NOTICE OF PUBLICATION FOR COMMENT

**PROPOSED AMENDMENTS TO
THE CHILDREN'S COURT RULES AND FORMS
USED IN ABUSE AND NEGLECT PROCEEDINGS
SUBJECT TO THE INDIAN CHILD WELFARE ACT**

The Children's Court Rules Committee is considering whether to recommend for the Supreme Court's consideration emergency, out-of-cycle approval of proposed amendments to the Children's Court Rules and Forms. If approved, the amendments would coincide with the effective date of recently approved amendments to the federal regulations that implement the Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

The amended federal regulations, which will become effective on December 12, 2016, are intended to "clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." *Id.* at 38,778, 38,868. To that end, the regulations promote the early identification of Indian children in state child-custody proceedings, and seek to minimize the unnecessary separation of Indian children from their families and to maximize early compliance with the child placement preferences set forth in ICWA. *See* Bureau of Indian Affairs, *Frequently Asked Questions, Final Rule: Indian Child Welfare Act (ICWA) Proceedings*, at 3-4 (June 17, 2016), http://www.bia.gov/cs/groups/xraca/documents/text/idc1-034295.pdf.

The proposed amendments to the Children's Court Rules and Forms are intended to raise awareness of key requirements of the new federal regulations and to incorporate those requirements into proceedings under the Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -34. For example, proposed amended Rule 10-315 NMRA would require the court to inquire at the custody hearing whether any party or participant "knows or has reason to know that the child is an Indian child." *Accord* 81 Fed. Reg. at 38,869-70 (to be codified at 25 C.F.R. § 23.107). Proposed new Rule 10-318 NMRA would further require the court to ensure that the department follows ICWA's placement preferences when there is reason to know that the child is an Indian child. *Accord* 81 Fed. Reg. at 38,874-75 (to be codified at 25 C.F.R. §§ 23.129 to .132). And proposed amended Form 10-521 NMRA would incorporate the amended requirements for providing notice of a child-custody proceeding to an Indian child's parent, Indian custodian, or tribe. *Accord* 81 Fed. Reg. at 38,870-71 (to be codified at 25 C.F.R. § 23.111).

If you would like to comment on the proposed new and amended rules and form set forth below before the committee submits its final recommendation to the Supreme Court, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://nmsupremecourt.nmcourts.gov/ or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court

P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before October 3, 2016, to be considered by the committee. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

10-315. Custody hearing.

A. **Time limits.** A custody hearing shall be held within ten (10) days from the date a petition is filed alleging abuse or neglect. At the custody hearing the court shall determine if the child should remain or be placed in the custody of the department pending adjudication. Upon written request of the respondent, the hearing may be held sooner, but in no event shall the hearing be held less than two (2) days after the date the petition was filed.

B. **Notice.** The department shall give reasonable notice of the time and place of the custody hearing to the parents, guardian, or custodian of the child alleged to be abused or neglected.

C. **Audio recording.** The court shall make an audio recording of the custody hearing and shall provide a copy of the recording immediately upon request to a party who wishes to file an appeal under Paragraph [~~E~~]I of this rule.

D. **ICWA; Indian child; duty to inquire.** At the commencement of the custody hearing, the court shall ask each party and participant, including the guardian *ad litem* and agency representative, to state on the record under oath whether the party or participant knows or has reason to know that the child is an Indian child under the Indian Child Welfare Act. An Indian child is any unmarried person who is under eighteen (18) years of age at the time the petition is filed and who is either,

(1) a member of an Indian Tribe; or

(2) eligible for membership in an Indian Tribe and the biological child of a member of an Indian Tribe.

E. **ICWA; duty to determine; reason to know.** On the basis of the information and evidence provided, the court shall determine that the child is or is not an Indian child. If the evidence is insufficient to make such a determination, the court shall determine whether there is reason to know that the child is an Indian child. The court has reason to know that the child is an Indian child upon the occurrence of any of the following:

(1) any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) the child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) the court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a pueblo, reservation, or in an Alaska Native village;

(5) the court is informed that the child is or has been a ward of a Tribal court; or

(6) the court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

F. **Indian child; effect on proceedings.** If the court determines that the child is an Indian child, or determines that there is reason to know the child is an Indian child but insufficient evidence to determine that the child is or is not an Indian child, the court shall do the following:

(1) confirm, by way of a report, declaration, or testimony included in the record that the department or other party used due diligence to identify and work with all Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership);

(2) ensure that the department promptly sends notice of the proceeding as required by the Indian Child Welfare Act and its regulations and substantially in the form approved by the Supreme Court; and

(3) treat the child as an Indian child subject to the Indian Child Welfare Act unless and until it is determined on the record that the child does not meet the definition of an Indian child under applicable law. Treating the child as an Indian child includes, but is not limited to, the following:

(a) permitting the temporary or emergency foster care placement to continue only if the court finds that it is necessary to prevent imminent physical harm to the child; and

(b) terminating the temporary or emergency foster care placement as soon as the court or agency possesses sufficient evidence to determine that the emergency removal is no longer necessary to prevent imminent physical harm to the child, unless the court orders a foster care placement in accordance with the standard of proof and time limits mandated by the Indian Child Welfare Act and its regulations.

G. **Not an Indian child; effect on proceedings; continuing duty to disclose.** If the court determines that the child is not an Indian child, or that there is no reason to know that the child is an Indian child, the court shall do the following:

(1) proceed as though the child is not subject to the Indian Child Welfare Act; and

(2) order the parties and participants at the hearing to inform the court if they subsequently receive information that provides reason to know that the child is an Indian child. If the court finds, on the basis of information or evidence presented at a later hearing, that there is reason to know the child is an Indian child, the court shall proceed as required under Paragraph E of this rule.

[~~D~~]H. **Form of order.** The decision of the court shall be made by a written order that shall be filed with the clerk of the court at the earliest practicable time.

[~~E~~]I. **Appeal.** An order filed under this rule that grants legal custody of a child to, or withholds legal custody from, one or more parties may be appealed as provided by Section 32A-4-18 NMSA 1978. An appeal from such an order shall proceed as an expedited appeal under Rule 12-206A NMRA of the Rules of Appellate Procedure.

[As amended, effective August 1, 1999; Rule 10-303 NMRA, recompiled and amended as Rule 10-315 NMRA by Supreme Court Order No. 08-8300-042, effective January 15, 2009; as amended by Supreme Court Order No.14-8300-004, effective in all cases filed on or after July 1, 2014; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — See Section 32A-4-18 NMSA 1978 (2005), which provides criteria for the issuance of custody orders. The Rules of Evidence, other than those with respect to privileges, do not apply to custody hearings. See Rule 11-1101 NMRA of the Rules of Evidence.

The 2016 amendments to the rule coincide with the adoption of new regulations by the Bureau of Indian Affairs (BIA) that are intended to "clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." 25 C.F.R. § 23.101. Consistent with the new regulations, the amended rule places an affirmative duty on the court to ask each participant at the commencement of every custody hearing whether the participant knows or has reason to know that the child is an Indian child. *See* 25 C.F.R. § 23.107(a) (providing that the court shall make such an inquiry at the commencement of an "emergency or voluntary or involuntary child-custody proceeding").

The amended rule further requires the court to determine, based on the information provided by the participants, whether the child is in fact an Indian child or, at a minimum, whether there is reason to know that the child is an Indian child. If either condition is met, the rule requires the court to treat the child as an Indian child subject to ICWA and to ensure that the department has complied and continues to comply with its responsibilities under ICWA. *See* 25 C.F.R. § 23.107(b) (requiring the court to confirm that the department has used "due diligence to identify and work with all of the Tribes of which there is reason to know that the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership)"); *id.* § 23.111 (setting forth the notice and timing requirements for child-custody proceedings that involve an Indian child); *see also* Form 10-521 NMRA (ICWA notice).

The law is unsettled about whether ICWA's notice and timing requirements apply at the custody hearing. *See* 25 U.S.C. § 1912(a) (providing that no proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, and Tribe and requiring the court to grant up to an additional 20 days to prepare for the hearing upon request of the child's parent, Indian custodian, or tribe). The Supreme Court has held that ex parte and custody hearings are emergency proceedings under ICWA and therefore are exempt from the requirements of § 1912. *See State ex rel. Children, Youth and Families Dep't v. Marlene C.*, 2011-NMSC-005, 34, 149 N.M. 315, 248 P.3d 863 ("New Mexico's ex parte and custody hearings are emergency proceedings under [25 U.S.C.] § 1922 to which the requirements of [25 U.S.C.] § 1912 do not apply.").

Recently adopted federal regulations, however, clarify the standards imposed in emergency proceedings under ICWA and are difficult to reconcile with the procedures allowed under New Mexico law. *Compare, e.g.*, 25 C.F.R. § 23.113(b) (providing that the emergency removal or placement of an Indian child must be based on a finding that the removal or placement "is necessary to prevent imminent physical damage or harm to the child"), *and id.* § 23.113(e) (providing that an emergency proceeding should not be continued for more than 30 days without a finding, *inter alia*, that "restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm"), *with* NMSA 1978, § 32A-4-18(C) (providing that custody may be awarded to the department based upon a showing that, *inter alia*, "the child will be subject to injury by others if not placed in the custody of the department"), *and id.* § 32A-4-19(A) (providing that an adjudicatory hearing shall commence within 60 days of service on the respondent).

Regardless of the continued validity of *Marlene C.*, the committee views the new regulations,

taken as a whole, as a directive to engage potentially interested Tribes as early as possible in a child-custody proceeding in which an Indian child may be affected. *See* 25 C.F.R. § 23.101. Thus, the committee recommends as a best practice that the department, at a minimum, should inform the Tribe of the custody hearing when the department knows or has reason to know that the child is an Indian child prior to the custody hearing.

If the court determines at the custody hearing that the child is not an Indian child and that there is no reason to know that the child is an Indian child, the amended rule requires the court to order the participants to inform the court of any information that they subsequently receive that provides reason to know that the child is an Indian child. Although not required by rule or regulation, the committee encourages courts to inquire at each proceeding following the custody hearing whether any participant has received such information.

[As amended by Supreme Court Order No. 08-8300-042, effective January 15, 2009; as amended by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

10-318. Placement of Indian children.

A. **Placement preferences.** The court shall ensure that the department follows the placement preferences established by the Indian Child Welfare Act and its regulations when the following conditions are met:

(1) the court finds at the custody hearing or any subsequent hearing that there is reason to know that the child is an Indian child; and

(2) legal custody of the child is or has been transferred or awarded to the department.

B. **Applicability.** The placement preferences must be applied in any foster care, preadoptive, or adoptive placement by the department unless there is a determination on the record that good cause exists to not apply those placement preferences.

C. **Departure from placement preferences; good cause.** If any party asserts that good cause exists not to follow the placement preferences, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the proceeding and the court. The party seeking departure from the placement preferences bears the burden of proving by clear and convincing evidence that there is good cause to depart from the placement preferences.

D. **Determination of good cause.** A determination of good cause to depart from the placement preferences must be made on the record or in writing and based on one or more of the following considerations:

(1) the request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) the request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) the presence of a sibling attachment that can be maintained only through a particular placement;

(4) the extraordinary physical, mental, or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; or

(5) the unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but

none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

E. **Good cause; impermissible considerations.**

(1) ***Socioeconomic status.*** A placement may not depart from the placement preferences based on the socioeconomic status of any placement relative to another placement.

(2) ***Ordinary bonding or attachment.*** A placement may not depart from the placement preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

F. **Placement hearing; motion.** The court shall hold a placement hearing within ten (10) days of the filing of a motion by a party, Tribe, or the department to determine whether good cause exists to depart from the placement preferences.

(1) ***Motion by the department.*** The department shall move for a determination of good cause when it makes or recommends a placement that it knows to be a departure from the placement preferences.

(2) ***Motion by a party or Tribe.*** A party or Tribe shall move for a determination of good cause when it appears that a placement or recommended placement departs from the placement preferences.

[Approved by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The Indian Child Welfare Act and its regulations provide the following placement preferences for Indian children in foster-care or preadoptive placements:

> (a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least restrictive setting that:
>
> (1) Most approximates a family, taking into consideration sibling attachment;
>
> (2) Allows the Indian child's special needs (if any) to be met; and
>
> (3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.
>
> (b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:
>
> (1) A member of the Indian child's extended family;
>
> (2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;
>
> (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.
>
> (c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's

placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

25 C.F.R. § 23.131.

The Indian Child Welfare Act and its regulations provide the following placement preferences for Indian children in adoptive placements:

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

25 C.F.R. § 23.130.

The rule requires the court to ensure that the department follows the placement preferences when custody has been "transferred or awarded" to the department. The use of both terms is consistent with the Children's Code and is intended to clarify that the placement preferences must be followed irrespective of when the department receives custody of the child. *See* NMSA 1978, § 32A-4-18(D)(2) (providing that the court may "award" custody of the child to the department at the conclusion of the custody hearing); § 32A-4-22(B)(2) (providing that the court may "transfer" custody of the child to the department at the conclusion of the dispositional hearing).

[Approved by Supreme Court Order No. _____, effective _____.]

10-521. ICWA notice.

[For use with Rules 10-312 and 10-315 NMRA]

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT
IN THE CHILDREN'S COURT

STATE OF NEW MEXICO ex rel.
CHILDREN, YOUTH AND FAMILIES DEPARTMENT

No. _____

In the Matter of
_____, (a) Child(ren), and Concerning,
_____, Respondent(s).

ICWA NOTICE AS TO _____ (*CHILD(REN)*)[1]

COMES NOW the New Mexico Children, Youth and Families Department (CYFD) by _____, Children's Court Attorney, and gives the following notice under 25 U.S.C. § 1912(a) and 25 C.F.R. §§ 23.11 and 23.111:

1. An Abuse/Neglect Petition was filed in _____County, New Mexico, _____ Judicial District Court on _____, in the above-captioned and numbered cause.

2. _____ (*name of child(ren)*), is/are unmarried, under eighteen (18) years of age, and [~~believed to~~] may be

[ ] member(s) of the _____ tribe(s); or

[ ] eligible for membership in the _____ tribe(s) and the biological child(ren) of member(s) of the _____ tribe(s).

3. [~~The basis for the belief~~] There is reason to know that the child(ren) may be eligible for membership in the _____ tribe(s) [~~is as follows:~~] because _____ _____.

4. This proceeding may result in the termination of the parental and/or custodial rights of the [~~child(ren)'s Indian parent(s) and/or Indian custodian(s)~~] parents and/or custodian(s) of the Indian child(ren).

5. The following information about _____ (*name of child(ren)*) is known (*repeat or modify as necessary if more than one child*):

a. Full name of child _____;
   i. Birth date _____;
   ii. Birthplace _____;

b. Full name of child's biological mother (*including maiden, married, and former names or aliases*) _____;
   i. Birth date _____;
   ii. Place of birth and[~~/or~~] death (*if applicable*) _____;
   iii. Tribal enrollment number _____;
   iv. Other identifying information _____;
   v. All known current and former addresses _____;

c. Full name of child's biological father (*including married and former names or aliases*) _____;
   i. Birth date _____;
   ii. Place of birth and[~~/or~~] death (*if applicable*) _____;
   iii. Tribal enrollment number _____;
   iv. Other identifying information _____;
   v. All known current and former addresses _____;

d. (*Provide the information above, if known, for the child's* [~~*maternal and paternal grandparents, great grandparents, and Indian custodians*~~] *other*

direct lineal ancestors, such as grandparents).

6. The child(ren) is/are currently in the custody of CYFD, and contact with CYFD may be made by contacting either undersigned counsel or _____, the child(ren)'s case worker, at _____ (*address*) or at the following telephone number: _____.

7. The child(ren) is/are currently placed in _____ (*type of placement, e.g., non-relative foster care*).

8. The Indian child(ren)'s biological Indian parent(s), Indian custodian(s), and tribe(s) [~~shall~~] have the [~~absolute~~] right to intervene[~~, premised on the establishment of the applicability of the Indian Child Welfare Act (ICWA) to~~] in this case.

9. If the child(ren)'s Indian parent(s) or Indian custodian(s) is/are unable to afford counsel, counsel will be appointed upon a finding of indigency.

10. The address and telephone number of the _____ Judicial District Court for _____ County, New Mexico is: _____. The cause is assigned to the Honorable _____.

11. The child(ren)'s Indian parent(s), Indian custodian(s), and tribe(s) shall have the right to petition the court for transfer of the proceeding to the [~~child's tribal~~] Tribal court[~~, provided that the subject tribal court shall have the right to decline the transfer~~] as provided by 25 U.S.C. § 1911 and 25 C.F.R. § 23.115.

12. [~~These proceedings are confidential and all information contained in this notice shall be kept confidential~~] You must keep confidential the information contained in this notice, and this notice should not be handled by anyone not needing the information to exercise rights under ICWA.

13. [~~No~~] Except for emergency proceedings, no hearing on the petition in the involuntary child custody proceeding shall be held sooner than ten (10) days from the date of receipt of this notice by the child(ren)'s Indian parent(s), Indian custodian(s), and tribe(s)[~~, or sooner than fifteen (15) days from the date of receipt of this notice by the Area Director of the Bureau of Indian Affairs~~]. The child(ren)'s Indian Parent(s), Indian custodian(s), and tribe(s) have the right to be granted, upon request, up to twenty (20) additional days to prepare for the child custody proceedings.[+][2]

14. The child(ren)'s Indian parent(s), Indian custodian(s), and tribe(s) shall have the right to request up to twenty (20) additional days to prepare for a hearing on the petition.

15. Request is hereby made of the _____ tribe(s) to respond to the undersigned or to the Court if and when ICWA may be applicable to this action, and the undersigned will distribute to the parties of record and to the Court.

_____

Name of Attorney, CCA
CYFD Protective Services
Address
Telephone Number

CERTIFICATE OF MAILING[2]

I hereby certify that a true and correct copy of this Notice, along with a copy of the Abuse/Neglect Petition and Affidavit of _____, were sent by registered/certified mail, return receipt requested, to (*check all that apply*)

[ ] the designated [~~representatives~~] Tribal Agent [~~3~~][4] of the _____ tribe(s) at _____ (*address*);

[ ] _____ (*name of Indian parent/custodian*) at _____ (*address*);

[ ] the appropriate [~~Area~~] Regional Director of the Bureau of Indian Affairs [~~4~~][5] at _____ (*address*)[~~;~~

~~[ ] the Secretary of the Department of the Interior[5] at _____ (*address*), on this ____day of _____, 20____~~].

_____
Name of Attorney, CCA

USE [~~NOTE~~] NOTES

[~~1. The time limits set forth in this paragraph do not apply to proceedings for the emergency removal or placement of a child. *See* 25 U.S.C. § 1922; *see also State ex rel. Children, Youth and Families Dep't v. Marlene C.*, 2011-NMSC-005, ¶ 34, 149 N.M. 315, 248 P.3d 863 ("New Mexico's ex parte and custody hearings are emergency proceedings under § 1922 to which the requirements of § 1912 do not apply.").~~]

1. This form is intended for use in the early stages of a child-custody proceeding. *See* Rule 10-315 (F)(1)(c) NMRA (providing that the court shall ensure that the department provides notice under ICWA when the court determines at a custody hearing that the child is an Indian child or that there is reason to know that the child is an Indian child); *see also* Rule 10-312 NMRA (providing that the department shall provide the notice required under ICWA of the filing of the petition when the child is enrolled or eligible for enrollment in an Indian tribe). This form should be modified as necessary when the duty to provide notice under ICWA arises later in the proceeding. *See* Rule 10-315(G) (providing that the court shall order the participants to inform the court if they receive information after the custody hearing that provides reason to know that the child is an Indian child).

2. The law is unsettled about whether the time-related restrictions set forth in this paragraph, which are required under ICWA, 25 U.S.C. § 1912(a), apply to ex parte and custody hearings. The Supreme Court has held that ex parte and custody hearings are emergency proceedings under ICWA and therefore are exempt from the requirements of § 1912. *See State ex rel. Children, Youth and Families Dep't v. Marlene C.*, 2011-NMSC-005, 34, 149 N.M. 315, 248 P.3d 863 ("New Mexico's ex parte and custody hearings are emergency proceedings under [25 U.S.C.] § 1922 to

which the requirements of [25 U.S.C.] § 1912 do not apply.").

Recently adopted federal regulations, however, clarify the standards imposed in emergency proceedings under ICWA and are difficult to reconcile with the procedures allowed under New Mexico law. *Compare, e.g.*, 25 C.F.R. § 23.113(b) (providing that the emergency removal or placement of an Indian child must be based on a finding that the removal or placement "is necessary to prevent imminent physical damage or harm to the child"), *and id.* § 23.113(e) (providing that an emergency proceeding should not be continued for more than 30 days without a finding, *inter alia*, that "restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm"), *with* NMSA 1978, § 32A-4-18(C) (providing that custody may be awarded to the department based upon a showing that, *inter alia*, "the child will be subject to injury by others if not placed in the custody of the department"), *and id.* § 32A-4-19(A) (providing that an adjudicatory hearing shall commence within 60 days of service on the respondent).

Regardless of the continued validity of *Marlene C.*, the committee views the new regulations, taken as a whole, as a directive to engage potentially interested Tribes as early as possible in a child-custody proceeding in which an Indian child may be affected. *See* 25 C.F.R. § 23.101. The committee therefore encourages all participants in an abuse and neglect proceeding-including the court-to work with and accommodate the needs of interested Tribes to the fullest extent possible under the circumstances.

[~~2.~~]3. ICWA and its [~~accompanying~~] regulations require this Notice to be sent via registered or certified mail, return receipt requested, to the individuals identified in the certificate of mailing. *See* 25 C.F.R. §§ 23.11, 23.111(c). A copy of this Notice also must be served on the parties, as required by Rule 10-104 NMRA.

[~~3.~~]4. The CCA must send a copy of this Notice to the designated [~~representative~~] Tribal Agent of the Indian child's tribe(s), who may be identified by contacting the Bureau of Indian Affairs or by consulting the Bureau's annually published listing of Designated Tribal Agents for Service of Notice. The CCA may also determine the identity of the designated tribal representative(s) by contacting the tribe(s), subject to the confidentiality required by law.

[~~4.~~]5. The CCA must send a copy of this Notice to the appropriate [~~Area~~] Regional Director of the Bureau of Indian Affairs identified in 25 C.F.R. § 23.11(c) when the identity or location of the child's parents, Indian custodian, or Tribe cannot be ascertained but there is reason to know that the child is an Indian child. *See* 25 C.F.R. §§ 23.11(a), 23.111(e).

[~~5. The CCA is only required to send a copy of this Notice to the Secretary of the Department of the Interior when the identity and location of the child's Indian parent(s), Indian custodian(s), or tribe(s) are known. *See* 25 C.F.R. § 23.11(a), (b).~~]

[Adopted by Supreme Court Order No. 14-8300-009, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. _____, effective _____.]

New Mexico Courts

Terri Saxon <suptls@nmcourts.gov>

Rule Proposal Comment Form

1 message

mailservices4@sks.com <mailservices4@sks.com> Mon, Sep 26, 2016 at 9:45 AM
To: supjdm@nmcourts.gov, suptls@nmcourts.gov

SUPREME COURT OF NEW MEXICO
FILED

SEP 26 2016

Your Name
Peter Breen

Phone Number
5058272926

Email
plumtreeman1@gmail.com

Proposal Number
2016-064

Comment

The rule may be legally defective, in that it seems to give only one biological parent veto power over the placement preferences of the Act. Rule 10-318 (C,D).

I would rewrite the rule to require the concurrence of both parents and the tribe, or at least the non-objection of the other parent and the tribe or the non-appearance of the other parent and tribe after proper notice.

A subsidiary issue is the possibility of shilly-shallying by the parent. A parent in an abuse and neglect proceeding at odds with the in-laws may identify a reason for non-applicability of the Act, which is then rejected or simply appears to be "heading south" in advance of a final determination. Then there is another reason offered much later, typically child abuse of the non-custodial parent.

I suggest that there be some limited preclusive effect to the reason offered by the parent. I suggest that changes or amendments to the reason given by the parent may only jointly be made with CYFD.

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