

**PROPOSED REVISIONS TO THE CHILDREN'S COURT RULES AND FORMS
PROPOSAL 2018-010**

The Children's Court Rules Committee has recommended amendments to Rule 10-314 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> 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 April 11, 2018, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

10-314. Explanation of respondent's rights at first appearance; appointed counsel.

A. **Explanation of rights at first appearance.** At the first appearance of the respondent [~~on an abuse or neglect petition or a termination of parental rights motion, if the respondent is not represented by an attorney~~], the respondent shall be informed by the court of the following:

(1) the allegations of the abuse or neglect petition or the termination of parental rights motion;

(2) the right to an adjudicatory hearing on the allegations in the petition or the right to a trial on the allegations in the motion;

(3) the right to an attorney and that if the respondent cannot afford an attorney, one will be appointed to represent the respondent free of charge; ~~and~~

(4) the possible consequences if the allegations of the petition or the motion are found to be true;

(5) the right to have the proceedings interpreted into a language the respondent understands; and

(6) if the child is an Indian child or there is reason to know that the child may be an Indian child as defined by the Indian Child Welfare Act, the respondent shall be further informed by the court of the following:

(a) the parent, Indian custodian, or tribe may request that the case be transferred to tribal court;

(b) the department shall place the Indian child in accordance with the placement preferences set forth in the Indian Child Welfare Act, unless good cause is shown to depart from those preferences;

(c) active efforts shall be made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family;

(d) the department shall prove the allegations in the abuse or neglect petition by clear and convincing evidence; and

(e) the department shall prove the allegations in the termination of rights motion beyond a reasonable doubt.

B. Appointed counsel. In any proceeding or case that may result in the termination of parental rights, an attorney may not be appointed to represent more than one respondent.

[Approved, effective November 1, 1978, Rule 55 NMSA 1978; Rule 10-304 SCRA 1986; as amended, effective August 1, 1999; Rule 10-304 NMRA, recompiled and amended as Rule 10-314 NMRA by Supreme Court Order No. 08-8300-042, effective January 15, 2009; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Historically, noncriminal proceedings against parents based on their treatment of their children were equitable in nature and were based on the doctrine of *parens patriae*. See *In re Santillanes*, 1943-NMSC-011, 47 N.M. 140, 138 P.2d 503 (1943). Modern abuse and neglect and termination of parental rights proceedings are typically statutory proceedings. Absent statutory authorization for a right to a jury trial, it has been held that the parents have no such right. *Matter of T.J.*, 1997-NMCA-021, 123 N.M. 99, 934 P.2d 293 (mother not entitled to jury trial under New Mexico constitution or by statute).

Subsection (A)(6) was added to recognize the rights of Indian children, their families, and their tribe(s). The intent of this subsection is to provide the courts with a uniform advisement of rights for a case subject to the Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963. The Act contains many other procedural requirements that the parties should be aware of; this advisement is meant to alert the parties generally that unique protections are afforded to Indian children, their families, and their tribe(s). The adoption by the U.S. Department of the Interior, Bureau of Indian Affairs, of the new Regulations for Implementing the Indian Child Welfare Act, 25 C.F.R. Part 23 (effective December 12, 2016), was the impetus for articulating certain rights and responsibilities in an Indian Child Welfare Act case.

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

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Proposal Number
2018-10

Comment

If the change is intended to explain to parents of a child subject to ICWA their rights under ICWA, the section is incomplete.

A parent of a child subject to ICWA should be also informed of the parent's right to object to and prevent a transfer of the case to tribal court, pursuant to 25 U.S.C. § 1911(b).

SUPREME COURT OF NEW MEXICO
FILED

MAR 13 2018

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Proposal 2018-002 should be approved. It provides our tribal entities a sanctioned form by which individuals who are simultaneously tribal members and citizens of the State may access services that their tax dollars support.

Proposal 2018-010 is consistent with the Federal Regulations and BIA Guidelines promulgated in December, 2016 and should be approved. For too long, ICWA and its purposes have not been implemented in a consistent and uniform manner nationally or throughout New Mexico's courts.

Proposal 2018-11 reflects the practice in some NM courts and should be approved. However, tribal representatives still report that some judicial officers will not allow ICWA tribal representatives in the proceedings because they are not licensed attorneys and have not entered an appearance. Most tribal representatives appear by telephone and not in person. What is not included in the proposal is an explicit provision permitting tribal representatives to report and provide input.

Thank you.

JOHN J. ROMERO, JR.
District Judge
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FILED

MAR 16 2018



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Proposal Number
2018-10

Comment

My only comment is that in proposed 10-314 section e that mentions termination of parental rights, the sentence should start with "if a termination of parental rights motion is filed," because the way it is written assumes a TPR motion will be filed

SUPREME COURT OF NEW MEXICO
FILED

MAR 16 2018





[nmsupremecourtclerk-grp] RE: Children's Court Proposed Rules

1 message

'Amy DeLaney-Hernandez' via nmsupremecourtclerk

Mon, Apr 2, 2018 at

<nmsupremecourtclerk-grp@nmcourts.gov>

7:50 AM

Reply-To: amy_esq@yahoo.com

To: nmsupremecourtclerk@nmcourts.gov

To Whom It May Concern:

It would be helpful in practice if CYFD had a certain number of days to notify the tribe once a Respondent Parent notifies the Department that he or she believes ICWA applies in a case. I currently have a case in Dona Ana County where it has taken over 244 days for the Department to send proper notice to the tribe and, in the case of another Respondent, whom I do not represent, over 180 days. Failure of the Department to properly notify the tribe quickly leads to all kinds of otherwise preventable procedural and substantive problems down the line.

This is also true with foreign national parents where the Department fails to notify the applicable consulate for months. I realize this is not an ICWA issue, but it does create the same problems noted above.

Thank you for your consideration.

Amy C. DeLaney-Hernandez, Esq.

SUPREME COURT OF NEW MEXICO
FILED

APR - 2 2018

A handwritten signature in black ink, appearing to be "J. Moya", written over the date stamp.

Your Name
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Proposal Number
10-314 (A)(6) (b-e)

Comment

I do not agree with the inclusion of advisements b-e, because the referenced advisements are not rights specific to a Respondent. They are references to legal requirements in ICWA cases that the Dept. must comply with and burdens of proof that the Department must meet to retain custody.

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FILED

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