements at www.nmbar.org/licensing. Payment by credit card is available (payment by credit card will incur a service charge). For more information, call 505-797-6083 or email license@nmbar.org. For help logging in or other website troubleshooting, call 505-797-6084 or email aarmijo@nmbar.org. Those who have already completed their licensing requirements should disregard this notice.

Alternative Methods of Dispute Resolution Committee

Feedback Survey

The ADR Committee is interested in receiving feedback regarding speaker presentations, topics and participation from State Bar members who are not already involved with the Committee. To complete the survey, visit www.surveymonkey.com/r/66CR2LL.

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A Message from State Bar President

Scotty A. Holloman

Dear State Bar of New Mexico Members,

I am humbled and proud to serve as your State Bar president for 2017. I am the 121st person to hold this office and I intend to serve you well, across the state and nationally.

When presented the opportunity to be involved in State Bar leadership, I was concerned that practicing and living in Hobbs could be a challenge since most State Bar activities seem to occur in Albuquerque and Santa Fe. That said, I decided to become part of the State Bar leadership in part to demonstrate that the State Bar is indeed a statewide organization, committed to assisting and serving both members and the public across a very large geographical area. I understand the challenges miles present, but assure you that your State Bar exists for all of our benefit. New Mexico lawyers practicing outside of the state are the second largest constituency, just behind Albuquerque, with more than 1,300 members. This is a segment I would like to reach in 2017, along with in-state members wherever you happen to practice. I would also like to try and find additional ways for State Bar members that live outside of Albuquerque and Santa Fe to become more involved in State Bar activities.

I would like to thank the Board of Bar Commissioners and its leadership for their commitment and volunteer service to the profession. Our outgoing president, J. Brent Moore, had an outstanding year as president and has provided years of service to the BBC. I commend his dedication amidst a thriving practice and a young family at home. I look forward to working with the BBC this coming year. It truly is an amazing group who come together to help shape the State Bar and the profession.

For 2017, my goals, working with the BBC and other officers, are to continue prudent financial management of the organization, and the continuation of programs and services far too many to list here. I am particularly interested in the state of legal services for poor and modest mean residents who, more often than not, cannot access the legal help they need. To that end, we will continue to grow a new program started in 2016, Entrepreneurs in Community Lawyering, which is designed to train less experienced lawyers to be successful solo practitioners and return to their home communities or other underserved areas to provide legal services to those who do not qualify for traditional legal services, but who are otherwise financially unable to retain an attorney.

The New Mexico State Bar Foundation is also continuing its goal to benefit members and the public. Consider that over the past five years, the Foundation has provided direct legal assistance to more than 22,500 seniors statewide through the Legal Resources for the Elderly Program. It has sponsored 250 workshops statewide on debt relief/bankruptcy, divorce, wills and probate and benefits issues. Through the Supreme Court's Access to Justice Commission, the Foundation has distributed more than $1.7 million for legal services programs throughout the state. We have reached more than 33,000 students through the annual High School Essay Contest and Constitution Day events. This is a small sample of the Foundation's activities and its efforts to help the public and members.

In addition, the State Bar provides significant assistance to a number of Supreme Court programs that benefit the entire legal community. The State Bar is responsible for administering the Client Protection Fund, the Bridge the Gap Mentorship Program, and the IOLTA Program. It also administers Pro Hac Vice applications, the Judges and Lawyers Assistance Programs and collects pro bono and malpractice insurance data for the Court. Fastcase is provided as a free legal research product for State Bar members. The State Bar also administers the important work of more than 25 sections and committees.

There is substantial amount of activity ongoing at the State Bar, and I've mentioned just a few highlights. The BBC and Supreme Court have approved the 2017 budget, without an increase in licensing fees, and will monitor it throughout the year. Interestingly, of the State Bar's $2,745,460 budget, more than $844,700 is derived from non-licensing fees, which includes advertising in the *Bar Bulletin* and *Bench & Bar Directory*, State Bar Center room rentals and other activities.

The State Bar continues to be a robust and important presence and resource for the legal community. I look forward to working with and meeting many of you in the coming year. I encourage you to contact me if there are specific ideas or concerns you would like to share. Best wishes for a prosperous and healthy New Year.

Sincerely,

Scotty A. Holloman

131ST BIRTHDAY Celebration

You're Invited!

The State Bar is proud of the tremendous dedication and service that our membership has given to the legal profession and the public. We hope you will join us for this important celebration.

State Bar President Scotty A. Holloman
will honor attorneys celebrating 25 and 50 years of service.

Distinguished guests from the New Mexico Supreme Court, New Mexico Court of Appeals and the UNM School of Law have been invited to attend.

Friday, Jan. 27

Ceremony at 4 p.m. • Reception to follow

State Bar Center, 5121 Masthead NE, Albuquerque

STATE BAR of NEW MEXICO

For more information or to R.S.V.P., contact Breanna Henley, bhenley@nmbar.org.

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Board of Bar Commissioners

Commissioner Vacancies

Two vacancies exist on the Board of Bar Commissioners. Applicants should plan to attend the 2017 Board meetings scheduled for April 21, July 27 (Ruidoso, in conjunction with the annual meeting), Sept. 15 and Dec. 13, 2017 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and résumé to Executive Director Joe Conte (jconte@nmbar.org) by Jan. 16.

A vacancy was created in the First Bar Commissioner District, representing Bernalillo County, due to Julie Vargas' appointment to the bench. The Board will make the appointment at the Jan. 27 meeting to fill the vacancy until the next regular election of Commissioners. The term will run through Dec. 31, 2017.

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Jan. 27 meeting to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31, 2017. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply.

Committee on Women and the Legal Profession

Nominations: 2016 Outstanding Advocacy for Women Award

Nominations for the 2016 Justice Pamela B. Minzner Outstanding Advocacy for Women Award are now open. Each year the Committee gives this award to a New Mexico attorney, male or female, who has distinguished themselves during the prior year by providing legal assistance to women who are underrepresented or underserved or by advocating for causes that will ultimately benefit and/or further the rights of women. To make a nomination, submit one to three letters describing the work and accomplishments of the nominee to Zoe Lees at zoe.lees@modrall.com by Jan. 31. The award ceremony will be held on June 8. For more details about the award and previous recipients, visit www.nmbar.org/committeeonwomen.

Committee on Diversity in the Legal Profession

2017 Jaramillo Summer Law Clerk Program Accepting Employers

For 25 years, the Arturo Jaramillo Summer Law Clerk Program has diversified applicant pools, lowered artificial barriers to employment opportunities, and produced high-quality law clerks who have become outstanding lawyers and judges in New Mexico. The Committee on Diversity invites you to join along in our common commitment to expand opportunities in the legal profession. To participate, contact Morris Chavez at mo@saucedochavez.com by Jan. 16 or visit www.nmbar.org/clerkshipprogram for more information.

Solo and Small Firm Section

Luncheon Speaker Series Features Ron Taylor in January

Albuquerque attorney Ron Taylor will present "A World Apart—A View From the Eyes of a Lawyer-Juror" at the Solo and Small Firm Section's monthly luncheon speaker series. The presentation will begin at noon, Jan. 17, at the State Bar Center. All are welcome and lunch is provided. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

UNM

Law Library

Hours Through Jan. 15

Building & Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10a.m.–6p.m.
Sunday	noon–6 p.m.

KANW New Mexico Public Radio

The Law of Rock and Roll with Michael Olivas

The Law of Rock and Roll radio show is hosted by University of Houston Law professor and New Mexico native Michael A. Olivas. The show explores the legal aspects of stars' careers, cases involving record companies and the business of rock and roll. KANW presents an evening of entertainment with Dr. Olivas at 6:30 p.m., Jan. 20, at Robertson & Sons Violin Shop Recital Hall, 3201 Carlisle Blvd., Albuquerque. Tickets are $30 and proceeds support KANW programming. One hour of CLE credit is available at no extra cost. Tickets can be purchased at www.kanw.com. The event is co-sponsored by the UNM School of Law, New Mexico Hispano Music Association Inc. and the New Mexico Hispanic Bar Association.

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Other Bars

Federal Bar Association, New Mexico Chapter

Save the Date for Chemerinsky Event in March

The New Mexico Chapter of the Federal Bar Association is pleased to have University of California Irvine School of Law Dean Erwin Chemerinsky return to Albuquerque. On March 31, Dean Chemerinsky will present his popular talk about the Supreme Court and its recent cases, "An Amazing Time in the Supreme Court." The talk will be presented at the Hotel Andaluz in downtown Albuquerque at lunchtime. CLE credit is pending. Save the date! For more information, email nmfedbar@gmail.com.

Legal Education

January 2017

12 **2017 Uniform Commercial Code Update—Everything You Need to Know About the Past Year**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Law Practice Succession (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Indian Law 2016: What Indian Law Practitioners Need to Know**
1.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **2016 Tax Symposium**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **The Law of Background Checks—What Clients May/May "Check"**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Property Management Agreements in Commercial Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Trust and Estate Planning Issues in Divorce**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Lawyer Ethics and Texting**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Capital Contributions, Capital Calls & Finance Provisions in Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **UCC Issues in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Drafting Special Needs Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Just Between Us: Drafting Effective Confidentiality & Non-disclosure Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

February 2017

7 **2017 Ethics Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **2017 Ethics Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Essentials of Employment Law**
5.6 G
Live Seminar, Las Cruces
Sterling Education Services Inc.
www.sterlingeducation.com

10 **Estate Planning for Digital Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Use of Trust Protectors in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Ethics in Billing and Collecting Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics in Negotiations**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Estate Planning for Retirement Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

March 2017

1 **Trusts and Distributions: All About Non-Pro-Rata Distributions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 **Management and Information Control Issues in Closely Held Companies: Strategies, Conflicts and Drafting Consideration**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Advanced Workers Compensation**
5.6 G
Live Seminar, Albuquerque
Sterling Education Services, Inc.
www.sterlingeducation.com

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective December 30, 2016

Published Opinions

No. 34662	1st Jud Dist Santa Fe DM-10-302, J MARTINEZ v A MARTINEZ (reverse and remand)	12/29/2016
No. 35006	4th Jud Dist San Miguel CR-13-239, STATE v J MONTOYA (affirm)	12/29/2016

Unpublished Opinions

No. 35448	2nd Jud Dist Bernalillo LR-15-23, STATE v D FOLLINGSTAD (affirm)	12/28/2016
No. 35320	1st Jud Dist Rio Arriba JQ-14-9, CYFD v CELINA R (affirm)	12/29/2016

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Dated Jan. 3, 2017

Clerk's Certificate of Address and/or Telephone Changes

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective January 11, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2016 NMRA:

Effective Date (except where noted differently: 12/31/2016)

Rules of Civil Procedure for the District Courts

1-005.2	Electronic service and filing of pleadings and other papers	01/01/2017
1 007.2	Time limit for filing motion to compel arbitration	
1 009	Pleading special matters	07/01/2017
1 017	Parties plaintiff and defendant; capacity	07/01/2017
1 023	Class actions	
1 054	Judgments; costs	
1 055	Default	07/01/2017
1 060	Relief from judgment or order	07/01/2017
1 079	Public inspection and sealing of court records	05/18/2016
1 083	Local rules	
1 093	Criminal contempt	
1 096	Challenge of nominating petition	
1 104	Courtroom closure	
1 120	Domestic relations actions; scope; mandatory use of court-approved forms by self-represented litigants	
1 128	Uniform collaborative law rules; short title; definitions; applicability	
1 131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
1 128.1	Collaborative law participation agreement; requirements	
1 128.2	Initiation of collaborative law process; voluntary participation; conclusion; termination; notice of discharge or withdrawal of collaborative lawyer; continuation with successor collaborative lawyer	
1 128.3	Proceedings pending before tribunal; status report; dismissal	
1 128.4	Emergency order	
1 128.5	Adoption of agreement by tribunal	
1 128.6	Disqualification of collaborative lawyer and lawyers in associated law firm	
1 128.7	Disclosure of information	
1 128.8	Standards of professional responsibility and mandatory reporting not affected	
1 128.9	Appropriateness of collaborative law process	
1 128.10	Coercive or violent relationship	
1 128.11	Confidentiality of collaborative law communication	
1 128.12	Privilege against disclosure for collaborative law communication; admissibility; discovery	
1 128.13	Authority of tribunal in case of noncompliance	

Rules of Civil Procedure for the Magistrate Courts

2 110	Criminal contempt
2 114	Courtroom closure
2 305	Dismissal of actions
2 702	Default
2 705	Appeal

Rules of Civil Procedure for the Metropolitan Courts

3 110	Criminal contempt
3 114	Courtroom closure
3 204	Service and filing of pleadings and other papers by facsimile
3 205	Electronic service and filing of pleadings and other papers
3 702	Default

Civil Forms

4 204	Civil summons	
4 226	Civil complaint provisions; consumer debt claims	07/01/2017
4 306	Order dismissing action for failure to prosecute	
4 309	Thirty (30) day notice of intent to dismiss for failure to prosecute	
4 310	Order of dismissal for failure to prosecute	
4 702	Motion for default judgment	
4 702A	Affirmation in support of default judgment	
4 703	Default judgment; judgment on the pleadings	
4 909	Judgment for restitution	
4 909A	Judgment for restitution	
4 940	Notice of federal restriction on right to possess or receive a	05/18/2016
4 982	Withdrawn	
4 986	Withdrawn	
4 989	Withdrawn	
4 990	Withdrawn	

Rules of Criminal Procedure for the District Courts

5 102	Rules and forms	
5 104	Time	
5 112	Criminal contempt	
5 123	Public inspection and sealing of court records	05/18/2016
5 124	Courtroom closure	

5 304	Pleas	
5 511	Subpoena	
5 511.1	Service of subpoenas and notices of statement	
5 614	Motion for new trial	
5 615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/2016
5 801	Reduction of sentence	

Rules of Criminal Procedure for the Magistrate Courts

6 102	Conduct of court proceedings	
6 109	Presence of the defendant	
6 111	Criminal contempt	
6 116	Courtroom closure	
6 201	Commencement of action	
6 209	Service and filing of pleadings and other papers	
6 506	Time of commencement of trial	05/24/2016
6 601	Conduct of trials	

Rules of Criminal Procedure for the Metropolitan Courts

7 109	Presence of the defendant	
7 111	Criminal contempt	
7 115	Courtroom closure	
7 201	Commencement of action	
7 209	Service and filing of pleadings and other papers	
7 304	Motions	
7 506	Time of commencement of trial	05/24/2016
7 606	Subpoena	

Rules of Procedure for the Municipal Courts

8 102	Conduct of court proceedings	
8 108	Presence of the defendant	
8 110	Criminal contempt	
8 114	Courtroom closure	
8 201	Commencement of action	
8 208	Service and filing of pleadings and other papers	
8 506	Time of commencement of trial	05/24/2016
8 601	Conduct of trials	

Criminal Forms

9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
9 611	Withdrawn	
9 612	Order on direct criminal contempt	
9 613	Withdrawn	

Children's Court Rules and Forms

10 103	Service of process	
10 163	Special masters	
10-166	Public inspection and sealing of court records	05/18/2016
10 168	Rules and forms	
10-171	Withdrawn	05/18/2016
10-315	Custody hearing	11/28/2016
10-318	Placement of Indian children	11/28/2016
10 322	Defenses and objections; when and how presented; by pleading or motion	
10 325	Notice of child's advisement of right to attend hearing	
10 340	Testimony of a child in an abuse or neglect proceeding	
10 408A	Withdrawn	
10 413	Withdrawn	
10 414	Withdrawn	
10 417	Withdrawn	
10 502	Summons	
10-521	ICWA notice	11/28/2016
10 560	Subpoena	
10 570	Notice of child's advisement of right to attend hearing	
10 571	Motion to permit testimony by alternative method	
10-604	Withdrawn	05/18/2016
10 701	Statement of probable cause	
10 702	Probable cause determination	
10 703	Petition	
10 704	Summons to child Delinquency Proceeding	
10 705	Summons to parent or custodian or guardian – Delinquency Proceeding	
10 706	Order of appointment of attorney for child and notice and order to parent(s), guardian(s), or custodian(s)	
10 707	Eligibility determination for indigent defense services	
10 711	Waiver of arraignment and denial of delinquent act	
10 712	Plea and disposition agreement	
10 713	Advice of rights by judge	
10 714	Consent decree	
10 715	Motion for extension of consent decree	
10 716	Judgment and Disposition	
10 717	Petition to revoke probation	
10 718	Sealing order	
10 721	Subpoena	
10 722	Affidavit for arrest warrant	
10 723	Arrest warrant	
10 724	Affidavit for search warrant	
10 725	Search warrant	
10 726	Bench warrant	
10 727	Waiver of right to have a children's court judge preside over hearing	
10 731	Waiver of arraignment in youthful offender proceedings	
10 732	Waiver of preliminary examination and grand jury proceeding	
10 741	Order for evaluation of competency to stand trial	
10 742	Ex parte order for forensic evaluation	
10 743	Order for diagnostic evaluation	
10 744	Order for pre dispositional diagnostic evaluation	
10 745	Order for evaluation of amenability to treatment for youthful offender (requested by defense counsel)	

Rule Set 10 Table Table of Corresponding Forms

On June 27, 2016, the Court issued Order No. 16-8300-003 provisionally approving amendments to Rule 10-166 NMRA and provisionally approving new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. On November 28, 2016, the Court issued Order No. 16-8300-037, withdrawing the provisionally-approved amendments to Rule 10-166 NMRA and the provisionally-approved new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. Accordingly, Rule 10-166 NMRA has been restored to the version approved by

Order No. 11-8300-010, and Rule 10-171 and Form 10-604 have been withdrawn.

Rules of Evidence

11-803	Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness

Rules of Appellate Procedure

12 101	Scope and title of rules
12 201	Appeal as of right; when taken
12 202	Appeal as of right; how taken
12 203	Interlocutory appeals
12 203.1	Appeals to the Court of Appeals from orders granting or denying class action certification
12 204	Appeals from orders regarding release entered prior to a judgment of conviction
12 206	Stay pending appeal in children's court matters
12 206.1	Expedited appeals from children's court custody hearings
12 208	Docketing the appeal
12 209	The record proper (the court file)
12 302	Appearance, withdrawal, or substitution of attorneys; changes of address or telephone number
12 305	Form of papers prepared by parties.
12 309	Motions
12 310	Duties of clerks
12 317	Joint or consolidated appeals
12 318	Briefs
12 319	Oral argument
12 320	Amicus curiae
12 321	Scope of review; preservation
12 322	Courtroom closure
12 402	Issuance and stay of mandate
12 403	Costs and attorney fees
12 404	Rehearings
12 501	Certiorari from the Supreme Court to the district court regarding denial of habeas corpus
12 503	Writs of error
12 504	Other extraordinary writs from the Supreme Court
12 505	Certiorari from the Court of Appeals regarding district court review of administrative decisions
12 601	Direct appeals from administrative decisions where the right to appeal is provided by statute
12 602	Appeals from a judgment of criminal contempt of the Court of Appeals
12 604	Proceedings for removal of public officials within the jurisdiction of the Supreme Court
12 606	Certification and transfer from the Court of Appeals to the Supreme Court
12 607	Certification from other courts to the Supreme Court
12 608	Certification from the district court to the Court of Appeals

Uniform Jury Instructions – Civil

13-1830	Measure of damages; wrongful death (including loss of consortium)

Uniform Jury Instructions – Criminal

14 301	Assault; attempted battery; essential elements
14 303	Assault; attempted battery; threat or menacing conduct; essential elements
14 304	Aggravated assault; attempted battery with a deadly weapon; essential elements
14 306	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14 308	Aggravated assault; attempted battery with intent to commit a felony; essential elements
14 310	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14 311	Aggravated assault; attempted battery with intent to commit a violent felony; essential elements
14 313	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 351	Assault upon a [school employee] [health care worker]; attempted battery; essential elements
14 353	Assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct; essential elements
14 354	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery with a deadly weapon; essential elements
14 356	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14 358	Aggravated assault on a [school employee] [health care worker]; attempted battery with intent to commit a felony; essential elements
14 360	Aggravated assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14 361	Assault on a [school employee] [health care worker]; attempted battery with intent to commit a violent felony; essential elements
14 363	Assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 371	Assault; attempted battery; "household member"; essential elements
14 373	Assault; attempted battery; threat or menacing conduct; "household member"; essential elements
14 374	Aggravated assault; attempted battery with a deadly weapon; "household member"; essential elements
14 376	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; "household member"; essential elements
14 378	Aggravated assault; attempted battery with intent to commit a felony; "household member"; essential elements
14 380	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; "household member"; essential elements
14 381	Assault; attempted battery with intent to commit a

	violent felony; "household member"; essential elements
14 383	Assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements
14 990	Chart
14 991	Failure to register as a sex offender; 1999 and 2000 versions of SORNA; essential elements
14 992	Failure to register as a sex offender; 2005, 2007, and 2013 versions of SORNA; essential elements
14 993	Providing false information when registering as a sex offender; essential elements
14 994	Failure to notify county sheriff of intent to move from New Mexico to another state, essential elements
14 2200	Assault on a peace officer; attempted battery; essential elements
14 2200A	Assault on a peace officer; threat or menacing conduct; essential elements
14 2200B	Assault on a peace officer; attempted battery; threat or menacing conduct; essential elements
14 2201	Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements
14 2203	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with a deadly weapon; essential elements
14 2204	Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements
14 2206	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements
14 2207	Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements
14 2209	Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 3106	Possession of a dangerous drug
14 4503	Driving with a blood or breath alcohol concentration of eight one hundredths (.08) or more; essential elements
14 4506	Aggravated driving with alcohol concentration of (.16) or more; essential elements
14 5120	Ignorance or mistake of fact

Rules Governing Admission to the Bar

15 104	Application
15 205	Grading and Scoring
15 302	Admission to practice

Rules of Professional Conduct

16-108	Conflict of interest; current clients; specific rules

Rules Governing Discipline

17 202	Registration of attorneys
17 204	Trust accounting
17 208	Incompetency or incapacity
17 214	Reinstatement

Rules Governing the Client Protection Fund

17A-005	Composition and officers of the commission

Rules Governing the Unauthorized Practice of Law

17B 005	Civil injunction proceedings
17B 006	Determination by the Supreme Court

Rules Governing the Recording of Judicial Proceedings

22 101	Scope; definitions; title
22 204.1	Temporary Certification for Court Reporters

Supreme Court General Rules

23 107	Broadcasting, televising, photographing, and recording of court proceedings; guidelines

Rules Governing the New Mexico Bar

24 101	Board of Bar Commissioners
24 102	Annual license fee
24 110	"Bridge the Gap: Transitioning into the Profession" program
24 111	Emeritus attorney

Recompiled and Amended Local Rules for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth Judicial District Courts

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's Web Site at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us/nmrules/NMRuleSets.aspx

Certiorari Denied, September 22, 2016, No. S-1-SC-36054

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-092

No. 33,639 (filed July 28, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOHN MONAFO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
FREDDIE J. ROMERO, District Judge

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Opinion

Roderick T. Kennedy, Judge

{1} Appellee has filed a motion for rehearing in this matter, which has been considered by the original panel, and is hereby granted. The opinion filed July 5, 2016, is hereby withdrawn, and this Opinion is filed in its stead.

{2} Immediately after releasing Defendant from a traffic stop, officers twice pulled him over to investigate ownership of a van he was towing. As a result, Defendant entered a conditional plea to unlawful taking of a motor vehicle, reserving his right to contest the constitutionality of the second stop and search of a receipt book. We agree with the district court that the second stop was sufficiently attenuated from the first. The deputy's review of the entire receipt book, however, was not completely justified by the limited extent of Defendant's consent to search.

I. BACKGROUND

{3} On July 1, 2011, Defendant, John Monafo, was driving a flat-bed tow truck, towing a van in Chaves County, New Mexico. Deputy James Seely stopped Defendant, believing Defendant had committed a traffic violation.[1] The reasons for, and facts of, that stop are not material to this appeal. At some point, Francisco Castro arrived at the scene of his own accord. In a side conversation with another officer on the scene, Castro stated that he owned the van on the truck and that he had not given permission for anyone to remove it from his property. It seems from the record that this conversation took place while Deputy Seely was dealing with Defendant.

{4} Deputy Seely, apparently unaware of Castro's conversation with the other officer on scene, released Defendant from the stop. Deputy Seely began driving away from the scene. Once on the road, he received a dispatch from the scene informing him of Castro's claims regarding the van, and he returned to the scene just as Defendant was pulling out onto the road. Deputy Seely activated his emergency lights, and Defendant pulled over immediately, stopping only a short distance away from where he had initially been stopped.

{5} After conversing with Castro and the other officers on the scene, Deputy Seely approached Defendant's driver's side door and asked Defendant for a "bill of lading" or "manifest" for the van.[2] Defendant retrieved a receipt book containing several receipts, opened it to the one relevant to the van, and gave it to Deputy Seely. Deputy Seely inquired about Cheri Loya, the individual who, according to the bill, consented to the removal of the van, and he requested a check of the driver's license number listed in the bill. Deputy Seely then left the driver's side door and walked toward the rear of the truck where two other officers were standing. Together, the officers first scrutinized the information on the bill, eventually looking through the other entries in the receipt book and finding another entry authorized by Ms. Loya. The signatures on the two bills appeared different, despite allegedly belonging to the same individual. Deputy Seely then discovered that the driver's license number listed in the receipt for the van belonged to a woman with a different name and address than Loya's. Deputy Seely arrested Defendant for the unlawful taking of a vehicle, contrary to NMSA 1978, § 30-16D-1 (2009).

A. Procedural History

{6} Traffic violations arising from the first stop were charged separately from the unlawful taking of a vehicle charge arising from the second stop. Defendant proceeded pro se in both cases. Having been convicted of the traffic violations in magistrate court, Defendant appealed those convictions, on which he was acquitted, after a de novo trial in the district court.

{7} In this case, Defendant filed a motion to suppress the contents of the receipt book. The district court denied the motion, concluding that once Defendant gave Deputy Seely the receipt book, Deputy Seely "certainly [was] able to get into the items that he ha[d] in his hands." Defendant also filed a motion to dismiss, which the district court characterized as a *Foulenfont* motion pursuant to *State v. Foulenfont*, 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329. Defendant's motion suggested that the van did not qualify as a "vehicle" or "motor vehicle" under Section 30-16D-1, and instead was a "nonrepairable vehicle" outside the purview of the statute charged. After a hearing, the district court denied the motion to dismiss, reasoning that the facts could fit either

[1]The district court's decision states that the stop occurred on December 11, 2010.

[2]In order to promote clarity, we follow the district court's lead in referring to these items as the receipt, and refer to the book in which it, and others like it, is kept as the receipt book.

definition, and concluding that it was for the jury to decide which definition was applicable in this case.

{8} Defendant acquired counsel who filed another motion to suppress, asserting that all evidence obtained through the second stop should be suppressed, as no attenuation existed between the first illegal stop and the subsequently acquired evidence. The district court held a hearing on the motion. Denying Defendant's motion to suppress, the district court held that sufficient attenuation existed because of Castro's "fortuitous arrival." Defendant ultimately entered a conditional plea, reserving the right to appeal previous orders of the district court. Defendant timely filed a notice of appeal.

II. DISCUSSION

{9} Defendant contests the district court's denial of both motions to suppress and insists that the van in question is not a "vehicle" within the definition provided in the Motor Vehicle Code (the Code). Defendant asks that we suppress all evidence obtained as a result of the second stop, or, in the alternative, suppress all contents of the receipt book aside from the receipt for the van. Defendant requests suppression based on a lack of attenuation between the stops and an impermissible expansion of the scope of Defendant's consent. The State urges that sufficient attenuation exists between the stops to justify admitting evidence obtained during the second stop.

A. Suppression of Evidence Obtained During Second Stop

{10} When reviewing a district court's denial of a motion to suppress, appellate courts draw all reasonable inferences in favor of the district court's ruling and defer to the district court's findings of fact, so long as they are supported by substantial evidence. *See State v. Murry*, 2014-NMCA-021, ¶ 10, 318 P.3d 180. Rather than being limited to the record made on a motion to suppress, appellate courts "may review the entire record to determine whether there was sufficient evidence to support the trial court's denial of the motion to suppress." *State v. Johnson*, 1996-NMCA-117, ¶ 21, 122 N.M. 713, 930 P.2d 1165 (citing *State v. Martinez*, 1980-NMSC-066, ¶ 16, 94 N.M. 436, 612 P.2d 228 (holding that appellate courts consider the entire record on appeal, not just evidence presented during a suppression hearing, in affirming the denial of a motion to suppress)).

{11} The parties do not dispute the invalidity of Deputy Seely's first stop of Defendant, as found by the district court.[3] Rather, the parties disagree on the effect that the first, unconstitutional stop has on subsequent events. Defendant argues, under the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution, that all evidence obtained subsequent to the initial stop should be suppressed under the "fruit of the poisonous tree" doctrine, as there was no attenuation between the unconstitutional stop and the evidence in this case. The State argues that the evidence need not be excluded as the "fruit" of an illegal search.

1. Fruit of the Poisonous Tree Doctrine

{12} The "fruit of the poisonous tree" doctrine provides for suppression of "evidence that is obtained not only 'during' but 'as a direct result of' an unlawful seizure" when there are two distinct investigatory seizures by the police. *See Garcia*, 2009-NMSC-046, ¶ 23. The main inquiry under this doctrine is " 'whether . . . the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "[4] *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). In order to be purged of a taint of initial illegality, "there must be a break in the causal chain between the illegality and the consent." *State v. Monteleone*, 2005-NMCA-129, ¶ 17, 138 N.M. 544, 123 P.3d 777. A break in the causal chain, or attenuation, from initial illegality provides an exception to the fruit of the poisonous tree doctrine's bar to admitting evidence legally obtained through past police illegalities. *See id.* Attenuation is measured using three factors: (1) the temporal proximity of the illegal stop and the consent, (2) the presence of intervening circumstances, and (3) the flagrancy of the official misconduct. *See Brown v. Ill.*, 422 U.S. 590, 603-04 (1975); *Monteleone*, 2005-NMCA-129, ¶ 17.

2. Attenuation Under the Fourth Amendment

{13} Regarding the first *Brown* factor, the two stops were very close in both time and place. The initial, illegal stop finished less than a minute before Deputy Seely stopped Defendant for a second time. However, the first stop had finished, Deputy Seely had left, Defendant had put his car in motion to leave, and Castro's story had not yet given rise to a request to detain him again. As such, the first *Brown* factor weighs only slightly in Defendant's favor if at all. This segues neatly into the second *Brown* factor, by which we look at whether there was an intervening event that isolated Defendant from the coercive effects of the original illegal stop. *See United States v. Gregory*, 79 F.3d 973, 980 (10th Cir. 1996). Defendant argues that there was no intervening event, insisting that Castro's arrival was not adequate to constitute an intervening circumstance. In our view, another, more persuasive, fact lends itself to our conclusion that an intervening event occurred in this case.

{14} The parties are in agreement that Deputy Seely released Defendant from the first stop. They disagree, however, on whether Defendant's actions in attempting to leave created sufficient attenuation between the first and second stop. It hardly matters here, as Deputy Seely himself had departed the stop prior to Defendant. Defendant began driving away from the scene, though he did not get far before being stopped for the second time. Because Deputy Seely's release of Defendant, and Defendant's departure resulting from that release, occurred after the illegal stop but prior to the second stop and Defendant's consent, we conclude it constitutes an intervening circumstance under the Fourth Amendment. *See, e.g.*, *Gregory*, 79 F.3d at 980 (acknowledging that acts such as issuing *Miranda* warnings, telling the defendant he is free to leave, and advising the defendant that he may refuse consent "may satisfy the requirement of intervening circumstances" (internal quotation marks and citation omitted)); *cf. Wong Sun*, 371 U.S. at 491 (concluding that releasing the petitioner on his own recognizance rendered "the connection between the arrest

[3]Though immaterial to our consideration of this case, we note that a "regrettable" mistake of law on the officer's part may not invalidate a traffic stop under the Fourth Amendment. *Heien v. N.C.*, ___ U.S. ___, ___, 135 S. Ct. 530, 540 (2014).

[4]New Mexico case law is inconsistent regarding whether "all taint" must be removed, or whether purging the evidence of the "primary taint" is sufficient. *Compare e.g.*, *State v. Prince*, 2004-NMCA-127, ¶ 20, 136 N.M. 521, 101 P.3d 332 (holding consent must be purged from all taint) *with e.g.*, *State v. Wagoner*, 2001-NMCA-014, ¶ 22, 130 N.M. 274, 24 P.3d 306 (noting that evidence unassociated with the "primary taint" may be admissible).

and the [evidence] . . . 'so attenuated as to dissipate the taint.' " (internal quotation marks and citation omitted)). The second *Brown* factor therefore weighs in the State's favor.

{15} To fulfill the third *Brown* factor, Defendant would have to establish purposeful and flagrant official misconduct where: (1) the impropriety was obvious, or the official knew his conduct was likely unconstitutional but continued nonetheless; or (2) the misconduct was investigatory in design and purpose. *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006); *Brown*, 422 U.S. at 605. There is no evidence of misconduct with regard to Castro's arrival at the scene, and Defendant concedes that the district court's finding that Castro's arrival was fortuitous and unanticipated is supported by the evidence. Defendant hints at purposeful investigatory misconduct in the facts of the first stop.[5] We have previously affirmed the district court's decision regarding the first stop in a memorandum opinion, *State v. Monafo*, No. 32,315, mem. op. (N.M. Ct. App. Nov. 15, 2012) (non-precedential), based not on intentional misconduct but a mistake of law. It is not necessary here to take up Defendant's invitation to re-visit the facts and legal issues presented therein.

{16} Though Deputy Seely's mistake of law in making the first stop of Defendant may have been objectively unreasonable, an unreasonable mistake alone is not sufficient to establish flagrant misconduct in an attenuation analysis. *E.g.*, *United States v. Barnum*, 564 F.3d 964, 973 (8th Cir. 2009) (concluding that a traffic stop initiated as part of patrol but based on an unreasonable mistake was not the type of blatantly unconstitutional or flagrant behavior condemned in *Brown*); *United States v. Herrera-Gonzalez*, 474 F.3d 1105, 1113 (8th Cir. 2007) (concluding that where police conduct was a "mistaken exercise of otherwise legitimate police investigation," seizure was "more innocuous than damning"); *United States v. Green*, 111 F.3d 515, 523 (7th Cir. 1997) (concluding violation was not flagrant where there was no evidence of bad faith police conduct); *United States v. Boone*, 62 F.3d 323, 325 (10th Cir. 1995) (acknowledging that, where an officer acted upon mistaken belief in violating the Fourth Amendment, such conduct did not rise to the level of flagrant misconduct in attenuation analysis); *United States v. Pimental*, 645 F.2d 85, 86-87 (1st Cir. 1981) (concluding that where an officer acted on a mistaken belief that consent had been given, a Fourth Amendment violation was not flagrant misconduct). The exclusionary rule exists to discourage police misconduct. Application of the rule when police action, though erroneous, was not undertaken in a flagrant and purposeful violation of the suspect's protected rights does nothing to further that purpose. Thus, absent any evidence of bad faith, knowledge, or investigatory purpose, we conclude that Deputy Seely's first stop of Defendant, while a Fourth Amendment violation, was neither flagrant nor purposeful misconduct for purposes of our attenuation analysis. The third *Brown* factor therefore weighs in favor of the State.

{17} Weighing the three *Brown* factors together, we conclude that Defendant's Fourth Amendment claim must fail. As such, we turn to an analysis of whether Defendant fares better under Article II, Section 10 of the New Mexico Constitution.

3. Attenuation Under Article II, Section 10

{18} Defendant suggests that under Article II, Section 10, we should afford the third *Brown* factor "little or no value." In support of this position, Defendant argues that the third factor embodies the purpose of the exclusionary rule under the United States Constitution and that it differs so significantly from the purposes driving the exclusionary rule in New Mexico that the third *Brown* factor is rendered superfluous. Under the facts of this case, even if we were to assume *arguendo* Defendant's analysis is correct, he would not prevail; we therefore do not need to address Defendant's contention.

{19} Removing consideration of the third *Brown* factor would result in an analysis based solely on the temporal proximity and intervening event factors alone because, as Defendant claims in his brief, those factors "have more to do with establishing a causal connection" anyway. Here, the temporal proximity of the illegal acts and the evidence sought to be suppressed is a minute at best. However, the intervening event of Defendant's release and his beginning to leave weighs strongly in the State's favor, just as it did in the Fourth Amendment analysis. *See State v. Hernandez*, 1997-NMCA-006, ¶ 34, 122 N.M. 809, 932 P.2d 499 (finding no attenuation where the defendant was in constant custody between the illegal detention and her giving consent to search despite no independent jurisdiction on the part of the police to do so). Following Defendant's proposed interpretation of attenuation, we are therefore left to balance these two factors, neither of which weighs in favor of Defendant.

{20} Evaluating attenuation is a highly fact-specific process. In *State v. Figueroa*, we noted that evaluating intervening circumstances was limited to the facts of the case: "A different result may occur where an officer is careful to clearly establish a transformation in the encounter." 2010-NMCA-048, ¶¶ 33, 35, 148 N.M. 811, 242 P.3d 378. An officer could not more clearly impress upon a suspect that his encounter with a police officer has terminated than allowing him to leave, as Deputy Seely did here. Though Defendant's freedom to leave the stop was short-lived, he was unquestionably released from the encounter, and had put his truck in motion to leave when Deputy Seely was called back to the scene. Here, where there was a complete end to the first stop and a clear beginning to the subsequent stop, attenuation between the two stops, in both time and purpose, is complete. The short amount of time between the two is not significant to our analysis here.

{21} Taking all of the circumstances surrounding the incident into consideration, *id.* ¶ 33, we conclude that the existence of an intervening event outweighs the importance of any temporal proximity under the facts of this case because the attenuation analysis is, above all, aimed at preventing exploitation of an illegality. *Wong Sun*, 371 U.S. at 488. Not only is there no evidence of such exploitation in this case, Deputy Seely's release of Defendant is evidence that he harbored no expectation that he would any longer obtain any evidence "as a direct result of" the first stop. *Id.* at 485. Thus, Deputy Seely returned Defendant to the position that he would have been in had his rights not been violated, *i.e.*, traveling down the road of his own free will, before the second stop. When Defendant was stopped the second time, the basis for the stop was unrelated to the first encounter as if the first had not occurred. *See Wagoner*, 2001-NMCA-014, ¶ 30 (stating purpose of state exclusionary rule is accomplished

[5]As support for this contention, Defendant points to the length of the detention and the nature of the traffic citations issued, as evidence that Deputy Seely was fishing for additional violations.

by "doing no more than return the parties to where they stood before the right was violated." (internal quotation marks and citation omitted)). Because Defendant does not prevail on this issue, we need not address the State's additional argument that evidence obtained during the second stop should not be excluded because of the independent source doctrine.

B. Consent to Search the Receipt Book

{22} Having concluded that evidence obtained during the second stop need not be excluded as fruit of a poisonous tree, we next address Defendant's assertion that the district court erred in denying his motion to suppress the contents of the receipt book, save the single receipt for the van that he was towing. The State asserts that Defendant consented to Deputy Seely's search of the entire receipt book by handing it over during the stop without qualifying or limiting that consent.

{23} The scope of a consensual search is defined by, and limited to, the actual consent given. *State v. Garcia*, 1999-NMCA-097, ¶ 9, 127 N.M. 695, 986 P.2d 491. The scope of consent is an objective inquiry, constrained by the bounds of reasonableness. *State v. Mosley*, 2014-NMCA-094, ¶ 24, 335 P.3d 244. Courts may rely on social norms when determining "what a reasonable person would have understood by the exchange between the officer and the suspect." *Garcia*, 1999-NMCA-097, ¶ 9. Courts must also consider "what a police officer could reasonably interpret the consent to encompass." *Id.* ¶ 13 (internal quotation marks and citation omitted). A search is invalid if it exceeds the scope of the consent given. *Id.* ¶ 9.

{24} The evidence shows that Deputy Seely approached Defendant's truck and requested documentation specific to the van in tow: "Can you show me a bill of lading again? Your manifest to pick this up?" Defendant complied. While looking at the receipt specific to the van, Deputy Seely questioned Defendant as to the information it contained and ran a check on the driver's license number listed on the receipt. Still holding the receipt book, Deputy Seely walked away from Defendant's driver's side door, joined two other officers at the rear of the truck, and began leafing through the receipt book.

{25} The State asks us to conclude that Defendant's failure to limit or qualify his consent constitutes a broad, sweeping statement of consent that encompassed the entire receipt book.[6] We decline to draw such a conclusion under the facts of this case. Deputy Seely made a specific request to see the receipt for a specific vehicle, and Defendant complied with that request by opening the receipt book to the relevant page. A reasonable person in that situation would have understood Defendant's consent to have been limited to that specific page or document. It was not reasonable for Seely to assume that physical possession of the receipt book, which was given to facilitate a close inspection of the information on the receipt, allowed him to flip through the entire receipt book and examine the contents of all pages. Deputy Seely asked only for the single receipt rather than the entire receipt book, and he received the specific page he requested. We therefore conclude that Defendant's consent was limited to the receipt for the van, and that Seely impermissibly expanded the scope of that consent. As such, the contents of the receipt book, and evidence obtained therefrom, should be suppressed. However, because Deputy Seely obtained the receipt with Defendant's consent, the single receipt for the van need not be suppressed.

{26} That said, our decision regarding the exclusion of the receipt book does not remove Deputy Seely's probable cause for arrest, as it appears from the evidence that Deputy Seely ran a check on the (ultimately false) driver's license number on the receipt before flipping through the rest of the receipt book. Thus, when Deputy Seely discovered that the license number did not match the name and address given on the receipt, he had probable cause to believe Defendant had committed a felony and exigency could be presumed. *See Campos v. State*, 1994-NMSC-012, ¶ 14, 117 N.M. 155, 870 P.2d 117 (stating that for a warrantless arrest to be reasonable, the arresting officer must have probable cause and some exigency must exist; where an officer "observes the person arrested committing a felony, exigency will be presumed"); *State v. Paananen*, 2015-NMSC-031, ¶ 26, 357 P.3d 958 (holding that "there are other situations in which an exigency not necessarily amounting to an imminent threat of danger, escape, or lost evidence will be sufficient to render reasonable a warrantless public arrest supported by probable cause under the totality of the circumstances"); Section 30-16D-1(A) (listing the "taking of a vehicle or motor vehicle" as a felony offense).

C. Definition of "Vehicle" Under NMSA 1978, § 66-1-4.12(B) (2007, amended 2016)

{27} Defendant's appeal also raises the question of whether the terms "vehicle" or "motor vehicle" can be interpreted to cover the van involved in this case. Defendant first raised this issue in his pro se motion to dismiss, which the district court interpreted as a motion under *Foulenfont*, 1995-NMCA-028, ¶ 5 (deeming it proper for the district court to dismiss criminal charges on purely legal grounds when the district court assumes the facts underlying the charges are true). The district court denied the motion, deeming the issue a question of fact for the jury to decide. *See State v. Hughey*, 2007-NMSC-036, ¶ 11, 142 N.M. 83, 163 P.3d 470 (stating the rule that "where a motion involves factual matters that are not capable of resolution without a trial on the merits, the trial court lacks the authority to grant the motion prior to trial"). If the State could reasonably assert the availability of additional evidence, pretrial dismissal under Rule 5-601(B) NMRA is inappropriate. *State v. Gomez*, 2003-NMSC-012, ¶ 7, 133 N.M. 763, 70 P.3d 753. We review issues of statutory interpretation de novo. *State v. Carbajal*, 2002-NMSC-019, ¶ 3, 132 N.M. 326, 48 P.3d 64. When a statute "specifically defines a term, we interpret the statute according to those definitions, because those definitions reflect legislative intent." *State v. Smith*, 2009-NMCA-028, ¶ 13, 145 N.M. 757, 204 P.3d 1267.

{28} Defendant asserts that the van in question in this case is a "nonrepairable vehicle" under the Code, Section 66-1-4.12(B), rather than a "vehicle" or "motor vehicle" as named in Section 30-16D-1. The State asserts that the van satisfies the definition of "vehicle" under the Code. Section 30-16D-1(A) prohibits the unlawful taking of a vehicle or motor vehicle. It defines an

[6]With regard to the State's suggestion that consent must be exactly and conclusively limited, requiring such a qualification seems unrealistic in light of the stark reality that such statements could give rise to the "suspicious" or "furtive" behavior that often gives rise to probable cause or reasonable suspicion. *See State v. Leyva*, 2011-NMSC-009, ¶ 24, 149 N.M. 439, 250 P.3d 861 (quoting *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) ("Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you.")).

unlawful taking as "a person taking any vehicle or motor vehicle as defined by the Motor Vehicle Code . . . intentionally and without consent of the owner." *Id.* The Code defines a "vehicle" as "every device in, upon or by which any person or property is or may be transported or drawn upon a highway, including any frame, chassis, body or unitized frame and body of any vehicle or motor vehicle, except devices moved exclusively by human power or used exclusively upon stationary rails or tracks[.]" NMSA 1978, § 66-1-4.19(B) (2005). The Code defines a "motor vehicle" as "every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from batteries or from overhead trolley wires, but not operated upon rails[.]" NMSA 1978, § 66-1-4.11(H) (2015). A "nonrepairable vehicle"[7] is "a vehicle of a type otherwise subject to registration that: (1) has no resale value except as a source of parts or scrap metal" and has been "irreversibly designat[ed]" as such; or (2) has been stripped as a result of theft and "has little or no resale value other than its worth as a source of a vehicle identification number that could be used illegally[.]" Section 66-1-4.12(B)(1)-(2).

{29} The evidence contained in the record reveals that Castro purchased the van knowing that its engine was not working, but with an eye toward making repairs that would eventually render it operable. The van had a smashed window, was missing headlights, and the previous owner had used it for parts. The State asserted that Castro may have changed his mind regarding this issue, but before acting to fix or stip the van, the van was taken from his possession without his consent. The State further pointed out in its motion that there was no "nonrepairable vehicle certificate" for the vehicle in question.

{30} Based on the facts in the record, this is a matter to be resolved by the fact-finder during trial. The statutory definitions and the limited evidence presented prior to trial reveal that the fact-finder could reasonably conclude that the van was a vehicle or a nonrepairable vehicle. Because it is not clear what evidence could be presented at trial or how the fact-finder would weigh the evidence presented, it is inappropriate for this Court to speculate as to the outcome of this factual issue. *See Hughey*, 2007-NMSC-036, ¶ 16 ("It is the role of the fact[-]finder to judge the credibility of witnesses and determine the weight of evidence."). We therefore affirm the district court's denial of Defendant's motion.

III. CONCLUSION

{31} There was sufficient attenuation between the first and second stop to purge any taint resulting from the illegal first stop. Evidence obtained from the receipt book, except the receipt for the van, however, must be excluded because Deputy Seely only obtained consent for the receipt alone. As such, flipping through the rest of the receipt book was an impermissible expansion of the scope of Defendant's consent. We partially reverse the district court's denial of Defendant's motion to suppress the receipt book, excluding that greater portion of the book *other than* the receipt relevant to the vehicle in question, permitted by Defendant's consent. Based on this reversal, we remand to the district court to afford Defendant a chance to withdraw his plea, should he deem it prudent to do so. *See State v. Hodge*, 1994-NMSC-087, ¶ 20, 118 N.M. 410, 882 P.2d 1 (stating the rule that if a defendant prevails on appeal, he is allowed to withdraw his plea).

{32} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge

[7]The Code requires nonrepairable vehicle certificates, which is a "vehicle ownership document conspicuously labeled 'NONREPAIRABLE' issued to the owner[.]" Section 66-1-4.12(C).

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-093

No. 34,327 (filed August 31, 2016)

IN THE MATTER OF THE ADOPTION PETITION OF DARLA D. and PATTY R.,
Petitioners-Appellees,
v.
GRACE R.,
Respondent-Appellant,

and

IN THE MATTER OF TRISTAN R.,
Child.

APPEAL FROM THE DISTRICT COURT OF MORA COUNTY
GERALD E. BACA, District Judge

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Santa Fe, New Mexico

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AIDA MEDINA ADAMS
LAW OFFICE OF
AIDA MEDINA ADAMS
Santa Rosa, New Mexico
Guardian Ad Litem

Opinion

Linda M. Vanzi, Judge

{1} Grace R. (Mother) appeals from the district court's letter decision and decree of adoption and termination of parental rights, terminating her parental rights to Tristan R. (Child) and granting the verified petition for adoption and termination of parental rights (the petition) filed by Darla D. and Patty R. to adopt Child pursuant to the provisions of the Adoption Act, NMSA 1978, §§ 32A-5-1 to -45 (1993, as amended through 2012). Mother challenges the letter decision and decree on numerous grounds, including that her constitutional and statutory rights were violated and that there was insufficient evidence to support the termination of her parental rights. We agree with Mother that multiple procedural and constitutional violations infected the proceedings below. We further conclude that the district court's rulings that Mother abused and neglected Child and that the conditions and causes of such neglect and abuse are unlikely to change in the foreseeable future are not, as they must be, supported by clear and convincing evidence. We therefore reverse.

BACKGROUND

{2} We begin with an overview of the factual and procedural background. Additional details necessary to our analysis of particular issues are provided in the discussion section below.

{3} Mother, who suffers from depression and post-traumatic stress disorder as well as a physical illness, has been receiving support and therapy services through Life Link since about August 2009. In May 2013 Life Link lost funding for the program that subsidized Mother's rent, requiring Mother to move from the home in Santa Fe, New Mexico that she had been sharing with her boyfriend, Child, and Child's older sister. Concerned about finding housing she could afford, Mother became depressed and overwhelmed. On the morning of May 23, 2013, with a few days left to move and her daughter getting ready for summer school, Mother got into an argument with her boyfriend and began yelling at him. When he tried to restrain her, Mother "scratched and bit at him[.]" The police were called, and Mother was arrested and jailed for five days. She pleaded guilty to disorderly conduct and was sentenced to ten hours of community service and six months of unsupervised probation.

{4} While Mother was in jail, her children remained with her boyfriend. The Children, Youth and Families Department (CYFD) checked on the welfare of the children and determined that they were safe in his care. When Mother was released from jail, she contacted the Santa Fe CYFD office and asked CYFD worker Denise Shirley for help. Mother explained to Shirley that she felt her emotional stability was at risk: She was going to lose her home and had no family support, and she was requesting services offered by CYFD because they had been helpful in the past.

{5} CYFD and Mother agreed on a safety plan for the care of the children while Mother sought intensive treatment from Life Link to address her anxiety disorder and to help with coping skills. The safety plan provided that Child's older sister would fly to New Jersey to live with her biological father and Child would reside with his paternal grandmother, Darla D. (Grandmother). Although the children were not in CYFD custody, the safety plan was to remain "in effect until further reassessment by the family's CYFD caseworker."

{6} On May 31, 2013, Grandmother and her partner, Patty R., (collectively, Petitioners) picked up Child at Mother's residence and took him to their home in Mora, New Mexico. While Child was living with Petitioners, Mother saw a counselor and caseworker at Life Link. She was placed on a waiting list for the Life Link intensive program but participated in the program as a "casual member" between July and September, attending therapy three times a week. In September 2013 Mother became an official member of the program. At the time of trial, Mother continued to receive counseling through Life Link.

{7} During the summer of 2013, Mother talked to Child on the phone at least once a week. Between August and September, she also saw Child four times when Grandmother was in Santa Fe with him. Later, Mother started calling Child nightly. However, Petitioners told Mother that the nightly calls were disruptive. They set up a schedule for Mother to call two days a week but sometimes did not answer the phone. Mother left messages stating her

frustration with not being able to talk to Child.

{8} In early October 2013 Mother told Grandmother that she wanted to begin to reintegrate Child back into her life and that she was hoping to have him back in Santa Fe after Christmas. In November 2013 Grandmother had a disagreement with Mother concerning how often Mother could speak with Child and, shortly thereafter, Mother learned that Grandmother was trying to "serve [her] with something." In fact, Grandmother had filed a petition for a restraining order (TRO petition) against Mother in the San Miguel County District Court, seeking to prevent Mother from having any contact with her or Child. The TRO petition was dismissed in early December 2013, after the district court held a hearing and concluded that Mother should visit Child and that phone calls should occur regularly. At that point, Mother had not seen Child in about a month and a half.

{9} In November 2013 after the TRO petition was filed, Mother was served with Petitioners' petition to terminate parental rights and to adopt Child in a closed adoption. The petition, which had been filed almost a month earlier in a separate proceeding in the district court, sought termination of the parental rights of Child's biological parents "on the basis of voluntary relinquishment of parental rights" and requested a judgment declaring the closed adoption of Child by Petitioners.

{10} On March 3, 2014, after a hearing, the district court appointed a guardian ad litem (GAL)—selected by Petitioners—for Child. The court held a merits hearing on the petition (for ease of reference, trial) on July 15 and 25, 2014, and entered its letter decision nearly three months later, on October 8, 2014. The letter decision contains no factual findings and merely states the following conclusions: Child "has been abused or neglected while in the care and custody of [Mother], and the conditions and causes of the neglect or abuse are unlikely to change in the foreseeable future"; Child "has been abandoned by his parents in that [C]hild has been placed in the care of [P]etitioners by [Mother]"; and "all of the conditions set forth in Section 32A-5-15(B)(3)(a-e) . . . exist and have not been rebutted by [Mother.]" No party filed proposed findings of fact and conclusions of law. The decree of adoption and termination of parental rights was filed on November 5, 2014. This appeal followed.

DISCUSSION

{11} Our courts have repeatedly recognized that a biological parent's right to the care and custody of her child implicates fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions. *See State ex rel. Children, Youth & Families Dep't v. John R.*, 2009-NMCA-025, ¶ 27, 145 N.M. 636, 203 P.3d 167 (stating that "a parent has a fundamental interest in the care, custody, and control of his or her children"); *see also 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"); *State ex rel. Children, Youth & Families Dep't v. Joe R.*, 1997-NMSC-038, ¶ 29, 123 N.M. 711, 945 P.2d 76 ("[A parent's] rights and obligations . . . are protected by his constitutional right to due process."); *Ronald A. v. State ex rel. Human Servs. Dep't*, 1990-NMSC-071, ¶ 3, 110 N.M. 454, 797 P.2d 243 (noting that a parent's right to custody is constitutionally protected). Although a parent's right is fundamental and superior to the claims of other persons and the government, it is not absolute. *See In re Adoption of Francisco A.*, 1993-NMCA-144, ¶ 20, 116 N.M. 708, 866 P.2d 1175 ("It is well established in New Mexico that parents do not have absolute rights in their children; rather parental rights are secondary to the best interests and welfare of the children."); *In re Adoption of Bradfield*, 1982-NMCA-047, ¶ 16, 97 N.M. 611, 642 P.2d 214 (noting that "[t]he paramount issue in an adoption proceeding . . . is the welfare of the child"). Nevertheless, to comply with due process requirements, actions to terminate a parent's rights "must be conducted with scrupulous fairness." *State ex rel. Children, Youth & Families Dep't v. Lorena R.*, 1999-NMCA-035, ¶ 19, 126 N.M. 670, 974 P.2d 164 (alteration, internal quotation marks, and citation omitted). The provisions of the Adoption Act governing proceedings for adoption of children and concurrent termination of parental rights, discussed below, reflect the constitutional dimension of the rights at stake.

{12} Mother makes several arguments on appeal. She contends that the district court disregarded due process and statutory requirements for proceedings to terminate parental rights, including by failing to inform her of her right to court-appointed counsel and requiring her to share the cost of the GAL. She argues that the district court abused its discretion by (1) admitting into evidence and relying on the GAL's investigatory report, which included portions of the CYFD file; (2) failing to exclude hearsay and double hearsay in the testimony of CYFD worker Kurt Smith; and (3) allowing Child's therapist to testify despite her refusal to produce her treatment notes. Mother also contends that the decision terminating her parental rights is not supported by clear and convincing evidence. We agree. We also conclude that the petition was improperly filed and should have been dismissed at the inception of this case.

{13} We note at the outset that it appears that this matter was erroneously treated as an abuse and neglect case under the Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -34 (1993, as amended through 2016), rather than as a proceeding under the Adoption Act for adoption and concurrent termination of parental rights. We begin by discussing the requirements for proceedings under the Adoption Act, and some of the multitude of failures by Petitioners, the GAL, and the district court to follow those requirements. We then address errors and abuses of discretion in the conduct of the trial that led to the improper termination of Mother's parental rights.

Failure to Follow the Strict Requirements for Adoption Requires Reversal

{14} The record reveals a host of violations of the Adoption Act, any one of which would warrant reversal. Our review is de novo. *Helen G. v. Mark J. H.*, 2008-NMSC-002, ¶ 7, 143 N.M. 246, 175 P.3d 914; *State ex rel. Children, Youth & Families Dep't v. Carl C.*, 2012-NMCA-065, ¶ 8, 281 P.3d 1242. To the extent that some of these issues have been raised for the first time on appeal, we review for fundamental error. *See State ex rel. Children, Youth & Families Dep't v. Paul P., Jr.*, 1999-NMCA-077, ¶ 14, 127 N.M. 492, 983 P.2d 1011 (stating that "termination of parental rights cases can be candidates for fundamental error analysis").

{15} The overarching purpose of the Adoption Act is to "establish procedures to effect a legal relationship between a parent and adopted child" and to "ensure due process protections." Section 32A-5-2(A), (C). Only an "individual who has been approved by the court as a suitable adoptive parent *pursuant to the provisions of the Adoption Act*" may adopt. Section 32A-5-11(B)(1) (emphasis added). The record reveals consistent failures to comply with the Adoption Act's requirements. We

proceed chronologically, beginning with the petition.

Requirements for Verified Petition for Adoption

{16} As relevant here, Section 32A-5-12 of the Adoption Act provides:

> A. No petition for adoption shall be granted by the court unless the adoptee was placed in the home of the petitioner for the purpose of adoption:
> (1) by the department;
> (2) by an appropriate public authority of another state;
> (3) by an agency; or
> (4) pursuant to a court order, as provided in Section 32A-5-13.
> . . . .
> C. When an adoptee is not in the custody of the department or an agency, the adoption is an independent adoption and the provisions of this section and Section 32A-5-13 . . . shall apply, except when the following circumstances exist:
> . . . .
> (2) a relative within the fifth degree of consanguinity to the adoptee or that relative's spouse seeks to adopt the adoptee, and, *prior to the filing of the adoption petition*, the adoptee has lived with the relative or the relative's spouse *for at least one year*[.]

(Emphasis added.)

{17} The language of the Adoption Act is unambiguous. Petitioners could petition for adoption of Child *only* if the requirements of either Section 32A-5-12(A) or (C) were met. To the extent Petitioners imply that Child was "placed" with them under Section 32A-5-12(A)(1), they are wrong. The record is clear and undisputed that CYFD never took custody of Child. Accordingly, CYFD could not "place" him in the home of Petitioners for *any* purpose. *See* § 32A-5-3(K) (" '[D]epartment adoption' means an adoption when the child is in the custody of [CYFD.]"); *see also In re Adoption of Doe*, 1982-NMCA-094, ¶ 47, 98 N.M. 340, 648 P.2d 798 (noting that the mother's act of leaving child with her ex-husband was not a "placement" for purposes of adoption under the Adoption Act). And certainly nothing in the safety plan or the record as a whole shows that CYFD "placed [Child] in the home of [Petitioners] *for the purpose of adoption*[.]" Section 32A-5-12(A) (emphasis added). Indeed, if Child had been "placed" with Petitioners, then the district court should have required pre- and post-placement studies pursuant to Sections 32A-5-14 and -31. The pre-placement study is a written evaluation, paid for by the petitioner, of the adoptive family, the adoptee's biological family, and the adoptee. *See* §§ 32A-5-3(U), -13(B), -14(B). The post-placement report is a written evaluation of the adoptive family and the adoptee after the adoptee is placed for adoption. Section 32A-5-3(T). Here, the court never required any such study at the commencement of the proceeding and, in fact, declared in the decree that none was required, further belying Petitioners' implication that Child was "placed" with them for adoption. In short, Section 32A-5-12(A) did not provide a basis for the petition.

{18} Nor could the petition properly be filed in reliance on Section 32A-5-12(C)(2), as the record makes plain that the threshold requirements of this provision also were not met. The petition, filed on October 23, 2013, states that "[C]hild has lived with . . . Petitioners since May 2013." It is evident from the face of the petition itself, then, that Child had lived with Petitioners for a mere five months, and not "for at least one year" *prior to the filing of the adoption petition*, as the Adoption Act requires. Accordingly, Petitioners' own allegations show that Section 32A-5-12(C)'s statutory prerequisite was not met and that, therefore, they were not entitled to bring an action seeking an independent adoption under the Adoption Act. *See In re Adoption of Webber*, 1993-NMCA-099, ¶ 8, 116 N.M. 47, 859 P.2d 1074 (stating that the one-year residency provision is "a statutory prerequisite to . . . adoption and a safeguard to ensure that the best interests of the child are met by allowing the adoption").

{19} Given that the statutory prerequisite was not met, had Petitioners wished to pursue the adoption of Child at any time prior to May 31, 2014, they would have been required to obtain a court order placing Child in their home for the purpose of adoption. *See* § 32A-5-12(A)(4). Such an order requires compliance, not only with Sections 32A-5-14(C) or -31(C), but also with Section 32A-5-13(A), which requires a petitioner to file a request with the court to allow the placement and directs that "[a] n order permitting the placement shall be obtained *prior* to actual placement." (Emphasis added.) Petitioners never sought any such order prior to May 2013.

{20} Instead, Petitioners alleged, citing Sections 32A-5-31(C) and 32A-5-14(C), that "[p]lacement is not required because this is a relative adoption within the fifth degree of consanguinity to the adoptee." Petitioners are wrong. First, neither Section 32A-5-14(C) nor -31(C) deals with "placement" but rather, as discussed above, with pre- and post-placement studies, neither of which were ordered by the district court. Moreover, both provisions state that pre- and post-placement reports are "not required in cases in which the child is being adopted by a stepparent, a relative or a person named in the child's deceased parent's will *pursuant to Section 32A-5-12*." Sections 32A-5-14(C) and -31(C) (emphasis added). Thus, the Adoption Act provides that "[n]o petition for adoption shall be granted by the court" unless the requirements of Section 32A-5-12 are met. Section 32A-5-12(A). Sections 32A-5-31(C) and 32A-5-14(C) provide no basis to circumvent those requirements.

{21} In summary, the petition was improperly filed, and the district court should have dismissed it immediately as a matter of law for failure to meet the Adoption Act's requirements. Although reversal is mandated for this reason alone, we continue our analysis because the number, severity, and aggregate effect of errors in the conduct of the proceedings below demand our attention and censure.

Termination Procedures

{22} The district court failed to heed and enforce procedural safeguards applicable to proceedings to terminate parental rights under the Adoption Act. In pertinent part, Section 32A-5-16 requires:

> E. The court shall, upon request, appoint counsel for an indigent parent who is unable to obtain counsel or if, in the court's discretion, appointment of counsel for an indigent parent is required in the interest of justice. Payment for the appointed counsel shall be made by the petitioner pursuant to the rate determined by the [S]upreme [C]ourt of New Mexico for court-appointed attorneys.
> F. The court shall appoint a guardian ad litem for the child in all contested proceedings for termination of parental rights. . . .
> G. Within thirty days after the filing of a petition to terminate parental rights, the petitioner shall request a hearing on the petition. The hearing date shall be at least thirty days after service is effected upon the parent of the child or completion of publication.

{23} We begin with Subsection (E)'s requirement that the court must appoint counsel for an indigent parent either upon request or in the interest of justice. The record shows that, although the district court was made aware that Mother was indigent, it never informed Mother that it would appoint counsel for her if she was indigent and requested counsel. Mother's indigency became clear at the very first hearing in the case in February 2014. Petitioners' counsel told the court that counsel for Mother was concerned that Mother could not pay half the cost of the GAL to be appointed for Child. Mother's counsel elaborated, stating his concern that Mother could not pay for the GAL because she was on Social Security Disability Income (SSDI) and the amount she received was "barely enough for her to live on." He explained that he was working on the case mostly pro bono. Although Mother had paid him a small amount of money, "this is . . . a largely pro bono case."

{24} We recognize that Mother was not pro se but represented by "largely pro bono" counsel. But we have previously held that "a court must advise a parent in termination proceedings under the adoption provisions of the Children's Code that he or she is entitled to have counsel appointed if indigency can be established." *Chris & Christine L. v. Vanessa O.*, 2013-NMCA-107, ¶ 18, 320 P.3d 16. Given that Mother's indigency was pointed out to the court at the first hearing, it was incumbent upon the court to advise Mother of her statutory right to counsel upon a showing of indigency. As we noted in *Chris & Christine L.*, the right to counsel "is meaningless if the parent is unaware of the right." *Id.* ¶ 17. Not only did the court fail to advise Mother of this statutory right, it inexplicably proceeded to order Mother to pay one-third of the GAL's fee, as discussed below.

{25} We conclude that the court's failure to advise Mother that she would be entitled to appointed counsel—paid for by Petitioners—if she could establish indigency violated her rights under the Adoption Act, was in derogation of her due process rights, and constitutes fundamental error. *See* § 32A-5-2(C) (stating that one purpose of the Adoption Act is to "ensure due process protections"); *Paul P., Jr.*, 1999-NMCA-077, ¶ 15 (stating that "the procedures set out in the Children's Code for termination of parental rights suffice to insure a parent's due process rights"). This established right is viewed by our precedent as critical to the circumstance in which a parent's constitutional right to the care and custody of his or her child is implicated. While pro bono legal representation is both commendable and important to legal proceedings of all sorts in New Mexico, Mother nonetheless was not given an opportunity for appointed counsel that was her right to accept or reject.

{26} We next address 32A-5-16(F)'s requirement that the court "shall appoint a guardian ad litem for the child in all contested proceedings for termination of parental rights." As noted, the GAL was contacted and selected by Petitioners' counsel, who had discussed the case with her prior to the hearing on the motion for appointment of a GAL for Child. The record is silent as to what information, if any, the GAL received from Petitioners concerning the case. Nor is there any indication that Mother's counsel or the district court spoke with the proposed GAL before she was appointed. In fact, it is apparent from the transcript that the GAL, who was "new to the district" according to Petitioners' counsel, was not present at the hearing on her appointment. Nothing in the Adoption Act prescribes a method for appointing a GAL. Nevertheless, we think that, in the circumstances presented here, the judicial duty to ensure that procedures implicating a parent's due process rights are conducted with "scrupulous fairness," *see Lorena R.*, 1999-NMCA-035, ¶ 19, required the district court to confirm that the GAL was properly informed as to her responsibilities under New Mexico law, was not biased and was able to adequately represent Child's interest. And we conclude that the district court's apparent failure to inquire about the adequacy of the GAL's representation of Child's interest constitutes an abuse of discretion.

{27} We also conclude that the district court abused its discretion in requiring Mother to pay one-third of the cost of the GAL that Section 32A-5-16(F) requires to be appointed "in all contested proceedings for termination of parental rights[,]" despite having been informed that Mother could not afford to pay even a portion of the $150 hourly fee. Accepting Petitioners' representation that the GAL anticipated spending about ten hours on the case, Mother's one-third portion of the fee would have amounted to more than one-third of her total monthly income, which was already "barely enough for her to live on." Even Petitioners' counsel asked if there was a discretionary fund that might be used to assist Mother. But the district court asked Mother's counsel if there were "any resources there to assist her in getting that payment taken care of" and then required Mother to pay one-third of the GAL fee.

{28} The Adoption Act prescribes no requirements for payment of GAL fees in contested adoption proceedings, and district courts consequently have broad discretion in apportioning those fees among the parties. But given the representations of counsel for both sides concerning Mother's inability to pay in this case, we conclude that the court abused its discretion in requiring Mother to pay one-third of the GAL fee.

{29} The district court, moreover, confused the role of the GAL in this adoption proceeding with that of a GAL in a domestic relations custody dispute, an error that resulted in additional erroneous rulings contributing to the district court's decision to terminate Mother's parental rights. We discuss these rulings and their impact on the court's decision more fully below, but pause here to explain.

{30} The Adoption Act states that the court shall appoint a GAL for the child in all contested proceedings. Section 32A-5-16(F) and -33. As set forth in the Children's Code, the duties of the GAL are to "zealously represent the child's best interests in the proceeding for which the [GAL] has been appointed and in any subsequent appeals."[1] NMSA 1978, § 32A-1-7(A) (2005). The Children's Code further requires that "[a]fter consultation with the child, a [GAL] shall convey the child's declared position to the court at every hearing." Section 32A-1-7(D). And it lists certain mandatory duties and responsibilities, including consistent contact with the child and communications with professionals involved in the child's case. Section 32A-1-7(E).

{31} The district court erroneously determined that the GAL's role and duties were governed by Rule 1-053.3(A) NMRA, which allows a court to appoint a GAL in "any proceeding when custody of a minor child is contested under Chapter 40" (Domestic Affairs). While the Adoption Act "ensure[s] due process protections" in proceedings to determine whether to

[1]We note that the GAL has not participated in any way in this appeal.

terminate a parent's ties with her child, *see* § 32A-5-2(A), (C), the rule exists to assist the court in determining how both parents should best care for their children. *See* Rule 1-053.3(A) (stating that "[t]he [GAL] serves as an arm of the court and assists the court in discharging its duty to adjudicate the child's best interests"). There are marked differences between the appointment and role of the GAL in the two types of cases. For example, unlike the mandatory requirement to appoint a GAL in a contested adoption/termination of parental rights proceeding, the appointment of a GAL in a domestic relations matter is discretionary. *See id.* (stating that the court "may appoint" a GAL); *see also* Rule 1-053.3(E) (listing seventeen factors to consider in determining whether an appointment will be made). And while Rule 1-053.3(B) requires that the appointment order specify the GAL's role, tasks, duties, and any limitations and allows the parties to agree to adopt the GAL's recommendations, *see* Rule 1-053.3(G), the Adoption Act does not. Given these differences, and for reasons discussed more fully below, we conclude that the district court erred in applying Rule 1-053.3 to the adoption and termination proceeding at issue here.

{32} We briefly address Section 32A-5-16(G)'s requirement that the petitioner shall request a hearing on the petition within thirty days after the filing of a petition to terminate parental rights. Petitioners filed the petition on October 23, 2013, and did not file a request for a hearing on the petition until April 14, 2014, well after the thirty-day deadline. And by the time final judgment was entered on November 5, 2014, over a year had elapsed since the petition was filed. The length of time it took for this case to be decided did not inure to the benefit of Child, now almost ten years old and, in fact, may well have been detrimental to him.

Other Factors Contributing to Error in this Case

{33} We also briefly address Petitioners' failure to meet the statutory requirements for establishing relinquishment by a parent and for providing an accounting of disbursements, and the district court's own failure to apply the correct statute. First, the sole justification asserted in the petition for seeking termination of Mother's parental rights is "on the basis of voluntary relinquishment." Yet nowhere do Petitioners demonstrate compliance with Sections 32A-5-21 and -22, which apply when a petitioner is seeking to adopt on the basis of a relinquishment of parental rights. Second, Section 32A-5-34(A) states that "[p]rior to the final hearing on a petition, the petitioner shall file a full accounting of all disbursements of anything of value made or agreed to be made by or on behalf of the petitioner in connection with an adoption." We have searched the record and found no evidence that any such report was ever filed.

{34} The ultimate question in considering the many aforementioned failures to comply with the Adoption Act that preceded the district court's grant of the petition is whether these failures substantially increased the risk of an erroneous decision to terminate Mother's parental rights. *See State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 37, 136 N.M. 53, 94 P.3d 796. In this regard, Mother need only demonstrate that there is "a reasonable likelihood that the outcome *might* have been different." *Id.* We conclude that the outcome might well have been different had the petition filed without a proper statutory basis been dismissed; had Mother been advised of her right to court-appointed counsel upon a showing of indigency; had a GAL been selected with proper court oversight; and had Mother not been required to spend a significant portion of her SSDI benefits on the GAL fee.

{35} Although we conclude that reversal is warranted for the reasons already stated, we address Mother's argument that the district court's decision to terminate her parental rights was not supported by substantial evidence and other issues related to the trial.

The Decree Is Not Supported by Clear and Convincing Evidence and Is Erroneous as a Matter of Law to the Extent It Was Based on Alleged Abuse and Neglect

{36} The standard of proof for termination of parental rights is clear and convincing evidence. Sections 32A-5-16(H) and -36(E); *State ex rel. Children, Youth & Families Dep't v. Vanessa C.*, 2000-NMCA-025, ¶ 24, 128 N.M. 701, 997 P.2d 833. We will affirm the district court's decision resulting in the termination of parental rights if its findings are supported by clear and convincing evidence *and* if it applied the proper rule of law. *State ex rel. Dep't of Human Servs. v. Minjares*, 1982-NMSC-065, ¶ 12, 98 N.M. 198, 647 P.2d 400. "Clear and convincing evidence" is defined as evidence that "instantly tilt[s] the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *In re Termination of Parental Rights of Eventyr J.*, 1995-NMCA-087, ¶ 2, 120 N.M. 463, 902 P.2d 1066 (internal quotation marks and citation omitted). "The function of the appellate court is to view the evidence in the light most favorable to the prevailing party, and to determine therefrom if the mind of the fact[]finder could properly have reached an abiding conviction as to the truth of the fact or facts found." *State ex rel. Children, Youth & Families Dep't v. Michelle B.*, 2001-NMCA-071, ¶ 12, 130 N.M. 781, 32 P.3d 790 (internal quotation marks and citation omitted). Applying this standard here requires that we evaluate whether the district court could have found by clear and convincing evidence the necessary statutory requirements for termination. *Id.* ¶ 20; *State ex rel. Children, Youth & Families Dep't v. Patricia N.*, 2000-NMCA-035, ¶ 10, 128 N.M. 813, 999 P.2d 1045. To the extent we must interpret the Adoption Act's provisions, our review is de novo. *Helen G.*, 2008-NMSC-002, ¶ 7.

{37} As we have noted, the parties did not file any proposed findings of fact and conclusions of law, and the district court did not enter any findings and conclusions supporting its decisions to terminate Mother's parental rights and grant Petitioners' request to adopt Child. The court's failure to make specific findings has greatly hampered our ability to review the issues raised on appeal. Nevertheless, we have carefully reviewed the record and now address the question whether Petitioners have "present[ed] and prove[d] each allegation set forth in the petition for adoption by clear and convincing evidence." Section 32A-5-36(E); *see* § 32A-5-16(H).

{38} The Adoption Act authorizes the termination of parental rights when the child has been abandoned, neglected or abused, or placed in the care of others and certain conditions exist. Section 32A-5-15(B). Although Petitioners cite Section 32A-5-15 as the basis for terminating Mother's parental rights, the verified petition in this case alleged that Mother's parental rights were "being sought to be terminated on the basis of voluntary relinquishment of parental rights." Indeed, Petitioners' counsel repeatedly stated that "voluntary relinquishment" was the reason for seeking termination of Mother's parental rights. Yet there is not a shred of evidence in the record that Mother voluntarily relinquished her parental rights and, in any

event, Petitioners wholly failed to meet Section 32A-5-21(A)'s clear requirement that any such relinquishment by a parent shall be in writing.

{39} We will then assume that Petitioners meant to seek termination of Mother's parental rights based on presumptive abandonment, as the petition's allegations track several of the conditions stated in Section 32A-5-15(B)(3) that, if proved, would establish a rebuttable presumption of abandonment. For example, the petition alleges the following: Child has lived with Petitioners since May 2013, when Child was placed there by CYFD pursuant to a safety plan; Child's sister was placed with her father in New Jersey for the same reasons; Petitioners financially support Child and provide his educational, medical, and emotional needs; a parent/child relationship has developed between Petitioners and Child; and Mother is not capable of caring for Child.

{40} To be clear, Petitioners nowhere assert that Child was abandoned by Mother, as set forth in Section 32A-5-15(B)(1), or that he was neglected or abused and the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future, as set forth in Section 32A-5-15(B)(2). Nevertheless, and without notice to Mother, Petitioners proceeded to trial against Mother seeking termination of her parental rights, apparently on grounds of abandonment, presumptive abandonment, and abuse and neglect. The district court terminated Mother's parental rights to Child.[2] Although the allegations stated in the petition implicate only presumptive abandonment, we discuss each statutory ground.

Abandonment

{41} We easily dispense with Petitioners' contention and the district court's ruling that Mother abandoned Child. Abandonment, in its purest form, requires a complete renunciation of responsibility. There is no evidence to support the district court's determination of abandonment, let alone clear and convincing evidence.

{42} Mother and CYFD agreed on a safety plan for the Child's care while Mother sought intensive treatment from Life Link. The plan provided that Child, who was six-and-a-half years old at the time, would reside with Grandmother "until further reassessment by . . . CYFD." At no time did Mother indicate that she no longer wanted Child; in fact, she was hoping to get Child back by the start of the school year. There is no evidence that Mother left Child with Petitioners without communication, either by telephone or in person. To the contrary, there is unrefuted testimony that, during the summer of 2013, Mother called Child at least once a week; saw him four times between August and September; and later called him nightly. Even after Petitioners told Mother that the nightly calls were "disruptive," Mother tried to call Child two days a week. And even the GAL concluded that Mother had not abandoned Child. The district court's ruling that Mother abandoned Child is entirely unsupported by the evidence, and we reverse that ruling. As indicated below, the evidence better supports conduct by Mother for which she is to be commended: She recognized that her emotional, financial, and living conditions did not allow for the best environment for her children. She took the opportunity to locate, while she sought help, suitable alternative homes for her children until she could properly care for them. Nothing in this record—and we mean nothing—supports relinquishment, abandonment, or anything even suggesting that Mother sought to permanently yield her liberty right to the custody and care of Child.

Presumptive Abandonment

{43} A rebuttable presumption of abandonment can be raised by showing that the child has been placed in the care of others, including other relatives, whether by court order or otherwise, and by establishing the following six additional criteria:

> (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.

Section 32A-5-15(B)(3).

{44} In *In re Adoption of J.J.B.*, our Supreme Court addressed the requirements of the presumptive abandonment statute stating:

> [W]e have emphasized that two factors must both be established to prove abandonment: (1) parental conduct evidencing a conscious disregard of obligations owed to the child, and (2) this conduct must lead to the disintegration of the parent-child relationship. We emphasize that both factors must be established to prove abandonment, and that evidence of the disintegration of the parent-child relationship is of no consequence if not caused by the parent's conduct.

1995-NMSC-026, ¶ 44, 119 N.M. 638, 894 P.2d 994.

{45} Thus, Petitioners had the burden of proving "that the objective parental conduct [is] the cause of the destruction of the parental-child relationship." *Id.* ¶ 47. The presumption of abandonment arising from proof of the factors listed in Section 32A-5-15(B)(3) "is completely rebutted by showing that a parent lacks responsibility for the destruction of the parent-child relationship." *Adoption of J.J.B.*, 1995-NMSC-026, ¶ 47.

{46} Petitioners claim they proved that the statutory factors have been met by clear and convincing evidence. Specifically, they contend that Child has lived with Petitioners "for an extended period of time"; the parent-child relationship has disintegrated; a psychological parent-child relationship had developed between them and Child; and Child no longer prefers to live with Mother. *See* § 32A-5-15(B)(3)(a)-(d). As proof, Petitioners say that Child lived with them for over a year at the time of trial and, therefore, the "extended period of time" requirement has been met. They also contend that they initiated and arranged all visits between Mother and Child and that Child did not want to engage with Mother during the visits.

[2]It is unclear from the record whether the district court terminated Mother's rights on all three statutory grounds. Both the court's letter decision and the decree conclude that Child has been abused and neglected and that the causes and conditions are unlikely to change. Both also state that Child has been abandoned, citing only the presumptive abandonment statute. Because of the lack of findings from the district court, we cannot discern the legal basis for the court's decision.

These facts, they argue, prove by clear and convincing evidence that the parent-child relationship has disintegrated. In addition, they say, Child has known Petitioners for a long time, is bonded to them and loves them, and these circumstances establish a psychological parent-child relationship. Finally, they rely on the testimony of Grandmother and Child's therapist that Child's preference was to live with Petitioners.

{47} We disagree with Petitioners that there is clear and convincing evidence to support the decree on grounds of presumptive abandonment. As a preliminary matter, we note that the failure to prove any one of the statutory criteria by clear and convincing evidence is sufficient to preclude termination of Mother's parental rights, as the statute makes clear that all six conditions must exist. *See* § 32A-5-15(B)(3); § 32A-5-15(C) (stating that a rebuttable presumption of abandonment exists when the court finds that each of the six factors enumerated in Section 32A-5-15(B)(3) has been met).

{48} We begin with the requirement that Child lived in Petitioners' home "for an extended period of time." The lengths of time and the surrounding facts vary in the case law, but what remains constant is deliberate action by the parent to leave the child behind or to refuse to assume parental responsibilities. While it is true that Child had lived with Petitioners for over a year at the time of trial, we conclude that this fact, standing alone, is insufficient to satisfy Section 32A-5-15(B)(3)(a) in the circumstances presented here. Child had lived with Petitioners only for about five months at the time the petition was filed. Had Petitioners followed the Adoption Act's requirement and requested a hearing within thirty days of filing, instead of waiting six months to do so, it is reasonably likely that Petitioners could not make this argument today. We discern no justification for the delay in requesting a hearing on the petition. Further, prior to the filing of the petition, and once Petitioners learned that Mother wanted Child back, they filed the TRO petition seeking to prevent Mother from having *any* contact with Child. There is little question that Petitioners have taken steps to restrict Mother's access to Child throughout these proceedings. We reject Petitioners' attempt to use their own violation of one statutory requirement (to request a hearing within thirty days of filing the petition) as evidence of compliance with another statutory requirement (that Child lived in Petitioners' home "for an extended period of time"), and conclude that the "extended period of time" requirement was not met. *See* § 32A-5-15(B)(3)(a).

{49} We need go no further in reversing the district court's determination of presumptive abandonment, but nevertheless briefly address the evidence purportedly supporting the remaining statutory requirements. With regard to the disintegration of the parent-child relationship, Petitioners point to evidence that they initiated and arranged visits between Mother and Child and to Patty R.'s testimony that "most of the visits I'd have to say [Child] was not very engaged with her. He didn't want to be." We have difficulty concluding that this constitutes clear and convincing evidence that the parent-child relationship had disintegrated. *See, e.g.*, *Adoption of J.J.B.*, 1995-NMSC-026, ¶ 49 (defining "disintegration" of the parent-child relationship as the destruction of the parent's relationship with the child). Moreover, as we have discussed above, to the extent Mother's relationship with Child had disintegrated, Petitioners themselves contributed to the disintegration by thwarting Mother's efforts to have contact with Child, precluding the conclusion they seek. *See id.* (stating that a party seeking adoption of a child "must not by their own conduct have intentionally contributed to the factors causing the disintegration of the parent-child relationship").

{50} In addition, although we do not doubt that Child has a bond with Petitioners, there was not sufficient evidence that "a psychological parent-child relationship [had] developed." Section 32A-5-15(B)(3)(c). That Child had extended overnight visitations with Petitioners, wanted to come home from school because he missed them, and relied on them for his home environment does not demonstrate by clear and convincing evidence the existence of a parent-child relationship.

{51} Finally, the record does not establish Child's preference by clear and convincing evidence. Petitioners' argument to the contrary relies on the following: Grandmother's testimony that Child "is adamant about no longer wanting to live with [Mother]"; the testimony of Child's therapist that Child wanted to tell the judge that he wants to live with Petitioners; and the GAL's report stating that she did not ask Child where he prefers to live "because the answer was obvious." We agree with Mother that this is insufficient to support a finding that Child does not prefer to live with Mother. First, Grandmother's self-serving testimony alone cannot establish Child's preference, especially given her repeated efforts to prevent Mother from having any contact with Child (i.e., by filing the TRO petition and by limiting Mother's phone calls and visits). Second, the GAL failed entirely to perform her mandatory statutory duty to meet with and interview Child prior to the hearings and to consult with Child and convey his declared position to the court at every hearing. *See* § 32A-1-7(D), (E). The GAL met Child twice—once with Petitioners at a local restaurant, and once when she "was able to visit with [Child] and . . . Petitioners at their home." Her report states that Child "is an incredible young person; [he] is highly intelligent and charismatic"; however, this was her first encounter with Child and he "did seem somewhat guarded." At the second meeting, Child showed the GAL his bedroom and favorite things and indicated that he loves his trampoline, had planted a sunflower garden, and said that he reads every night. The GAL's report provides no other information about her interaction with Child. Yet the GAL never asked Child where he would prefer to live because, she said, "that answer was obvious." Even if Child's happiness and health at Petitioners' may be viewed as supporting this assertion, it does not establish Child's preference by clear and convincing evidence. In this regard, we note also the GAL's request for a waiver of Child's appearance at trial or for an appearance limited to the judge's chambers, based on the GAL's representation that she has "spoken to [C]hild and [C]hild does not wish to attend the hearing[,]" is unavailing. The GAL's request is inconsistent with the testimony of Child's therapist, upon which Petitioners also rely, who testified that Child wanted to tell the judge that he preferred to live with Petitioners. This inconsistency aside, because the district court granted the request to waive Child's appearance at the hearing and did not require Child to appear in chambers, Child never conveyed his preference to the court.

{52} Because Petitioners failed to present sufficient evidence to support the required findings under Sections 32A-5-15(B)(3)(a)-(d), we must conclude that clear and convincing evidence does not support termination of Mother's parental rights on the basis of presumptive abandonment.

Abuse and Neglect

{53} This regrettable litigation has run its course as a private termination of parental rights under Section 32A-5-15 of the Adoption Act, the terms of which were construed by the district court to allow any person with a legitimate interest in the matter to petition to terminate another's parental rights by proving allegations of abuse and neglect to the district court without any involvement or oversight by CYFD. *See* §§ 32A-5-15(B)(2), 32A-5-16(A)(3). The Adoption Act's termination of parental rights provision is basically identical to that in the Abuse and Neglect Act, except it contains no definition of an abused or neglected child, and omits the requirement that CYFD or another appropriate agency make reasonable efforts to "assist the parent in adjusting the conditions that render the parent unable to properly care for the child." *Compare* § 32A-5-15(B)(2), *with* 32A-4-28(B)(2).

{54} That "reasonable efforts" requirement became part of New Mexico law in response to the enactment of the Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 670-79 (1980, as amended through 2015), which made federal funds available to child welfare programs that make reasonable efforts to (1) prevent the removal of children from their homes, and (2) reunify families whenever possible. *See generally In re Kenny F.*, 1990-NMCA-004, ¶ 15, 109 N.M. 472, 786 P.2d 699 ("The reasonable-efforts requirement is a central feature of recent legislation governing the protection of children."), *overruled on other grounds by In re Adoption of J.J.B.*, 1993-NMCA-145, ¶ 28, 117 N.M. 31, 868 P.2d 1256, *aff'd in part and rev'd in part by In re Adoption of J.J.B.*, 1995-NMSC-026. The Children's Code as a whole now echoes that policy: One of its primary purposes is to preserve the unity of the family when doing so is not in conflict with a child's health or safety. NMSA 1978, § 32A-1-3 (2009).

{55} Thus, procedures for terminating parental rights involving a child who is allegedly abused or neglected normally incorporate strictly enforced safeguards. In order to prevent the unwarranted removal of a child from her home, CYFD is the only entity that can bring a petition for abuse and neglect, *see Vescio v. Wolf*, 2009-NMCA-129, ¶ 10, 147 N.M. 374, 223 P.3d 371, and may do so only after the department has conducted an investigation, NMSA 1978, § 32A-4-4(A), (D) (2005), and the children's court attorney has determined that filing the petition is in the best interests of the child, NMSA 1978, § 32A-4-15 (1993). "An individual cannot bring [an] abuse and neglect action." *Vescio*, 2009-NMCA-129, ¶ 10.

{56} After "a child is adjudged neglected [or abused] under the Children's Code, the Code requires the department to provide services and to undertake efforts to attempt in the reunification of the family and further requires periodic review of the situation." *In re Guardianship of Ashleigh R.*, 2002-NMCA-103, ¶ 9, 132 N.M. 772, 55 P.3d 984. After the adjudication, CYFD drafts a treatment plan that sets forth "services to be provided to the child and the child's parents to facilitate permanent placement of the child in the parent's home[.]" NMSA 1978, § 32A-4-21(B)(10) (2009). A dispositional hearing then takes place in which the court evaluates, among other things, CYFD's efforts at reunification. Section 32A-4-22(A)(8), (9). The dispositional hearing is followed by a permanency hearing, where parties may present evidence and cross-examine witnesses before a court can change the plan from reunification to placement for adoption with the corresponding termination of parental rights. *See* NMSA 1978, § 32A-4-25.1 (2009). In short, the path to permanency in an abuse and neglect case—whether that means reunification, or alternatively, termination of parental rights and adoption—is staked out by a statutory scheme that contemplates CYFD's involvement at every stage, overseen by the court.

{57} Before 1993, Petitioners' abuse and neglect claim likely would have been dismissed as a matter of course because our statutes had only a single provision authorizing termination of parental rights on the basis of abuse and neglect, and it naturally required 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 which render the parent unable to properly care for the child[.]" *See* NMSA 1978, § 32-1-54(B)(3) (1985), *repealed by* 1993 N.M. Laws, ch. 77, § 234; *In re Adoption of J.J.B.*, 1993-NMCA-145, ¶ 28 (concluding that termination under the abuse and neglect provision would have been improper because "there was no evidence of any efforts by the [d]epartment or other agency to assist [the father] in caring for his son"). In other words, prior to 1993, CYFD (or another appropriate agency) was plainly expected to be involved in every abuse and neglect case. That is not at all surprising in light of the purposes of the Children's Code and the Department's responsibility under federal law to make reasonable efforts at reunification whenever possible.

{58} When the Abuse and Neglect Act was enacted in 1993, the Children's Code was reorganized to include separate acts governing adoptions and abuse and neglect. *See* 1993 N.M. Laws ch. 77; §§ 32A-4-1 to -34; 32A-5-1 to -45. The termination of parental rights provision of Section 32-1-54(B)(3) was split in two. 1993 N.M. Laws, ch. 77, § 122; 1993 N.M. Laws, ch. 77, § 142. It became Section 32A-4-28(B)(2) in the Abuse and Neglect Act, with the reasonable efforts requirement intact, and Section 32A-5-15(B)(2) in the Adoption Act, but with no such reasonable efforts requirement. *Id.* This litigation seems to have proceeded under the assumption that the two provisions now authorize two separate methods of terminating parental rights for abuse and neglect: (1) termination of parental rights involving children in CYFD custody, governed by the Abuse and Neglect Act; and (2) proceedings where private litigants can allege and prove abuse and neglect to terminate one another's parental rights (without any department involvement or oversight) under the Adoption Act.

{59} That is a questionable view of the Children's Code. First, if taken literally, the Adoption Act also purports to authorize CYFD *itself* to petition for termination of parental rights under Section 32A-5-15(B)(2), *see* § 32A-5-16(A)(1), which would allow CYFD to circumvent its requirement to make reasonable efforts at reunification in abuse and neglect cases, offending both the funding conditions of federal law and the stated purposes of the Children's Code. Or CYFD could be quasi-involved, as in this case, negotiating safety plans and such, without ever conducting an investigation into the best interests of the child, filing an abuse and neglect petition, or ensuring that its efforts behind-the-scenes do not ultimately result in the unwarranted breakup of a family under cover of the Adoption Act.

{60} Second, cases where CYFD is not involved at all, and the petition for termination is brought privately under Section 32A-5-16(A)(3), would be ripe for abuse. The entire scheme of the Abuse and Neglect Act, discussed above, is designed to

prevent precisely what occurred in this case. An individual's role in an abuse and neglect case is simply to report the abuse to CYFD, under criminal penalty no less, *see* NMSA 1978, § 32A-4-3(A) (2005), which then has a responsibility to initiate its investigation in accordance with the Abuse and Neglect Act, following all of the requirements stated therein. We think it highly unlikely that the Legislature intended to create under the Adoption Act a parallel scheme that can effectively remove CYFD from abuse and neglect cases. The Children's Code is to be read as a whole, so that the legislative intent is properly realized. *State v. Adam M.*, 2000-NMCA-049, ¶ 10, 129 N.M. 146, 2 P.3d 883. Moreover, the literal meaning of a statute also does not control "when such an application would be absurd, unreasonable, or otherwise inappropriate." *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939; *see State v. Trujillo*, 2009-NMSC-012, ¶ 21, 146 N.M. 14, 206 P.3d 125 (stating that the court will reject the plain meaning "in favor of an interpretation driven by the statute's obvious spirit or reason" if adherence to the literal words would lead to "injustice, absurdity or contradiction" (internal quotation marks and citations omitted)); *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022 ("[The appellate courts have] rejected a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute."); *Atchison, T. & S. F. Ry. Co. v. Town of Silver City*, 1936-NMSC-036, ¶ 13, 40 N.M. 305, 59 P.2d 351 ("Canons of construction are but aids in determining legislative intent and are not controlling if they lead to a conclusion, which by the terms or character of the legislation manifestly was not intended." (citation omitted)). In our view, the only construction of Section 32A-5-15(B)(2) consistent with the rest of the Children's Code is that the Adoption Act's abuse and neglect provision refers to abuse and neglect as defined in the Abuse and Neglect Act, and that CYFD's involvement is required by reference, which in turn requires all the safeguards set forth in the Abuse and Neglect Act, including the requirement that CYFD make reasonable efforts to reunify a child with her natural parent whenever possible. Such a construction is additionally consistent with the constitutional liberty interest at stake when a parent is faced with termination of her right to raise and have a relationship with her child.

{61} The parties have not briefed the issue and, we need not and do not expand on it any further. Even assuming that private litigants can terminate another's parental rights by proving abuse and neglect in a civil case, the evidence was insufficient to do so in this case. We first discuss the evidence and testimony erroneously admitted at trial and relied upon by the district court in reaching its decision. We then examine the only competent evidence of record and conclude that it was plainly insufficient to terminate Mother's parental rights on the basis of neglect and abuse.

{62} "We review the admission of evidence for abuse of discretion." *Couch v. Astec Indus.*, 2002-NMCA-084, ¶ 8, 132 N.M. 631, 53 P.3d 398. "The district court abuses its discretion when its ruling is based on a misunderstanding of the law." *State v. Phillips*, 2006-NMCA-001, ¶ 10, 138 N.M. 730, 126 P.3d 546, *overruled on other grounds by State v. Guthrie*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904. The erroneous admission of evidence does not constitute reversible error unless it is apparent that the court considered such evidence in deciding the case. *Davis v. Davis*, 1972-NMSC-045, ¶ 9, 83 N.M. 787, 498 P.2d 674.

{63} We begin with the GAL's amended report, which the district court admitted over Mother's objection and said it would consider in making its decision. The admission of the GAL's preliminary and amended report was problematic in three critical ways. First, the initial report was hand-delivered to Mother's counsel on July 15, 2014, the first day of trial. Mother's counsel clearly did not have an adequate—indeed any—opportunity to adequately review the report before the commencement of the hearing that day. Next, the amended GAL report, without prior notice of the amendment, was hand-delivered to Mother's counsel at the beginning of the second day of trial on July 25, 2014. Although Mother's counsel did not argue prejudice based on the late filing and delivery of these reports, we are troubled that this might well have impacted his ability to adequately prepare Mother's defense. *See Lorena R.*, 1999-NMCA-035, ¶ 25 (stating that parents have a due process right to participate meaningfully in termination of parental rights cases, including the right to review and challenge the evidence presented against them). Notice issues aside, the GAL's amended report was improperly admitted into evidence.

{64} That report, while substantially similar in substance to the original report filed July 15, 2014, was amended by attaching eighteen pages of allegations against Mother from CYFD's files. Our close review of these attachments reveal that many of the allegations were anonymous, most were found by CYFD to be unsubstantiated, and all were hearsay statements. The district court overruled Mother's objections that the report and attachments contained hearsay and that the GAL was required to offer witnesses to testify about the contents of the documents.[3] The court ruled that the report and file excerpts were admissible under Rule 1-053.3(F). As discussed above, the court erred as a matter of law in relying on Rule 1-053.3. Moreover, Petitioners cite no case holding that inadmissible hearsay testimony is admissible simply because it is proffered by a GAL, let alone in a proceeding implicating a parent's fundamental due process rights. A GAL is not legally authorized to circumvent applicable rules of evidence by attaching inadmissible hearsay documents to a report. The district court should not have admitted the GAL's amended report or relied upon it in determining whether to grant the petition.

{65} The failure of witnesses to timely provide documents was not limited to the GAL. CYFD worker Kurt Smith, who had no personal knowledge of the case, had never even seen the safety plan prior to the trial and was only "vaguely familiar" with Mother, was allowed to testify about CYFD records pertaining to Mother. Mother's counsel had served subpoenas for the records prior to trial, but they were not produced. Yet the district court overruled Mother's counsel's objection and allowed Smith to testify about notes and other written records

[3]Further complicating matters, Mother's counsel objected to the admission of the GAL's amended report at the conclusion of the July 25, 2014 hearing. The district court accepted the report into evidence but then set a hearing ten days later for Mother to respond to the GAL's allegations and hearsay reports. The court made no determination of admissibility prior to accepting the report and then shifted the burden to Mother to rebut the allegations in the report and CYFD notes. There is no legal justification for the court's actions in this regard.

containing numerous inadmissible hearsay statements. Similarly, Mother's attorney subpoenaed and did not receive the treatment notes of Child's counselor, Mary Carafelli. In fact, Carafelli did not bring those notes to court but produced only a file containing a handful of forms. The district court overruled counsel's objection that Carafelli's refusal to produce her file should bar her testimony and ordered Carafelli to produce her file within a week. It is unclear whether she ever complied with that order, but no such documents appear in the record. In our view, with nothing in the record to show otherwise, the district court's rulings denied Mother her rights to confront and cross-examine the witnesses against her. *See Maria C.*, 2004-NMCA-083, ¶ 34 (holding that "parents have a due process right to fair notice and an opportunity for meaningful participation . . . , including the right to present evidence and cross[-]examine witnesses"). Under the circumstances presented here, the district court should not have allowed or relied on the testimony of Kurt Smith and Mary Carafelli.

{66} Excluding consideration of the foregoing inadmissible evidence, Petitioners' evidence in support of allegations of abuse and neglect and that this alleged circumstance was unlikely to change in the foreseeable future can be summarized as follows: Mother's living environment was dirty, in disarray, and with bed bugs "all over," Child was dirty, hungry, withdrawn and scared, behind in school, exposed to domestic violence, and traumatized; Mother was also dirty, her hair was greasy, and she smelled of alcohol and body odor; Mother's apartment was near an empty lot that was full of needles, glass, liquor bottles, debris, sleeping bags, and mattresses; Mother was destructive and violent; and Mother drank almost every day and sometimes used drugs.

{67} We accept for the purposes of our discussion that this evidence, if established, might provide a basis for finding abuse and neglect. The question becomes whether, to the extent that the alleged circumstances truly exist, they demonstrate clearly and convincingly that Mother's condition warranted a termination of her parental rights.

{68} We first turn to Mother's housing. The chief complaints from Petitioners were that Mother's homes were filthy and infested with bed bugs, and that she lived near an empty lot filled with trash and drug paraphernalia. Although one's housekeeping habits could form the basis of a legitimate petition for neglect, there is no evidence in the record that Mother's situation was seriously detrimental to Child, and no evidence that Child had ever been harmed in Mother's household. That Mother's cleanliness did not meet Petitioners' approval cannot be the basis for terminating Mother's parental rights. *See State ex rel. Children, Youth & Families Dep't v. Patricia H.*, 2002-NMCA-061, ¶ 21, 132 N.M. 299, 47 P.3d 859 (stating that "[t]he fact that a child might be better off in a different environment is not a basis for termination of parental rights in this state" (internal quotation marks and citation omitted)). Nor are we prepared to say that the fact that Mother's previous apartment was near an empty lot with trash and possible drug paraphernalia constituted neglect or abuse. After all, Mother could hardly be expected to obtain an apartment that was not "low income" given the amount of her monthly SSDI. Finally, we note that Petitioners provided no evidence at the time of trial that Child would not be safe in Mother's home.

{69} To the extent that Petitioners contend that Mother was unfit because Child was withdrawn, scared, and traumatized, there was no competent evidence to support these assertions. There was no evaluation or diagnosis of Child (or of Mother), and scant testimony concerning Mother's interaction with Child. Patty R. testified that Mother was "a little bit more talkative" with Child than she was with her daughter. Lee Carrizales, a friend of Mother's, testified that Mother loves Child "in her own way," but she did not act lovingly or patiently with her children. Even if we agree that Mother did not interact with Child at a level that would ensure that Child necessarily will experience maximum emotional development, there was insufficient evidence to satisfy the strict requirements for termination of parental rights.

{70} We briefly address the allegations of drug and alcohol use and Mother's alleged violent tendencies. Lee Carrizales testified that Mother drank alcohol "pretty much every day" and that she used drugs. Carrizales' testimony regarding Mother's alcohol use was based on her observations in the summer of 2009 when Mother, her boyfriend and the children lived with Carrizales. She said that she knew Mother used street drugs "because they would discuss it" and because she found a pipe in her shed. Although Mother testified that she used to drink, she said that she was sober and no longer drank alcohol. Doug Simon, who had been in a relationship with Mother more than thirteen years earlier, testified that their relationship was "[a]t some points . . . loving and at others, highly toxic, volatile, destructive." Yet, Simon allowed Mother to raise their daughter until Mother sent their daughter to live with Simon pursuant to the safety plan. In any event, the record does not provide evidence that supports "an abiding conviction" in our mind, *see In re Termination of Parental Rights of Eventyr J.*, 1995-NMCA-087, ¶ 2, that Mother was drinking or using drugs at the time of trial, or that she was emotionally unstable at the time of trial, let alone that these conditions would continue into the foreseeable future.

{71} Perfection in parenting is not attainable, but neither is it required by law. Under the circumstances, Mother's decision to have Child reside in a relative's home where he would receive adequate care does not evidence a failure to provide proper and necessary support for Child constituting abuse and neglect but rather concern for Child. Petitioners have failed to meet their burden to demonstrate by clear and convincing evidence that termination of Mother's parental rights was warranted.

{72} We recognize that our decision may have significant emotional consequences for Child who, by now, has lived with Petitioners for over three years. But applicable law does not permit the termination of parental rights where, as here, the district court applied the law incorrectly and failed in its duty to ensure that the proceedings were conducted with scrupulous fairness. Consequently, we reverse.

CONCLUSION

{73} For the foregoing reasons, we reverse the judgment terminating Mother's parental rights to Child, and void the proposed adoption.

{74} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
J. MILES HANISEE, Judge

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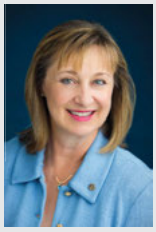
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