BAR BULLETIN

Official Publication of the State Bar of New Mexico

September 6, 2017 • Volume 56, No. 36

Yosemite Fall, by Bhavna Misra (see page 3) www.bhavnamisra.com

Inside This Issue

HALF-DAY

Mixed Bag CLE

Presented by the
State Bar of New Mexico
Paralegal Division

Saturday, September 23, 2017
9:00 am to 12:00 pm

– 3.0 General Credits –
Open to Attorneys and Paralegals
Paralegal Division approval for its members & MCLE approval for attorneys

$35 for Paralegal Division Members
$50 for Paralegal Non-Members &
$55 for Attorneys

Topics include:

Pre-Adjudication Animal Welfare (P.A.W.) Court
The background and development of the P.A.W. court and the process for getting cases heard.

Third Party Sexual Harassment
A look at sexual harassment in the workplace by a non-employee – a third party.

The Attorney/Paralegal Relationship
How can the Attorney and Paralegal work successfully as a team and what that encompasses.

Please RSVP to Christina Babcock at
cbabcock1@cnm.edu for more information and to reserve your spot.

State Bar of New Mexico
Paralegal Division

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address@nmbar.org • www.nmbar.org

September 6, 2017, Vol. 56, No. 36

Table of Contents

Meetings

September

6
Employment and Labor Law Section Board
Noon, State Bar Center

8
Prosecutors Section Board
Noon, State Bar Center

12
Committee on Women and the Legal Profession
Noon, Modrall Sperling, Albuquerque

12
Solo and Small Firm Section Board
11 a.m., State Bar Center

13
Taxation Section Board
11 a.m., teleconference

13
Children's Law Section Board
Noon, Juvenile Justice Center

14
Elder Law Section Board
Noon, State Bar Center

14
Public Law Section Board
Noon, Montgomery & Andrews, Santa Fe

Workshops and Legal Clinics

September

6
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

6
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

8
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

20
Common Legal Issues for Senior Citizens Workshop
10–11:15 a.m., Bonine Dallas Senior Center, Farmington, 1-800-876-6657

20
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

27
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

About Cover Image and Artist: Bhavna Misra is a full-time painter. She works out of her Fremont, Calif., based art studio. Portraiture and wildlife are her preferred genres but she paints other things as well. She creates with love in her heart, respect towards the subject matter and a compete dedication fora well-crafted artwork. She has participated in more than 17 exhibitions including five solo shows. She has won multiple awards for her work in juried fine arts shows and has been featured in newspapers including *Fremont Bulletin*, *Milpitas Post*, *Tri City Voice*, *Cupertino Courier*, *Ohlone Monitor* and *ArtAscent* art magazine. She lives in Fremont with her husband and two children. In spare time, she likes to take photos and spend time with her family. View more of her work at www. bhavnamisra.com.

Notices

Court News

New Mexico Supreme Court Commission on Access to Justice

September Meeting

The next meeting of the Commission on Access to Justice is noon-4 p.m., Sept. 15, at the State Bar Center. Interested parties from the private bar and the public are welcome to attend. Further information about the Commission is available at Access to Justice at nmcourts.gov.

New Mexico Court of Appeals

Candidates Announcement

The New Mexico Court of Appeals Nominating Commission convened on Aug. 25 in Santa Fe, and completed its evaluation of the six applicants for the vacancy on the New Mexico Court of Appeals. The Commission recommends the following six applicants (in alphabetical order) to Governor Susana Martinez: **Jennifer Attrep**, **Daniel Jose Gallegos Jr.**, **Lauren Keefe**, **Emil J. Kiehne**, **Kerry Kiernan** and **Edward W. Shepherd**.

Compilation Commission

Coming Soon—*Criminal and Traffic Law Manual*

The New Mexico Compilation Commission announces the official *2017 New Mexico Criminal and Traffic Law Manual*®. Exclusive to this official version are the section numbers of new or amended statutes extracted from the official New Mexico Statutes Annotated 1978®, a Table of Sections affected by 2017 legislation, and a Chapter 30, NMSA 1978 Table of Chargeable Criminal Offenses. Pertinent official NMRA excerpts from the Rules of Criminal Procedure, Evidence, and court-approved forms are included. Order yours at 505-827-4821 or 866-240-6550. Private practitioners, $31; Government, $29.

Second Judicial District Court

Exhibit Destruction Notice

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy Domestic (DM/DV) exhibits filed with the Court for cases for the years of 1993 to the end of 2012, 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 Sept. 29. Parties with cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717 from 10 a.m.-2 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.

Seventh Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court retention and disposition schedule, 1.21.2.617, the Seventh Judicial District Court, Catron County, Socorro County, Sierra County, and Torrance County will destroy exhibits filed with the Court; all unmarked exhibits, oversized poster boards/maps, diagrams and miscellaneous items; the Domestic (DM/DV) cases for the years of 1987 to the end of 2015; the Civil (CV/PB) cases for the years of 1997 to the end of 2015; the Sequestered exhibits (SQ/PQ/JQ/SI/SA) cases for the years of 1992 to the end of 2015; including but not limited to cases which have been consolidated. Counsel for parties are advised that exhibits may be retrieved through Setp. 22. For more information or to claim exhibits, contact Jason Jones, court executive officer, at 575-835-0050. 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.

U.S. District Court, District of New Mexico

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of part-time U.S. Magistrate Judge B. Paul Briones is due to expire on March 20, 2018. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new four-year term. The duties of a magistrate judge in this Court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the Court and should be addressed as follows: U.S. District Court, CONFIDENTIAL—ATTN: Magistrate Judge Merit Selection Panel, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. Comments must be received by Sept. 5.

Professionalism Tip

With respect to the courts and other tribunals:

I will avoid the appearance of impropriety at all times.

State Bar News

Attorney Support Groups

- Sept. 11, 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#.
- Sept. 18, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- Oct. 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month. Group will not meet in September due to the Labor Day holiday.)

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert, 505-242-6845.

Business Law Section

2017 Business Lawyer of the Year

The Business Law Section has opened nominations for its annual Business Lawyer of the Year Award, to be presented on Nov. 15 after the Section's Business Law Institute CLE. Nominees should demonstrate professionalism and integrity, superior legal service, exemplary service to the Section or to business law in general, and service to the public. Self-nominations

are welcome. A complete description of the award and selection criteria are available at www.nmbar.org/BusinessLaw. The deadline for nominations is Oct. 2. Send nominations to Breanna Henley at bhenley@nmbar.org. Recent recipients include David Buchholz, Leonard Sanchez, John Salazar, Dylan O'Reilly and Susan McCormack.

Committee on Women and the Legal Profession

Professional Clothing Closet

Does your closet need some cleaning? The Committee on Women seeks gently used, dry cleaned, dark colored professional clothing donations for their professional clothing closet. Individuals wishing to donate to the closet may drop off donations at the West Law Firm, 40 First Plaza NW, Suite 735 in Albuquerque, during business hours or to Committee Co-chair Laura Castille at Cuddy & McCarthy, LLP, 7770 Jefferson NE, Suite 102 in Albuquerque. Individuals wishing to look for a suit can stop by the West Law Firm during business hours or call 505-243-4040 to set up a time to visit the closet.

Entrepreneurs in Community Lawyering

Fall Incubator Boot Camp Open to Solo Practitioners

The Entrepreneurs in Community Lawyering program, the State Bar's new legal incubator program, will host its third Boot Camp Oct. 17-20 at the State Bar Center. The Boot Camp is a condensed and intense introduction to the basics of setting up and managing a solo law practice. It also offers a learning opportunity for new lawyers not in ECL, who are starting or considering starting a solo practice. The Boot Camp covers a wide range of business topics and practice management issues. The State Bar invites up to 10 members to join ECL's participating attorneys for the October 2017 Boot Camp, on a first-come, first-served basis. CLE credit is not offered but materials will be provided to each participant. A $150 fee will be charged for lawyers participating in the Bootcamp who are not admitted to ECL. View the curriculum at www.nmbar.org/ECL. For more information or to enroll contact Stormy Ralstin at 505-797-6053 or Ruth Pregenzer at 505-797-6077.

Real Property, Trust and Estate Section

Division Meetings Open to Section Membership

To more effectively promote its activities, the Real Property, Trust and Estate Section established two divisions in 2014: the Real Property Division and the Trust and Estate Division. The RPTE Board of Directors overseeing the divisions will meet on the following dates: Real Property Division: noon-1 p.m., Sept. 20, at the State Bar Center and noon-1 p.m., Dec. 6, during the Real Property Institute; Trust and Estate Division: noon-1 p.m., Aug. 16, at the State Bar Center and 8-8:30 a.m., Nov. 16, during the Probate Institute. At the meetings, members will be updated about recent rule changes and brainstorm activities for the remainder of 2017 and beginning of 2018. Meals will be provided during the meetings. R.S.V.P. to Breanna Henley at bhenley@nmbar.org. If you cannot attend the meeting but would like to provide suggestions of what you would like to see from the divisions this year, or have questions generally, contact Real Property Division Chair Charles Price at cprice@cpricelaw.com or Trust and Estate Division Chair Greg MacKenzie at greg@hurleyfirm.com.

Solo and Small Firm Section

Fall Speaker Series Line-up

The Solo and Small Firm Section will again sponsor monthly luncheon presentations on unique law-related subjects and this fall's schedule opens with Joel Jacobsen, *Journal Business Outlook* columnist and retired assistant attorney general, will present on current legal-business topics in New Mexico and (inter)nationally on Sept. 12. Following Jacobsen's presentation, Mark Rudd, former UNM associate professor and social activist, will speak about political movements over the last fifty years and the effects (if any) on American and international law on Oct. 17. On Nov. 21, the newly appointed U.S. Attorney will identify special issues that he or she will emphasize his or her tenure. And on Jan. 16, Nancy Hollander, internationally-respected defense attorney, will address constitutional developments in criminal law under the last four presidents, including Guantanamo and terrorism issues. All presentations will take place from noon-1 p.m. at the State Bar Center. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

Young Lawyers Division

Veterans Legal Clinic Seeks Volunteers

The Veterans Legal Clinic seeks volunteer attorneys to provide brief legal advice (15-20 minutes) to Veterans in the areas of family law, consumer rights, bankruptcy, landlord/tenant, and employment during its first legal clinic of 2017 on Jan. 10 from 8:30-11 a.m. The only remaining clinic date 2017 is Sept. 12 from 8:30-11 a.m. For more information or to volunteer contact Keith Mier at KCM@sutinfirm.com.

UNM

Law Library Hours

Through Dec. 16

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Holiday Closures	
Sept. 4 (Labor Day)	
Nov. 24–25 (Thanksgiving)	

New Mexico Law Review

Symposium: A Look at Aid in Dying

The New Mexico Law Review presents "Establishing New Rights A Look at Aid in Dying"(5.5G) from 9 a.m.-4 p.m., Sept. 23, at the UNM School of Law. This Symposium will explore aid in dying from medical and legal perspectives, the background of New Mexico's rulings on aid in dying, and how other states have tried or succeeded in legalizing aid in dying. It will also focus on the issue of using state supreme courts and constitutions to create rights that do not currently exist on a national level. Erwin Chemerinsky, Dean

of the University of California Berkeley School of Law, will present the keynote address on the history of state constitutions in providing civil rights. New Mexico Supreme Court Justice Charles W. Daniels will present on the New Mexico Supreme Court's history of interpreting its constitution to establish civil liberties. Panels comprised of New Mexico judges and legal experts will discuss the topics of Aid in Dying and the role of state judiciaries. Early registration is strongly encouraged. Visit http://lawschool.unm.edu/events/aid/registration.html.

Other Bars

Albuquerque Bar Association

September Luncheon and CLE

The Albuquerque Bar Association will host its monthly luncheon and CLE on Sept. 12 at the Hyatt Regency Albuquerque, 330 Tijeras Ave. NW, 87102. Richard Painter, of University of Minnesota Law School and vice-chairman of Citizens for Responsibility and Ethics will deliver the keynote address sponsored by the Thornburg Foundation. The luncheon will be noon–1 p.m. (arrive at 11:30 a.m. for networking). Afterwards, there will be a CLE program the New Mexico Lawyers and Judges Assistance Program will present "Helping Lawyers Do What They Do Best" (1.0 EP) from 1:15–2:15 p.m.

Albuquerque Lawyers' Club

New Luncheon Speaker Season Kicks off with Judge Nan Nash

The Albuquerque Lawyers' Club, the oldest lawyers group in Albuquerque, announces the beginning of its 2017-2018 season. The Club meets for nine lunch sessions, which feature compelling speakers addressing issues important to the law, New Mexico culture and issues of the day. Past speakers have included Sam Donaldson, Mayor Richard Berry, best-selling author Lee Maynard, and Captain David Iglesias. Membership dues for the year are $250 and include all nine lunches. The lunch meetings are held at Seasons Restaurant on the first Wednesday of each month, at noon, September through May. Non-members are also welcome to our lunches. The cost for each lunch for non-members is $30 in advance or $35 on the day of. The first meeting will be held on Sept. 6 and will feature Judge Nan Nash, chief judge of the Second Judicial District Court. Judge Nash will discuss the court's recent role in advancing justice through system reform and reflect on this role when its efforts may run counter to the public's perception of justice. Judge Nash will be introduced by Chief Judge Linda Vanzi of the New Mexico Court of Appeals. For more information, contact Yasmin Dennig at ydennig@Sandia.gov.

Oliver Seth American Inn of Court

2017 Meeting Season

The Oliver Seth American Inn of Court meets on the third Wednesday of the month from September to May. The meetings always address a pertinent topic and conclude with dinner. Lawyers who reside/practice in Northern New Mexico and want to enhance skills and meet some pretty good lawyers should send a letter of interest to: Honorable Paul J. Kelly Jr., U.S. Court of Appeals, Tenth Circuit, Post Office Box 10113, Santa Fe, New Mexico 87504-6113.

New Mexico Women's Bar Association

Free Marketing Seminar

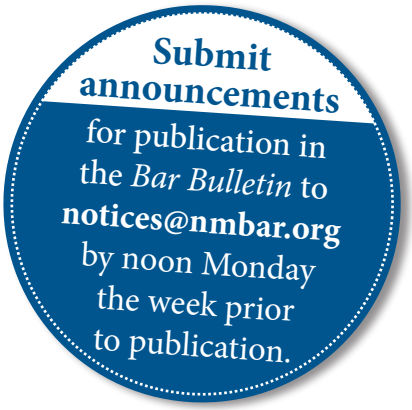
The New Mexico Women's Bar Association is presenting a free marketing seminar for attorneys from 11:45 a.m.–1:15 p.m., Sept. 15, at the State Bar Center. "Three Things You Should Do Now To Get More Business Later" is being presented by Lisa Simon, chief marketing and business development officer from Phoenix for Lewis Roca Rothgerber Christie LLP. Simon is an inductee of the Legal Marketing Association Hall of Fame and will share best practices to develop more work. Box lunches will be provided to pre-registered participants at no fee. Register by email at nmwba1990@gmail.com or visit nmwba.org for more information.

Other News

New Mexico Workers' Compensation Administration

New Judge Reassignment

Effective Aug. 28, all pending and administratively closed cases before the New Mexico Workers' Compensation Administration previously assigned to Judge David Skinner will be reassigned to newly appointed Judge Tony Couture. Parties who have not yet exercised their right to challenge or excuse will have 10 days from Aug. 28 to challenge or excuse Judge Couture pursuant to N.M.A.C. Rule 11.4.4.13. Questions about case assignments should be directed to WCA Clerk of the Court Heather Jordan at 505-841-6028.



New Mexico Supreme Court
Committees, Boards, and Commissions
Notice of 2017 Year-End Vacancies

The Supreme Court of New Mexico is seeking applications to fill upcoming year-end vacancies on the many of its committees, boards, and commissions. Applicants will be notified of the Court's decisions at the end of the year. Unless otherwise noted below, any person may apply to serve on any of the following committees, boards, and commissions:

Appellate Rules Committee (appellate public defender position)
Board Governing Recording of Judicial Proceedings (attorney position)
Board of Bar Examiners (active status NM attorneys only)
Children's Court Rules Committee (children's court and delinquency proceeding attorney positions)
Children's Court Improvement Commission (statewide education and substance abuse treatment positions)
Code of Judicial Conduct Committee
Code of Professional Conduct Committee
Courts of Limited Jurisdiction Rules Committee
Disciplinary Board (attorney position)
Domestic Relations Rules Committee
Drug Court Advisory Committee (district judge & juvenile justice positions)
Judicial Branch Personnel Grievance Board (judicial employee position)
Judicial Branch Personnel Rules Committee (judicial employee position)
Judicial Continuing Legal Education Committee (district judge position)
Judicial Education & Training Advisory Committee (appellate judge & magistrate court clerk positions)
Metropolitan Courts Rules Committee
Minimum Continuing Legal Education Board (active status NM attorneys only)
Rules of Civil Procedure Committee (district judge position)
Rules of Criminal Procedure Committee
Statewide ADR Commission (magistrate judge and metro court ADR positions)
UJI-Civil Committee
UJI-Criminal Committee (district judge position)

Anyone interested in volunteering to serve on one or more of the foregoing committees, boards, or commissions may apply by sending a letter of interest and resume to Joey D. Moya, Chief Clerk, by mail to P.O. Box 848, Santa Fe, New Mexico 87504, by email to nmsupremecourtclerk@nmcourts.gov, or by fax to 505-827-4837. The letter of interest should describe the applicant's qualifications and may prioritize no more than 3 committees of interest.

The deadline for applications is Friday, Oct. 6.

Next in the Series: Positive Psychology for Lawyers

Resilience is Key to Thriving in Law Practice

By Hallie N. Love

Introduction

The need for preventive well-being strategies for attorneys is apparent from the 2015 ABA and Hazelden Betty Ford Foundation study of more than 12,000 lawyers that showed 28, 19 and 23 perecent experienced depression, anxiety, and stress, respectively. [1] According to Dr. Larry Richard, expert on the psychology of lawyer behavior, attorneys generally rank low on the resiliency scale. [2]

Further, in light of resilience as prevention regarding attorneys' high occupational risk of secondary traumatic stress[3], it is important attorneys understand what resilience is, why it's important, and how to create more of it.

What is resilience?

Resilience is the adaptive and healthy response to difficult situations including setbacks, disappointments, losses, traumas and significant transitions. It's also the capacity to respond to thoughts, emotions, and beliefs instead of reacting. It's how one "bounces back" to normal. Resilience also refers to one's ability to thrive in life. Internal well-being resources and strengths that produce resilience can prevent or reduce depression, anxiety and stress.

A progressive approach to resilience for lawyers addresses the "whole person." This creates equilibrium in the body and mind. It boils down to creating a resilient brain, a resilient nervous system and a resilient mindset, and it starts with the kind of core well being that optimizes the brain's executive functioning, emotional regulation and impulse control and reduces the brain's ancient survival functions. It's a sustainable homeostatic state.

What is a resilient brain?

According to renowned psychologist and mindfulness expert Elisha Goldstein Ph.D., the way to create a naturally resilient brain is to:

- decrease right prefrontal cortex activation (associated with negative emotions and avoidance);
- increase left prefrontal cortex activation (associated with positive emotions);
- lower amygdala activation (connected to stress and the fight or flight response);
- strengthen the hippocampus (associated with evaluation of potential consequences); and
- increase vagal tone (associated with activating the calm part of the nervous system). [4]

Interventions including quality sleep,[5] regular exercise and deep relaxation directly target the amygdala and lower its activation. The consistent practice of mindfulness, in particular, has been shown to shrink the amygdala and thicken the hippocampus and other key areas of the brain associated with self-regulation, self-awareness, and cognitive functioning. Mindfulness practice also disrupts the wandering mind's negative default mode where worrying, rumination and self-criticism often run rampant, and, along with positive psychology exercises, supports the development of a positive default mode.

Additional tips and exercises to create your resilient brain appear throughout this article and in the other *Positive Psychology for Lawyers* articles referenced in the endnotes.

What is a resilient nervous system?

When the two parts of the nervous system (the sympathetic wing, in charge of the fight or flight stress response, and the calming parasympathetic wing with its main feature, the Vegas nerve, that connects the brain to major internal organs) are operating optimally you have a hearty and resilient nervous system with a core sense of ease in the heart, the stomach, and the lungs. When the sympathetic wing is overactive, there is low vagal tone associated with depression and confusion and a tendency to experience body feelings of contraction or anxiety.

The chronic stress and widespread negativity in the legal profession tends to create a nervous system where the sympathetic wing is overactive and the parasympathetic wing is basically offline. To combat this, you can routinely unplug from stress where you bring the parasympathetic wing online with a few minutes of recharge techniques. With consistent practice overall arousal to stress generally decreases so that even with the same external stressors, the body does not respond so harshly to them.[6]

What is a resilient mindset?

When your brain and nervous system are operating in balance, you are primarily in responsive mode, as opposed to reactive mode. In responsive mode you have the capacity to view difficult situations from multiple perspectives, and to think clearly and creatively.

Even in heated situations, the responsive mode is where your reactive ancient brain does not hijack you. You can collect and process information necessary to consider long-term goals, like keeping in mind the effect of your behavior on the judge or

the jury or your reputation. In responsive mode you have optimal professionalism and decision-making.

Having a resilient mindset is also about being aware of thoughts, emotions, behaviors and physiological responses, and having enough internal equilibrium to change those thoughts, emotions, behaviors and physiological responses to achieve a desirable outcome. This type of awareness is most readily developed with the practice of attention, focus and concentration training, otherwise known as mindfulness. There are many good forms of mindfulness training including iRest® which also has the additional components of deep relaxation and positive emotions woven into a 20-minute guided practice.[7]

By way of positive psychology, the science of thriving, a resilient mindset can be built with a few key strategies:

- employ a strengths-based focus to create a life aligned with our values [8];
- practice a growth mindset (using the inevitable obstacles in life to learn from) as opposed to a fixed mindset (where setbacks are seen as failures);
- "Look for the good" as opposed to fault-finding. This can install neural paths of optimism in your brain and allows you to see negative events as temporary and not pervasive;
- develop healthy GRIT in order to persevere with determination; and
- incorporate more meaning and purpose in your life, which automatically produces greater well-being.
- Additionally, installing more positive emotions into your brain on a regular basis mediates depressive thinking and promotes greater resilience.[9] According to psychologist Barbara Fredrickson, it takes at least three positive emotions for every negative emotion to feel well.

You can develop new neural connections for lasting resilience hardwired into your brain with self-directed neuroplasticity, which means consciously changing your brain with targeted exercises. In neuropsychologist Dr. Rick Hanson's words, "You can use the mind to change the brain to change the mind for the better." It's important to understand that the more you engage in negative thinking, rumination, and unhelpful/unproductive thinking patterns, the more these becomes habitual and engrained. The reverse is also true. And when you practice exercises such as gratitude and appreciation, which reduce the propensity to feel discontented or dissatisfied, and allow the good feelings to linger and sink in you will lay down new neural paths of positivity making it easier to nudge your mind towards positive thoughts.

Why is resilience necessary for lawyers?

Without a resilient brain and nervous system as home base, many lawyers soldier through the daily high stress, negative emotions and adversities that have them operating from the ancient survival part of the brain in charge of the fight/flight/freeze response with its a cocktail of stress hormones, and the ruminating, and self-critical default mode network of the brain.

With chronic negative emotions and chronic negative thinking we are routinely angry, irritated, anxious or depressed. This can cause the amygdala to enlarge and the hippocampus to shrink (changing your brain to be even more reactive) and other regulatory systems in the brain become less able to cope.

A second reason lawyers need to build resilience is that what operates in the legal world as prudence often leads to a faultfinding pessimistic mindset in the non-legal world. Pessimistic thinking has been linked with depression, stress and anxiety. Since optimism creates resilience against depression it's advisable for attorneys to retain prudence when needed on the job but to develop a more optimistic approach in other settings. You can begin by practicing exercises where you purposefully look for the good.

A third reason lawyers need to build resilience is that secondary traumatic stress is a high occupational risk among lawyers who work with traumatized populations and then unconsciously absorb some of the trauma. Whether one develops symptoms of STS or not, may depend on the level of resilience.

Conclusion

Some lawyers are naturally more resilient than others. They recover from stress and bounce back faster from difficulties. Others can get stuck in a debilitating neurochemical deluge of fight, flight, or shutdown physiology.

It is possible to install into your brain and nervous system a foundation of resiliency where you operate from calm strength, feel more ease more of the time, and have the capacity for optimal professionalism and decision-making.

It only takes a handful of minutes throughout the day for recharge and mindfulness in order for the body to start feeling safe with a balanced nervous system, and satisfied (as an antidote to the body's agitation when you're dissatisfied.) And with supportive social engagement one can gain an overall sense of being connected, which creates high vagal tone. From this place of core well being, one can more readily build a resilient mindset with positive psychology and practice resilient living, a place where lawyers can learn to thrive.

Endnotes

[1] Krill, P.R., Johnson, R. Albert, L. (2016) The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys. *Journal of Addiction Medicine* 10 (1), 46-52.

[2] Richards, Larry. Retrieved from www.lawyerbrain.com

[3] Love, H. (2017) Lawyers are at Risk for Secondary Traumatic Stress. *Bar Bulletin* 56 (7)

[4] facesconferences.com/wpcontent/uploads/2016/SanDiego2016/GOLDSTEIN.p

[5] Love, H. (2015) The Science of Sleep. *Bar Bulletin* 54 (38)

[6] Love, H. (2013) Work Smarter: The Power of Recharge. *Bar Bulletin*. 52 (21)

[7] Yeagley, J. (2013) Finding Equanimity Wherever You Are: On the Job, at Home and Even Under Pressure. *Bar Bulletin* 52 (5)

[8] Love, H. (2015) The Science of Character. *Bar Bulletin*. 43 (29)

[9] Love, H. (2014) The Benefits of Positive Emotions. *Bar Bulletin* 53 (29)

About the Author

Attorney Hallie N. Love, a national speaker on positive psychology for lawyers topics, is a licensed positive psychology instructor with the Wholebeing Institute (founded by Dr. Tal Ben- Shahar), a therapist certified by the International Association of Yoga Therapists, an Integrative Restoration (iRest ®) mindfulness instructor, and author of Y*oga for Lawyers—Mind-Body Techniques to Feel Better All the Time*, published by the ABA. Her Positive Resilience Training™ for lawyers will be available starting 2018. Visit www.PositivePsychologyforLawyers.com for more information.

YOU'RE INVITED

The State Bar of New Mexico
and the Young Lawyers Division
invite you to attend the annual

STATE BAR OPEN HOUSE

to mix and mingle with members
of the legal community and to welcome
newly admitted lawyers to the profession.

THURSDAY, SEPT. 14 • 5:30-7:30 p.m.
State Bar of New Mexico
5121 Masthead NE in Albuquerque

Join us for food, beverages, State Bar Center tours, exhibitor booths and for your chance to win a Premium Professional Development Package worth up to 15.0 CLE credits and other door prizes!

Please R.S.V.P. you and your guest(s) by visiting
www.nmbar.org/OpenHouse.

STATE BAR of NEW MEXICO

Legal Education

September

8 **Practical Succession Planning for Lawyers**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Fit to Practice: Substance Abuse Prevention, Overcoming Depression and Physical Fitness for Ethical Well-Being**
1.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **2016 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Add a Little Fiction to Your Legal Writing (2016)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Techniques to Avoid and Resolve Deadlocks in Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Ethical Implications of Section 327 of the Bankruptcy Code**
1.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **What Notorious Characters Teach About Confidentiality**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **Best and Worst Practices Including Ethical Dilemmas in Mediation (2016)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **The Ethics of Representing Two Parties in a Transaction**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **28th Annual Appellate Practice Institute**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **Ethical Considerations in Foreclosures**
1.0 EP
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

18 **New Mexico Conference on the Link Between Animal Abuse and Human Violence**
11.7 G
Live Seminar, Albuquerque
Positive Links
www.thelinknm.com

18 **Ethical Considerations in Foreclosures**
1.0 EP
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

19 **How to Make Your Client's Estate Plan Survive Bankruptcy**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Concealed Weapons and Self-Defense**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

21 **Controversial Issues Facing the Legal Profession (2016)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Legal Technology Academy for New Mexico Lawyers (2016)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Guardianship in New Mexico/The Kinship Guardianship Act (2016)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Structured Settlements in Claims Negotiations**
1.0 G
Live Seminar, Albuquerque
National Structured Settlements Trade Association
202-289-4004

22 **2017 Tax Sympmosium**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **How Jurors View Mistakes and Conflicts**
1.5 EP
Live Seminar, Santa Fe
Attorneys Liability Assurance Society
www.alas.com

23 **Half-Day Mixed Bag CLE**
3.0 G
Live Seminar, Albuquerque
State Bar of New Mexico Paralegal Division
505-203-9057

September

28 **32nd Annual Bankruptcy Year in Review (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Transgender Law and Advocacy (2016)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Ethics for Government Attorneys (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **PLSI 50th Anniversary CLE: Evolution of Indian Laws and Indian Lawyers**
4.5 G, 2.0 EP
Live Seminar, Isleta
American Indian Law Center
www.ailc-inc.org

29 **Professional Liability Insurance: What You Need to Know (2015)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Ethically Managing Your Law Practice (2016 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

October

2 **Uncovering and Navigating Blind Spots Before They Become Land Mines**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Bankruptcy Law: The New Chapter 13 Plan**
3.1 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Lawyers' Duties of Fairness and Honesty (Fair or Foul 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Deposition Practice in Federal Practice (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **2017 Health Law Symposium**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Employment and Labor Law Insititute**
5.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Ethics, Disqualification and Sanctions in Litigation**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Basic Practical Regulatory Training for the Electric Industry**
27.0 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU
business.nmsu.edu

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

12 **Human Trafficking (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Contempt of Court: The Case that Forever Changed the Practice of Law (2017 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13–14 **Heartburn Issues: How Not To Commit Malpractice in Military Divorce Relocation Cases**
Total Possible CLE Credits: 1.0 G, 1.0 EP (plus an optional 1.0 EP)
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **New Mexico DWI Cases: From the Initial Stop to Sentencing (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective August 25, 2017

PUBLISHED OPINIONS

A-1-CA-34387	State v. P Cazares	Affirm	08/22/2017
A-1-CA-34190	State v. M Yancey	Reverse/Vacate/Remand	08/24/2017
A-1-CA-34191	State v. M Yancey	Reverse/Vacate/Remand	08/24/2017
A-1-CA-34192	State v. M Yancey	Reverse/Vacate/Remand	08/24/2017

UNPUBLISHED OPINIONS

None

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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Clerk's Certificate of Admission

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective September 6, 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 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information andindictment	07/01/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017
5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-703	Appeal	07/01/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-506	Time of commencement of trial	07/01/2017
7-703	Appeal	07/01/2017

Rules of Procedure for the Municipal Courts

8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017

Children's Court Rules and Forms

10-166	Public inspection and sealing of court records	03/31/2017

Rules of Appellate Procedure

12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-307.2	Electronic service and filing of papers	07/01/2017*
12-307.2	Electronic service and filing of papers	08/21/2017*
12-314	Public inspection and sealing of court records	03/31/2017

*The rule adopted effective July 1, 2017, implemented mandatory electronic filing for cases in the Supreme Court. The rule adopted effective August 21,2017, implements mandatory electronic filing in the Court of Appeals.

Rules Governing Admission to the Bar

15-104	Application	08/04/2017
15-105	Application fees	08/04/2017
15-301.1	Public employee limited license	08/01/2017
15-301.2	Legal services provider limited law license	08/01/2017

Rules of Professional Conduct

16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017

Disciplinary Rules

17-202	Registration of attorneys	07/01/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

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

Certiorari Denied, June 15, 2017, No. S-1-SC-36380

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-049

No. 34,165 (filed March 2, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ARMIS BELLO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Ross C. Sanchez, District Judge

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Santa Fe, New Mexico
Charles J. Gutierrez
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Albuquerque, New Mexico
for Appellee

Bennett J. Baur
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Allison H. Jaramillo
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Santa Fe, New Mexico
for Appellant

Opinion

M. Monica Zamora, Judge

{1} Defendant Armis Bello appeals from his convictions for trafficking cocaine by distribution, contrary to NMSA 1978, Section 30-31-20(A)(2) (2006), and trafficking cocaine by possession with intent to distribute, contrary to Section 30-31-20(A)(3). Defendant argues that (1) his convictions violate the prohibition against double jeopardy, (2) the State presented insufficient evidence to sustain his convictions, and (3) he received ineffective assistance of counsel. We affirm in all respects.

BACKGROUND

{2} On November 11, 2009, an Albuquerque Police Department (APD) undercover narcotics team conducted an undercover operation in an area of the city known to police for narcotics-related activity. Detective David Jaramillo was the case agent for the operation and was the undercover officer responsible for making the narcotic purchases. Detective Jaramillo was dropped off in the targeted area, where he observed a man standing at the corner of an intersection with no apparent purpose and who appeared to be a "flagger" or a person that solicits sales of narcotics. The man was later identified as Ralph Franco.

{3} Detective Jaramillo approached Franco and asked whether Franco was "holding"—which is common street terminology for possessing narcotics for sale. After Detective Jaramillo indicated that he was looking for crack cocaine, Franco told him that he did not have any but that he could take Detective Jaramillo to another location to make a purchase. Detective Jaramillo followed Franco on foot to a parking lot a few blocks away. Once they arrived at the parking lot, Franco identified Defendant as the person selling the crack cocaine. Detective Jaramillo gave Franco a $20 bill and watched as Franco approached Defendant and gave him the money. In exchange, Defendant gave Franco an unknown substance. Franco returned to Detective Jaramillo and handed him a clear cellophane package containing what appeared to be a small rock of crack cocaine.

{4} According to Detective Jaramillo, the rock Franco gave him was very small, "way under the value" of the money exchanged. Staying "in role" Detective Jaramillo questioned Franco about being shortchanged, and then he approached Defendant directly. Defendant brushed Detective Jaramillo's complaint off and told him that the small rock was all he was getting. Detective Jaramillo asked Defendant if he had any more to sell, and Defendant indicated that he did. Detective Jaramillo bought a second rock from Defendant for ten dollars. As he left the parking lot, Detective Jaramillo gave his team the bust signal. Defendant, Franco, and a third subject identified only as Aguilar, were arrested.

{5} The two rocks Detective Jaramillo purchased were labeled and tagged into APD evidence. Both substances were tested by the APD crime lab and were positively identified as cocaine. Defendant was indicted for trafficking cocaine by distribution, conspiracy to commit trafficking, trafficking cocaine by possession with intent to distribute, and tampering with evidence. Defendant was convicted of trafficking cocaine by distribution and trafficking cocaine by possession with intent to distribute.

DISCUSSION

Double Jeopardy

{6} Defendant contends that his convictions for trafficking cocaine by distribution and possession of cocaine with intent to distribute violate the prohibition against double jeopardy. "A double jeopardy challenge is a constitutional question of law[,] which we review de novo." *State v. Swick* (*Swick II*), 2012-NMSC-018, ¶ 10, 279 P.3d 747. "The Fifth Amendment of the United States Constitution[,] . . . made applicable to New Mexico by the Fourteenth Amendment[,]" prohibits double jeopardy and "functions in part to protect a criminal defendant against multiple punishments for the same offense." *Id.* (internal quotation marks and citation omitted). Double jeopardy cases involving multiple punishments are classified as either double description cases, "where the same conduct results in multiple convictions under different statutes[,]" or unit of prosecution cases, "where a defendant challenges multiple convictions under the same statute." *Id.*

{7} In the present case, both parties assert that Defendant's convictions under Subsection (A)(2) (distribution) and Subsection (A)(3) (possession with intent to distribute) implicate a double description analysis. Defendant relies on this Court's decision in *State v. Swick (Swick I)*, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, *aff'd in part, rev'd in part by Swick II*, 2012-NMSC-018. In *Swick I*, the defendant illegally entered the victims' home, and once inside, beat and stabbed the victims before taking $14 and the victims' vehicle. *Swick I*, 2010-NMCA-098, ¶ 3. The defendant was convicted of one count of second degree murder, two counts of attempted murder, two counts of aggravated battery with a deadly weapon, two counts

of aggravated burglary by battery, one count of aggravated burglary with a deadly weapon, two counts of armed robbery, two counts of conspiracy, and unlawful taking of a motor vehicle. *Id.* ¶ 1.

{8} On appeal, the defendant argued, among other things, that his convictions for aggravated burglary involving a deadly weapon, contrary to Subsection (B) of NMSA 1978, Section 30-16-4 (1963), and aggravated burglary involving battery, contrary to Subsection (C) of the same statute, violated his double jeopardy protections. *See Swick I*, 2010-NMCA-098, ¶ 26. This Court stated, "[w]hen convictions under separate subsections of a single statute are at issue, we apply the double[] description analysis." *Id.* ¶ 27. Applying a double description analysis to the facts of the case, we determined that the convictions did not "offend double jeopardy principles." *Id.* ¶¶ 28-29.

{9} In *Swick II*, the New Mexico Supreme Court granted certiorari to address a number of issues, including whether the defendant's convictions under Section 30-16-4 violated double jeopardy.[1] *See Swick II*, 2012-NMSC-018, ¶¶ 6, 43-44. The Supreme Court applied a unit of prosecution analysis since the two convictions were under the same statute. *Id.* ¶ 33 (stating that "[w]e apply a unit[]of[]prosecution analysis because we are examining multiple convictions under the same statute"). The Supreme Court held that the two aggravated burglary convictions did violate double jeopardy. *Id.* ¶ 44. The Supreme Court did not offer an explanation or directly address the double description analysis applied by this Court in *Swick I*. For its unit of prosecution standard the Supreme Court relied on *State v. Gallegos*, 2011-NMSC-027, ¶ 31, 149 N.M. 704, 254 P.3d 655. *Gallegos* involved three convictions under the same subsection of the conspiracy statute. *Id.* Thus, it appears that double jeopardy claims involving multiple convictions under different statutes are to be analyzed the same way as double jeopardy claims based on multiple violations of different subsections under one statute—using the unit of prosecution standard analysis. *See Swick II*, 2012-NMSC-018, ¶ 10.

{10} We follow the approach taken by our Supreme Court in *Swick II* and apply a unit of prosecution analysis to Defendant's double jeopardy claim even though, like the subsections of the burglary statute in *Swick II*, the subsections of the trafficking statute have different elements. *See Aguilera v. Palm Harbor Homes, Inc.*, 2002-NMSC-029, ¶ 6, 132 N.M. 715, 54 P.3d 993 (recognizing that the Court of Appeals is bound by Supreme Court precedent).

{11} "In unit of prosecution cases, the defendant is charged with multiple violations of a single statute based upon acts that may or may not be considered a single course of conduct." *State v. Sena*, 2016-NMCA-062, ¶ 8, 376 P.3d 887. To determine the correct unit of prosecution, we consider "whether the [L]egislature intended punishment for the entire course of conduct or for each discrete act." *Swafford v. State*, 1991-NMSC-043, ¶ 8, 112 N.M. 3, 810 P.2d 1223. First, courts look to the language of the statute to determine if the Legislature has defined the unit of prosecution. *Swick II*, 2012-NMSC-018, ¶ 33. If so, the inquiry is complete and proceeds no further. *Id.* Where the unit of prosecution is not clearly defined in the language of the statute, courts proceed to analyze "whether a defendant's acts are separated by sufficient indicia of distinctness to justify multiple punishments." *Gallegos*, 2011-NMSC-027, ¶ 31 (internal quotation marks and citation omitted).

{12} In this case, we do not reach the second part of the test because we conclude that the Legislature defined the unit of prosecution to be one transfer of a controlled substance. *See Swick II*, 2012-NMSC-018, ¶ 33 (concluding that for Section 30-16-4(A) and (C) the Legislature defined the unit of prosecution to be an unlawful entry with intent to commit a felony therein). Section 30-31-20(A) provides in pertinent part: "[a]s used in the Controlled Substances Act, 'traffic' means the: (1) manufacture of a controlled substance . . . ; (2) distribution, sale, barter or giving away of . . . a controlled substance . . .; or (3) possession [of a controlled substance] with intent to distribute." Here, Defendant was convicted of one count each of trafficking by distribution and trafficking by possession with intent to distribute. As used in the Controlled Substances Act, to " 'distribute' means to deliver" and to " 'deliver' means the actual, constructive or attempted transfer [of a controlled substance] from one person to another." NMSA 1978, § 30-31-2(G), (J) (2009).

{13} In *State v. Borja-Guzman*, this Court noted that the "various means of trafficking and the broad definition of deliver evinces a legislative intent to authorize prosecution and punishment for each separate transfer of a controlled substance." 1996-NMCA-025, ¶ 13, 121 N.M. 401, 912 P.2d 277. In *Borja-Guzman*, the defendant gave undercover agents a sample of methamphetamine and a sample of heroin. *Id.* ¶ 2. Approximately four hours later, the defendant met undercover agents in the same location and sold them quantities of the same substances. *Id.* ¶¶ 2-3. The defendant was convicted of multiple trafficking offenses. *Id.* ¶ 4. He challenged the convictions on double jeopardy grounds, arguing that the distribution of a sample of a controlled substance and the subsequent sale of the same substance at the same place and to the same person or persons, constituted only one transfer. *Id.* ¶ 14. This Court rejected that argument holding that "the [L]egislature clearly intended, in its enactment of Section 30-31-20 criminalizing drug trafficking, to authorize separate prosecution and punishment for each individual transfer or delivery under the circumstances where the transfer is not contemporaneous." *Id.* ¶ 26.

{14} In the present case, Defendant's convictions arose from two separate transfers of a controlled substance. The first transfer occurred when Detective Jaramillo purchased the first rock cocaine from Defendant through Franco. The

[1]There is a factual discrepancy between *Swick I* and *Swick II* that in turn generates a discrepancy in the applicable subsection of Section 30-16-4 to the defendant's aggravated burglary (deadly weapon) conviction. Our analysis of Section 30-16-4(B) in *Swick I* was based on the defendant "arming himself with a knife once inside" the victims' home. *Swick I*, 2010-NMCA-098, ¶ 24; *see* § 30-16-4(B) ("Aggravated burglary consists of the unauthorized entry . . . with intent to commit any felony or theft therein and the person . . . : after entering, arms himself with a deadly weapon[.]"). In *Swick II*, the Supreme Court's analysis of Section 30-16-4(A) was based on the defendant's unauthorized entry into the victims' home armed with a knife. *Swick II*, 2012-NMSC-018, ¶¶ 35, 43; *see* § 30-16-4(A) ("Aggravated burglary consists of the unauthorized entry . . . with intent to commit any felony or theft therein and the person . . . : is armed with a deadly weapon[.]"). Nonetheless, the pertinence of *Swick I* and *Swick II* is the double jeopardy analysis for more than one conviction based on different subsections of one statute.

second transfer occurred moments later when Detective Jaramillo purchased the second rock cocaine from Defendant directly. While the two sales occurred within a short period of time, they did not occur contemporaneously and fall within the Legislature's authorization for separate punishment. *See id.*

{15} Defendant argues that the two purchases were part of one ongoing transaction since the second purchase would not have occurred, but for Detective Jaramillo's dissatisfaction with the first purchase. We disagree. Section 30-31-20(A)(2) defines the unit of prosecution as one controlled substance transfer. Here, there were two distinct exchanges between Defendant and Detective Jaramillo. In each exchange, Defendant transferred a distinct quantity of cocaine to Detective Jaramillo in exchange for a distinct sum of money. The reason for the second purchase is not germane to our analysis. We conclude that Defendant's convictions under Section 30-31-20(A)(2) and (3) do not violate double jeopardy.

Sufficiency of the Evidence

{16} Defendant challenges the sufficiency of the evidence to support both trafficking convictions. Defendant asserts that possession of cocaine is a required element of both trafficking offenses with which he is charged, and he claims that the evidence was insufficient to establish possession because other than Detective Jaramillo's testimony, the State did not present any evidence that he possessed cocaine. We are unpersuaded.

{17} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Torrez*, 2013-NMSC-034, ¶ 40, 305 P.3d 944 (internal quotation marks and citation omitted). Our Supreme Court has expressly established a two-step process for applying this test. *State v. Garcia*, 2016-NMSC-034, ¶ 24, 384 P.3d 1076. First we must "draw every reasonable inference in favor of the jury's verdict." *Id.* Then we "evaluate whether the evidence, so viewed, supports the verdict beyond a reasonable doubt." *Id.*

{18} In order to find Defendant guilty of trafficking cocaine by possession with intent to distribute, the State had to prove beyond a reasonable doubt that on or about November 11, 2009, Defendant had cocaine in his possession, knowing it was cocaine, or believing it to be some drug or other substance the possession of which is regulated or prohibited by law, and that Defendant intended to transfer it to another. With regard to this charge, Detective Jaramillo testified that Franco agreed to take him to a location where he could purchase crack cocaine. Franco identified Defendant as the person selling the crack cocaine. Detective Jaramillo gave Franco a $20 bill and watched as Defendant removed an unknown substance from his mouth and gave it to Franco in exchange for the buy money. Franco returned and gave Detective Jaramillo a package containing a small rock, which later tested positive as cocaine. From this testimony, a jury could reasonably infer that the unknown substance Defendant gave to Franco in exchange for the buy money was the same rock of cocaine that Franco gave to Detective Jaramillo. In other words, a jury could reasonably infer that Defendant was in possession of the first rock of cocaine and intended to transfer it to Detective Jaramillo through Franco.

{19} The jury instruction on trafficking by distribution provided that, in order to find Defendant guilty of trafficking cocaine by distribution, the State had to prove beyond a reasonable doubt that on or about November 11, 2009, Defendant transferred cocaine to another, knowing that it was cocaine, or believing it to be some drug or other substance the possession of which is regulated or prohibited by law. Detective Jaramillo testified that after Defendant brushed off his complaints about the first purchase, Detective Jaramillo asked if Defendant had more to sell, and Defendant confirmed that he did. Defendant sold Detective Jaramillo a second rock for $10, removing the package from his mouth, exchanging it for a $20 bill and giving Detective Jaramillo $10 in change. Based on this testimony, a jury could reasonably infer that Defendant transferred cocaine directly to Detective Jaramillo.

{20} Drawing all reasonable inferences from the evidence in favor of the verdict, as we must, we conclude that the evidence is sufficient to support Defendant's convictions for trafficking by distribution and trafficking with intent to distribute.

Ineffective Assistance of Counsel

{21} Defendant asserts that he received ineffective assistance of counsel because his attorney failed to call key defense witnesses. "We review claims of ineffective assistance of counsel de novo." *State v. Dylan J.*, 2009-NMCA-027, ¶ 33, 145 N.M. 719, 204 P.3d 44.

{22} "The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees . . . the right to the effective assistance of counsel." *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 16, 130 N.M. 179, 21 P.3d 1032 (internal quotation marks and citation omitted). "When an ineffective assistance claim is first raised on direct appeal, [the appellate courts] evaluate the facts that are part of the record." *State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. "A prima facie case of ineffective assistance is made by showing that defense counsel's performance fell below the standard of a reasonably competent attorney and, due to the deficient performance, the defense was prejudiced." *Patterson*, 2001-NMSC-013, ¶ 17 (internal quotation marks and citation omitted). "A prima facie case for ineffective assistance of counsel is not made if there is a plausible, rational strategy or tactic to explain the counsel's conduct." *Lytle v. Jordan*, 2001-NMSC-016, ¶ 26, 130 N.M. 198, 22 P.3d 666 (internal quotation marks and citation omitted).

{23} As to the first prong, "[d]efense counsel's performance is deficient if it falls below an objective standard of reasonableness[,]" usually judged as an action contrary to "that of a reasonably competent attorney." *Dylan J.*, 2009-NMCA-027, ¶ 37. Our review of counsel's performance is "highly deferential" in that counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (internal quotation marks and citation omitted). Therefore, a defendant "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *State v. Hunter*, 2006-NMSC-043, ¶ 13, 140 N.M. 406, 143 P.3d 168 (internal quotation marks and citation omitted). "If there is a plausible, rational strategy or tactic to explain counsel's conduct, a prima facie case for ineffective assistance is not made." *Dylan J.*, 2009-NMCA-027, ¶ 39.

{24} As to the second prong, "[a] defense is prejudiced if, as a result of the deficient performance, there was a reasonable probability that . . . the result of the trial would have been different." *Id.* ¶ 38 (omission in original) (internal quotation marks and citation omitted). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Id.* (internal quotation marks and citation omitted).

The deficient performance "must represent so serious a failure of the adversarial process that it undermines judicial confidence in the accuracy and reliability of the outcome." *Id.* (internal quotation marks and citation omitted).

{25} Defendant claims ineffective assistance of counsel on the grounds that his attorney did not call Franco and Aguilar as witnesses at trial. Defendant asserts that the men were necessary defense witnesses whose testimony would likely have exculpated him. However, Defendant does not point to any facts in the record that support this claim. Thus, Defendant has not made a prima facie showing of ineffective assistance of counsel. However, "this decision does not preclude [the d]efendant from pursuing habeas corpus proceedings on this issue should he be able to garner evidence to support his claims." *State v. Bernal*, 2006-NMSC-050, ¶ 36, 140 N.M. 644, 146 P.3d 289.

CONCLUSION

{26} For the foregoing reasons, Defendant's convictions are affirmed.

{27} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
STEPHEN G. FRENCH, Judge

Certiorari Denied, May 4, 2017, No. S-1-SC-36387

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-050

No. 34,572 (filed March 2, 2017)

ROY NEAL HOUGH,
Petitioner-Appellee,
v.
SUMMER LYNNE BROOKS,
Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
JAMES WAYLON COUNTS, District Judge

FREDA HOWARD MCSWANE
FREDA HOWARD MCSWANE, P.C.
Ruidoso, New Mexico
for Appellee

WILLIAM N. GRIFFIN
Ruidoso, New Mexico
for Appellant

Opinion

Linda M. Vanzi, Chief Judge

{1} Summer Lynne Brooks (Mother) and her estranged husband, Roy Neal Hough (Father), entered into a stipulated interim order that allowed Mother to relocate with their four children from Ruidoso, New Mexico to Phoenix, Arizona. Approximately eight months later, the district court ordered that the children move back to Ruidoso to live with Father during the school year. On appeal, Mother argues that the district court erred by (1) drastically changing the primary custodial arrangement without first finding that a substantial and material change in circumstances had occurred, and (2) not making specific findings that the change was in the children's best interests. We hold that the district court abused its discretion by not finding "a substantial and material change in circumstances" before changing the existing custody arrangement, as required by the New Mexico Joint Custody Statute, NMSA 1978, § 40-4-9.1(A) (1999). We further hold that the district court abused its discretion by not conducting a best interests analysis and by failing to consider any of the statutorily mandated factors, under NMSA 1978, Section 40-4-9(A) (1977) and Section 40-4-9.1(B), and that the district court's custody determination was not supported by substantial evidence. Accordingly, we reverse.

BACKGROUND

{2} Although their marriage certificate was never filed, Mother and Father married in October 1999 and lived together with their four children in their family residence in Ruidoso. Mother is a school teacher, and Father is a wild-land firefighter employed by the U.S. Forest Service.

{3} The couple's relationship deteriorated after a March 2012 incident in which Father kicked his eldest daughter, A.H., and broke her leg. Father was charged with child abuse and bribery of a witness for encouraging A.H. to lie about what had happened. Father pleaded no contest and received a conditional discharge. He was placed on three years of probation and was required to undergo counseling. The probation agreement stated that Father would "not associate with any person identified by [his p]robation/[p]arole [o]fficer as being detrimental to [his p]robation supervision," including any victim or witness of his crimes. Father admitted that A.H. was a victim of his crimes. After the charges were filed, Children, Youth and Families Department (CYFD) and Father's probation officer requested that Father leave the family residence for six months, after which he had limited contact with the children. Although Father did have phone calls with the children, they were intermittent as a result of his job, which often took him out of cell phone service.

{4} Father did not see or talk to A.H. for at least two years after the incident. A.H. is a special needs child, who had difficulties in school after the child abuse episode and was removed from school by Mother to be home-schooled for a period of time. A.H. had been evaluated after the child abuse incident and was diagnosed with childhood schizophrenia.

{5} In March 2014, Father filed a petition to determine paternity, custody, visitation, and child support (the petition). Specifically, Father sought joint legal and physical custody of the children and an order for child support pursuant to the New Mexico Child Support Guidelines. Mother did not dispute paternity and agreed that Father should be granted legal or physical custody but stated that he should not be granted unsupervised visitation until he completed his probation and counseling. Mother also did not deny that child support should be awarded.

{6} Two weeks after Father filed the petition and before Mother had an opportunity to file her answer, Father's parents (Grandparents) filed a motion to intervene. The motion sought, among other things, to allow Grandparents, who were residents of Tennessee, to assist in making decisions about the children because Father was "unable to properly care for the minor children alone based on his employment." Mother objected to the motion to intervene arguing lack of jurisdiction and other legal grounds. The district court ultimately denied Grandparents' motion in October 2014.

{7} Father and Mother entered into a joint stipulated custody, visitation, and support agreement and, on June 3, 2014, the district court entered a stipulated interim order reflecting the parties' agreement. The stipulated interim order provided, in relevant part:

> 2. [Mother], upon providing proof of employment [for a teaching position] in Phoenix, Arizona, shall be allowed to relocate to Phoenix, Arizona with the minor children.
> 3. [Father] shall have a two[-] week period of responsibility with the minor children for two . . . weeks after the end of the 2013-2014 school year in Ruidoso, New Mexico. Said period of responsibility shall take place at the children's residence[.] . . . Such supervised visitation shall be from July 6, 2014 through July 20, 2014.
> 4. [Father's] parents shall supervise this visitation by remaining

at the residence with [Father] and the minor children.

5. After the minor children have relocated to Phoenix, Arizona, [Father] shall be allowed nightly phone calls with the minor children and Skype visits with the minor children at least two . . . times per week.
6. Until further [o]rder of this [c]ourt, [Father] shall pay child support to [Mother] in the amount of $949.81.

{8} In the summer of 2014, Mother obtained a teaching position at a private school in Phoenix, Arizona, and pursuant to the stipulated interim order, relocated with the children to Phoenix. Three of the children attended the private school as a benefit of Mother's employment, and A.H. attended a special school.

{9} Shortly thereafter, Father filed a motion to show cause, alleging that he had "placed a phone call every night" to the children since July 20, 2014, as permitted by the stipulated interim order, but had not been able to reach the children. Mother denied that she missed multiple phone calls from Father, and filed a countermotion, alleging that Father "has underpaid, or failed to pay, child support each month since June[] 2014." According to Father, he paid utility bills on the family residence that Mother had left unpaid and had given Mother an extra child support payment in March 2014. The record does not indicate whether the district court ruled on this matter.

{10} Six months after the stipulated interim order was entered, the district court held a child custody hearing. Both Father and Mother testified. Father said that he was in favor of the move when it occurred and agreed that there were ample doctors in Arizona that were better suited to address A.H.'s needs. In addition, Father knew that one of his sons had struggled in Ruidoso public schools because of the son's speech difficulties. Nevertheless, Father no longer wanted the children to reside in Arizona. He admitted that he "did not keep up with any of the kids while they were in school" in Ruidoso and further acknowledged that he had no reason to believe the children were not doing well in Arizona.

{11} Mother testified that the children were happy and doing well in the Phoenix private school, and the child with speech issues received specialized support for his disability. Furthermore, Mother said that A.H., who had struggled after the 2012 incident with Father, was doing better in Phoenix and was slated to get special treatment where she would attend support sessions and where a psychiatrist and case manager would visit her in the home.

{12} Testimony at the hearing established that, prior to the time he was required to leave the family home, Father had undertaken numerous remodeling projects in the Ruidoso residence that remained unfinished when he left. Father admitted that while he lived there, he had punched holes in the walls. According to Mother, she had difficulties with mice coming in through one of the areas involving Father's unfinished projects. Mother had neither the money nor the skills to make repairs or finish the projects once Father was out of the house, nor did she allow Father to come back to make repairs. Mother stated that she did not want Father in the home because he was aggressive and could not control his temper. Moreover, having Father come into the home to make repairs never panned out because of Father's work schedule and because A.H. was in the home. The result was that, at the time of Father's July 2014 visitation period, which took place in the family's Ruidoso residence, the condition of the home was "horrible." According to Father, the house smelled of urine, was filthy, and there were mice feces throughout the premises.

{13} With respect to Grandparents, prior to the two-week visitation period in July 2014, it had been seven years since Grandparents had interacted with any of the children, and they had never met the two younger children. The decision to cut off contact between Grandparents and the children had been a mutual decision between Father and Mother. Notwithstanding that they did not know the children, Father testified that Grandparents would move to New Mexico from Tennessee to help him with the children if he was granted custody during the school year. Father's mother also testified to the same effect. There is no evidence in the record indicating whether Grandparents actually moved to New Mexico.

{14} At a December 2014 hearing, the district court entered an order requiring that the children spend Christmas break with Father. The exchange was to take place in Lordsburg, New Mexico on December 20, 2014, and the children were to be returned to Mother in Lordsburg on January 3, 2015. A.H. did not arrive in Lordsburg as required by the order. Father filed a motion to show cause, alleging that Mother had refused to bring A.H. for Christmas break and that, therefore, Mother should be held in contempt. Mother responded that she "did everything within her power to compel [A.H.] to go" and that A.H. herself had refused to go to Lordsburg for the holiday exchange. Mother reiterated that A.H. had been "gravely injured" by Father, that she had been diagnosed with schizophrenia and posttraumatic stress disorder (PTSD), that Father was under a probation order not to have contact with A.H., and that A.H. wanted "an audience with the [j]udge in chambers to express her desires [regarding] visitation with [Father]." Moreover, A.H.'s counselor was developing a treatment plan, recommending that A.H. and Father develop their relationship in "calculated stages."

{15} At a show cause hearing on March 30, 2015, A.H. testified that she did not want to go to Lordsburg because Father's physically abusive behavior made her feel unsafe. She also said that one of her counselors had developed a plan for her in which she would establish a relationship with Father at her own pace. A.H. stated that the day of the holiday exchange, Mother tried to make her go, but she had locked herself in her room and refused to come out. Notwithstanding A.H.'s testimony and that it had previously required visitation with the children to be supervised, the district court held Mother in contempt, stating that she did not do "what was necessary to carry out the [district court's] order" and ordered Mother to pay Father's attorney fees.

{16} On March 6, 2015, the district court memorialized its January 30, 2015 minute order in a court-ordered parenting plan (the parenting plan). The parenting plan granted joint legal custody to Father and Mother of all the minor children, with Father being the primary physical custodian. Beginning with the 2015-2016 school year, the children would reside with Father in Ruidoso "from one week before the start of school through one week following the end of the school year." This order invariably conflicted with Father's probationary status as it related to A.H., as his probation was not scheduled to end until December 2015. The parenting plan provided that the "children shall spend the summer break with [Mother] commencing one week after the end of . . . school through one week before the beginning of school." Although the district court stated that it was in the best interests of the children to have "a

Sept.–Dec. 2017

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Featured CLEs

Presented live at the State Bar Center in Albuquerque. Some courses can also be attended remotely by Live Webcast.

28th Annual Appellate Practice Institute

6.0 G 1.0 EP

Friday, Sept. 15 • 8:15 a.m.–5 p.m.

$279 Appellate Practice Section members, government and legal services attorneys and Paralegal Division members
$309 Standard and Webcast Fee

Topics include judicial selection and elections, recent developments in New Mexico appellate practice, extra ordinary writs, and ethical issues in negotiation and mediation. The program features Keynote Speaker Judge James E. Graves, Jr. of the U.S. Court of Appeals for the Fifth Circuit.

2017 Tax Symposium

6.0 G 1.0 EP

8.0 recommended CPE credits (7.0 Technical, 1.0 Ethics)

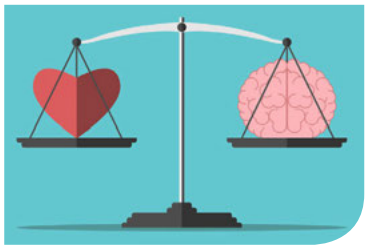
Friday, Sept. 22 • 8:25 a.m.–4:30 p.m.

All Day
$279 Taxation and Business Law section members, government and legal services attorneys, and Paralegal Division members
$309 Standard and Webcast Fee

Morning Sessions: *Federal and State Tax Updates (3.5 G) • 8:25 a.m.–12:15 p.m.*
$155 Taxation and Business Law Section members, government and legal services attorneys, and Paralegal Division members
$185 Standard and Webcast Fee

Afternoon Sessions: *Business and Tax Law Special Topics (2.5 G, 1.0 EP) • 12:45–4:30 p.m.*
$155 Taxation and Business Law section members, government and legal services attorneys, and Paralegal Division members
$185 Standard and Webcast Fee

This program is intended for taxation and business law attorneys, bankers, and CPAs and the Taxation Section will hold its Annual Meeting during the lunch break. A reception will be hosted at 4:30 p.m. by the Taxation Section and the New Mexico Society of CPAs. All attendees are welcome!



Uncovering and Navigating Blind Spots Before They Become Land Mines

2.0 EP

Monday, Oct. 2, 2017 • 9 a.m.–11 a.m.

$89 Government and legal services attorneys, and Paralegal Division members
$109 Standard Fee
$125 Webcast Fee

Neuroscience and behavioral science health research has shown that being aware of our emotional state and expanding our emotional intelligence yields multiple benefits for our professional and personal lives. Results include improved judgment and performance, an enhanced ability to effectively communicate, listen and resolve conflict, increased adaptability to change and a greater capacity to weather discomfort. As legal professionals we may experience ambiguity, stress, abrasiveness, unreasonableness, ethical dilemmas and other unsettling situations. We also interact with and serve a variety of people every day, all of which we owe some kind of duty—professionalism, civility, respect, zealous representation, candor, diligence, prudence and courtesy. This interactive course offers tools to help you recognize your blind spots and modify your "reactions" to challenging situations so you can maintain your professionalism, competence and discretion, and remain centered.

2017 Health Law Symposium

6.0 G 1.0 EP

Thursday, Oct. 5 • 9 a.m.–5 p.m.

$279 Health Law Section members, government and legal services attorneys and Paralegal Division members
$309 Standard and Webcast Fee

Program topics will include the Affordable Care Act, fraud and abuse, HIPAA, the New Mexico opioid epidemic and will include a panel of healthcare trade associations. The section will hold its Annual Meeting during the lunch break, and a reception will follow the program at Montgomery and Andrews Law Firm (located just next door to the State Bar Center)!

2017 Employment and Labor Law Institute

5.0 G 1.0 EP

Friday, Oct. 6 • 9 a.m.–4 p.m.

$249 Employment and Labor Law Section members, government and legal services attorneys and Paralegal Division members
$279 Standard and Webcast Fee

This program will include a discussion on EEOC hot topics, 2017 labor update, information security issues, ethics/professionalism and much more!

Heartburn Issues: How Not to Commit Malpractice in Military Divorce, Military Retirement and Relocation Cases

Possible 10.0 G 1.0 EP

2017 New Mexico Family Law Institute

Friday, Oct. 13 • 8:30 a.m.–5:30 p.m. and
Saturday, Oct. 14 • 9:30 a.m.–4:10 p.m.

Both Days
$385 Two-day early-bird fee for (in-person attendance only); registration must be received by Sept. 13
$439 Two-day fee for Family Law Section members, government and legal services attorneys, and Paralegal Division members
$469 Two-day Standard and Webcast Fee

***Friday Only** – 5.0 G, possible 1.0 EP*
$239 One-day early-bird fee (in-person attendance only); registration must be received by Sept. 13
$279 One-day fee for Family Law Section members, government and legal services attorneys, and Paralegal Division members
$309 One-day Standard and Webcast Fee

***Saturday Only** – 5.0 G*
$179 One-day early-bird fee (in-person attendance only); registration must be received by Sept. 13
$209 One-day fee for Family Law Section members, government and legal services attorneys, and Paralegal Division members
$239 One-day Standard and Webcast Fee

As family law practitioners, how do we approach military divorce, military retirement and relocation? What do we need to know to successfully represent our clients in these cases, especially given the significant recent changes surrounding military retirement? Those questions and many others will be answered at the 2017 New Mexico Family Law Institute. The Family Law Section is pleased to welcome featured speaker, Mark Sullivan. Sullivan is a frequent speaker at military and family law programs and is an annual lecturer on family law at the Army JAG School and the Naval Justice School. Sullivan is a member of the American Academy of Matrimonial Lawyers, the Family Law Sections of the North Carolina Bar Association and the American Bar Association, the Judge Advocates Association, and the Reserve Officers Association. He is a retired colonel in the U.S. Army Reserve. The updated edition of his book, *The Military Divorce Handbook* will be available for purchase at the CLE.

This CLE qualifies for a total possible 10.0 General and 2.0 EP. In order to receive 2.0 EP credits, you must attend the 4:30 p.m. session on Friday "Complying with Disciplinary Board Rule 17-204." Attendees that have taken the Disciplinary Board Trust Accounting course separately will not be eligible to receive additional ethics/professionalism credit during this program and attendance is optional.

Co-sponsor: *Family Law Section*

Rise of the Machines, Death of Expertise: Skeptical Views of Scientific Evidence

3.5 G 2.5 EP

Friday, Oct. 20 • 9 a.m.–4:30 p.m.

$209 Early bird registration fee (in-person attendance only); registration must be received by Sept. 20
$249 Government and legal services attorneys and Paralegal Division members
$279 Standard and Webcast fee

This program directly addresses the New Mexico Supreme Court's "scrivener" fallacy when assessing machine generated evidence. The question of "witness" cognitive bias as they relate to the linguistic environment in which they work, and the linguistic disconnection between lawyers and their witnesses is also a topic for discussion. The basics of hair testing for drugs is fraught with much misinformation, and will be the subject of discussion by the toxicologist who worked on Lady Diana's death investigation. Last, the news of the Baby Gard case out of Great Britain concerning the extent to which extraordinary medical measures to keep a child alive are ethically warranted or even permissible. This program will also discuss the paradox of woefully inadequate funding for public defender experts against the constitutional mandate for adequate assistance of counsel. Attendees will see how scientific thought is generated and evaluated for use in court. The methods of skeptically evaluating the quality of scientific evidence and the procedures by which it is used in the law are applicable to civil and criminal attorneys alike.

Craig Othmer Memorial Procurement Code Institute

2.5 G 1.0 EP

Live only at the New Mexico State Personnel Office, Auditorium

Friday, Oct. 27 • 8:15 a.m.–Noon

$90 Early bird fee; registration must be received by Sept. 27
$104 Public Law Section members, government and legal services attorneys and Paralegal Division members
$140 Standard Fee

Lawrence Maxwell, New Mexico State Purchasing, New Mexico General Services Department will guide attendees through procurement basics and elaborate on current statutory and regulatory subjects including anticipated legislative proposals relating to procurements and forthcoming administrative rules. Jennifer Bradley, City of Albuquerque Legal Department will explain procurement processes for the City of Albuquerque and highlight specific and potential distinctions relating to local government procurements as compared to state procurements. Carolyn Wolf, Esq.; Ramona Martinez, City of Albuquerque; Dennis Ritschel, Los Alamos National Laboratory; and moderator Andrea Salazar bring expertise in procurement processes and associated ethical considerations at the local, state and federal level. Attendees will receive guidance on common ethical considerations and issues in the context of government procurements.

Fall Elder Law Institute – Hot Topics in Adult Guardianship Law

4.5 G 1.5 EP

Friday, Oct. 27 • 8:30 a.m.–4:15 p.m.

$209 Early bird fee (in-person attendance only); registration must be received by Sept. 27
$249 Employment and Labor Law Section members, government and legal services attorneys and Paralegal Division members
$279 Standard and Webcast Fee

Join the Elder Law Section for the full-day CLE, which will include an overview of the newly revisited Uniform Guardianship Act, a report on the New Mexico Adult Guardianship Study Commission and more.

Registration and payment must be received prior to the program date. A $20 late fee will be incurred when registering the day of the program. This fee applies to live registrations and does not apply to live webcasts, webinars or live replays.

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1.0 EP

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- Identification of records that must be maintained
- Best and prohibited practices for operating a trust account and accepting retainers
- Recording trust transactions in general and client ledgers
- Reconciling trust account ledgers with bank statements

Effective December 31, 2016, the New Mexico Supreme Court adopted modifications to Rule 17-204 NMRA, which is the rule pertaining to attorney trust accounts. Among other things, the rule requires that once every three years all licensed New Mexico attorneys, with very limited exceptions as set forth in the Rule, take a one-hour trust accounting course approved by the New Mexico Disciplinary Board. Currently, the State Bar of New Mexico Center for Legal Education is the only approved course provider. Please see below for upcoming opportunities to attend the required ethics course. For more information, lawyers should carefully read Rule 17-204 NMRA.

Upcoming dates and times:

Friday, Sept. 8 • 11:30 a.m.–12:30 p.m.
Thursday, Sept. 14 • 9–10 a.m.
Thursday, Oct. 12 • 9–10 a.m.
Thursday, Oct. 19 • 9–10 a.m.
Tuesday, Nov. 7 • 9–10 a.m.

Mark Your Calendar

Save the date for these exciting programs down in your calendar and stay tuned for further details including credit hours, presenters and prices.

Rules of Civil Procedure New
Oct. 12

Intellectual Property Institute
Oct. 18
(Hyatt Regency Albuquerque)

Indian Law Institute
Nov. 2

Alternative Dispute Resolution (ADR) Institute
Nov. 3

Back by Popular Demand!
Litigation and Argument Writing in the Smartphone Age
Nov. 8
Presented by Steven D. Stark

Business Law Institute
Nov. 15

Probate Institute
Nov. 16

The Basics of Family Law New
Nov. 30

Annual Paralegal Division CLE
Dec. 1

Legal Malpractice Potpourri
Dec. 4

Back by Popular Demand!
Trials of the Century III
Dec. 5
Presented by Todd Winegar

Real Property Institute
Dec. 6

Family Law From a New Judge's Perspective New
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significant relationship with . . . [F]ather and [Grandparents,]" the parenting plan does not provide a best interests analysis. Nor does it address any statutory factors as a basis for the custody determination. Instead, the parenting plan simply stated that the children's relationship with Father "cannot be fostered if the children only see [him] in the summer because his work requires him to be away from home for significant periods of time in the summer due to fire season." And, "[Mother] can best maintain her relationship with the children during the summer months since she is a teacher and will have summers off." The parenting plan provided no guidance for transition from Mother's care to Father, nor did it address any particulars with respect to A.H.

{17} In sum for ease of reference, the pertinent and material events and dates set out above started in March 2012. Father had limited contact with the children from about March 2012 until about at least March 2014 when he filed his petition and likely until June 3, 2014, which would have been over two years. Mother relocated to Phoenix with the children around midsummer 2014, pursuant to the stipulated interim order. Father had a two-week visitation with the children, except A.H., in July 2014. In December 2014, following a September motion for an order to show cause, the court ordered visitation with Father over Christmas break in December 2014. There was a January 30, 2015 minute-ordered parenting plan, memorialized on March 6, 2015, ordering joint legal custody with Father having primary physical custody of all of the children. A show cause hearing occurred on March 30, 2015. We now turn to the arguments on appeal.

DISCUSSION

Standard of Review

{18} We review a district court's child custody determination for abuse of discretion, and we will uphold the district court's findings if they are supported by substantial evidence. *Grant v. Cumiford*, 2005-NMCA-058, ¶ 13, 137 N.M. 485, 112 P.3d 1142. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Id.* (internal quotation marks and citation omitted). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation omitted). In addition, the failure of a district court to apply the applicable statutory guidelines to order a change of custody will constitute an abuse of discretion. *State ex rel. Children, Youth & Families Dep't v. Michelle B.*, 2001-NMCA-071, ¶ 27, 130 N.M. 781, 32 P.3d 790.

The District Court Abused Its Discretion by Not Finding a Substantial and Material Change in Circumstances

{19} Mother's first argument on appeal is that the district court "erred in drastically changing the primary custodial arrangement, requiring the children to move back to Ruidoso from Phoenix[.]" In particular, Mother contends that the district court erred by not making a finding that there was a substantial and material change in circumstances, as required by Section 40-4-9.1(A), justifying a modification of the stipulated interim order. Father responds that the stipulated interim order was not a final order and that, therefore, departure from or modification of the order did not require a showing of a substantial and material change in circumstances. For the reasons that follow, we agree with Mother.

{20} Pursuant to NMSA 1978, Section 40-4-7(G) (1997), "[t]he court may modify and change any order or agreement merged into an order in respect to the guardianship, care, custody, maintenance or education of the children whenever circumstances render such change proper." However, such a modification or change may occur "only upon a showing of a substantial change in circumstances since the prior order that affects the best interests of the children." *Grant*, 2005-NMCA-058, ¶ 13 (internal quotation marks and citation omitted). Section 40-4-9.1(A) specifically states,

> Joint custody shall not be awarded as a substitute for an existing custody arrangement unless there has been a substantial and material change in circumstances since the entry of the prior custody order or decree, which change affects the welfare of the child such that joint custody is presently in the best interests of the child.

{21} The question of whether the above statute applies to the present situation is an issue of statutory construction that we review de novo. *See State v. Saiz*, 2001-NMCA-035, ¶ 2, 130 N.M. 333, 24 P.3d 365. In engaging in statutory interpretation, "our primary goal is to give effect to the intent of the [L]egislature[,]" and in doing so, "we look first to the plain language of the statute." *Id.*

{22} As noted above, Section 40-4-9.1(A) states, "Joint custody shall not be awarded as a substitute for an *existing custody arrangement* unless there has been a substantial and material change in circumstances." (Emphasis added.) There is nothing in this section that indicates an existing custody arrangement must be based on a final order or entered after a merits hearing, as Father contends. Indeed, no case has been cited to us, nor has any been found, that would limit the application of Section 40-4-9.1(A) solely to final orders. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that where a party cites no authority to support an argument, we may assume no such authority exists). To the contrary, the plain language of the statute refers—without limitation—to any "existing custody arrangement" that is instituted by court "order or decree[.]" Section 40-4-9.1(A). We will not depart from the clear meaning of the plain language of the statute, which by its terms, encompasses the stipulated interim order because the district court's order created an "existing custody arrangement." *See id. See generally Summers v. N.M. Water Quality Control Comm'n*, 2011-NMCA-097, ¶ 16, 150 N.M. 694, 265 P.3d 745 (observing that, when considering the plain language of the words in a statute, we "assume that the ordinary meaning of the words expresses the legislative purpose" (internal quotation marks and citation omitted)).

{23} Under the stipulated interim order, Mother was to be the sole custodian of the children by virtue of her relocation with the children to Phoenix. *See* § 40-4-9.1(L)(8) (defining "sole custody" as "an order of the court awarding custody of a child to one parent"). The stipulated interim order does not make any provision for joint custody or for Father's custody. Father was only granted "supervised visitation" for a two-week period of time. *See* § 40-4-9.1(L)(9) (" '[V]isitation' means a period of time available to a noncustodial parent, under a sole custody arrangement, during which a child resides with or is under the care and control of the noncustodial parent."). Therefore, the stipulated interim order created a sole custody arrangement, and the district court's entry of the March 2015 parenting plan granting Mother and Father joint legal custody, necessarily required a showing of a "substantial and

material change in circumstances." *See* § 40-4-9.1(A) ("Joint custody shall not be awarded as a substitute for an existing custody arrangement unless there has been a substantial and material change in circumstances.").

{24} We emphasize that facts, as always, are important, and we reach our decision today based on the specific and unique circumstances of this case. We do not suggest that all interim orders will require a showing of a "substantial and material change in circumstances" but where, as in the present case, the district court's order establishes a durable custody arrangement with substantial provisions for the children's relocation with one parent out of state and no indication that the custody determination would be revisited, any modification of that order must be accompanied by a showing of a substantial and material change of circumstances. *Cf. Lawson v. Lawson*, 48,296, p. 5 (La. App. 2 Cir. 7/24/13), 121 So. 3d 769, 772 (explaining that, under the facts of the case, a "judgment [that] was designated an 'interim judgment' . . . was a final judgment as to every issue except the choice of school for the child" because the stipulated interim judgment indicated that the only matter that would be revisited would be the child's school); *Chandler v. Chandler*, 48,891, pp. 5-6 (La. App. 2 Cir. 12/13/13), 132 So. 3d 413, 417 (concluding that, an interim judgment that was consented to by both parents "was a final judgment as to every issue concerning custody" and that in order for the nondomiciliary parent to obtain a change in custody, she had "the burden of showing that there had been a material change in circumstances since the interim decree was entered").

{25} There is nothing in the stipulated interim order establishing that the custody arrangement was temporary or subject to change. There was no set time frame during which Mother's custody of the children was to be reevaluated or for which the order was set to expire. In contrast, the district court's child support order, which was also contained in the stipulated interim order, stated, "Until further [o]rder of this [c]ourt, [Father] will pay child support to [Mother] in the amount of $949.81." The language "[u]ntil further [o]rder of this [c]ourt" demonstrates that the parties and district court left open a future adjustment of child support. *Cf. Lawson*, 121 So. 3d at 772-73 (discussing whether a stipulated interim judgment was final as to choice of school and custody). There is no such similar language with respect to the custody arrangement contained in the stipulated interim order. Instead, the stipulated interim order permitted Mother to relocate to another state with the children and did not indicate that such relocation would be temporary or was subject to further order of the district court. Allowing relocation with one parent, especially a relocation that occurs across state lines and thus inherently involves removing children from their current home, school, and community, and placing them in new ones, is a consequential decision, which we conclude, under the facts of this case, created an "existing custody arrangement." Section 40-4-9.1(A). Accordingly, we hold that any modification or change from the stipulated interim order required a showing of a "substantial and material change in circumstances." *See Schuermann v. Schuermann*, 1980-NMSC-027, ¶¶ 4, 7, 94 N.M. 81, 607 P.2d 619 (stating that there is a strong presumption in favor of the original custody arrangement, and the party seeking to alter the status quo bears the burden of proving a change in circumstances).

{26} The district court in this case did not consider whether there was a substantial and material change in circumstances affecting the best interests of the children between the entry of the stipulated interim order and the custody hearing. Neither the minute order nor the parenting plan contain any findings or conclusions in this regard, nor is there any mention of Section 40-4-9.1 or its standards for determination of a custodial re-assessment. Importantly, it appears the primary—if not sole—basis for the change in custody was the district court's determination that

> [i]t is in the best interests of the minor children that they have a significant relationship with . . . [F]ather and [Grandparents]. Said relationship cannot be fostered if the children only see [Father] in the summer time because his work requires him to be away from home for significant periods of time in the summer due to fire season. [Mother] can best maintain her relationship with the children during the summer months since she is a teacher and will have summers off.

We conclude that the district court's failure to consider whether a material change in circumstances affecting the best interests of the children occurred and granting joint legal custody constituted an abuse of discretion. Although we could reverse on this basis alone, we take the opportunity to address Mother's remaining arguments.

The District Court Abused Its Discretion in Granting Joint Custody Because It Did Not Conduct a Best Interests Analysis

{27} Mother's second argument on appeal is that the district court "erred in making the change to the custodial arrangement without making specific findings that such a change was in the children's best interests." Mother also argues that the district court erred by not making specific findings concerning implementing protection for A.H. On both these points, we agree with Mother.

{28} The guiding principle in child custody determinations is the best interests of the child. *See Jaramillo v. Jaramillo*, 1991-NMSC-101, ¶ 13, 113 N.M. 57, 823 P.2d 299 ("The 'best interests' criterion . . . is the lodestar for determining a custody award, under both statute and case law in New Mexico[.]"); *Schuermann*, 1980-NMSC-027, ¶ 4 ("[T]he controlling inquiry of the [district] court in settling any custody dispute is the best interests of the child."). Pursuant to Section 40-4-9(A), "[i]n any case in which a judgment or decree will be entered awarding the custody of a minor, the district court shall, if the minor is under the age of fourteen, determine custody in accordance with the best interests of the child."[1] The statute further specifies that the district court must "consider all relevant factors" in its best interests analysis,

[1]We note that the best interests analysis applies in all custody decisions. *See id.* (stating that any custody dispute should be determined based on the best interests of the child). While we recognize that there did not appear to be a best interests analysis conducted with respect to the stipulated interim order, we stress that New Mexico law gives preference to custody arrangements reached by the parties, unless the district court finds that the agreement is contrary to the best interests of the child. *See* § 40-4-9.1(D) ("In any case in which the parents agree to a form of custody, the court should award custody consistent with the agreement unless the court determines that such agreement is not in the best interests of the child."). Because there was no finding that the stipulated interim order, which was based on the parties' agreement, was not in the best interests of the children, we conclude that the order properly went into effect.

including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parents, his siblings and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community; and

(5) the mental and physical health of all individuals involved.

Id. Importantly, "[i]f the minor is fourteen years of age or older, the court shall consider the desires of the minor as to with whom he wishes to live before awarding custody of such minor." Section 40-4-9(B).

{29} When a district court is determining whether joint custody should be awarded, the district court is required to consider not only the factors discussed above under Section 40-4-9(A), which are applicable to all child custody determinations, but additional factors under Section 40-4-9.1(B). The additional factors are as follows:

(1) whether the child has established a close relationship with each parent;

(2) whether each parent is capable of providing adequate care for the child throughout each period of responsibility, including arranging for the child's care by others as needed;

(3) whether each parent is willing to accept all responsibilities of parenting, including a willingness to accept care of the child at specified times and to relinquish care to the other parent at specified times;

(4) whether the child can best maintain and strengthen a relationship with both parents through predictable, frequent contact and whether the child's development will profit from such involvement and influence from both parents;

(5) whether each parent is able to allow the other to provide care without intrusion, that is, to respect the other's parental rights and responsibilities and right to privacy;

(6) the suitability of a parenting plan for the implementation of joint custody, preferably, although not necessarily, one arrived at through parental agreement;

(7) geographic distance between the parents' residences;

(8) willingness or ability of the parents to communicate, cooperate or agree on issues regarding the child's needs; and

(9) whether a judicial adjudication has been made in a prior or the present proceeding that either parent or other person seeking custody has engaged in one or more acts of domestic abuse against the child, a parent of the child or other household member. If a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child, the abused parent or other household member.

Section 40-4-9.1(B).

{30} While the "best interests test is broad and vests the [district court] with considerable discretion[, t]he exercise of discretion by the [district court] . . . must be consistent with the evidence" and statutory requirements. *Schuermann*, 1980-NMSC-027, ¶ 8 (internal quotation marks omitted); *Newhouse v. Chavez*, 1988-NMCA-110, ¶ 24, 108 N.M. 319, 772 P.2d 353 (setting forth the statutory requirement that a district court must find a "substantial and material change in circumstances" in order to modify an existing custody arrangement (internal quotation marks and citation omitted)).

{31} Here, our review of the record reveals that the district court did not make any specific findings related to any of the statutorily mandated factors it was required to consider when making a custody determination. The district court made only vague and broad statements in findings regarding the children's best interests, stating that, "[i]t is in the best interests of the minor children that they have a significant relationship with . . . [F]ather and [Grandparents]" and that "[t]he best interests of the children are the primary consideration for the [district c]ourt in making time sharing decisions." The district court insinuated that the best interests of the children involved spending the "maximum amount of quality time" with each parent but did not articulate any reason why that was in the children's best interests to relocate them again considering the evidence before it.

{32} Although we stress that the district court's failure to consider any of the statutory factors constituted error, the court's neglect of some particularly relevant factors illustrates the court's abuse of discretion in this case. For instance, the district court did not consider the wishes of any of the four minor children in making its custody determination. *See* § 40-4-9(A)(2) (requiring the district court to consider the children's wishes as to their custody). And importantly, the district court did not consider the wishes of A.H., who was fourteen years old at the time of the custody hearing. *See* § 40-4-9(B) ("If the minor is fourteen years of age or older, the court shall consider the desires of the minor as to with whom he wishes to live before awarding custody of such minor."). The wishes of the children, considering that they had limited contact with Father for two years and had essentially been in Mother's sole custody since the child abuse incident, would certainly have been vital information for the district court to take into account. Had the district court inquired as to A.H.'s wishes, the record suggests that she likely would have indicated her desire not to be in Father's custody. In fact, A.H. testified at a show cause hearing that she did not feel safe with Father because of his physically abusive behavior and the episode in which he kicked her so hard he broke her leg. Because the district court did not take into account A.H.'s wishes, as it was required to by statute, the district court placed her in the primary physical custody of a parent with whom she had not seen or talked to for at least two years and with whom she did not feel safe, very probably contrary to her best interests.[2] *See generally Jaramillo*,

[2]We recognize that the parties did not offer any evidence at the December 2014 custody hearing indicating the children's preference or desires as to their custody. However, where the parties have not provided sufficient information for a court to address the relevant statutory considerations, it is incumbent on the district court "to elicit further information on its own motion." *See Jaramillo*, 1991-NMSC-101, ¶ 27 (explaining that a court should take the initiative to seek relevant information when it is not provided by the parties in a child custody dispute).

1991-NMSC-101, ¶ 14 (explaining that a parent has primary physical custody of a child if the child lives with that parent for more than half of the time).

{33} Likewise, the district court did not discuss with any specificity how the children's interactions and interrelationships with Mother, Father, and Grandparents affected their best interests in either the minute order or parenting plan. *See* § 40-4-9(A)(3) (requiring the district court to consider "the interaction and interrelationship of the child with his parents, his siblings and any other person who may significantly affect the child's best interest"); § 40-4-9.1(B)(1) (requiring the district court, in a joint custody determination, to consider "whether the child has established a close relationship with each parent"). Nor did the district court address whether the children would benefit from increased contact with Father. *See* § 40-4-9.1(B)(4) (requiring the district court to consider whether the children's "development [would] profit from [predictable and frequent] involvement and influence from both parents"). But Father's extended period of limited contact with the children and Mother's role as sole caretaker merited analysis with respect to how the children's relationship with their parents would be affected by any change to the status quo.

{34} The considerable need for stability and continuity in the children's custody arrangement and the damage that might occur from disrupting established patterns of care, relationships, and emotional connections with Mother—the primary caretaker—warranted the district court's consideration. *See Schuermann*, 1980-NMSC-027, ¶ 7 (explaining that, generally, a child's best interests will not be served by modifying a custody arrangement unless there has been a substantial change in circumstances, for example, if the current custody situation "prevents the child from receiving proper care or from enjoying stable family relationships").

{35} Furthermore, the district court made no findings about how the children's relationship with Grandparents factored into the children's best interests in light of the fact that they had no contact with them for seven years and would allegedly be moving to New Mexico to help care for them. *See Newhouse*, 1988-NMCA-110, ¶ 20 (concluding that the district court erred in not making any "findings addressing the interests of the children in their relationship with [their] mother, their younger sibling or their stepfather, or as to the interdependent relationships within this family, although there was evidence from which the [district] court could have made such findings[,]" and because there were no "findings to indicate that the [district] court considered the effect of its judgment on these relationships" (citation omitted)).

{36} In addition, the district court did not consider the impact that moving the children from Phoenix back to Ruidoso would have on them. *See* § 40-4-9(A)(4) (requiring the district court to consider the "child's adjustment to his home, school and community"). The district court first granted the stipulated interim order, which permitted Mother to relocate to Phoenix with the children in the summer of 2014 and then subsequently ordered that the children move back to Ruidoso to live with Father for the commencement of the 2015-2016 school year, after they had already completed a year of school in Phoenix.[3] The district court did not analyze whether removing the children from their home, school, and community for the second time in a year would have any negative impact on their best interests. As our Supreme Court has observed, "[f]requent changes of schools and home locations, differences in family structures and in parental personalities are difficult for children to adapt to even under the best of circumstances." *Schuermann*, 1980-NMSC-027, ¶ 7. The district court failed to accord any weight to these considerations—the children's need for a stable environment and the impact of uprooting them once again not only from their home, school, and community, but also from the primary care of Mother.

{37} Also, the evidence adduced at the custody hearing regarding the children's adjustment to their new private school in Phoenix indicated that the children were excelling and doing better than they had at the public schools in Ruidoso. There was evidence that the child with a learning disability was getting specialized attention and A.H. was receiving individualized treatment for her special needs. Father even admitted that the doctors in Phoenix were better suited for A.H. and that he had no reason to believe that the children were not doing well in Phoenix. Had the district court considered the children's positive adjustment to their new home, school, and community, as required by Section 40-4-9(A)(4), the evidence would have weighed in favor of maintaining their current custody arrangement. *See Schuermann*, 1980-NMSC-027, ¶ 7 ("Modifications in custody should not be granted too quickly.").

{38} Finally, the district court neglected to examine the impact of placing A.H. in Father's primary physical custody. *See* § 40-4-9.1(B)(9) (requiring the district court to consider "whether a judicial adjudication has been made in a prior or the present proceeding that either parent or other person seeking custody has engaged in one or more acts of domestic abuse against the child"). The district court heard testimony regarding the incident in which Father broke A.H.'s leg, and the court took judicial notice of the child abuse charge and the probation agreement. The district court also noted the incident in its findings of fact. Nonetheless, the district court inexplicably failed to factor either the probation agreement or the child abuse into any best interests analysis. While we note that Father received a conditional discharge, and a conditional discharge is not an adjudication of guilt under New Mexico law, *see* NMSA 1978, § 31-20-13(A) (1994), evidence at the custody hearing indicated that A.H. was negatively impacted by the incident and had difficulties coping with it. The district court, therefore, abused its discretion in not considering how the abuse and A.H.'s relationship with Father affected her best interests. And significantly, the district court failed to make any findings on whether granting Father primary physical custody would adequately protect A.H. *See* § 40-4-9.1(B)(9) ("If a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child[.]").

{39} To summarize, because the district court did not consider the statutorily mandated factors relevant to a determination of the children's best interests, the district court abused its discretion in granting joint custody to Mother and Father and in awarding primary physical custody to Father.

[3]Of significance, we note that the district court's order requiring all four children to live with Father commencing with the start of the 2015-2016 school year appears to conflict with his probation agreement, which expired in December 2015, and stated that Father should not associate with any person detrimental to his probation supervision, which may include any victim of his crimes.

There Was Not Substantial Evidence Supporting the District Court's Findings

{40} Turning next to the issue of substantial evidence, we conclude, for the ensuing reasons, that there was not substantial evidence for the district court's findings and ultimate award of joint custody with primary physical custody being awarded to Father. *See Grant*, 2005-NMCA-058, ¶ 13 (explaining that we will uphold a district court's custody findings if they are supported by substantial evidence).

{41} This Court will not reweigh evidence on appeal or substitute our judgment for that of the district court. *See Jeantete v. Jeantete*, 1990-NMCA-138, ¶ 8, 111 N.M. 417, 806 P.2d 66 ("[T]he appellate court will not reweigh the findings of the [district] court involving disputed testimony or inferences to be drawn therefrom, nor the [district] court's determination as to the credibility of the witnesses."). The district court's findings, nevertheless, must be supported by "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State v. Brown*, 2014-NMSC-038, ¶ 43, 338 P.3d 1276 (internal quotation marks and citation omitted).

{42} Here, the district court made numerous findings that were not supported by substantial evidence, which apparently informed its custody determination. The district court, for example, found that Mother had "engaged in a deliberate program of alienation of the children from [Father and his] family," but the undisputed evidence was that Father had moved out of the family home after the child abuse incident, and his limited contact with the children had started at that time. Moreover, CYFD had specifically required that Father stay out of the home for a period of time after the incident, and the probation agreement required Father to refrain from associating with persons detrimental to his probation supervision, which may include any victim of his crimes. The evidence in the record, therefore, established that Father's alienation from the family was largely caused by his own actions, and not Mother's "deliberate program of alienation."

{43} Similarly, the district court found that Mother "would not cooperate with allowing calls from [Father,]" but Mother alleged that she had missed only one call from Father during the time in question. Father himself acknowledged that his phone calls with the children "were intermittent at best, sometimes due to my job, being in remote areas [and] not having service." The district court's finding that Mother had alienated relatives from the children was belied by its contrary finding that the decision to cut off contact with Grandparents and other family members was a mutual decision made by Father and Mother.

{44} We note as well the district court's findings that the family residence was in a state of disrepair and Mother "could never find time in her schedule to allow [Father] to come in" and make the repairs and that Mother "did not make any improvements to the home while [Father] was out of the house and the conditions were poor." Yet, the undisputed evidence showed that Father had left many projects unfinished when he left the house due to the child abuse incident. Moreover, the district court apparently did not give any weight to the reasons why Mother prevented Father from returning to the home, such as Father's anger issues and aggressive behavior.

{45} We are unpersuaded by any weight given by the district court that Mother had refused to return excess child support and that Father had been forced to pay unpaid utility bills. The court wholly failed to relate these findings to a best interests analysis or indicate how this evidence supported its joint custody determination. *See Jaramillo*, 1991-NMSC-101, ¶ 13 ("The 'best interests' criterion . . . is the lodestar for determining a custody award[.]"). Nothing in the minute order or parenting plan establishes that it was not in the children's best interests to remain in Mother's primary care in Phoenix. Indeed, our review of the record does not reveal any evidence supporting the notion that it was in the children's best interests to be removed from their primary caretaker, their home, or their school in Phoenix. Lastly, the district court also did not cite any facts supporting that it was in the children's best interests to have a relationship with Grandparents, who they barely knew and who would allegedly be moving to New Mexico to help care for them.

{46} Considering the foregoing discussion—the district court's findings and subsequent child custody order giving Father primary physical custody during the school year—was not supported by substantial evidence. *See Grant*, 2005-NMCA-058, ¶ 13 ("[W]e will uphold the [district] court's [custody] findings if supported by substantial evidence." (internal quotation marks and citation omitted)); *see also Brown*, 2014-NMSC-038, ¶ 43 ("Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." (internal quotation marks and citation omitted)).

{47} We reverse the district court's March 2015 parenting plan with the following instructions. Because the children are in the middle of the school year and have been living with Father for the past five months, we recognize the disruption our decision will have on their lives yet again. The district court should consider appointing a neutral guardian ad litem (GAL), pursuant to Rule 1-053.3(A) NMRA, which will allow the GAL to work with the parents and the court to arrive at an orderly transition plan from Father's custody back to Mother. The district court is to hold a hearing within forty-five days of the date of this opinion and should enter an order implementing the plan no later than five business days after the hearing.

CONCLUSION

{48} For the reasons stated, we reverse and vacate the district court's March 2015 parenting plan with instructions as set forth above.

{49} IT IS SO ORDERED.

LINDA M. VANZI, Chief Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
MICHAEL E. VIGIL, Judge

Certiorari Denied, May 17, 2017, No. S-1-SC-36432

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-051

No. 34,932 (filed March 28, 2017)

JENNY DOVE and DAVID TAPIA,
Third-Party Plaintiffs-Appellants,
v.
STATE FARM FIRE AND CASUALTY COMPANY,
Third-Party Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
DAVID K. THOMSON, District Judge

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Opinion

J. Miles Hanisee, Judge

{1} At issue in this appeal is whether Defendant State Farm Fire and Casualty Company breached its duty to defend when it refused Plaintiff Jenny Dove's request for legal representation in the underlying lawsuit brought by current co-Plaintiff David Tapia against her. Because the facts tended to show that Dove was arguably covered by the policy, which is the established legal standard in New Mexico, we hold that Defendant breached its duty to defend. The district court having concluded otherwise, we reverse.

BACKGROUND

{2} The following facts underpin the civil action (the primary action) brought by Tapia against Dove: On August 24, 2007, Tapia, a Public Service Company of New Mexico employee, was reading the electrical meter at a residential property in Santa Fe, New Mexico when he was injured by Dove's 150-pound Bullmastiff dog. Dove had been renting the back dwelling unit at the property from Betsy Joyce, the owner, since March 7, 2007. The property consisted of two rental units: a front main house and Dove's studio unit in back, each with its own private yard separated by a fence. There was also a common yard in the front part of the property that contained large trees and planting beds.

{3} Joyce, who lives in California, utilized the services of several third parties to manage and maintain the property in her absence. Gay Nathan—a long-time Santa Fe resident and retired high school English teacher who had many rental properties of her own—was primarily responsible for screening and selecting tenants and collecting rent, activities for which Joyce compensated her. Nathan also provided Joyce and Joyce's tenants with a list of various service providers, such as plumbers, electricians, and exterminators. Nathan was not responsible for either coordinating or making repairs at Joyce's property and did not pay service bills on Joyce's behalf. Nathan also had no involvement in gardening or maintaining the landscaping at the property. Joyce hired a gardener to maintain the common yard, including weeding and watering.

{4} Tenants were responsible for maintaining the private yard associated with their respective dwelling unit. Tenants were also free to use the common yard, including tending to the garden and eating the raspberries and apricots that grew there. Dove knew that she was allowed to use the common yard but spent little, if any, time there out of respect for the privacy of the main house tenants, whose windows faced the common yard.

{5} In the summer of 2007, during one of Joyce's visits to the property, which occurred two times per year, Joyce noticed that one of the trees in the common yard was not getting enough water. Joyce asked Dove to water the tree and "make sure things stayed alive[.]" While Joyce's primary request was that Dove water the tree, Dove was also asked to tend to "all the flower beds around" the common yard. Joyce may have also asked the tenant in the main house to water the common yard, though Dove believed "[t]hey had some kind of agreement where maybe he was doing more maintenance like cleaning . . . the yard and things like that." Neither Dove nor the other tenant received payment or a rent reduction for the work they did in the common yard. At the time that Tapia was injured by Dove's Bullmastiff on August 24, 2007, Dove was in the common yard watering plants per Joyce's request.

{6} In April 2010 Tapia sued Joyce[1] and Dove, alleging negligence, negligence per se, and premises liability, and seeking to recover damages for the injuries he sustained from Dove's Bullmastiff. Joyce had a rental dwelling insurance policy with Defendant (the policy) that covered the property, and Defendant tendered a defense to Joyce in the primary action because she was the named insured under the policy. Joyce was granted summary judgment in April 2012. Dove—who was not served with Tapia's complaint until March 2011—filed a pro se answer and motion to dismiss on April 6, 2011. In a letter to Defendant dated April 28, 2011, Dove requested that Defendant tender her a defense. On May 9, 2011, Defendant responded and denied Dove's request because she was not the named insured and did not "qualify as an insured by definition under the [r]ental [d]welling [p]olicy owned by . . . Joyce."

{7} Tapia and Dove eventually entered into a settlement agreement on May 7, 2012. Under its terms, Tapia's damages were determined to be $107,056.03, and Dove agreed to assign Tapia "all rights, claims and causes of action, together with the proceeds therefrom which [Dove] has against [Defendant] for its failure

[1]Joyce's domestic partner was also a named defendant in the lawsuit but was dismissed when it was determined that she had no interest in the Santa Fe property.

to defend and/or indemnify . . . Dove" in the primary action. Dove executed the assignment concurrently with the settlement agreement.

{8} On November 9, 2012, Dove and Tapia filed their third-party complaint against Defendant, seeking a declaratory judgment that Defendant breached its duty to defend Dove in the primary action. Defendant moved for summary judgment, arguing that Dove was "simply a tenant" and "[t]hus, [Defendant] correctly concluded [Dove] was excluded from coverage under [the policy] as a tenant." At the hearing on Defendant's motion, Defendant argued that Dove could not be considered a "real estate manager" (and thereby covered by the policy) based on her limited maintenance duties as a tenant. Dove and Tapia argued that the question the district court had to answer was not whether Dove was, in fact, a real estate manager, but whether the facts as known to or discoverable by Defendant suggested that Dove was potentially covered by the policy.

{9} The district court granted Defendant's motion for summary judgment, finding that Dove was a tenant and "not a property manager[2] and, thus, she was excluded from coverage under [the policy]." Dove and Tapia appealed.

DISCUSSION

Standard of Review

{10} We review the district court's grant of summary judgment de novo. *See Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 ("An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo."). "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "All reasonable inferences are construed in favor of the non-moving party." *Montgomery*, 2007-NMSC-002, ¶ 16 (internal quotation marks and citation omitted). "Furthermore, the interpretation of an insurance contract is a matter of law, which we review de novo." *Krieger v. Wilson Corp.*, 2006-NMCA-034, ¶ 30, 139 N.M. 274, 131 P.3d 661.

Duty to Defend

1. Applicable Case Law and Analyses

{11} "The obligation of an insurer is a matter of contract law and must be determined by the terms of the insurance policy." *Miller v. Triad Adoption & Counseling Servs., Inc.*, 2003-NMCA-055, ¶ 8, 133 N.M. 544, 65 P.3d 1099. In this regard, our appellate jurisprudence establishes certain interpretive requirements in determining whether an insurance contract triggers an obligation to defend in a given set of circumstances. First, an "insurance company is obligated to defend when the complaint filed by the claimant alleges facts potentially within the coverage of the policy." *State Farm Fire & Cas. Co. v. Price*, 1984-NMCA-036, ¶ 18, 101 N.M. 438, 684 P.2d 524, *overruled on other grounds by Ellington v. N.N. Inv'rs Life Ins. Co.*, 1991-NMSC-006, 111 N.M. 301, 805 P.2d 70; *see also Miller*, 2003-NMCA-055, ¶ 9 ("If the allegations of the complaint or the alleged facts tend to show that an occurrence comes within the coverage of the policy, the insurer has a duty to defend regardless of the ultimate liability of the insured."). Second, there is a duty to defend when the facts in the complaint "are not stated with sufficient clarity so that it can be determined from the face of the complaint whether the action falls within the coverage of the policy." *Am. Emp'rs Ins. Co. v. Cont'l Cas. Co.*, 1973-NMSC-073, ¶ 9, 85 N.M. 346, 512 P.2d 674. "[A]ny doubt about whether the allegations are within policy coverage is resolved in the insured's favor." *Price*, 1984-NMCA-036, ¶ 18. Third, "[i]f the duty to defend does not arise from the complaint on its face, the duty may arise if the insurer is notified of factual contentions or if the insurer could have discovered facts, through reasonable investigation, implicating a duty to defend." *Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.*, 2006-NMCA-151, ¶ 14, 140 N.M. 720, 148 P.3d 806. In New Mexico, "an insurance company is required to conduct such an investigation into the facts and circumstances underlying the complaint against its insured as is reasonable given the factual information provided by the insured or provided by the circumstances surrounding the claim in order to determine whether it has a duty to defend." *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 23, 128 N.M. 434, 993 P.2d 751. *But cf. Guar. Nat'l Ins. Co. v. C de Baca*, 1995-NMCA-130, ¶ 14, 120 N.M. 806, 907 P.2d 210 (explaining that "when an insured is sued, the insurer has no duty to defend if the allegations in the complaint clearly fall outside the policy's provisions").

{12} Regarding the nature and duration of the defense owed, "[i]t is the norm that an insurer, though denying coverage and liability, must nonetheless defend its insured unless and until it receives a judicial ruling in its favor relieving it of any further obligations." *Loya v. Gutierrez*, 2015-NMSC-017, ¶ 42, 350 P.3d 1155; *see Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 857 F. Supp. 822, 830 (D.N.M. 1994) ("Where coverage under the policy is in some doubt, the proper remedy, under New Mexico law, is for the insurer to seek a court determination as to non-coverage of the primary action; mere unilateral determination that there is no duty to defend is not an acceptable remedy for the insurer." (internal quotation marks and citation omitted)). So an insurer may undertake its duty to defend and seek a declaratory judgment that the alleged insured is not covered by the policy, thereby relieving it of its duty to defend. *See Found. Reserve Ins. Co. v. Mullenix*, 1982-NMSC-038, ¶¶ 4, 8-12, 97 N.M. 618, 642 P.2d 604; *see also* 44 Am. Jur. 2d *Insurance* § 1405 (2017) (explaining that an insurer's three options when presented with a request to defend a claim that may be outside a policy's coverage are to "seek a declaratory judgment regarding its obligations before or pending trial of the underlying action, defend the insured under a reservation of rights, or refuse either to defend or to seek a declaratory judgment at its peril that it might later be found to have breached its duty to defend"). Or, when an insurer doubts the existence of coverage, but nonetheless assumes its duty to defend, it may proceed with defending the insured under a reservation of rights to later deny coverage. *See Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 1990-NMSC-094, ¶¶ 14, 16, 110 N.M. 741, 799 P.2d 1113. The ultimate determination—separate from the question of an insurer's duty to defend—of whether a claim falls within or outside of a policy's coverage must generally "be made in the primary lawsuit, and not in an action for declaratory judgment, because it is a factual question." *Lopez v. N.M. Pub. Sch. Ins. Auth.*, 1994-NMSC-017, ¶ 11, 117 N.M. 207, 870 P.2d 745.

{13} Here, Defendant did not seek a judicial ruling relieving itself of its duty to defend. Rather, it unilaterally determined that Dove was not covered under the policy and refused to tender her a defense. It is unclear from the record what, if any,

[2]Per Defendant's policy, we use the term "real estate manager" though we observe that the district court and the parties use the terms "real estate manager" and "property manager" interchangeably.

investigation Defendant undertook in reaching its conclusion that Dove did not qualify as an insured. Defendant's letter denying Dove's request does nothing more than quote the "insured" and "named insured" definitions from the policy and gives no further explanation of its basis for concluding that it had no duty to defend Dove. Even assuming Defendant's refusal to defend Dove was based on its good-faith belief that Dove was not covered by the policy because she was merely a tenant, such a good faith belief "is not a defense to the breach of the duty to defend." *Lujan v. Gonzales*, 1972-NMCA-098, ¶ 22, 84 N.M. 229, 501 P.2d 673. That is because the insurer bears the "burden of proving as a matter of law that all claims arose out of an [uncovered] act" and thus has a duty to defend "until it [meets] that burden." *Lopez*, 1994-NMSC-017, ¶ 13.

{14} The upshot of our case law in this realm is this: an insurer who refuses to defend a covered insured without seeking a judicial determination that the alleged insured is not covered under the policy, *see Mullenix*, 1982-NMSC-038, ¶ 12, or without a voluntary waiver from the insured, *see Garcia v. Underwriters at Lloyds, London*, 2008-NMSC-018, ¶ 19, 143 N.M. 732, 182 P.3d 113, does so at its peril. And that is not only the case in New Mexico. *See, e.g., Liberty Mut. Ins. Co. v. Metzler*, 586 N.E.2d 897, 902 (Ind. Ct. App. 1992) ("An insurer can refuse to defend or clarify its obligation by means of a declaratory judgment action. If it refuses to defend it does so at its peril[.]" (alteration, internal quotation marks, and citation omitted)); *J & C Moodie Props., LLC v. Deck*, 2016 MT 301, ¶ 21, 385 Mont. 382, 384 P.3d 466 ("[W]here an insurer refuses to defend its insured, it does so at its peril." (internal quotation marks and citation omitted)); *see also Quihuis v. State Farm Mut. Auto. Ins. Co.*, 334 P.3d 719, 730 (Ariz. 2014) (explaining that an insurer may be liable for damages, breach of contract, and bad faith tort claims stemming from the breach of duty); 44 Am. Jur. 2d *Insurance* § 1405 ("If the insurer desires to show that the claim against the insured is based on facts excluded from the policy coverage and the insurer refuses to defend, it must do so at its peril, and if the insurer guesses wrong, it must bear the consequences of its breach of contract.").

{15} We next address the analysis a district court is to apply to resolve an action seeking to declare that an insurer has breached its duty to defend. Our standard in this regard is also whether there was any potential that the claim in the primary action was covered, *see Price*, 1984-NMCA-036, ¶ 18, or whether the claim clearly fell outside of the policy's coverage. *See also C de Baca*, 1995-NMCA-130, ¶ 14 (explaining that an insurer is relieved of its duty to defend when the claim "*clearly* fall[s] outside the policy's provisions" (emphasis added)). If there is any doubt whether the claim was covered, an insurer who refused to defend has breached its duty. *See Price*, 1984-NMCA-036, ¶ 18. In a breach of the duty to defend case, the district court should not attempt to determine the merits of the underlying claim in the primary action, i.e., whether the claim was *actually* covered. *Cf. Risk Mgmt. Div., Gen. Servs. Dep't of State ex rel. Apodaca v. Farmers Ins. Co. of Ariz.*, 2003-NMCA-095, ¶ 7, 134 N.M. 188, 75 P.3d 404 (explaining that when a district court is presented with an insurer's request for declaratory judgment that it has no duty to defend, the question is "whether the district court ha[s] before it sufficiently developed facts to conclude as a matter of law . . . that [an] exclusion applies" or that the occurrence is outside the policy's coverage). That is because an insurer who unilaterally refuses to defend effectively waives its ability to later challenge the underlying merits as to coverage because the ultimate question of coverage is to be properly resolved in the primary action in order to protect the interests of the insured and for judicial efficiency. *See Progressive Cas. Co.*, 1990-NMSC-094, ¶ 18 (explaining that "[a]n insurer suffers serious consequences upon its unjustified failure to defend after demand"); *see also State Farm Fire & Cas. Co. v. Ruiz*, 36 F. Supp. 2d at 1308, 1316-18 (D.N.M. 1999) (reviewing New Mexico insurance law, including conflicting federal court interpretations of it, and concluding that when an insurer "unjustifiably refuse[s] to defend its insured, it 'will not be heard to complain that the claims might not have been within the coverage' " (quoting *Valley Improvement Assoc. v. United States Fid. & Guar. Corp.*, 129 F.3d 1108, 1125-26 (10th Cir. 1997))); *Mullenix*, 1982-NMSC-038, ¶ 12. In other words, the question in a breach of duty to defend action is less exacting—and thus easier for the claimant to prevail on—than the underlying question presented when the parties are disputing whether there is coverage.

{16} Here, the district court addressed the underlying merits of the question of coverage—i.e., whether Dove was a "real estate manager" and thus covered by the policy—rather than the less exacting question on which declaratory judgment was sought. This difference is not analytically trivial because Defendant's duty to defend depended not on whether Dove was actually covered, but rather on whether she was *potentially* covered. *See Price*, 1984-NMCA-036, ¶ 18. In order for its ruling to be affirmable, then, the district court must have been indisputably correct in its assessment that Dove was not a real estate manager under the policy, i.e., that the complained-of occurrence in the primary action clearly fell outside the policy's coverage. *See C de Baca*, 1995-NMCA-130, ¶ 14; *see also Bernalillo Cty. Deputy Sheriffs Ass'n v. Cty. of Bernalillo*, 1992-NMSC-065, ¶¶ 3-5, 114 N.M. 695, 845 P.2d 789 (holding that the insurer had no duty to defend an insured where it was undisputed that the alleged acts occurred after the expiration of the policy); *Ins. Co. of N. Am. v. Wylie Corp.*, 1987-NMSC-011, ¶¶ 21-24, 105 N.M. 406, 733 P.2d 854 (holding that the insurer had no duty to defend where a complaint's allegations placed it "directly within the exclusionary clause" of the policy). In order to determine whether the district court was indisputably correct, we must do two things: (1) consider the term "real estate manager" as contained in the policy, and (2) determine whether the facts in the primary action potentially brought Dove within the meaning of that term. If Dove was possibly acting as a real estate manager for Joyce when Tapia was injured, the district court's order of summary judgment must be reversed.

2. The Term "Real Estate Manager"

{17} "Insurance contracts are construed by the same principles which govern the interpretation of all contracts." *Hinkle v. State Farm Fire & Cas. Co.*, 2013-NMCA-084, ¶ 18, 308 P.3d 1009 (alteration, internal quotation marks, and citation omitted). In construing an undefined term in an insurance contract, "[t]he district court must ultimately decide what coverage the parties agreed to under the policy." *Apodaca*, 2003-NMCA-095, ¶ 8. "If a policy is clear and unambiguous, then the court does not construe the terms; it merely gives the terms their usual and ordinary meaning." *Id.* "But where a policy term is reasonably and fairly susceptible of different constructions, it is deemed ambiguous and must be construed against the insurance company as the drafter of the policy." *United Nuclear Corp. v. Allstate Ins. Co.*, 2012-NMSC-032, ¶ 10, 285 P.3d

644 (internal quotation marks and citation omitted). "Although far from dispositive, the lack of a definition in a policy may be one indication of ambiguity." *Id.* ¶ 16.

{18} Here, Defendant's rental dwelling policy is neither clear nor unambiguous. Rather, it defines "insured" to include, among other parties, "any person or organization while acting as real estate manager for [Joyce]." The policy does not define the term "real estate manager." The parties disagree whether "real estate manager" is an ambiguous term, yet they generally agree how the term should be defined. Both parties draw our attention to Louisiana cases that have interpreted "real estate manager" to mean " 'one who manages real estate for another' " with the term "manager" meaning " 'a person who has the conduct or direction of a thing.' " *Armand v. Rapides Bank & Tr. Co.*, 98-1664, p.7 (La. App. 3 Cir. 4/7/99); 732 So. 2d 719, 723 (quoting *Savoy v. Action Prods. Co.*, 324 So. 2d 921, 923 (La. App. 3d Cir. 1975) (alteration and internal quotation marks omitted)). They also cite the same *Cambridge Dictionary* definition of "property manager": "[t]he person who is in charge of managing land and buildings[.]" The parties' agreement about how to define the term suggests that the term itself is not facially ambiguous. But none of the definitions proffered by either party—whether from other jurisdictions or various dictionaries—proves particularly helpful in resolving the issue at hand. That is because it is the application of the term—not its definition—about which the parties disagree, meaning that there exists an as-applied ambiguity in this case. *See Apodaca*, 2003-NMCA-095, ¶ 8 ("Even if an ambiguity is not apparent on its face, an ambiguity can arise when otherwise clear policy language appears ambiguous upon application to a particular circumstance." (internal quotation marks and citation omitted)). We thus turn to the substantive merits of the district court's ruling, but only to ascertain if coverage *possibly* extended to Dove as a real estate manager.

3. Whether Dove Was Potentially a "Real Estate Manager"

{19} "When evaluating competing interpretations of a policy, the appellate court views the language of the policy from the standpoint of a hypothetical reasonable insured." *Krieger*, 2006-NMCA-034, ¶ 33 (internal quotation marks and citation omitted); *see also United Nuclear Corp.*, 2012-NMSC-032, ¶ 11 ("Where a term in an insurance policy is found to be ambiguous, the court's construction of the policy will be guided by the reasonable expectations of the insured." (alterations, internal quotation marks, and citation omitted)). The record proper in this case suggests the existence of potentially two hypothetical reasonable insureds: the property owner (Joyce) and the tenant (Dove). As to the property owner, the hypothetical reasonable insured is also a landlord who lives in another state, only visits her residential rental property two times per year, and entrusts the day-to-day care and management of the property—including statutorily-imposed obligations—to third parties, sometimes without compensation. *See* NMSA 1978, § 47-8-20(A)(3) (1999) (requiring owners to "keep common areas of the premises in a safe condition"). And as to the tenant, in this instance it is someone who has agreed to undertake additional responsibilities outside of her contractual and statutory obligations as a tenant and has done so for the benefit of the owner. *See* § 47-8-20(D)(1) (explaining that an owner's obligations regarding the care and upkeep of a rental property may only be transferred to a tenant if there is a signed written agreement that is supported by consideration). The question is whether under known facts or those discoverable through reasonable investigation in this case, these hypothetical reasonable insureds would have possibly considered the tenant a "real estate manager," therefore bringing the tenant arguably within the policy's coverage.

{20} Tapia's original complaint contained the following pertinent alleged fact regarding Dove: at the time Tapia approached the property, "he noticed a woman, later identified as . . . Dove, in the front yard who was watering the flowers." Notably, one of Defendant's own proffered definitions provides that the term "property manag[er]" "can include finding tenants, collecting rent monies and *looking after maintenance such as gardening* and small repairs." (Emphasis added.) Defendant did not dispute Tapia's alleged fact in the primary action: that Dove was watering in the front yard at the time the incident occurred. This should have initially alerted Defendant to the possibility that Dove fell within the policy because Dove was performing a function commonly associated with "real estate management" per Defendant's own definition. Particularly when coupled with Defendant's stipulation that Dove was the renter of the *back* unit, Defendant's knowledge that Dove was watering the common *front* yard at the time of the incident should, at the very least, have reasonably prompted Defendant to investigate whether Dove's activity clearly placed her afield of coverage owed pursuant to Joyce's insurance policy. *See Sw. Steel Coil*, 2006-NMCA-151, ¶ 14; *Agora Syndicate, Inc.*, 2000-NMCA-003, ¶¶ 23-24.

{21} Further, as we have stated, even if the complaint itself was devoid of specificity regarding facts that tend to give rise to Defendant's duty to defend, unpleaded facts later revealed during the course of discovery—or that Defendant could have discovered through reasonable investigation, which it was required to undertake—further establish Dove's potential coverage under the policy. *See* UJI 13-1703 NMRA ("A liability insurance company must act reasonably under the circumstances to conduct a timely investigation and fair evaluation of its duty to defend."). Indeed, deposition testimony taken shortly after Defendant refused Dove's request for a tender of defense demonstrated the following facts: (1) Joyce lived in California and was not involved in the day-to-day management of the property; (2) Nathan, one of the people with certain real estate management responsibilities for the property, had no involvement in gardening or maintaining the landscaping at the property; (3) Joyce hired a gardener to maintain the common yard in front, including watering; (4) sometime during the summer of 2007, Joyce visited the property, observed that one of the trees in the common yard was not getting enough water, and asked Dove to water the tree and flowerbeds; (5) Dove had a private yard adjacent to her back unit, which was separated from the common yard by a fence; (6) Dove did not typically spend time in the common yard because the main house's windows faced the common yard and Dove wanted to respect the privacy of the main house's tenants; and (7) at the time Tapia was injured by Dove's Bullmastiff, Dove was watering in the common yard per Joyce's request. These alleged or discoverable facts all tend to suggest that Dove was arguably, if not definitively, acting as Joyce's real estate manager (even if but one of several) at the time of the incident and, therefore, covered as an "insured" under the policy.

{22} While Defendant may well be correct that not every tenant who waters plants is a real estate manager, and that tenants who are fulfilling standard duties to maintain their leased property are not transformed into "property managers" by such performance, such does not elimi-

nate the possibility that Dove could be considered a real estate manager given the particular circumstances of this case. First, by Defendant's own admission, "[t]he only requirement placed on Dove was to maintain the *private yard* associated with the studio apartment she was renting." (Emphasis added.) But at the time of the incident, Dove was not in her private yard—she was watering in the *common yard*. Dove stated that she was not watering on her own initiative—in which case she might be less characterizable as a real estate manager than as a conscientious tenant—but had been asked by Joyce to water the common area in order to "make sure things stayed alive." Considered in sum, the asserted facts suggest that Dove could very well have been acting as Joyce's real estate manager when Tapia was injured. *See* § 47-8-20(A)(3), (D)(1) (providing that it is a property owner's obligation to "keep common areas of the premises in a safe condition" and allowing an owner to delegate his or her maintenance responsibilities to a tenant "only if . . . the agreement of the parties . . . is set forth in a separate writing signed by the parties and supported by consideration"). This legitimate question regarding the coverage here gives rise under our case law to a duty on Defendant's part to defend Dove until the dispute was definitively resolved by a fact-finder and it could be resolved by the district court as a matter of law whether Dove was covered by the policy. *See Lopez*, 1994-NMSC-017, ¶¶ 11-13; *Mullenix*, 1982-NMSC-038, ¶¶ 8-12; *see also Ruiz*, 36 F. Supp. 2d at 1315 (citing with approval *Lopez* and *Mullenix* and concluding that "an insurer who has in its possession facts contrary to or not pled in the complaint demonstrating that the policy does not cover the injury alleged must bring these facts to the attention of the trial court in the primary action and request to be relieved of the duty to defend, rather than merely abdicating its responsibility to its insured").

{23} Defendant's argument that Dove could not have been a real estate manager because Joyce "had already hired and paid a real estate manager for the management activities" at the property is also unavailing. Nothing in the policy's language suggests that there can only be one real estate manager for a given property. In fact, the policy clearly contemplates the possibility of many managers by providing that an "insured" includes "*any* person or organization while acting as real estate manager for the named insured." (Emphasis added.) Nor does the policy require that a person be compensated in order to qualify for coverage as a real estate manager. This is made evident by the fact that there is an additional provision that defines "insured" to mean "any *employee* of the named insured while acting within the scope of that employment[.]" (Emphasis added.) *See United Nuclear Corp.*, 2012-NMSC-032, ¶ 16 (explaining that "[i]nsurance policy terms cannot be analyzed in a vacuum, and a policy must be construed in its entirety, with each clause interpreted in relation to others contained therein" (internal quotation marks and citation omitted)); *see also The Random House Dictionary of the English Language* 468 (unabridged ed. 1971) (defining "employee" as "a person working for another person or a business firm for pay").

{24} We are also unpersuaded by Defendant's arguments that Dove cannot as a matter of law be considered a real estate manager because Dove and Joyce did not have a "legal relationship . . . that would satisfy the intent of [Defendant's] policy" and because Dove had "no formal responsibility to maintain the yard[.]" It is precisely a situation like this—where an unwitting tenant has informally assumed the statutorily imposed obligations of an owner, *see* § 47-8-20(A)(3), and rendered a service for the owner's benefit without compensation—in which a hypothetical reasonable insured (both the owner (Joyce) and the tenant/real estate manager (Dove)) would reasonably expect to be covered by the policy. *See W. Commerce Bank v. Reliance Ins. Co.*, 1987-NMSC-009, ¶ 8, 105 N.M. 346, 732 P.2d 873 (explaining that "the test is not what the insurer intended its words to mean, but what a reasonable person in the insured's position would have understood them to mean"). While things such as professional qualifications, prior management experience, a contract for services, one's title or self-identified profession, and compensation may be evidence that one is a real estate manager, the absence of any or all of these indicators is not dispositive of the question of whether one is *acting* as a real estate manager at a given time. The policy itself does not limit construction of the term "real estate manager" to only those who have a "legal relationship" with a property owner, receive compensation, or are professional property managers. And if Defendant had wished to so limit the policy's coverage by defining "real estate manager" more narrowly, it could have done so. Because it did not, we construe the term against Defendant and hold that the facts tended to show that Dove was at the very least potentially acting as Joyce's real estate manager at the time of Tapia's injury and was therefore arguably within the policy's coverage. *See United Nuclear Corp.*, 2012-NMSC-032, ¶ 10. As such, Defendant had a duty to defend Dove in the primary action, and its unilateral refusal to do so constituted a breach of that duty.

CONCLUSION

{25} The district court erred in granting summary judgment to Defendant. We reverse and remand for the district court to enter judgment consistent with our ruling.

{26} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
M. MONICA ZAMORA, Judge

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