

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
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July 1, 2022

The Honorable Rebecca Dow  
NM House of Representatives – District 38  
806 Sierra Vista  
Truth or Consequences, NM 87901  
E-mail: rebecca.dow@nmlegis.gov

**Re: Opinion Request – Foster Parent Placement Preference**

Dear Representative Dow,

You have asked whether New Mexico law allows for a placement preference to a (non-relative) foster parent with whom a child has lived and developed an emotionally significant relationship. More specifically, you have inquired as to whether, if such a placement preference exists, New Mexico law requires that a placement preference be provided in favor of a relative over that of a non-relative foster parent with whom the child is living and has such a relationship. Based on our examination of the relevant constitutional, statutory, and case law authorities, as well as the information available to us at this time, and as explained in greater detail below, we conclude that a relative placement preference exists, but that circumstances based on the best interests of the child involved may warrant placement of that child with a non-relative foster parent with whom the child is living and has developed an emotionally significant relationship over that of a relative.

As a preliminary matter, and for context of the remainder of this opinion, child custody proceedings, whether they arise from the dissolution of a marriage, are the result of abuse or neglect by the child's biological parent(s), or some other circumstance that leads to a child's instability, are incredibly complex due to the active (as opposed to stagnant) factors each case presents. Examples of such factors may include, but are not limited to, the termination or relinquishment of the parent or parents' parental rights, the existence of and willingness of other family members to assist in the raising of the child, the presence of any siblings and their respective locations, the child's age, the child's wishes, the duration in which the child is in foster care or living outside of their nuclear family's home, whether the child is Native American, and the existence of statutorily-recognized relationships, such as kinship guardians and grandparents. As such, while the following is intended to illuminate and inform you on the doctrines and guidelines that govern this area of the law, it is not possible to explicitly determine how they would apply in a particular case.

Next, although your question does not indicate a specific circumstance, based on your references to the New Mexico Children's Code and Abuse and Neglect Act, and for purposes of clarity, this opinion is written based on a situation in which a child is placed in a non-relative foster care home as a result of an abuse and neglect proceeding. It is further assumed that the child's biological parents, whether the result of termination or relinquishment of their parental rights, are no longer viable options for placement of the child and are not contesting the child's placement.

The north star of child custody proceedings is the best interests of the child doctrine. *Jaramillo v. Jaramillo*, 1991-NMSC-101, ¶ 13, 113 N.M. 57, 823 P.2d 299. Although elusive in nature, it is the guiding criterion in such matters. *Id.* "... [T]he expression 'best interests of the child' may have a different meaning for each person. There are few guidelines that delineate the meaning of this phrase or the criteria by which a court can apply it as a legal standard [...] [T]o some extent the court's determination of the child's best interests must be characterized as intuitive." *In the Matter of Adoption of J.J.B.*, 1995-NMSC-026, ¶ 63, 119 N.M. 638 (quoted from *State ex rel. Lewis*, 207 N.W.2d at 831). The child's best interests involve evaluation of the child on a number of levels, including her emotional, intellectual, and physical well-being. *Id.* ¶ 65. "In permanency hearings, [...] the operative rebuttable presumption is that 'the child's best interest will be served by changing the child's permanency plan' to one that provides for permanency, such as adoption, emancipation, permanent guardianship, or long-term foster care placement. *State ex rel. Children, Youth and Families Dept. v. Lance K.*, 2009-NMCA-054, ¶ 42, 146 N.M. 286.

Notwithstanding the best interests of the child doctrine, a placement preference *does* exist in favor of a child's relatives over non-relatives under New Mexico statute and case law. A "child" is defined by the Abuse and Neglect Act as a person under the age of eighteen, and a "relative" is defined as "a person related to another person by blood within the fifth degree of consanguinity or marriage by the fifth degree." NMSA 1978, § 32A-1-4. The intended purpose of the Abuse and Neglect Act, in addition to making decisions in the child's best interests and providing due process to all involved parties, is to "preserve the unity of the family." *State ex rel. Children, Youth & Families Dept v. Maria C.*, 2004-NMCA-083, ¶ 23, 136 N.M. 53, 94 P.3d 796. Once a child is placed in CYFD's custody and a court has made a finding of abuse or neglect, a placement preference with qualified relatives is triggered, which remains the case for any future permanency changes involving the child. *State ex rel. Children, Youth and Families Dept. v. Laura J.*, 2013-NMCA-057, ¶ 28, 301 P.3d 860 (*see also* Rule 8.10.8.10(A)(1) NMAC)).

Additionally, CYFD has a statutory duty "to make reasonable efforts to identify, locate, and conduct home studies on willing and appropriate relatives who could potentially serve as placement for the child." *Laura J.*, ¶ 50. The New Mexico Court of Appeals expanded on the importance of CYFD's obligation to make such reasonable efforts in *In re Laura J.*, and warned of the consequences of it not doing so.

"The permanency stage represented a significant point of the proceedings in terms of Colin's interest [Child's cousin and intervenor who argued CYFD did not make reasonable efforts to place Child with relatives, including him] and Child's interest because, had Colin been considered as a potential placement, Child may well have been placed with him as the case progressed toward termination of Mother's parental rights. In theory, such placement would have afforded Colin and Child an opportunity to form a bond and,

theoretically, the placement would have increased Colin's chances of becoming Child's adoptive parent [...] [A]s Mother suggests, had Child been placed with Colin, he could have grown up with his brother, and Mother could have remained connected to both of her sons.”

*Id.* ¶ 53. The Court continued to state that by the time the district court terminated Child’s mother’s parental rights, Child had resided in his non-relative foster home for nearly two years and developed a “psychological parent-child relationship” and attachment to them. *Id.* at ¶ 54. The Court in *In Re Laura J.* felt so strongly about the relative placement preference that in order to remedy CYFD’s failure to make such reasonable efforts, it ruled that Colin should have an opportunity to adopt Child and remanded to the district court with specific instructions on that process, so long as it was in the best interests of Child. *Id.* t ¶¶ 58, 60-61.

The Court was also stern in its demand that district courts ensure CYFD’s statutory duty under Section 32A-4-25.1(D) is satisfied. “Section 32A-4-25.1(D) imposes a duty upon the district court to make a serious inquiry into whether the Department has complied with its mandate to locate, identify, and consider relatives with whom to place children in its custody.” *Id.* ¶ 61. The Court continued, “In future cases, such inquiry will not be satisfied by a pro forma ratification of the Department’s assertions that such efforts have been made [...] The [district] court must conclude that the Department [...] has met its affirmative duty” to find all appropriate relatives “expressing an interest in providing permanency for the child.” *Id.*

Finally, you have asked whether there are circumstances under which a (non-relative) foster parent with whom a child is living and has an emotionally significant relationship may be given preference over a relative. “Fictive kin” is defined in the Abuse and Neglect Act as “a person not related by birth, adoption or marriage with whom a child has an emotionally significant relationship.” NMSA 1978, § 32A-4-2.

The case law in New Mexico on this issue overwhelmingly involves proceedings in which one party is either one or both of the child’s biological parents and the other is a relative of the child, such as a grandparent or ex-stepparent. Even so, *In re Laura J.* and *In re Guardianship of Victoria R.*, two of the few relevant cases on this subject that involve placement with a child’s non-relatives, highlight the tension between the relative placement preference and best interests of the child doctrine when a child has developed a psychological relationship with a non-relative. “Psychological parents are [...] adult caregivers who meet the child’s emotional and physical needs on a day-to-day basis for a sufficient period of time that the child comes to view the adult caregivers as the child’s actual parents.” *In re Guardianship of Victoria R.*, 2009-NMCA-007, ¶14, 145 N.M. 500, 201 P.3d 169. The Court found that Victoria R., who was raised by non-relatives pursuant to the Kinship Guardianship Act, NMSA 1978, Sections 40-10B-1 to -21, for most of her life, would face serious psychological harm if she were abruptly removed from their care and returned to her biological mother. *Id.* ¶¶ 13, 16, 18. For that reason, the Court did not immediately allow the biological mother to assume exclusive custody, but rather imposed a continued kinship guardianship until that relationship could be fostered. *Id.* ¶ 16.

In closing, while New Mexico statute and case law encourages and prioritizes the relative placement preference in abuse and neglect proceedings, the law also supports the notion that the

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preference must be tempered by the best interests of the child involved, with due weight given to the various factors that may present themselves in the case at issue (see above). There simply is no way, given the possible number of active factors that may exist in any given case, to determine how the aforementioned statutes and guidelines could or would be applied, or that they would be applied uniformly. Based on the best interests of the child doctrine, however, we believe there are circumstances in which a court could reasonably conclude that a non-relative foster parent with whom a child is living and has an emotionally significant relationship may and should be given preference over a relative.

Please note this opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

A handwritten signature in black ink that reads "Sally Malavé". The signature is written in a cursive style with a large initial "S" and a distinct "é" at the end.

Sally Malavé  
Assistant Attorney General  
Director, Open Government Division