CHILDREN'S COURT RULES AND FORMS

1986 Recompilation

Article

SCRA 10-001 (1995 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE AMENDMENT :
OF RULE 10-118 OF THE RULES
OF : 8000 Misc.
PROCEDURE FOR THE CHILDREN'S COURT :

The matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Scarborough, Senior Justice Sosa, Justice Stowers, Justice Walters and Justice Ransom concurring:

NOW, THEREFORE, IT IS ORDERED that Rule 10-118 of the Children's Court Rules be and the same is hereby amended;

IT IS FURTHER ORDERED that the amendment of Rule 10-118 of the Children's Court Rules shall be effective on and after July 1, 1988;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment of the Children's Court Rules by publishing the same in the SCRA 1986.

DONE at Santa Fe, New Mexico this 16th day of February, 1988.

/s/ TONY SCARBOROUGH
Chief Justice
/s/ DAN SOSA, JR.
Senior Justice
/s/ HARRY E. STOWERS, JR.
Justice
/s/ MARY C. WALTERS
Justice
/s/ RICHARD E. RANSOM
Justice

SCRA 10-002 (1995 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE AMENDMENT :
OF RULE 10-112 AND ADOPTION OF :
FORM 10-408A OF THE RULES
OF : 8000 Misc.
PROCEDURE FOR THE CHILDREN'S COURT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Sosa, Justice Stowers, Justice Scarborough, Justice Ransom and Justice Baca concurring:

NOW, THEREFORE, IT IS ORDERED that Rule 10-112 of the Children's Court Rules be and the same is hereby amended and the adoption of Children's Court Form 10-408A is hereby approved;

IT IS FURTHER ORDERED that the amendment of Rule 10-112 and the adoption of Form 10-408A of the Children's Court Rules shall be effective on and after August 1, 1989;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment and adoption of the above Children's Court Rules by publishing the same in the SCRA 1986.

DONE at Santa Fe, New Mexico this 16th day of May, 1989.

/s/ DAN SOSA, JR.
Chief Justice
/s/ HARRY E. STOWERS, JR.
Justice
/s/ TONY SCARBOROUGH
Justice
/s/ RICHARD E. RANSOM
Justice
/s/ JOSEPH F. BACA
Justice

SCRA 10-003 (1995 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE AMENDMENT :
OF FORM 10-408 OF THE RULES
OF : 8000 Misc.
PROCEDURE FOR THE CHILDREN'S COURT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Sosa, Justice Scarborough, Justice Ransom and Justice Baca concurring:

NOW, THEREFORE, IT IS ORDERED that the amendment of Form 10-

408 is hereby approved;

IT IS FURTHER ORDERED that the amendment of Form 10-408 of the Children's Court Rules shall be effective on and after August 1, 1989;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment and adoption of the above Children's Court Rules by publishing the same in the Bar Bulletin and in the SCRA 1986.

DONE at Santa Fe, New Mexico this 31st day of May, 1989.

/s/ DAN SOSA, JR.
Chief Justice

/s/ TONY SCARBOROUGH
Justice

/s/ RICHARD E. RANSOM
Justice

/s/ JOSEPH F. BACA
Justice

SCRA 10-004 (1995 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

IN THE MATTER OF THE AMENDMENT OF :
RULE 10-111 OF THE RULES
OF : 8000 Misc.
PROCEDURE FOR THE CHILDREN'S COURT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Sosa, Justice Ransom, Justice Baca, Justice Montgomery and Justice Wilson concurring:

NOW, THEREFORE, IT IS ORDERED that Rule 10-111 of the Children's Court Rules be and the same is hereby amended;

IT IS FURTHER ORDERED that the amendment of Rule 10-111 of the Children's Court Rules shall be effective for cases filed in the Children's Court on and after March 1, 1991;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment of the Children's Court Rules by publishing the same in the Bar Bulletin and the SCRA 1986.

DONE at Santa Fe, New Mexico this 29th day of November, 1990.

/s/ DAN SOSA, JR.
Chief Justice

/s/ RICHARD E. RANSOM
Justice

/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ KENNETH B. WILSON
Justice

SCRA 10-005 (1995 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE AMENDMENT :
OF RULE 10-111 OF THE RULES
OF : 8000 Misc.
PROCEDURE FOR THE CHILDREN'S COURT :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Sosa, Justice Ransom, Justice Baca, Justice Montgomery and Justice Franchini concurring:

NOW, THEREFORE, IT IS ORDERED that Rule 10-111 of the Children's Court Rules be and the same is hereby amended;

IT IS FURTHER ORDERED that the amendment of Rule 10-111 of the Children's Court Rules shall be effective for cases filed in the Children's Court on and after November 1, 1991;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment of the Children's Court Rules by publishing the same in the Bar Bulletin and in the SCRA 1986.

DONE at Santa Fe, New Mexico this 13th day of August, 1991.

/s/ DAN SOSA, JR.
Chief Justice
/s/ RICHARD E. RANSOM
Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice

SCRA 10-006 (1995 Supp.)

IN THE SUPREME COURT OF THE

STATE OF NEW MEXICO

IN THE MATTER OF THE AMENDMENT :
OF FORM 10-408 OF THE
CHILDREN'S : 8000 Misc.
COURT RULES AND FORMS :

This matter coming on for consideration by the Court and the Court being sufficiently advised, Chief Justice Ransom, Justice Baca, Justice Montgomery, Justice Franchini and Justice Frost concurring:

NOW, THEREFORE, IT IS ORDERED Form 10-408 of the Children's Court Rules and Forms be and the same is hereby amended;

IT IS FURTHER ORDERED that the amendment of Form 10-408 of the Children's Court Rules shall be effective for cases filed in the Children's Court on and after December 1, 1993;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment of the Children's Court Rules by publishing the same in the Bar Bulletin and in the SCRA 1986.

DONE at Santa Fe, New Mexico this 12th day of October, 1993.

/s/ RICHARD E. RANSOM
Chief Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

SCRA 10-007 (1995 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
No. 94-8300
IN THE MATTER OF THE AMENDMENT
OF RULE 10-101 OF THE CHILDREN'S
COURT RULES AND FORMS

This matter coming on for consideration by the Court, and the Court being sufficiently advised, Chief Justice Ransom, Justice Baca, Justice Montgomery, Justice Franchini, and Justice Frost concurring;

NOW, THEREFORE, IT IS ORDERED that Rule 10-101 of the Children's Court Rules and Forms be and the same hereby is amended;

IT IS FURTHER ORDERED that the amendment of Rule 10-101 of the Children's Court Rules shall be effective for cases filed in the Children's Court on and after March 1, 1994;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendment of the Children's Court Rules and Forms by publishing the same in the Bar Bulletin and SCRA 1986.

DONE at Santa Fe, New Mexico, this 2nd day of February, 1994.

/s/ RICHARD E. RANSOM
Chief Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

SCRA 10-008 (1995 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
No. 94-8300
IN THE MATTER OF THE WITHDRAWAL
OF RULE 10-102 OF THE CHILDREN'S
COURT RULES AND FORMS

This matter coming on for consideration by the Court, and the Court being sufficiently advised, Chief Justice Ransom, Justice Baca, Justice Montgomery, Justice Franchini, and Justice Frost concurring;

NOW, THEREFORE, IT IS ORDERED that Rule 10-102 of the Children's Court Rules and Forms be and the same hereby is withdrawn;

IT IS FURTHER ORDERED that the withdrawal of Rule 10-102 of the Children's Court Rules shall be effective for cases filed in the Children's Court on and after March 1, 1994;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendment of the Children's Court Rules and Forms by publishing the same in the Bar Bulletin and SCRA 1986.

DONE at Santa Fe, New Mexico, this 2nd day of February, 1994.

/s/ RICHARD E. RANSOM

Chief Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

SCRA 10-009 (1995 Supp.)

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
NO. 95-8300
IN THE MATTER OF THE AMENDMENT
OF RULES 10-108, 10-112, 10-222,
AND FORM 10-415A OF THE CHILDREN'S
COURT RULES AND FORMS

This matter coming on for consideration by the Court, and the Court being sufficiently advised, Chief Justice Joseph F. Baca, Justice Richard E. Ransom, Justice Gene E. Franchini, Justice Stanley F. Frost and Justice Pamela B. Minzner concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to rules 10-108, 10-112, 10-222 and form 10-415A of the Children's Court Rules and Forms be and the same hereby are approved;

IT IS FURTHER ORDERED that the amendments of rules 10-108, 10-112, 10-222, and form 10-415A of the Children's Court Rules and Forms shall be effective for cases filed in the Children's Court on and after July 1, 1995;

IT IS FURTHER ORDERED that the Clerk of the Court is hereby authorized and directed to give notice of the amendment of the Children's Court Rules and Forms by publishing the same in the Bar Bulletin and SCRA 1986.

DONE at Santa Fe, New Mexico this 19th day of April, 1995.

/s/ JOSEPH F. BACA
Chief Justice
/s/ RICHARD E. RANSOM
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

/s/ PAMELA B. MINZNER
Justice

SCRA 10-010 (1995 Supp.)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
NO 95-8300
IN THE MATTER OF THE AMENDMENT OF
RULES 10-103, 10-103.1, 10-103.2,
10-103.3, 10-114, 10-116, AND 10-228
OF THE CHILDREN'S COURT RULES

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Standing Committee on Children's Court Rules, and the Court being sufficiently advised, Chief Justice Joseph F. Baca, Justice Richard E. Ransom, Justice Gene E. Franchini, Justice Stanley F. Frost, and Justice Pamela B. Minzner concurring:

NOW, THEREFORE, IT IS ORDERED that the amendments to Rules 10-103, 10-103.1, 10-103.2, 10-103.3, 10-114, 10-116, and 10-228 of the Children's Court Rules and Forms be and the same hereby are approved;

IT IS FURTHER ORDERED that the amendments of Rules 10-103, 10-103.1, 10-103.2, 10-103.3, 10-114, 10-116, and 10-228 of the Children's Court Rules shall be effective for cases filed in the Children's Court on and after September 1, 1995;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the Children's Court Rules by publishing the same in the Bar Bulletin and SCRA 1986.

DONE at Santa Fe, New Mexico this 17th day of July, 1995.

/s/ Joseph F. Baca
Chief Justice
/s/ Richard E. Ransom
Justice
/s/ Gene E. Franchini
Justice
/s/ Stanley F. Frost
Justice
/s/ Pamela B. Minzner
Justice

SCRA 10-011 (1995 Supp.)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
NO 95-8300
IN THE MATTER OF THE AMENDMENT OF
RULES 10-104, 10-104.1, 10-111,
10-121 AND 10-106 OF THE CHILDREN'S
COURT RULES AND 10-401, 10-402, 10-403,
10-404, AND 10-404A OF THE CHILDREN'S
COURT FORMS

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Standing Committee on Children's Court Rules, and the Court being sufficiently advised, Chief Justice Joseph F. Baca, Justice Richard E. Ransom, Justice Gene E. Franchini, Justice Stanley F. Frost, and Justice Pamela B. Minzner concurring:

NOW, THEREFORE, IT IS ORDERED that the amendments to Rules 10-104, 10-104.1, 10-111, 10-121, and 10-106 of the Children's Court Rules and to Forms 10-401, 10-402, 10-403, 10-404, and 10-404A of the Children's Court Forms be and the same hereby are approved;

IT IS FURTHER ORDERED that the amendments of the above-referenced rules and forms of the Children's Court Rules and Forms shall be effective for cases filed in the Children's Court on and after September 1, 1995;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the Children's Court Rules by publishing the same in the Bar Bulletin and SCRA 1986.

DONE at Santa Fe, New Mexico this 17th day of July, 1995.

/s/ Joseph F. Baca
Chief Justice
/s/ Richard E. Ransom
Justice
/s/ Gene E. Franchini
Justice
/s/ Stanley F. Frost
Justice
/s/ Pamela B. Minzner
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 95-8300

IN THE MATTER OF THE AMENDMENT OF RULES 10-205, 10-207, 10-208, 10-209, 10-211, 10-212 AND ADOPTION OF NEW RULES 10-208A AND 10-208B AND NEW FORMS 10-430, 10-431 OF THE CHILDREN'S COURT RULES AND FORMS

ORDER

This matter coming on for consideration by the Court upon recommendation of the Children's Court Rules Committee to amend Rules 10-205, 10-207, 10-208, 10-209, 10-211, 10-212 and to adopt New Rules 10-208A and 10-208B and New Forms 10-430 and 10-431 of the Children's Court Rules and Forms, and the Court being sufficiently advised, Chief Justice Joseph F. Baca, Justice Richard E. Ransom, Justice Gene E. Franchini, Justice Stanley F. Frost and Justice Pamela B. Minzner concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rules 10-205, 10-207, 10-208, 10-209, 10-211, 10-212 and New Rules 10-208A and 10-208B of the Children's Court Rules and New Forms 10-430, 10-431 be and the same hereby are approved;

IT IS FURTHER ORDERED that the amendments of the above-referenced rules and forms of the Children's Court Rules shall be effective for cases filed in the Children's Court on and after November 1, 1995;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of existing rules and adoption of new Children's Court Rules and Forms by publishing the same in the Bar Bulletin and SCRA 1986.

DONE at Santa Fe, New Mexico this 21st day of August, 1995.

/s/ Joseph F. Baca
Chief Justice

/s/ Richard E. Ransom
Justice

/s/ Gene E. Franchini
Justice

/s/ Stanley F. Frost
Justice

/s/ Pamela B. Minzner
Justice

ARTICLE 1
GENERAL PROVISIONS; ALL PROCEEDINGS

Rule

10-101. Scope and title.

A. **Scope.** The following rules of procedure shall govern proceedings under the Children's Code:

(1) the Children's Court Rules and Forms shall govern procedure in the children's courts of New Mexico in all matters involving children alleged:

(a) to be delinquent as defined in the Children's Code;

(b) to be members of families in need of court ordered services as defined in the Children's Code;

(c) abused or neglected, as defined in the Children's Code.

(2) the Rules of Criminal Procedure for the District Courts shall govern the procedure:

(a) in all proceedings in the district court in which a child is alleged to be a "serious youthful offender", as defined in the Children's Code;

(b) except for disposition proceedings, all proceedings in the Children's Court in which a notice of intent has been filed alleging the child is a "youthful offender" as that term is defined in the Children's Code;

(3) the Rules of Criminal Procedure for the Magistrate Courts govern all proceedings in the magistrate court in which a sixteen (16) or seventeen (17) year old child is accused of first degree murder;

(4) the Rules of Criminal Procedure for the Metropolitan Courts govern all proceedings in the metropolitan court in which a sixteen (16) or seventeen (17) year old child is accused of first degree murder;

(5) the Children's Code and the Rules of Civil Procedure for the District Courts shall govern the procedure in all other proceedings under the Children's Code. In case of a conflict between the Children's Code and the Rules of Civil Procedure for the District Court, the Children's Code shall control.

B. **Construction.** These rules are intended to provide for the just determination of children's court proceedings. They shall be construed to secure simplicity in procedure,

fairness in administration, elimination of unjustifiable expense and delay and to assure the recognition and enforcement of constitutional and other rights.

C. **Title.** These rules shall be known as "Children's Court Rules and Forms".

D. **Citation form.** These rules and forms shall be cited by set and rule or form numbers, as in SCRA 1986, Rule 10-_____ and SCRA 1986, Form 10-_____.

[As amended, effective January 1, 1987; March 1, 1994.]

*** * * * * * * * * * * * * * * * * * ***

Although there are various statutory provisions authorizing the supreme court to adopt rules of procedure in civil and criminal cases, including rules for the children's court, the rulemaking power of the supreme court is a constitutional power which inherently belongs to the judicial branch of government under the doctrine of separation of powers. See State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

The rulemaking power traditionally extends only to proceedings conducted by the judicial branch of government. Thus the supreme court in the original rules of procedure governing the children's court did not establish procedures to be followed by the human services department (formerly the health and social services department) regarding alleged neglected children until formal court action had begun. The standing committee on criminal proceedings in the district court recommended to the supreme court that expanded neglect rules be adopted to assure uniformity in proceedings and eliminate any confusion caused by the absence of a clearly defined procedure. The supreme court accepted the recommendation and as of November 1, 1978, Children's Code provisions governing neglect prior to the onset of formal court action are modified by these rules. Effective February 1, 1982, these rules apply to abused children cases.

The supreme court did not believe this was a departure from its traditional view of its rulemaking procedure since Section 32-1-4 NMSA 1978 authorizes the supreme court to adopt rules of procedure in children's court proceedings and the Children's Code itself envisions that the human services department will be primarily responsible in neglect and abuse situations. See Section 32-1-15 NMSA 1978.

A more complete discussion of the rulemaking power of the supreme court is found at the beginning of the commentaries to the Rules of Criminal Procedure for the District Courts.

Rules 10-101 and 10-102 set forth the scope, purpose and construction of the Children's Court Rules of Procedure. The scope of the rules is specifically limited to children's court proceedings in which a child is alleged to be delinquent, in need of supervision, neglected or abused. Section 32-1-10 NMSA 1978 of the Children's Code gives the children's court exclusive original jurisdiction of a number of other

proceedings. These rules are not intended to establish procedures for these other proceedings, nor do they apply to court proceedings involving juveniles who allegedly have violated municipal ordinances or Motor Vehicle Code provisions which are not governed by the Children's Code under Sections 32-1-30 and 32-1-48 NMSA 1978.

As of January 1, 1982 no judicial district had established a family court division under Section 32-1-4 NMSA 1978. If such a division were to be established, these rules would apply only to proceedings in which a child is alleged to be delinquent, in need of supervision, neglected or abused. Other proceedings over which a family court would have jurisdiction pursuant to Section 32-1-10 NMSA 1978 are not intended to be within the scope of these rules.

In terms of purpose and construction, it must be emphasized that the procedures set forth in these rules supersede many of the procedures set forth in the Children's Code in effect at the time of adoption of the original rules and the revised rules.

ANNOTATIONS

Cross-references. - For provisions of the Children's Code, see 32A-1-1 NMSA 1978 et seq.

For Children's Code definitions, see 32A-1-4 NMSA 1978.

For establishment of children's court as division of district court (or additional family court division), see 32A-1-5 NMSA 1978.

The 1994 amendment, effective March 1, 1994, rewrote Paragraph A, which read "These rules govern the procedure in the children's courts of New Mexico in all matters involving children alleged to be delinquent, in need of supervision, abused or neglected, as defined in the Children's Code."

Effective dates. - Pursuant to an order of the supreme court dated September 24, 1986, the above rule is effective on or after January 1, 1987.

Children's Code. - See 32A-1-1 NMSA 1978 and notes thereto.

Rule 11 (now see Rule 10-111) limits inherent power of district judge. - Rule 11 (now see Rule 10-111) limits the inherent power of a district judge to appoint a special master in children's court. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

Consequence of violating Rule 49(b) (now see Paragraph B of Rule 10-229) is dismissal. - Consistent with this rule, and giving effect to the mandatory aspect of the time requirements of Rule 49 (now see Rule 10-229), the consequence of violating Paragraph B of the latter rule is dismissal. State v. Doe, 93 N.M. 31, 595 P.2d 1221 (Ct. App. 1979).

Law reviews. - For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 42 Am. Jur. 2d Infants §§ 16, 17; 47 Am. Jur. 2d Juvenile Courts §§ 4, 8, 13 to 15.

Marriage as affecting jurisdiction of juvenile court over delinquent or dependent, 14 A.L.R.2d 336.

Homicide by juvenile as within jurisdiction of juvenile court, 48 A.L.R.2d 663.

Court's power to punish for contempt a child within the age group subject to jurisdiction of juvenile court, 77 A.L.R.2d 1004.

Right to jury trial in juvenile court delinquency proceedings, 100 A.L.R.2d 1241.

Right of bail in proceedings in juvenile courts, 53 A.L.R.3d 848.

Expungement of juvenile court records, 71 A.L.R.3d 753.

Extradition of juveniles, 73 A.L.R.3d 700.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness or the like in dependency or divestiture proceeding, 79 A.L.R.3d 417.

21 C.J.S. Courts §§ 124 to 134; 43 C.J.S. Infants §§ 7, 98.

10-102. Withdrawn.

ANNOTATIONS

Compiler's note. - Pursuant to a court order dated February 2, 1994, this rule, defining certain terms, is withdrawn effective for cases filed in the Children's Court on and after March 1, 1994.

10-103. General rules of pleading.

A. **Pleadings.** There shall be a petition and, except for the child in a delinquency proceeding, a response.

B. **Response.** Except for a child alleged to be a delinquent child, every respondent shall serve a response within thirty (30) days after being served with the summons and petition.

C. **Form.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number and a designation as to the type of pleading. In the petition the title of the action shall include the names of all parties, but in other documents filed with the court it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

D. **Adoption by reference.** Statements made in one part of a pleading may be adopted by reference in another part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

E. **Name of respondent.** In any pleading, the name of the respondent shall be stated, or, if the respondent's name is not known, the respondent may be described by any name or description by which the respondent can be identified with reasonable certainty, together with a statement that respondent's name is not known.

F. **Defects, errors, omissions and clerical mistakes.** No pleading shall be deemed invalid, nor shall the inquiry, hearing, judgment or other proceeding thereon be stayed or in any manner affected because of any defect, error, omission, imperfection or inconsistency therein which does not prejudice the substantial rights of the respondent on the merits. The court may at any time prior to an adjudication on the merits cause the pleadings to be amended to cure errors, defects, omissions, imperfections or variances if substantial rights of the respondent are not prejudiced. Upon ordering such an amendment of a petition or other pleading, the court shall grant a continuance to any party whose ability to present the party's case has been affected by the amendment. Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

G. **Amendment of offense; delinquency proceedings.** At any time prior to commencement of the adjudicatory hearing in a delinquency proceeding and subject to the provisions of Rule 10-107, the court may allow the petition to be amended to charge the respondent with an additional or different offense. Upon allowing such an amendment and upon the request of the respondent, the court shall grant a continuance to allow further time for preparation.

H. **Defenses; how presented.** Except in delinquency proceedings, every defense, in law or fact, to a claim for relief in any pleading, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of process;

(5) insufficiency of service of process;

(6) failure to state a claim upon which relief can be granted;

(7) failure to join a necessary party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the party may assert at the trial any defense in law or fact to that claim for relief.

I. **Signing of pleadings.** Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address and telephone number. Except when otherwise specifically required by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading motion or other paper is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. For a willful violation of this rule, an attorney or party may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

[As amended, effective September 1, 1995.]

*** * * * * * * * * * * * * * * * * * ***

No substantive changes were made in this rule in 1978. The rule contains the basic guidelines for pleadings in children's court proceedings.

Paragraphs A and B are identical to Rule 5-202 of the Rules of Criminal Procedure for the District Courts. Forms adopted by the supreme court show the proper caption for the pleadings.

Paragraph C is substantially identical to Rule 5-202 of the Rules of Criminal Procedure for the District Courts.

Paragraph D is patterned after Paragraph A of Rule 5-204 of the Rules of Criminal Procedure for the District Courts and is designed to prevent challenges to pleadings

based on technical defects, errors, omissions or variances. The court may allow the pleadings to be amended to cure such technical defects if the request is made prior to the conclusion of the adjudicatory hearing and if substantial rights of the respondent are not prejudiced. If such an amendment affects the ability of a party to present his case, a continuance must be granted.

Paragraph E is designed to allow the addition of a new or different offense to a petition if the motion to amend is made before the adjudicatory hearing begins and the amendment conforms to the requirements of Rule 10-107 for joinder of offenses. The respondent in such a case is entitled to a continuance if he requests it. A continuance at the request of the state is left to the discretion of the court.

Paragraph F is identical to Rule 5-206 of the Rules of Criminal Procedure for the District Courts.

It should be noted that in children's court proceedings, the term "offense" has an expanded meaning and includes not only violations of criminal statutes and ordinances, but also violations of those standards of conduct defined by the Children's Code in 32-1-3 NMSA 1978 as constituting "need of supervision" and "neglect."

ANNOTATIONS

Cross-references. - For Rules of Professional Conduct, see Rule 16-101 et seq.

For Supreme Court Rules Governing Discipline, see Rule 17-101 et seq.

The 1995 amendment, effective September 1, 1995, added Paragraphs A and B and redesignated former Paragraphs A to E as Paragraphs C to G; added the last sentence in Paragraph C; added "or in another pleading or in any motion" and added the last sentence in Paragraph D; in Paragraph F, rewrote the paragraph heading and added the last sentence; in Paragraph G, added "delinquency proceedings" in the paragraph heading and inserted "in a delinquency proceeding"; added Paragraph H; redesignated former Paragraph F as Paragraph I and rewrote that paragraph; and made gender neutral and minor stylistic changes throughout the rule.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 72 et seq.

10-103.1. Motions; how and when presented.

A. **Requirement of written motion; time for filing.** All motions, except motions made during trial, or as may be permitted by the court, shall be in writing and shall state with

particularity the grounds and the relief sought. All pre-adjudicatory motions shall be filed at least ten (10) days prior to any adjudicatory hearing except by leave of court.

B. **Unopposed motions.** The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order initialed by opposing counsel shall accompany the motion.

C. **Opposed motions.** The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The movant shall not assume that the nature of the motion obviates the need for concurrence from opposing counsel unless the motion is a:

(1) motion to dismiss;

(2) motion for new trial;

(3) motion for judgment notwithstanding the verdict;

(4) motion for summary judgment in an abuse or neglect proceeding or in a termination of parental rights proceeding;

(5) motion for relief from a final judgment, order or proceeding in an abuse or neglect proceeding or a termination of parental rights proceeding pursuant to Paragraph B of Rule 1-060 of the Rules of Civil Procedure for the District Courts.

Notwithstanding the provisions of any other rule, counsel may file with any opposed motion a brief or supporting points with citations or authorities. If the motion requires consideration of facts not of record, the moving party shall file copies of all affidavits, depositions or other documentary evidence to be presented in support of the motion. Motions to amend pleadings shall have attached the proposed pleading. A motion for judgment on the pleadings presenting matters outside the pleading shall comply with Rule 1-056 of the Rules of Civil Procedure for the District Courts. A motion for new trial in a neglect or abuse or termination of parental rights proceeding shall comply with Rule 1-059 of the Rules of Civil Procedure for the District Courts.

D. **Response.** Unless otherwise specifically provided in these rules or by the Children's Code, any written response and all affidavits, depositions or other documentary evidence in support of the response shall be filed within fifteen (15) days after service of the motion. A motion for new trial in a delinquency proceeding shall comply with Rule 5-604 of the Rules of Criminal Procedure for the District Courts.

E. **Reply brief.** Any reply brief shall be filed within fifteen (15) days after service of any written response.

[Adopted, effective September 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 17, 1995, this rule is effective September 1, 1995.

10-103.2. Dismissal of actions.

A. **Voluntary dismissal; effect thereof.**

(1) In any action except a delinquency proceeding, the action may be dismissed by the petitioner without order of the court:

(a) by filing a notice of dismissal at any time before service of an answer or other responsive pleading or within ten (10) days of the filing of the petition, whichever date is later; or

(b) by filing a stipulation of dismissal signed by all parties in the action.

(2) The children's court attorney may dismiss a delinquency petition or a petition to revoke probation, at any time prior to adjudication, without order of the court.

(3) Except as provided in Subparagraphs (1) or (2) of this paragraph, an action shall not be dismissed on motion of the petitioner except upon order of the court and upon such terms and conditions as the court deems proper. If a party other than the petitioner has requested affirmative relief, the action shall not be dismissed against that party's objection unless the claim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. **Involuntary dismissal; effect thereof.** For failure of the petitioner to comply with these rules or any order of court, a respondent may move for dismissal of an action or of any claim against the respondent. Unless the court in its order for dismissal otherwise specifies, a dismissal under this paragraph and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 10-007, operates as an adjudication upon the merits.

C. **Dismissal of requests for affirmative relief by parties other than the petitioner.** The provisions of this rule apply to the dismissal of any request for affirmative relief by any party other than the petitioner. A voluntary dismissal without leave of the court by the party requesting such relief shall be made before a response is served, or if there is no response, before the introduction of evidence at the trial or hearing.

[Adopted, effective September 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 17, 1995, this rule is effective September 1, 1995.

10-103.3. Form of papers.

All pleadings and papers, except exhibits, filed in the children's court or served upon a party, shall be: clearly legible; typewritten or printed on good quality white paper eight and one-half by eleven (8 1/2 x 11) inches in size, with a left margin of one and one-half (1 1/2) inches, a right margin of one-half (1/2) inch, and top and bottom margins of one and one-half (1 1/2) inches; with consecutive page numbers at the bottom; and stapled at the upper left hand corner; and, except for a cover page, shall be typed or printed using pica (10 pitch) type style or a twelve (12) point typeface. A space of at least two and one-half (2 1/2) by two and one-half (2 1/2) inches for the clerk's recording stamp shall be left in the upper right-hand corner of the first page of each pleading. The contents, except quotations and footnotes, shall be double spaced. Exhibits which are copies of original documents may be reproduced from originals by any duplicating or copying process which produces a clear black image on white paper. The size of any exhibits shall be their original size or any smaller size not less than eight and one-half by eleven (8 1/2 x 11) inches.

[Adopted, effective September 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 17, 1995, this rule is effective September 1, 1995.

10-104. Summons.

A. **Scope.** Parties in children's court proceedings, except the respondent in a delinquency proceeding, shall be served with a copy of the petition and summons as provided in this rule. Service of the petition and summons upon the respondents in delinquency proceedings shall be made pursuant to Rule 10-104.1 of these rules.

B. **Form.** The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the party to be served and state the name and address of the petitioner or the petitioner's attorney. It shall also state the time within which the party must respond, and notify the party that failure to do so may result in a judgment against the party for the relief demanded in the petition. The court may allow a summons to be amended. The summons shall be substantially in the form approved by the Supreme Court.

C. **Issuance.** Upon or after filing the petition, the state shall present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal and issue it to the state for service upon the party. A summons, or a copy of the summons if addressed to multiple parties, shall be issued for each party to be served.

D. **Service with petition; by whom made.**

(1) A summons shall be served together with a copy of the petition. The petitioner is responsible for service of a summons and petition within the time allowed under Paragraph K of this rule and shall furnish the person making service with the necessary copies of the summons and petition.

(2) Service may be made by any person who is not a party and who is at least eighteen (18) years of age. At the request of the petitioner, however, the court may direct that service be made by the sheriff, a deputy sheriff or other person or officer specially appointed by the court for that purpose.

E. **Service upon parties within the United States.** Unless otherwise provided by law, service upon a party, other than a minor or an incompetent person, may be made within the United States by delivering a copy of the summons and of the petition to the party personally or by leaving copies thereof at the party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

F. **Service upon parties in a foreign country.** Unless otherwise provided by federal law, service upon a party, other than a minor or an incompetent person, may be made in a place not within the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(b) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(c) unless prohibited by the law of the foreign country, by

(i) delivery to the party personally of a copy of the summons and the petition; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

G. **Service upon minors and incompetent persons.**

(1) Service within the United States upon a minor, as defined in this rule, may be made by delivering a copy of the summons and petition, in the manner provided by Paragraph E of this rule, to the respondent child and to a custodial parent, custodian, guardian or conservator of the minor. Notice of the proceedings shall be given to any known guardian ad litem. Notice to any known guardian ad litem shall be served as provided in Rule 10-105 of these rules.

(2) Service in the United States upon an incompetent person, as defined in this rule, may be made by service of the summons and petition in the manner provided by Paragraph E of this rule:

(a) on the incompetent person's guardian ad litem, if any; or

(b) if there is no guardian ad litem, by service upon a conservator of the estate or guardian of the person.

(3) Service upon an infant or incompetent outside the United States shall be made in a manner prescribed by Subparagraphs (2)(a) or (2)(b) of Paragraph F of this rule or by such means as the court may direct.

(4) Notwithstanding any other provision of this rule, a party who is an alleged abused or neglected child shall be served by service on the guardian ad litem appointed to represent the child in the proceeding.

H. **Service upon governmental entities.** Service of a summons upon a federal, state or local governmental entity shall be made in the manner as provided in the Rules of Civil Procedure for the District Courts.

I. **Service by publication.** Service upon a party may be made by publication upon the filing of a certificate by the petitioner substantially in the form approved by the Supreme Court certifying that: after diligent inquiry and search efforts petitioner has been unable to serve the party; the party is deliberately concealed to avoid service of process or cannot be discovered after reasonably diligent inquiry and search efforts; and process cannot be served upon the party by any other means permitted by this rule. Upon the filing of the certificate, the clerk of the court shall cause to be issued a notice of the pendency of the proceeding substantially in the form approved by the Supreme Court. The clerk's notice of pendency of the proceeding shall be published in some newspaper in general circulation in the county for four (4) consecutive weeks. The publication of the notice shall be established by the affidavit of the publisher, manager or agent of the newspaper, and it shall be taken and considered as sufficient service of process.

J. **Proof of service.** The person making service shall make proof of service to the court. Proof of service in a place not within the United States shall, if made under subparagraph (1) of Paragraph G, be made pursuant to the applicable treaty or

convention, and shall, if made under subparagraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

K. **Time limit for service.** If service of the summons and petition is not made upon a party within one hundred twenty days (120) days after the filing of the petition, the court, upon motion or on its own initiative after notice to the petitioner, shall dismiss the action without prejudice as to that party or direct that service be made within a specified time; provided that if the petitioner shows good cause for the failure, the court shall extend the time for service for an appropriate period. This paragraph does not apply to service in a foreign country pursuant to Paragraph G.

L. **Definitions.** As used in this rule,

(1) a "minor" means a person under the age of eighteen (18) who has not been emancipated pursuant to the provisions of the Emancipation of Minors Act or other law. The term "minor" includes a "child" or an "infant" when those terms are used in any law or court rule;

(2) an "incompetent" means any person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that the person is unable to manage the person's personal care or property and financial affairs.

[As amended, effective September 1, 1995.]

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The rule governs the issuance of summons and service of the summons and a copy of the petition. The procedure set forth is unique to children's court proceedings in two ways. First, it differs from the summons format used in civil cases and criminal cases in the district courts in that the respondent is told he must appear before the court at the time specified in the notice of adjudicatory hearing (see approved summons form). The summons itself does not specify the time and place of appearance nor does it command the respondent to submit a written answer to the petition. No time is specified for appearance in the summons since one of the events that triggers the time limit for the commencement of the adjudicatory hearing is the date the petition is served on the respondent (Rules 10-227 and 10-308). Accordingly, it is highly unlikely that the adjudicatory hearing will have been scheduled at the time the summons is issued.

Under Rule 10-104, the notice of adjudicatory hearing must be served at least five days before the date the hearing is set.

The second unusual aspect of the summons procedure is the requirement for service of informational copies. See Paragraph F. The summons itself directs only the respondent to appear to answer the allegations of the petition. The parents, guardian or custodian of a child alleged to be in need of supervision cannot be ordered to answer the allegations of the petition. The parents of an alleged delinquent child may be named as parties pursuant to Section 32-1-47 NMSA 1978. In any event, as noted in the commentary to Rule 10-104, the original committee felt that the interests of the parents in the matter, even if they are not named as parties, required that they be informed of the proceedings. In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

Rule 10-105 differs from Rule 10-104 in that Rule 10-105 requires that the summons and copy of the petition be served on both parents, if not living together, unless parental rights have been terminated by court order, a parent is deceased or the children's court attorney certifies that the parent cannot be located. Rule 10-104 requires that service of other pleadings and orders be made only on the parent with legal custody. The requirement of Paragraph F of Rule 10-105 is designed to assure that a parent not living in the family home is aware that his or her child has allegedly committed a delinquent act, is allegedly a child in need of supervision or is allegedly being abused or neglected by the other parent, guardian or custodian. In such situations, the absent parent, once aware of the problem, may come forward to offer assistance.

Paragraph A of Rule 10-105 requires that a summons be issued upon the docketing of a petition. Once served, the summons will provide the basis for issuance of a bench warrant if the respondent does not appear at the adjudicatory hearing (Rule 10-206).

Paragraph B of Rule 10-105 simply provides that the summons used will be in the form approved by the supreme court.

Paragraph C of Rule 10-105 requires that the summons and copy of the petition be served upon issuance of the summons. This requirement is intended to prevent unreasonable delays in service which might have the effect of lengthening the time limit for the commencement of the adjudicatory hearing. See Rules 10-226 and 10-308.

Paragraph D of Rule 10-105 requires personal service of the summons and petition on a respondent alleged to be delinquent or in need of supervision, unless otherwise ordered by the court. The method of service is governed by Rule 1-004 of the Rules of Civil Procedure for the District Courts. (See also Paragraph A of Rule 5-209 of the Rules of Criminal Procedure for the District Courts.) Likewise, service on the respondent in a neglect case follows Rule 1-004 of the Rules of Civil Procedure for the District Courts. Service by publication on the respondent in a neglect case is authorized under certain circumstances. A special publication form has been approved by the supreme court for this purpose.

Parties other than the respondent shall be served with summons pursuant to Paragraph E of Rule 10-105. Included in the category "other parties" are an alleged neglected or abused child and the parents, guardian or custodian of an accused child if, at the time of

issuance of the summons, they have been allowed to intervene in the action pursuant to Rule 10-108 or if a parent has been named as a party pursuant to Section 32-1-47 NMSA 1978.

The guardian ad litem of the alleged neglected or abused child is served in the same manner as an attorney for a party. The guardian ad litem must be appointed no later than at the time the neglect or abuse petition is filed. See Rules 10-108 and 10-305.

Rule 10-105 supersedes the procedural aspects of Sections 32-1-20, 32-1-21 and 32-1-37 NMSA 1978. It differs from Section 32-1-20 NMSA 1978 in several ways: (1) the summons is directed to the respondent; (2) the requirement that the child's spouse, if any, be served, is dropped; (3) issuance of a summons to a person does not necessarily make that person a party to the action (see Rule 10-108); and (4) the summons need not contain an advisement of rights. The provisions of Section 32-1-21 NMSA 1978, including the time limits, have been replaced by Rule 10-105. The provisional hearing procedure set forth in Section 32-1-37 NMSA 1978 when service is by publication has been superseded.

ANNOTATIONS

Cross-references. - As to summonses, and service thereof, in children's court, see 32A-1-12 and 32A-1-13 NMSA 1978.

The 1995 amendment, effective September 1, 1995, recompiled this rule, which was formerly Rule 10-105 SCRA 1986, and rewrote the rule to the extent that a detailed comparison is impracticable.

Compiler's note. - Former Rule 10-104 SCRA 1986 was recompiled as Rule 10-105 SCRA 1986 in 1995.

The commentary above does not reflect the recompilation of Rules 10-104 and 10-105 SCRA 1986 in 1995.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 62 et seq.

Right of parent to notice and hearing before being deprived of custody of child, 76 A.L.R. 242.

10-104.1. Service of summons on child in delinquency proceeding; failure to appear.

A. **Issuance.** Upon the filing of a petition alleging a delinquent act, upon request of the children's court attorney, the clerk shall forthwith issue a summons. Separate or additional summons may be issued against the same child.

B. **Service.** Service of a summons on a child alleged to have committed a delinquent act shall be by mail or by personal service.

C. **Execution; form.** The summons shall be substantially in the form approved by the Supreme Court.

D. **Summons; time to appear.** If service is by mail, service shall be made at least ten (10) days before the child is required to appear, unless a shorter time is ordered by the court. If service is made by mail an additional three (3) days shall be added.

E. **Summons; service by mail.** Service upon the child in a delinquency proceeding may be accomplished by mailing the summons and petition to the child by first class mail.

F. **Failure to appear.** If a child fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may:

(1) issue a warrant for the child's arrest; or

(2) direct that service of such summons and petition may be made in the manner prescribed by the court.

G. **Return.** If service is made by mail return shall be by the children's court attorney filing a certificate of mailing. If service is by personal service, the person serving the process shall make proof of service by a certificate of service in the form approved by the Supreme Court. Where service within the state includes mailing, the return shall state the date and place of mailing.

[Adopted, effective September 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 17, 1995, this rule is effective September 1, 1995.

10-105. Notice of hearings; service and filing of pleadings.

A. **When required.** Except as provided in Paragraph B of this rule or unless the court otherwise orders, every pleading, every order not entered in open court, every written motion unless it is one as to which a hearing ex parte is authorized and every written notice, demand and similar paper shall be served:

(1) on each party, except service on a child alleged to be a neglected or an abused child shall be made on the child's guardian ad litem; and

(2) on the parents, guardian or custodian of a respondent alleged to be delinquent or in need or supervision. For purposes of this rule, service on a "parent" or "parents" means service on the parent having legal custody of the child, if the parents are separated or divorced. If the parents of the child reside together, service on one parent shall satisfy the requirements of this rule.

B. **Exceptions.** The provisions of this rule shall not apply to:

(1) service of summons and copy of the petition, Rule 10-105;

(2) notice of preliminary inquiry when the child is in detention, Rule 10-202;

(3) notice of detention, Rule 10-208;

(4) notice of detention hearing, Rule 10-211;

(5) service of an ex parte custody order, Rule 10-301;

(6) notice of custody, Rule 10-302; and

(7) notice of custody hearing, Rule 10-303.

C. **When made.** Notice of all formal hearings provided for in these rules and notice of hearings on written motions, other than those which may be heard ex parte, shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. An order allowing a different period for service of a notice of a formal hearing may for cause shown be made on ex parte application.

D. **How made.**

(1) If a party or a person entitled to service is represented by an attorney or guardian ad litem, service shall be made upon the attorney or guardian ad litem only, unless service upon such party or person is required by these rules or is ordered by the court. If the party or person is not represented by an attorney or guardian ad litem, service shall be made upon such party or person.

(2) Service shall be made either by delivering a copy to the attorney, guardian ad litem, party or person or mailing a copy to his last known address. "Delivery" shall mean: handing it to the attorney, guardian ad litem, party or person; leaving it at his office with his secretary or other person in charge, or if there is no one in charge, leaving it in a conspicuous place therein; if the office is closed or the party or person has no office, leaving it at his usual place of abode with some person of his family above fifteen (15)

years of age, informing such person of the contents thereof; or leaving it in a mail depository authorized by the attorney to be served. "Mailing" shall include deposit in an outgoing mail container which is maintained in the usual and ordinary course of business of the serving attorney. Service by mail shall be deemed complete upon mailing.

E. **Filing.** All original papers, copies of which are required to be served, must be filed with the court either before service or immediately thereafter. Such filing shall be made with the clerk of the court, who shall endorse on the papers the day, month and year that they are filed. The judge of the court may permit papers to be filed with him, in which case he shall note upon them the filing date and transmit them to the office of the clerk.

F. **Proof of service.** Except as otherwise provided in these rules or by order of court, proof of service shall be made by the certificate of an attorney of record, or if made by any other person, by the affidavit of such person. Such certificate or affidavit shall be filed with the clerk or endorsed on the pleading, motion, notice or other paper required to be served. Failure to make proof of service does not affect the validity of the service.

G. **Failure to serve.** If the respondent in a neglect or abuse proceeding or a person entitled to service under Subparagraph (2) of Paragraph A of this rule cannot be found, the children's court attorney shall file a sworn affidavit to that effect. Upon the filing of said affidavit, no party shall be required to make service upon said person in accordance with this rule.

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The rule establishes the basic procedure for the service of most notices and pleadings in a children's court proceeding. Notices and pleadings requiring special service are specifically excluded in Paragraph B of Rule 10-104. The procedure used to serve the notices and pleadings does not vary significantly from the procedures used in civil proceedings and adult criminal proceedings in the district courts. The persons upon whom the notices and pleadings are to be served does differ.

Certain provisions of Rules 10-104, 10-105 and 10-108 reflect the view of the original committee that the parents, guardian or custodian of a respondent alleged to be delinquent or in need of supervision have a legitimate interest in children's court proceedings. The actions of the children's court may effectively limit or nullify the traditional right of the parents, guardian or custodian to the custody, supervision and control of their child. See In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

The Children's Code subjects parents to specific liabilities. In delinquency cases, the parents may be made parties, may be ordered to submit to counseling or participate in a probation, treatment or institutional treatment program, and, if made a party and have not been determined to be indigent, shall be ordered to pay the reasonable costs of

support, maintenance and treatment if the child is institutionalized. See Section 32-1-47 NMSA 1978.

In abuse, neglect and need of supervision cases, the parents may be required to pay the reasonable costs of support and treatment if legal custody is vested in someone other than the parents. See Sections 32-1-41 and 32-1-47 NMSA 1978.

In delinquency, abuse, neglect or need of supervision proceedings, the parents may be ordered to pay the fees of the child's court-appointed attorney, the costs of medical and other examinations ordered by the court and court costs. See Section 32-1-41 NMSA 1978 and commentary to Rule 10-205.

Nevertheless, in delinquency proceedings, it is only the child, not the parents, guardian or custodian, who is the accused and whose actual liberty may be in question. Thus, the original committee felt that the interests of the parents, guardian or custodian of the accused child in the proceedings, although not raising them to the position of "parties" unless formal intervention is sought pursuant to Rule 10-108, do require that they be informed of the status of the proceedings.

Specifically, Subparagraph (1) of Paragraph A of Rule 10-104 requires service on each party. In delinquency proceedings, the parties are the state, the respondent and the parents of an alleged delinquent child if named pursuant to Section 32-1-47 NMSA 1978. In abuse and neglect proceedings, the parties are the state, the respondent and the child allegedly abused or neglected. See Rule 10-108.

Subparagraph (2) of Paragraph A of Rule 10-104 requires service upon the parents, guardian or custodian of a respondent alleged to be delinquent or in need of supervision. If the parents reside together, service of one copy of the notice or pleading suffices. If the parents do not reside together, only the parent, guardian or custodian having legal custody of the child is required to be served. The court may order that additional or different persons receive the copies of the notices and pleadings.

If a party or person required to be served is represented by an attorney or guardian ad litem, service is to be made upon his attorney or guardian ad litem under Paragraph D of Rule 10-104.

Written motions which may be heard ex parte are exempt from this rule. These motions include a stay pending appeal under Rule 10-118 and an ex parte custody order, Rule 10-301.

Paragraph B of Rule 10-104 enumerates the notices and pleadings which are not covered by Rule 10-104 and which are governed by the provisions of other rules. Except for the summons and copy of the petition and the ex parte custody order, the notices are not within the provisions of Rule 10-104 because the time limits involved in the relevant proceeding are such that the five-day notice requirement of Paragraph C of Rule 10-104 is inappropriate or unworkable.

Paragraph D of Rule 10-104 defining how service is made is substantially similar to Paragraph B of Rule 5-103 of the Rules of Criminal Procedure for the District Courts. The guardian ad litem receives service on behalf of the alleged abused or neglected child he represents. In terms of service, the role of the guardian ad litem is similar to that of the attorney for the respondent. See commentary to Rule 10-108 for discussion of the role of the guardian ad litem.

Paragraph D of Rule 10-104 relates to service by mailing. The "outgoing mail container" referred to in Subparagraph (2) of Paragraph D of Rule 10-104 denotes a container specifically designated and used solely for the purpose of receiving outgoing mail. The contents of the container should regularly and frequently be delivered to the United States postal service.

Paragraph C of Rule 10-104 on the filing of papers follows Paragraphs C and D of Rule 5-103 of the Rules of Criminal Procedure for the District Courts.

Paragraph F of Rule 10-104 on proof of service follows Paragraph E of Rule 5-103 of the Rules of Criminal Procedure for the District Courts. The last sentence makes clear that failure to make proof of service is not a jurisdictional defect.

Paragraph G of Rule 10-104 contains a unique procedure if the person entitled to service cannot be located. Paragraph B of Rule 5-103 of the Rules of Criminal Procedure for the District Courts provides that in such cases the pleading shall be left with the clerk of the court and placed in the court file. Paragraph G of Rule 10-104 (and Rule 10-105) provide that if the parents, guardian or custodian of the accused child or the respondent in an abuse or neglect action cannot be found, the children's court attorney must file an affidavit to that effect with the court. Such a filing suspends the requirements of Rule 10-104. The notice requirements of the rule are not suspended if the person who cannot be found is the respondent in a delinquency or need of supervision proceeding. If, after the affidavit is filed, the person returns and makes his presence known, good faith and probably due process will require that such person receive all notices and pleadings filed subsequent to his return.

If an affidavit is filed in connection with the service of summons and petition under Paragraph F of Rule 10-105, that affidavit will fulfill the requirements of Paragraph G of Rule 10-104.

The only notice provision of the Code specifically superseded by Rule 10-104 is Section 32-1-29A(3) NMSA 1978 relating to transfer hearings.

The basic effect of Rule 10-104 on the Code is to put in notice time limits where none existed before, to establish a procedure for service of copies of notices and pleadings and to clarify who is to receive copies of notices and pleadings.

ANNOTATIONS

Cross-references. - As to summonses, and service thereof, in children's court, see 32A-1-12 and 32A-1-13 NMSA 1978.

Recompilations. - In 1995, Former Rule 10-104 SCRA 1986 was recompiled as this rule. Former Rule 10-105 SCRA 1986 was recompiled as Rule 10-104 SCRA 1986.

Compiler's note. - The commentary above does not reflect the recompilation of Rules 10-104 and 10-105 SCRA 1986 in 1995.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 62 et seq.

Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically requested in pleadings of prevailing party, 5 A.L.R.5th 863.

43 C.J.S. Infants § 99.

10-106. Time.

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court or by the Children's Code, the day of the act, event or default from which the designated period of time begins to run shall not be included, unless otherwise provided by these rules. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, or when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

B. **Enlargement.** When, by these rules or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 10-212, 10-226 or 10-308, except to the extent and under the conditions stated in those rules.

C. **For motions.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

D. **Additional time after service by mail.** Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

[As amended, effective September 1, 1995.]

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No substantive changes were made in this rule in 1978. The rule substantially follows Rule 5-104 of the Rules of Criminal Procedure for the District Courts. Under Paragraph A, except as noted below, the time limits contained in these rules are computed in exactly the same manner as time is computed under either the Rules of Criminal Procedure for the District Courts or the Rules of Civil Procedure for the District Courts.

The exceptions to the general method of time computation are the time limits for giving notice of detention, Rule 10-208, and notice of custody, Rule 10-302. These notices are required to be given within 24 hours from the time the child was placed in detention or taken into custody, including Saturdays, Sundays and legal holidays, even if the 24-hour period ends on one of these days.

Paragraph B on enlargement of time limits is comparable to Paragraph B of the Rules of Criminal Procedure for the District Courts. The court may not extend the time for commencement of detention hearings or custody hearings unless the respondent's attorney agrees in writing to the extension. Under Rules 10-226 and 10-308, only the Supreme Court may extend the time for commencement of adjudicatory hearings.

Paragraph C on additional time after service by mail follows Paragraph D of Rule 5-104 of the Rules of Criminal Procedure for the District Courts.

Paragraph D on time for motions is patterned after Paragraph F of Rule 5-103 of the Rules of Criminal Procedure for the District Courts.

ANNOTATIONS

The 1995 amendment, effective September 1, 1995, rewrote Paragraph A, added "where the failure to act was the result of excusable neglect" at the end of Subparagraph B(2), substituted the ending language of Paragraph B for "The court may not extend the time for commencement of a detention hearing or a custody hearing unless the attorney for the respondent agrees in writing to an extension", added Paragraph C, redesignated former Paragraph C as Paragraph D and made gender neutral changes in that paragraph, and deleted former paragraph D relating to time for motions.

Failure of state to move for enlargement of time to file petition. - Paragraph B of this rule does not indicate that, upon failure of the state to move for an enlargement of the time in which to file a petition, the children's court loses jurisdiction or that it requires the petition to be dismissed with prejudice. State v. Doe, 91 N.M. 393, 574 P.2d 1021 (Ct. App. 1978).

Time for demand for jury trial. - Since the state was unable to establish the date the child's attorney was served with a copy of her appointment, the 10-day period within which to demand a jury trial began to run on the day following the appearance of the attorney at the detention hearing. In re Ruben O., N.M. , 899 P.2d 603 (Ct. App. 1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 16 et seq.

10-107. Joinder; severance.

A. **Joinder of allegations of offenses.** Two or more allegations of offenses may be joined in a single petition alleging delinquency or need of supervision, with each such allegation stated in a separate count if such allegations, whether felonies, misdemeanors or violations of a standard of conduct, are of the same or similar character, even if not part of a single scheme or plan, or are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

B. **Joinder of respondents.** Two or more respondents may be named in the same petition alleging delinquency or need of supervision when:

(1) each respondent is alleged to have committed each offense included; or

(2) the several offenses alleged:

(a) are part of a common scheme or plan; or

(b) are so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one allegation from proof of others.

C. **Joinder in neglect or abuse petition.** Allegations that any adult has neglected or abused one or more children may be joined in a single petition. Two or more adults may be named respondents in a single petition alleging neglect or abuse of one or more children.

D. **Relief from prejudicial joinder.** If it appears that the respondent is prejudiced by the joinder of offenses or of parties, the court may, on motion, notice and hearing, order an election or separate trials of offenses, grant a severance of proceedings or order whatever other relief justice requires.

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The rule sets forth the bases for joining offenses and respondents in children's court proceedings and the basis and method of relief from prejudicial joinder.

Paragraph A of Rule 10-107 on joinder of allegations of offenses follows Rule 5-203 of the Rules of Criminal Procedure for the District Courts. The issue of whether mandatory joinder is required by the supreme court order issued in December, 1979, was raised by the committee in December, 1981. It was the consensus of the supreme court that its earlier order did not extend to juvenile proceedings. See commentaries to Rule 5-203 of the Rules of Criminal Procedure for the District Courts. Paragraph B of Rule 10-107 relating to joinder of respondents is patterned after Paragraph B of Rule 5-203 of the Rules of Criminal Procedure for the District Courts. See also Section 32-1-47 NMSA 1978 for permissive joinder of parents in delinquency proceedings and Rule 10-108 of these rules.

Paragraph C of Rule 10-107 governs joinder in neglect or abuse actions. A single petition may allege that a parent, guardian or custodian has neglected or abused more than one child or that both parents, guardians or custodians have neglected or abused one or more children. Of course, some connection between the alleged acts of neglect or abuse or the children involved is envisioned. Thus, Paragraph C of Rule 10-107 would permit joinder in a single petition of allegations that one parent neglected or abused only one of a couple's children and that the other parent neglected or abused another of their children. It would allow in a single petition allegations of separate acts each amounting to neglect or abuse.

Under Paragraph D of Rule 10-107, relief from joinder is available only to the respondent. The relief may be granted only upon motion and hearing, and the moving respondent must show prejudice.

Evidence against a joint respondent which violates the constitutional right of confrontation of the moving respondent is not admissible against the moving respondent. Bruton v. United States, 391 U.S. 123, 130-31, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The Bruton holding has been held applicable to delinquency proceedings in at least one jurisdiction. In re Appeal No. 977, 22 Md. App. 511, 323 A.2d 663 (1974).

ANNOTATIONS

Cross-references. - As to petition initiating proceedings under Children's Code, see 32A-1-10, 32A-1-11 and to 32A-2-8 NMSA 1978.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

10-108. Parties; intervention.

A. **Delinquency proceedings.** In proceedings on petitions alleging delinquency, the parties to the action are the child alleged to be delinquent and the state.

B. **Neglect or abuse and family in need of court ordered services proceedings; parties.** In proceedings on petitions alleging neglect or abuse or a family in need of court ordered services, the parties to the action are:

(1) the state;

(2) the custodial parent or parents of the child alleged to have been neglected or abused or in need of court ordered services; and

(3) the child alleged to be neglected or abused or in need of court ordered services. The court shall appoint a guardian ad litem to represent the child alleged to be neglected or abused or in need of court ordered services upon the filing of a petition alleging neglect or abuse or a family in need of court ordered services.

C. **Termination of parental rights proceedings; necessary parties.** In termination of parental rights proceedings, the parties are the state, the parents of the child, the legal guardians of the child and any other person required by law to be made a party.

D. **Neglect or abuse and family in need of court ordered services proceedings; permissive joinder.** Neglect or abuse and family in need of court ordered services proceedings; permissive joinder. In proceedings on petitions alleging neglect or abuse or a family in need of court ordered services, the state may join as parties the non-custodial parent or parents, the guardian or custodian of the child or any other person permitted by law to intervene in the proceedings.

E. **Intervention.** Upon timely application the following persons may be permitted to intervene in a children's court proceeding under such terms and conditions as the judge may prescribe:

(1) in delinquency proceedings, the parents, guardian or custodian of the respondent;

(2) in neglect, abuse or family in need of court ordered services proceedings, a parent, guardian or custodian of the child alleged to have been abused or neglected or in need of court ordered services or any other person permitted by law;

(3) in a delinquency, neglect, abuse or family in need of court ordered services proceeding any person with a statutory right to intervene in the proceedings; or

(4) any person who has a constitutionally protected liberty interest in the proceedings if the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In exercising its discretion pursuant to this paragraph the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[As amended, effective July 1, 1995.]

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Rule 10-108 is essentially a definitional section. It was changed in 1978 to reflect the enactment of Section 32-1-47 NMSA 1978 (formerly Section 13-14-44.1 NMSA 1953), allowing the parent of an alleged delinquent child to be named a party to the action.

Under Paragraph A of Rule 10-108, the parties in delinquency and need of supervision proceedings are the respondent - the accused child - the state, a parent of a child alleged to be delinquent if named pursuant to Section 32-1-47 NMSA 1978, and, of course, anyone allowed to intervene under the rule. Depending on the stage of the proceeding, the state may be represented by either a juvenile probation officer or the children's court attorney. The children's court attorney must represent the state at adjudicatory hearings under Rules 10-227 and 10-308. Otherwise, his appearance at the various hearings is discretionary, although it would be unlikely that a probation officer would represent the state at release or transfer hearings.

Paragraph B of Rule 10-108 defines the parties in neglect and abuse cases. In addition to the accused and the state, the alleged neglected or abused child, represented by a guardian ad litem, is a party. The guardian ad litem must be appointed upon the filing of the neglect or abuse petition (Rule 10-305), although nothing prohibits appointment prior to the filing. The role of the guardian ad litem has been well defined. His appointment:

. . . is a position of the highest trust and no attorney should ever blindly enter an appearance as guardian ad litem and allow a matter to proceed without a full and complete investigation into the facts and law so that his clients will be fairly and competently represented and their rights fully and adequately protected and preserved. Bonds v. Joplin's Heirs, 64 N.M. 342 at 345, 328 P.2d 597 (1958).

In the 1978 revisions to the rules, the role of the guardian ad litem continues even after final disposition (Rule 10-309).

The major difference between the role of the guardian ad litem in a neglect or abuse case and the role of the accused's attorney in a delinquency or need of supervision proceeding is that in the former, the guardian ad litem does what he considers to be in the best interests of the child, while in the latter the attorney, although he may advise differently, follows the instructions of his client, even though he may not consider those instructions to be in the client's best interests. The guardian ad litem has much greater freedom.

Paragraph D of Rule 10-108 allows the parents, guardian or custodian of the respondent in delinquency and need of supervision proceedings to become a party by moving the court for permission to intervene in the proceeding. In neglect or abuse proceedings, the parent, guardian or custodian who is not alleged to have neglected or abused the child may be permitted to intervene. The motion envisioned by the committee would be similar to an application for permissive intervention under Rule 1-024 of the Rules of Civil Procedure for the District Courts, with the court considering whether the intervention would unduly delay the proceedings or prejudice the rights of the respondent. For example, in delinquency and need of supervision proceedings, the risks of delay and confusion seem most acute in those situations in which the parents, guardian or custodian filed the original complaint against their child. In such circumstances, intervention by the parents, guardian or custodian may result in both the state and the parents, guardian or custodian prosecuting the child. Intervention would probably be most desirable in those situations where the accused child does not wish to contest the allegations of the petition, but his parents, guardian or custodian do.

In the event that the court considers it necessary to have the parents, guardian or custodian appear before the court and intervention has not been sought and the parents have not been named as parties under Section 32-1-47 NMSA 1978, their appearance may be compelled by subpoena under Rule 10-109. Compare In re Downs, 82 N.M. 319, 481 P.2d 107 (1971).

Rule 10-108 supersedes Subsections K and L of Section 32-1-27 NMSA 1978 relating to appointment of guardians ad litem to the extent that the rule is in conflict with these subsections. The court is left with the discretion to make such an appointment in other proceedings under the criteria set forth in the statute.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "intervention" in the section heading and rewrote this rule to an extent that a detailed analysis is impracticable.

State's representative authorized to execute affidavit of disqualification of judge. - The power and duty of the children's court attorney to represent the state necessarily includes the authority to execute an affidavit of disqualification of a judge when the

disqualification is done on behalf of the state. Smith v. Martinez, 96 N.M. 440, 631 P.2d 1308 (1981).

Discretion of trial court in determining intervention. - The trial court has a good deal of discretion in determining whether to allow intervention, and the decision of the trial court will not be reversed absent a showing of abuse of that discretion. In re Termination of Parental Rights of Melvin B., 109 N.M. 18, 780 P.2d 1165 (Ct. App. 1989).

Applicability of 40-10-3H NMSA 1978. - That the nonparent custodians of a child were "acting as parents" pursuant to 40-10-3H NMSA 1978 because they had physical custody of the child and claimed a right to custody, had no applicability in a neglect or abuse case so as to entitle the custodians to the protections afforded in a termination of parent rights case. In re Agnes P., 110 N.M. 768, 800 P.2d 202 (Ct. App. 1990).

Rights of de facto custodians. - Because the nonparent custodians of a child failed to establish any right to the child, other than their previous status as de facto custodians, the children's court could properly discontinue their involvement in a treatment plan, dismiss them from the neglect action, and direct that the child be freed for adoption by other qualified and suitable persons. While through their status they appeared to have assumed all the obligations of parents, an in loco parentis status did not entitle them to parental termination proceedings pursuant to former 32-1-55 NMSA 1978. In re Agnes P., 110 N.M. 768, 800 P.2d 202 (Ct. App. 1990).

10-109. Compelling attendance of witnesses.

The Rules of Civil Procedure for the District Courts shall apply to and govern the compelling of attendance of witnesses in children's court proceedings.

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See Rule 1-045 of the Rules of Civil Procedure for the District Courts.

ANNOTATIONS

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

10-110. Witness immunity.

A. **Issuance of order.** If a person has been or may be called to testify or to produce a record, document or other object in an official proceeding conducted under the authority of the court, the court in which the official proceeding is or may be held may, upon the written application of the children's court attorney, issue a written order requiring the person to testify or to produce the record, document or other object notwithstanding his privilege against self-incrimination.

B. **Application.** The court may grant the application and issue a written order pursuant to this rule if it finds:

(1) the testimony, or the record, document or other object may be necessary to the public interest; and

(2) the person has refused or is likely to refuse to testify or to produce the record, document or other object on the basis of his privilege against self-incrimination.

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This rule is the same as Rule 5-116 of the Rules of Criminal Procedure for the District Courts.

10-111. Special masters.

A. **Appointment.** A special master may be appointed by a children's court judge pursuant to the provisions of this rule to assist in any children's court proceeding.

B. **Qualifications.** Any person appointed to serve as a special master pursuant to this rule shall:

(1) have been licensed to practice law in the State of New Mexico for at least three (3) years; and

(2) shall be knowledgeable in the trial of children's court matters.

C. **Powers.** Unless the order otherwise specifies, the special master has the power to perform any of the functions of a children's court judge pursuant to the provisions of the Children's Court Rules except that the special master shall not preside at a preliminary hearing or examination, jury trial, bench trial, adjudicatory hearing or dispositional hearing without concurrence of the parties. All recommendations of the special master are contingent upon the approval of the children's court judge.

D. **Duties.** The special master shall prepare a report including proposed findings of fact and conclusions of law on the matters submitted to the special master by the order of appointment. The report shall be filed with the court and copies shall be served on all parties in accordance with the provisions of these rules.

E. **Exceptions to report.** Any party may file exceptions to the special master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five (5) days after service of the master's report and shall set forth:

(1) those items to which exception is taken;

(2) a short resume of all facts relevant to the issues presented for review with appropriate references to the pages of the record proper and pages or sequential time or counter numbers of the transcript. If reference is made to evidence the admissibility of which is in controversy, reference shall be to the place in the transcript of proceedings where the evidence was identified, offered and received or rejected;

(3) a citation to any authority which may assist the children's court judge in reviewing the exceptions; and

(4) a statement of the precise relief sought.

F. **Review of the special master's report.** After the time for filing exceptions has expired the children's court may:

(1) adopt the report or proposed order, modify it or reject it in whole or in part; or

(2) receive evidence excluded by the special master to which exceptions have been taken.

G. **Removal of special masters.** In any proceeding, upon motion of any party upon good cause shown, or upon the court's own motion, the children's court may at any time remove the special master from acting in that proceeding.

H. **Time limits.** No time limit set forth in these rules shall be tolled or enlarged because of the appointment of a special master.

[As amended, effective March 1, 1991; November 1, 1991; September 1, 1995.]

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Rule 10-111 was added in 1978 to provide assistance to the children's court judge in large judicial districts by allowing a special master to exercise all powers of the court, other than power to preside at jury trials, transfer hearings and dispositional hearings. The 1981 legislature specifically provided for the use of special masters in other judicial districts and provided less restrictive qualifications than provided in this rule. The committee believes that the use of special masters is an inherent power of the judiciary; however, consistent with legislative intent, the court deleted the geographical limitations in Rule 10-111. The committee did not recommend any change in the qualifications for special masters. See Section 32-1-38.1 NMSA 1978 and the definition of "court" found as Subsection C of Section 32-1-3 NMSA 1978.

A major goal of the juvenile justice system is early and prompt judicial disposition of a case. Rule 10-111 is designed to allow supplementation of judicial resources whenever the children's court judge "is unable to expeditiously dispose of pending children's court cases" or some other "exceptional condition" requires the appointment. The supreme court need not approve the appointment of a special master in each individual case.

The power to appoint special masters is an inherent power of the judiciary. McCann v. Maxwell, 170 Ohio St. 282, 189 N.E.2d 143 (1963). See North Carolina R.R. v. Swasey, 90 U.S. 405, 23 L. Ed. 136 (1875). Typically, this power has been limited to unusual or complex cases. Thus, Rule 1-053 of the Rules of Civil Procedure for the District Court provides:

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

The committee believed that the court's inability to "expeditiously dispose of pending children's court cases" was the type of exceptional condition which warranted appointment of a special master. This conclusion was based on two considerations: (1) the goal of prompt disposition, previously discussed and (2) the very short time limits established in the rules and the Children's Code.

The time limits in these rules are not to be tolled or enlarged if a special master is appointed.

Once it was determined that a special master was a necessary addition to the system, the committee endeavored to draft a rule which would meet the requirements of both the state and federal constitutions.

A special master in a juvenile case has been held to be a ministerial officer and not a judicial officer so long as the master's recommendations are not binding on the district judge. In re Anderson, 272 Md. 85, 321 A.2d 516 (Md. Ct. App. 1974). Under Rule 10-111F, the court is not bound by the findings and conclusions of the special master and may, in fact, receive evidence excluded by the special master if the claimed error is properly preserved. The court retains full power over the dispositional hearing pursuant to Paragraph C of Rule 10-111. The children's court judge always has responsibility for the final decision in the case.

Under Rule 10-111 a child is subject to a "single proceeding which begins with a master's hearing and culminates with an adjudication by the children's court judge". Thus there is no violation of the double jeopardy clause of the United States Constitution. Swisher v. Brady, 438 U.S. 204, 98 S. Ct. 2699, 57 L. Ed. 705 (1978).

This rule was amended in 1990 to authorize the appointment of special advocates to assist the children's court by investigating facts and making reports to the court. The 1991 amendments eliminated the authority of special advocates to enter into ex parte communications with the children's court judge. [As revised, effective November 1, 1991.]

ANNOTATIONS

Cross-references. - For definition of "court appointed special advocate", see 32A-1-4 NMSA 1978.

The 1991 amendment, effective for cases filed in the children's court on and after March 1, 1991, in the catchline, added "and CASA"; in Paragraph A, substituted "A special master or a court appointed special advocate ('CASA')" for "With the prior approval of the New Mexico Supreme Court a special master" at the beginning and inserted "or CASA" in Subparagraph (2); in Paragraph B, added the designations in Subparagraph (1) and added Subparagraph (2); in Paragraph C, added the Subparagraph (1) designation and Subparagraph (2); in Paragraph D, substituted "Duties" for "Report" in the heading, added the Subparagraph (1) designation, substituting "submitted to the special master" for "submitted to him" and added Subparagraph (2); in Paragraph F, inserted "the special masters" in the heading; and, in Paragraph H, added "or a CASA" at the end.

The 1991 amendment, effective for cases filed in the children's courts on or after November 1, 1991, in Paragraph C, added "with copies to the parties" to the end of Subparagraph (2); in Subparagraph (2) of Paragraph D, deleted the heading "CASA" from the beginning and deleted former Sentence (f), relating to ex parte communications with judges by CASA volunteers; and added Subparagraph (3) of Paragraph D.

The 1995 amendment, effective September 1, 1995, deleted "and CASA" from the rule heading and rewrote Paragraphs A to D and H to delete provisions relating to court appointed special advocates; deleted former Subparagraphs A(1) and A(2) relating to necessary showings for appointment; rewrote Paragraph C; inserted "special" in the introductory language of Paragraph E; inserted "or proposed order" in Subparagraph F(1); and in Paragraph G, substituted "Removal" for "Substitution" in the paragraph heading, substituted "In any proceeding, upon motion" for "Upon application", inserted "upon good cause shown", and added "from acting in that proceeding".

Court is not bound by commentaries. - The court of appeals is not bound by the interpretations of the commentaries to this rule. State v. Doe, 96 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

Rule limits the inherent power of a district judge to appoint a special master in children's court. State v. Doe, 96 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

Appointment without prior approval is improper. - Where prior approval of the supreme court for a party to act as a special master to a children's court is never sought, either immediately prior to a particular case, or at some time more remote in the past, such an appointment is improper. State v. Doe, 96 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

Effect of special master's recommendations. - As long as the special master's recommendations are not binding on the children's court judge, a special master is

considered a ministerial, rather than a judicial officer, and is without powers of adjudication. Under Paragraph F of this rule, the children's court is not bound by the special master's findings and conclusions. Thus, there is no violation of the double jeopardy clause when the children's court judge remands to the special master prior to entering its findings and conclusions. State v. Billy M., 106 N.M. 123, 739 P.2d 992 (Ct. App. 1987).

Time limit for dispositional hearing is not suspended. - The running of the twenty-day time limit in Rule 10-229 within which a dispositional hearing must be held is not suspended until exceptions are filed under Paragraph E of this rule, and the children's court judge acts on the report of the special master. In re Paul T., 118 N.M. 538, 882 P.2d 1051 (Ct. App. 1994).

Where special master lacks authority to hear probation revocation petition, the court is without jurisdiction at the hearing on the petition. When the district judge disposes of the case more than 30 days after the petition is filed, the petition should be dismissed with prejudice. State v. Doe, 96 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

10-112. Peremptory challenge to a children's court judge; recusal; procedure for exercising; disability.

A. **Limit on excusals or challenges.** No party shall excuse more than one judge. A party may not excuse a judge after the party has requested that judge to perform any discretionary act. Action by the court in connection with a detention or custody hearing or the appointment of counsel shall not preclude the disqualification of a judge.

B. **Procedure for excusing a children's court judge.** A party may exercise the statutory right to excuse the judge before whom the proceeding is pending by filing with the clerk of the children's court a peremptory election. The peremptory election to excuse must be signed by the party or an attorney representing a party within ten (10) days after the latter of:

(1) the first appearance of the party;

(2) service of the petition on the party; or

(3) mailing by the clerk of notice of assignment or reassignment of the case to a judge.

C. **Notice of reassignment; service of excusal.** After the filing of the petition, if the case is reassigned to a different judge, the clerk shall give notice of reassignment to all parties. Any party electing to excuse a judge shall serve notice of such election on all parties.

D. **Recusal.** No children's court judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in any

such action. Upon receipt of notification of recusal from a children's court judge, the clerk of the court shall give written notice to each party.

E. **Disability.** If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge may recall any witness.

[As amended, effective August 1, 1989; July 1, 1995.]

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In 1989, Rule 10-112 was amended to adopt the peremptory disqualification procedures approved by the Supreme Court for civil cases. See Rule 1-088.1.

Paragraph D of Rule 10-112 applies to disqualifications pursuant to Section 38-3-9 NMSA 1978. In Frazier v. Stanley, 83 N.M. 719, 497 P.2d 230 (1972), the New Mexico Supreme Court held that the right to disqualify a judge pursuant to Section 38-3-9 NMSA 1978 (formerly Section 21-5-8 NMSA 1953) was applicable to the Juvenile Code, predecessor statute to the Children's Code. The court held that Juvenile Code proceedings were "either civil or criminal (and) (i)n either case, petitioner was a party to the action or proceeding and entitled to exercise the right of disqualification given her by Section 38-3-9, supra". 83 N.M. at 720.

Under Section 38-3-9 NMSA 1978, the party himself, not his attorney, must sign the affidavit of disqualification, and this procedure is continued under Rule 10-112. Rule 10-112, although following the procedures outlined in Section 38-3-9 NMSA 1978, does not follow the time limits for disqualification set forth in Section 38-3-10 NMSA 1978.

Paragraph B of Rule 10-112 is intended to make clear that the action of a judge at a detention or custody hearing or the action of the judge in appointing counsel is not considered an exercise of discretion in determining the validity of a later disqualification. See Smith v. Martinez, 96 N.M. 440, 631 P.2d 1308 (1968).

Paragraph C of Rule 10-112 follows Rule 5-106 of the Rules of Criminal Procedure for the District Courts.

Rule 10-112 is not meant to restrict disqualifications pursuant to Art. VI, Sec. 18, of the New Mexico Constitution, nor to disqualifications pursuant to Sections 32-1-29 or 32-1-36 NMSA 1978. Section 32-1-36 NMSA 1978 allows disqualification upon objection by the child in certain situations involving consent decrees, and Section 32-1-29 NMSA 1978 permits disqualification upon objection of a party when the judge presides at a transfer hearing.

ANNOTATIONS

The 1989 amendment, effective on and after August 1, 1989, substituted present Paragraph A for former Paragraph A, relating to filing by party of affidavit that judge cannot preside with impartiality; redesignated former Paragraph C as present Paragraph G; and added present Paragraphs C through F.

The 1995 amendment, effective July 1, 1995, rewrote this rule to an extent that a detailed analysis is impracticable.

State's representative authorized to execute affidavit of disqualification of judge. - The power and duty of the children's court attorney to represent the state necessarily includes the authority to execute an affidavit of disqualification of a judge when the disqualification is done on behalf of the state. Smith v. Martinez, 96 N.M. 440, 631 P.2d 1308 (1981).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 8.

10-113. Attorneys; fees.

A. **Entry of appearance.** Whenever counsel undertakes to represent a party in any children's court action, he immediately shall file a written entry of appearance in the cause, unless he has been appointed by written order of the court. For the purpose of this rule, the filing of any pleading signed by counsel constitutes an entry of appearance.

B. **Continued representation.** An attorney who has entered an appearance or who has been appointed by the court shall continue such representation until relieved by the court.

C. **Failure to observe rules.** An attorney who willfully fails to observe the requirements of these rules, including prescribed time limitations, may be held in contempt of court and subject to disciplinary action.

D. **Signing of pleadings.** Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

E. **Fees.** The children's court may award expert witness fees, guardian ad litem fees and attorney fees in accordance with the schedule approved by the supreme court and in effect at the time that the expenditure is incurred.

[As amended, effective May 1, 1986.]

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Rule 10-113 was formerly Rule 12. It was renumbered in 1978. See Rules 5-107 and 5-112 of the Rules of Criminal Procedure for the District Courts. See also discussion of attorney discipline in commentary to Rule 10-204.

The requirement in Paragraph A of Rule 10-113 that counsel "immediately" file a written entry of appearance is designed to prevent the unnecessary appointment of an attorney for a respondent alleged to be delinquent or in need of supervision when that respondent already has retained private counsel. Under Rule 10-204, appointment of counsel occurs automatically within five days of the filing of a petition or at the conclusion of the detention hearing unless counsel has entered an appearance on behalf of the respondent.

It should also be noted that the time limits for pretrial motions in Rule 10-114 and the time limit for a demand for jury trial in Rule 10-228 begin running from the time of appointment or entry of appearance.

Paragraph D was derived from Rule 1-011 of the Rules of Civil Procedure for the District Courts. It eliminates any need for endorsements on petitions by the children's court attorney. See Section 32-1-17 NMSA 1978.

ANNOTATIONS

Cross-references. - For Rules of Professional Conduct, see Rule 16-101 et seq.

For Supreme Court Rules Governing Discipline, see Rule 17-101 et seq.

Compiler's note. - Rule 10-204, referred to in the second sentence in the second paragraph of the committee commentary, was amended in 1982 and no longer deals with the appointment of an attorney.

Entry of appearance. - Since the state was unable to establish the date the child's attorney was served with a copy of her appointment, the 10-day period within which to demand a jury trial began to run on the day following the appearance of the attorney at the detention hearing. In re Ruben O., N.M. , 899 P.2d 603 (Ct. App. 1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Lack of notice to contemnor at time of contemptuous conduct of possible criminal contempt sanctions as affecting prosecution for contempt in federal court, 76 A.L.R. Fed. 797.

10-114. Withdrawn.

ANNOTATIONS

Withdrawals. - Pursuant to a court order dated July 17, 1995, this rule, relating to filing of motions, is withdrawn effective September 1, 1995.

10-115. Rules of evidence.

Except as otherwise provided by these rules, the New Mexico Rules of Evidence shall govern all proceedings in the children's court.

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Rule 10-115 was formerly Rule 14. It was renumbered in 1978.

Rule 10-115 carries forth the provision of Rule of Evidence 11-1101 that the Rules of Evidence apply to all the courts of the state.

Rule of Evidence 11-1101 makes the rules inapplicable to sentencing proceedings, issuance of arrest warrants and search warrants, granting or revoking probation and proceedings with respect to release on bail or otherwise. By analogy, these exceptions apply to the issuance of arrest and search warrants under Rule 10-206, to detention hearings under Rule 10-211 (a proceeding with respect to release on bail or otherwise), to dispositional hearings under Rules 10-229 and 10-309 (sentencing proceedings) and to reviews of dispositional judgments under Rule 10-311.

Within specific children's court rules, the Rules of Evidence are specifically made inapplicable to the determination of a factual basis for an admission or consent decree, Rules 10-224 and 10-307; to ex parte custody proceedings, Rule 10-301; custody hearings, Rule 10-303; and the release hearing, Rule 10-212, under the general policy of Rule 11-1101 of the Rules of Evidence.

The only other provisions of the Children's Court Rules which deal with evidentiary matters are Rules 10-224 and 10-307 relating to the inadmissibility of consent decree discussions in other proceedings.

The Children's Code itself contains two evidentiary provisions which are apparently in conflict with one another and at least partially in conflict with the Rules of Evidence. The New Mexico Supreme Court applies the same constitutional standards for waiver of constitutional rights to children and adults. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967). See also Section 32-1-27 NMSA 1978. Children may waive their constitutional rights. See Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968) and Bouldin v. Cox, 76 N.M. 93, 412 P.2d 392 (1966) (waivers of counsel); Lopez v. United States, 399 F.2d 865 (9th Cir. 1968) and West v. United States, 399 F.2d 467 (5th Cir. 1968) (waiver of Miranda rights).

ANNOTATIONS

Cross-references. - For Rules of Evidence, see Rule 11-101 et seq.

Expert witness. - A state police narcotics agent who had conducted 200 to 300 similar tests, 80 of which had been used in various cases, preliminary hearings and children's cases not involving felonies, was sufficiently expert to qualify for purposes of delinquency petitions involving marijuana offense which would have been a misdemeanor if committed by an adult. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Manifestation of belief in truth of statement. - A children's court judge could properly hold that a child manifested a belief in the truth of statements, made by two sons of the owner of a pickup, that he was trying to rip a CB radio out of the same, where the child admitted that he was caught running and more or less admitted that he was in the pickup. State v. Doe, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

Statements made without advice of counsel. - A child's statements manifesting the truth of the accusers' claims, but made to the police after being taken into custody without the benefit of the advice of counsel, were inadmissible under former 32-1-27 NMSA 1978. State v. Doe, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 47.

Applicability of rules of evidence, 43 A.L.R.2d 1128.

Use of judgment in prior juvenile court proceeding to impeach credibility of witness, 63 A.L.R.3d 1112.

43 C.J.S. Infants § 47.

10-116. Withdrawn.

ANNOTATIONS

Withdrawals. - Pursuant to a court order dated July 17, 1995, this rule, relating to clerical mistakes, is withdrawn effective September 1, 1995.

10-117. Harmless error; failure to comply with time limits.

Error or defect in any ruling, order, act or omission by the court or by any of the parties including failure to comply with time limits is not grounds for granting a new hearing or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or

order, or for dismissing an action, unless refusal to take any such action appears to the court inconsistent with substantial justice or unless these rules expressly provide otherwise.

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Rule 10-117 was formerly Rule 18. It was renumbered in 1978.

See Rule 1-061 of the Rules of Civil Procedure for the District Courts and Rule 5-113 of the Rules of Criminal Procedure for the District Courts. Rule 11-103 of the Rules of Evidence governs harmless error in the admission or exclusion of evidence.

Rule 10-117 was amended in 1981 to clarify that failure to comply with time limits is not grounds for dismissal of an action unless expressly provided otherwise by the rules. Rules 10-226, 10-229 and 10-308 provide for dismissal with prejudice for failure to comply with the time limits for adjudicatory and dispositional hearings.

In State v. Doe, 91 N.M. 393, 574 P.2d 1021 (Ct. App. 1978), the New Mexico Court of Appeals dismissed a petition with prejudice which had not been filed within the time prescribed by Section 32-1-14 NMSA 1978. The court dismissed the petition with prejudice, basing its decision on the statute. Section 32-1-14 NMSA 1978 was amended in 1981 to delete both the time limit and dismissal with prejudice requirement provisions.

Rules 10-226 and 10-308 provide time limits for adjudicatory hearings and Rule 10-229 provides time limits for dispositional hearings. These rules specifically require dismissal with prejudice if the time limit is not met. Since the decision in State v. Doe, supra, and apparently based on that holding, the court of appeals has dismissed petitions for failure to comply with time limits for dispositional and probation revocation hearings.

State v. Doe, 93 N.M. 31, 595 P.2d 1221 (Ct. App. 1979), held that a violation of the time requirements of Rule 10-229 requires dismissal. The delay of a child's arrival at the youth diagnostic center, followed by the withdrawal of the child's original attorney and a request for continuance of the hearing by a second attorney, resulting in the hearing being held more than seventy-five days following the completion of the adjudicatory hearing, does not affect the requirement of dismissal. State v. Doe, 94 N.M. 282, 609 P.2d 729 (Ct. App. 1980).

State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979), held that failure of the court to commence the hearing to revoke probation within the time prescribed by the rules requires that the revocation petition be dismissed with prejudice.

State v. Doe, 93 N.M. 748, 605 P.2d 256 (Ct. App. 1980), held that the hearing on a petition to extend custody pursuant to 32-1-38 NMSA 1978 must be held within 30 days after the date of termination of the prior custody or the date the respondent is arrested after his failure to appear, whichever shall last occur. The time limits of Rule 10-226 are applicable to petitions to extend custody. Failure to hold the hearing on the petition to

extend custody within 30 days of the date of the applicable occurrence stated above requires dismissal with prejudice of the petition to extend custody.

ANNOTATIONS

Fundamental error. - Fundamental error will only be heard to prevent a plain miscarriage of justice where someone has been deprived of rights essential to a defense, or to protect those whose innocence appears indisputable or is open to such question that it would shock the conscience to permit the conviction to stand. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Prejudicial error needed for reversal. - In children's court cases, no less than in adult cases, error must be prejudicial to be reversible. State v. Doe, 103 N.M. 233, 704 P.2d 1109 (Ct. App. 1985).

Improper admission of evidence not reversible error absent reliance. - The erroneous admission of evidence is not reversible error in a nonjury proceeding unless it appears that the court must have relied upon such evidence in reaching its decision; court's remarks at conclusion of child's transfer hearing showed that court did not rely on any of possibly inadmissible testimony based on contents of probation file, but rather on probation officer's personal knowledge of activities involving the child. In re Doe, 89 N.M. 700, 556 P.2d 1176 (Ct. App. 1976).

10-118. Stay pending appeal; application in the court of appeals.

A party appealing a judgment of the children's court may request that the judgment be stayed by filing and serving an application for stay in the manner provided by the Rules of Appellate Procedure.

[As amended, effective July 1, 1988.]

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This rule was revised in two ways in 1978: (1) the time in which an answer is to be filed in response to an application for stay was expanded from three days to seven days (see Rule 10-106 for computation of time limits), and (2) the role of the children's court judge in the appellate stay procedure was deleted. Requirements regarding reports of the evidence submitted in the children's court are now fulfilled by certificate of counsel.

This rule sets forth the general procedure for staying a judgment of the children's court. Both the attorney general and the children's court attorney must be served with the application. Although the attorney general represents the state on appeal, the trial attorney may be involved in opposing the application. To give effect to 32-1-39B NMSA 1978, the rule requires the application to present alternatives for placement of the child pending the appeal.

ANNOTATIONS

Cross-references. - As to appeals from children's court, see 32A-1-17 NMSA 1978.

The 1988 amendment, effective July 1, 1988, deleted the Paragraph A designation, substituted "in the manner provided by the Rules of Appellate Procedure" for the former provisions regarding filing and serving in the courts of appeals at the end of the rule, and deleted former Paragraphs B to E, regarding contents of the application, response to the application, stay pending disposition of the application, and disposition of the application.

10-121. Court appointed special advocates.

A. **Appointment.** A court appointed special advocate ("CASA") may be appointed by a children's court judge pursuant to the provisions of this rule to assist in any children's court proceeding.

B. **Qualifications.** Any volunteer appointed to serve as a CASA pursuant to this rule shall:

(1) be of the age of majority;

(2) have successfully passed screening requirements, including a written application, personal interview, reference checks, and criminal records checks;

(3) have successfully completed a minimum of fifteen (15) hours initial training in accordance with the guidelines of the National CASA Association;

(4) receive regular in-service training; and

(5) remain under the supervision of the local CASA director.

C. **Powers.** The CASA may assist the children's court:

(1) in determining the best interests of the child by investigating the facts of the situation when directed by the court and submitting reports to the parties; and

(2) by monitoring compliance with the treatment plan and submitting reports to the court and the parties subsequent to adjudication.

D. **Duties.** Any volunteer appointed to serve as a CASA pursuant to this rule shall be assigned duties consistent with the best interest of the child, which include but are not limited to:

(1) review of records other than those records to which access is limited by the court;

(2) interview of appropriate parties;

(3) monitoring of case progress;

(4) preparing reports based on the investigation conducted by the CASA, and including recommendations to the court; and

(5) conduct business while maintaining confidentiality of information obtained.

E. **Ex parte communications.** A CASA volunteer shall not engage in any ex parte communications with the judge assigned to any case on which the CASA volunteer is working.

F. **Reports.** Any reports prepared by the CASA volunteer shall not be filed with or considered by the children's court judge prior to the conclusion of the adjudicatory proceeding. The report shall be served on the parties, but not the court, at least five (5) days prior to the hearing at which it will be considered.

G. **Time limits.** No time limit set forth in these rules shall be tolled or enlarged because of the appointment of a CASA.

[Adopted, effective September 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 17, 1995, this rule is effective September 1, 1995.

ARTICLE 2
DELINQUENCY AND NEED OF SUPERVISION PROCEEDINGS

Rule

10-201. Preliminary inquiry; time limits.

A. **Time limits.** Probation services shall conduct a preliminary inquiry upon receipt of a report that a child is delinquent or is in need of supervision. The preliminary inquiry shall be completed:

(1) within thirty (30) days from the date of the first notice to the child and his parents, guardian or custodian of the initial conference in the inquiry if the child is not in detention; or

(2) within two (2) days from the date of detention if the child is in detention.

B. **Purpose of preliminary inquiry.** The purpose of the preliminary inquiry is to determine whether the best interests of the child and the public require that a petition alleging delinquency or need of supervision be filed. During the preliminary inquiry, the matter may be referred to other appropriate agencies and conferences may be conducted.

C. **Neglect or abuse complaints.** Probation services shall refer any complaint alleging that a child is neglected or abused to the department.

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Minor wording changes were made in Rule 10-201 in 1978.

The preliminary inquiry is the first step in the juvenile justice system. The purpose of the preliminary inquiry is not to determine guilt or innocence, nor is it intended that juvenile probation officers do the investigatory work traditionally performed by law enforcement officers. Rather, the essential inquiry is whether it is in the best interests of the child and the public that formal court action be taken against the child accused of having committed a delinquent act or of being in need of supervision.

The process has two values: it gives the officer insight into the possible need for filing a petition, and it allows some guidance for the parents and child that may obviate the need to file. If successful, a period of informal adjustment results in a "disposition" in that a petition is not filed and formal court action does not occur.

Council of Judges, National Council on Crime and Delinquency, Model Rules for Juvenile Courts, 13-14 (1969).

Juvenile probation officers are given a good deal of discretion under the Children's Code to determine whether or not to authorize the filing of a petition. (Note that under Rule 10-204 the children's court attorney may file the petition even if not authorized by juvenile probation. However, before the petition may be filed, juvenile probation must complete a preliminary inquiry.) It is not necessary that the child "confess" to the act alleged for the case to be disposed of informally. However, the juvenile probation officer must make some judgment as to whether the act complained of does constitute a delinquent act or that the child is in such need of supervision that it is necessary to invoke formal court action.

Paragraph A of Rule 10-201 sets forth the time limits for completion of the preliminary inquiry. The time limit depends on whether or not the child is in detention. If the child is not in detention, the time limit begins to run from the date the inquiry begins, that is, the date of the first notice to the child and his parents, guardian or custodian of the initial conference in the inquiry. It is not necessary that an actual conference be held in order for a valid preliminary inquiry to exist. State v. Doe, 91 N.M. 232, 572 P.2d 960 (Ct. App. 1977). Likewise, the rule does not purport to establish the content of the conference.

See State v. Doe, supra. If the child is in detention, the time limit runs from the date of detention. For computation of these time limits, see Rule 10-106.

Paragraph B of Rule 10-201 sets forth the purpose of the preliminary inquiry, and allows referral to other agencies.

Paragraph C of Rule 10-201 requires that neglect and abuse complaints received by juvenile probation be referred to the Human Services Department. The department then performs an investigation pursuant to Section 32-1-14 NMSA 1978.

Rule 10-201 supersedes the provisions of Sections 32-1-14 and 32-1-26A(1) NMSA 1978 relating to delinquency and need of supervision proceedings.

ANNOTATIONS

Cross-references. - As to preliminary inquiry by probation services, see 32A-2-7 NMSA 1978.

Determination whether to file delinquency petition deemed social, not legal. - The "best interests" determination as to the filing of a delinquency petition is a social determination, not a legal determination. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

And involves exercise of discretion. - A best interest determination, whether by probation services, the children's court attorney or both, involves the exercise of discretion. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

There can be a valid preliminary inquiry without a conference, and, therefore, without an initial conference involving the child, the parents and probation services. State v. Doe, 91 N.M. 232, 572 P.2d 960 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

Child asserting inadequate inquiry had burden of coming forward with evidence. - Where a child asserted that no preliminary inquiry was held because at the meeting prior to the detention hearing there was no inquiry as to whether the best interests of the child and the public required that a petition be filed, it was up to the child as movant to come forward with evidence tending to establish the inadequacy. State v. Doe, 92 N.M. 198, 585 P.2d 342 (Ct. App. 1978).

Delinquency petition based on alleged burglary not insufficient. - A best interests determination that a delinquency petition be filed, based on the fact that the child allegedly committed a burglary, is not insufficient as a matter of law. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 1 et seq.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 A.L.R.4th 985.

43 C.J.S. Infants § 5 et seq.; 67A C.J.S. Parent and Child §§ 73 to 83, 85, 87 to 89.

10-202. Notice of preliminary inquiry.

Before the preliminary inquiry is begun, probation services shall inform the child and his parents, guardian or custodian:

A. of the time, place and nature of the acts which resulted in the allegations that the child is delinquent or in need of supervision;

B. of the time and place of the initial conference in the preliminary inquiry and of the purpose of the inquiry;

C. that the child has a right to have an attorney present during any conferences between him and probation services during the inquiry and that if the child wants an attorney but cannot afford one, the public defender will represent the child; and

D. that if the parents, guardian or custodian can afford an attorney to represent their child, they will be ordered to reimburse the state for public defender representation.

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One of the notice requirements originally contained in Rule 10-202 was deleted in 1978. Probation services is no longer required to inform the child and his parents, guardian or custodian "that any communications made to probation services by the child during the preliminary inquiry are privileged." The privilege between the accused child and juvenile probation officers remains in effect under Rule 11-509 of the Rules of Evidence. The committee in 1978 decided that a general advisory statement by a layperson that the privilege exists would likely be misleading, considering the complexities of Rule 11-509. The committee believed that it should be the responsibility of the child's attorney to explain the privilege, if appropriate.

Rule of Evidence 11-509 was written specifically for Children's Code proceedings. It makes communications between the respondent and the juvenile probation officer during the preliminary inquiry confidential. It is designed to fulfill three functions:

(1) to provide the respondent protection similar to that afforded an adult criminal defendant and that provided all parties in civil litigation pursuant to Rules 11-408 and 11-410 of the Rules of Evidence. Because of phraseology and conceptual differences, it was questionable whether these rules of evidence would apply to Children's Code cases;

(2) to promote judicial economy by fostering an atmosphere during subjudicial processing that is conducive to informal disposition of complaints. Informal disposition requires open communication and if the probation officer can be a witness against the respondent, the child is going to be reluctant to discuss the acts alleged with the probation officer;

(3) to comply with the spirit of the Children's Code by de-emphasizing the adversary nature of the proceedings during the respondent's initial contact with the juvenile justice system. Without a privilege, the preliminary inquiry must begin with disclosure of the right against self-incrimination. The process immediately becomes accusatory and adversary in nature; the counseling functions of the juvenile probation officer are inhibited.

Rule 10-202 replaces Section 32-1-14B NMSA 1978 which requires that at the commencement of the preliminary inquiry the "parties" be advised of their basic rights under Section 32-1-27 NMSA 1978.

Rule 10-202 specifies the contents of the notice which must be given the child and his parents, guardian or custodian prior to the beginning of the preliminary inquiry.

The provisions of the rule apply whether or not the accused child is in detention. The notice goes to both the child and his parents, guardian or custodian. The notice need not be in writing, although the forms for children's court proceedings approved by the supreme court do contain a written notice of preliminary inquiry. Written notice generally will not be feasible when the child is in detention since the inquiry must be completed within two days of the date the child was placed in detention. If written notice is used, it may be mailed.

The time limits contained in Rule 10-104 do not apply to a notice of preliminary inquiry. Nevertheless, probation services is expected to use good faith and provide adequate notice.

Since the notice is directed at both the child and his parents, guardian or custodian, the rule provides that the parents, guardian or custodian be advised of their responsibility for attorney's fees in the event they can afford an attorney for the child, but do not retain one for the child and the court appoints counsel for the child. The authority for this assessment of attorney's fees is contained in Section 32-1-41B NMSA 1978.

It should be noted that there may be different offenses charged on the petition from those on the notice of preliminary inquiry. These different charges would be the result of the children's court attorney's evidentiary analysis of the police reports or booking slip.

ANNOTATIONS

Technical violation of notice requirement does not require dismissal. - Where a child does not claim prejudice by a lack of notice of the purpose of a preliminary hearing but only that notice was not given, the contention is based on a technicality which exalts form over substance; the child not having been harmed by the technical violation, the lack of notice of the purpose of the preliminary inquiry does not require dismissal of the petition filed pursuant to former 32-1-17 NMSA 1978. State v. John Doe, 92 N.M. 198, 585 P.2d 342 (Ct. App. 1978).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

10-203. Authorization of petition; request for attorney.

A. **Authorization of petition.** At the conclusion of the preliminary inquiry, probation services may authorize the filing of a petition upon a finding that informal adjustment is not in the best interests of the child and the public. If the children's court attorney determines that no petition should be filed, probation services shall inform the child.

B. **Request for attorney.** If, during the course of a preliminary inquiry, the child who is the subject of the inquiry requests an attorney and he cannot afford an attorney, probation services shall petition the court for appointment of counsel on his behalf.

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Rule 10-203 was formerly Rule 22. It was renumbered in 1978. It completes the rules governing the informal stage of juvenile proceedings.

Paragraph A of Rule 10-203 should be read in conjunction with Rule 10-204 and the commentary thereto. Even if probation services authorizes the filing of a petition, the children's court attorney may decide not to file the petition. Likewise, even if probation services does not authorize the filing of a petition, it is possible that the children's court attorney may wish to pursue the matter. However, it is expected that the children's court attorney will use this authority only in unusual cases.

Paragraph B authorizes probation services to file a motion with the court for appointment of counsel for the child prior to the filing of a petition if the child requests an attorney. Rule 10-205 provides for notice to the public defender by the court.

Paragraph A of Rule 10-203 replaces Section 32-1-14C NMSA 1978. Paragraph B has no statutory counterpart.

ANNOTATIONS

Cross-references. - As to no written notice of preliminary inquiry required, see Rule 10-104.

As to authorization to file petition, see 32A-1-10 and 32A-2-8 NMSA 1978.

Determination whether to file delinquency petition deemed social, not legal. - The "best interests" determination as to the filing of a delinquency petition is a social determination, not a legal determination. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

And involves exercise of discretion. - The best interest determination, whether by probation services, the children's court attorney or both, involves the exercise of discretion. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

Although determination by children's court attorney subject to judicial review. - The best interests determination of the children's court attorney is subject to judicial review by the children's court and by the New Mexico Court of Appeals. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

"Finding" held sufficient. - A petition signed by the children's court attorney stating that probation services has determined that the best interest of the child and the public require that a petition be filed complied with former 32-1-17 NMSA 1978 and was sufficient to satisfy the requirement of a "finding" in paragraph A. State v. Doe, 92 N.M. 198, 585 P.2d 342 (Ct. App. 1978).

Delinquency petition based on alleged burglary not insufficient. - A best interests determination that a delinquency petition be filed, based on the fact that the child allegedly committed a burglary, is not insufficient as a matter of law. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of juvenile court defendant to be represented during court proceedings by parent, 11 A.L.R.4th 719.

10-204. Filing of petition.

A. **Approval of petition.** Prior to the filing of a petition alleging delinquency or need of supervision, probation services shall complete a preliminary inquiry. The petition shall be signed by the children's court attorney.

B. **Form and contents.** Petitions shall be in a form approved by the supreme court. The petition shall set forth:

(1) the facts necessary to invoke the jurisdiction of the court;

(2) the criminal statute, other law or ordinance, if any, alleged to have been violated;

(3) the name, birthdate and residence address of the respondent;

(4) the names and residence addresses of the parents, guardian or custodian of the respondent and if no parent, guardian or custodian resides or can be found within the state, the name of any known adult relative residing within the state or residing nearest to the court;

(5) whether the respondent is in detention, and if so, the place of detention and the time he was placed in detention; and

(6) if any of the matters required to be set forth by this rule are not known, a statement of those matters and the fact that they are not known.

C. **Time limits.** Petitions shall be filed:

(1) within thirty (30) days from the date the preliminary inquiry was concluded if the child is not in detention; or

(2) within two (2) days from the date of detention if the child is in detention.

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Rule 10-204 was formerly Rule 23. It was renumbered in 1978.

The rule sets forth the procedure for initiating formal court action in a delinquency or need of supervision proceeding.

Under Paragraph A of Rule 10-204 the filing of a petition is a two-step process: (1) probation services conducts a preliminary inquiry and either authorizes or refuses to authorize the filing of a petition; and (2) the children's court attorney reviews the matter to determine if there are legally sufficient grounds to proceed to court with the case. The children's court attorney makes the final determination whether or not to prosecute the child. He may do so even if probation services has not authorized a petition. He may refuse to do so even if probation services has authorized the filing of the petition. However, probation services must have completed a preliminary inquiry before the petition can be filed. The original committee believed that the children's court attorney is responsible for prosecuting the case, and he should make the ultimate decision whether or not to proceed.

Paragraph B of Rule 10-204 sets forth the form and contents of the petition. Forms for petitions have been approved by the supreme court.

Paragraph C of Rule 10-204 establishes time limits for filing of the petition. The time limit for filing of a petition when the child is in detention is also the time limit for completion of the preliminary inquiry. For computation of the time limits see Rule 10-106.

Rule 10-204 covers the subject matter dealt with in Sections 32-1-14D, 32-1-17, 32-1-18, 32-1-19 and 32-1-26A(1) NMSA 1978. The most significant changes are in the procedure for filing a petition and in the time limits for filing a petition when the child is not in detention.

Paragraph A of Rule 10-204 supersedes conflicting provisions contained in Sections 32-1-17 and 32-1-18 NMSA 1978. Initiating formal court action is a procedural matter.

The requirement that the children's court attorney consult with probation services is believed to be directory and not mandatory. See State ex rel. Attorney General v. Reese, 78 N.M. 241, 430 P.2d 399 (1967). Rule 10-113 of these rules makes the endorsement on each petition that the filing of the petition is in the best interest of the child and the public unnecessary. See also art. 20, § 1 of the New Mexico Constitution.

In no case may anyone but the children's court attorney file a petition. (See Rule 10-305 for the filing of neglect petitions.) Probation officers are not allowed to sign any petitions, including petitions to revoke probation. (See Rule 10-232.) Of course, a parent, guardian, a representative of an agency licensed or authorized to provide care or supervision of children, etc., may make a complaint to probation services or the human services department.

In State v. Doe, 91 N.M. 393, 574 P.2d 1021 (Ct. App. 1978), the court held that a petition not filed within the mandatory time period must be dismissed with prejudice pursuant to the language of former Section 32-1-14D NMSA 1978. Under Rule 10-117, the only jurisdictional time limits are those contained in Rules 10-226 and 10-308 regarding the commencement of adjudicatory hearings on delinquency, need of supervision and abuse and neglect petitions and Rule 10-229 regarding the commencement of dispositional hearings. This is consistent with the general policy followed in the Rules of Criminal Procedure for the District Courts. Enforcement of the other provisions of the rules, including time limits, is through Rule 10-113 which allows the court to impose sanctions on an attorney who willfully violates the rules. This is also consistent with the policy of the Rules of Criminal Procedure and similar provisions in other rules adopted by the supreme court. For example, in State v. Lucero, 87 N.M. 369, 533 P.2d 758 (1975), the supreme court directed the court of appeals to hear an appeal on its merits with leave to "impose such sanctions as it deems appropriate" on an attorney for violation of the appellate rules. See also Rule 5-702 and commentary thereto of the Rules of Criminal Procedure for the District Courts.

Although Section 32-1-3P NMSA 1978 was amended to delete the requirement that a delinquent child be in need of care or rehabilitation, Section 32-1-31E NMSA 1978 requires the court to find that a delinquent child is in need of care and rehabilitation and

if the court does not so find, the petition shall be dismissed and the child released. "Need of care and rehabilitation" is still a requirement for delinquency.

ANNOTATIONS

Cross-references. - As to signing of petition, see 32A-1-10 NMSA 1978.

As to form and content of petition, see 32A-1-11 NMSA 1978.

As to time limit for filing of petition when child is detained, see 32A-2-13 NMSA 1978.

Determination whether to file delinquency petition deemed social, not legal. - The "best interests" determination as to the filing of a delinquency petition is a social determination, not a legal determination. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

And involves exercise of discretion. - A best interest determination, whether by probation services, the children's court attorney or both, involves the exercise of discretion. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

Although determination by children's court attorney subject to judicial review. - The best interests determination of the children's court attorney is subject to judicial review by the children's court and by the New Mexico Court of Appeals. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

Children's court attorney authorized to execute affidavit of disqualification of judge. - The power and duty of the children's court attorney to represent the state necessarily includes the authority to execute an affidavit of disqualification of a judge when the disqualification is done on behalf of the state. Smith v. Martinez, 96 N.M. 440, 631 P.2d 1308 (1981).

Rule does not apply to a petition to revoke probation; such petitions are governed by Rule 10-232. State v. Doe, 91 N.M. 364, 574 P.2d 288 (Ct. App. 1978).

Subparagraph C(1) is mandatory. State v. Doe, 91 N.M. 393, 574 P.2d 1021 (Ct. App. 1978).

And controls over conflicting statute. - There was a conflict between Subparagraph C(1) and 32-1-14D NMSA 1978 (prior to 1981) as to the time period the petition must be filed. As to this time period, the court rule is controlling. State v. Doe, 91 N.M. 393, 574 P.2d 1021 (Ct. App. 1978).

However, it does not provide for the dismissal of a petition for a failure to file the petition within the 30-day time period. State v. Doe, 91 N.M. 393, 574 P.2d 1021 (Ct. App. 1978).

Dismissal of petition inappropriate where procedural violation tangential to remedy. - The normal remedy for a violation of the children's court time limits, dismissal of the petition, would be inappropriate where the procedural violation is only tangentially related to the asserted remedy. State v. Doe, 94 N.M. 446, 612 P.2d 238 (Ct. App. 1980).

Delinquency petition based on alleged burglary not insufficient. - A best interests determination that a delinquency petition be filed, based on the fact that the child allegedly committed a burglary, is not insufficient as a matter of law. State v. Doe, 97 N.M. 792, 643 P.2d 1244 (Ct. App. 1982).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

10-205. Appointment of counsel; payment of fees.

A. **Appointment.** Within five (5) days from the date the petition is filed, or at the conclusion of the detention hearing, whichever occurs first, unless counsel has entered an appearance on behalf of the child, the court shall advise the public defender that the child is not represented by counsel and the public defender shall provide a defense for the child.

B. **Notice to parents.** If the public defender is asked to represent the child, the public defender shall serve on the parents, guardian or custodian a written notice on a form approved by the Supreme Court that if they can afford an attorney to represent the child, they will be ordered to reimburse the state for public defender representation. The notice shall be accompanied by a copy of the eligibility determination for indigent defense services form approved by the Supreme Court and shall advise the parents, guardian or custodian that if they do not complete the eligibility determination form return it to the public defender within the prescribed time, they may be charged for all legal representation of the child. The notice shall also advise the parents, guardian or custodian of the duty of the public defender to assist the parents, guardian or custodian in any indigency determination proceeding.

C. **Hearing on indigency.** Within ten (10) days after receipt of notice from the public defender pursuant to Paragraph B of this rule, the parents, guardian or custodian shall complete and return to the public defender the eligibility determination form or shall make satisfactory arrangements for payment for legal services performed for the child. Upon motion the children's court shall review the determination by the public defender that the parent, guardian or custodian is not indigent as provided by the procedures set forth in Children's Court Form 10-408.

[As amended, effective November 1, 1995.]

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Prior to the 1982 amendments, the Children's Code provided for the appointment of counsel to represent any child who cannot afford counsel and for the reimbursement of the state if the parents, guardian or custodian can afford to pay the costs of representation. Subsection B of Section 32-1-27 NMSA 1978 requires the public defender to represent a child determined indigent.

The 1981 session of the legislature did not amend several other sections of the Code which provide for the appointment of counsel by the court. See Subsection H of Section 32-1-27 NMSA 1978 (appointment of counsel by the court in delinquency and need of supervision cases); Subsection J of Section 32-1-27 NMSA 1978 (appointment of counsel by the court in neglect and abuse cases); and Section 32-1-41 NMSA 1978 (appointment of counsel is a charge upon the funds of the court). Since counsel appointed by the court must be paid out of court funds, it is presumed that in most cases the public defender will be requested to represent the child. Rule 10-205 was drafted to implement the 1981 requirement that the public defender represent the child.

The committee was of the opinion that the provisions of the Indigent Defense Act apply to a determination of who is a needy parent, guardian or custodian under the Children's Code. See Sections 31-16-1 through 31-16-10 NMSA 1978.

The committee did not believe that it was necessary to advise the child at each stage of the proceedings of the child's right to counsel in that the public defender has a duty to represent the child under the Children's Code and presumably will be present at each stage of the proceedings.

ANNOTATIONS

The 1995 amendment, effective November 1, 1995, substituted "child" for "respondent" near the beginning of Paragraph A; in Paragraph B, substituted "a copy of the eligibility determination for indigent defense services form" for "an affidavit of indigency" and "eligibility determination form" for "affidavit"; in Paragraph C, substituted "ten (10) days" for "thirty (30) days", "eligibility determination form" for "affidavit of indigency", and substituted the last sentence for "The public defender shall assist any parent, guardian or custodian in any hearing before the court to determine the indigency of the parents, guardian or custodian"; and deleted former Paragraph D relating to court orders.

10-206. Warrants.

A. **Arrest warrants.** Warrants for the arrest of a child alleged to be delinquent or in need of supervision may be issued by the children's court or the district court. The issuance, execution and return of the warrant for arrest shall be in accordance with the Rules of Criminal Procedure for the District Courts. The warrant for arrest shall be in the form approved by the supreme court.

B. **Bench warrants.** If any person who has agreed in writing to appear in court at a specified time and place or who is ordered by the court to appear at a specified time and place fails to appear at such specified time and place in person or by counsel when permitted by these rules, the court may issue a warrant for the person's arrest.

C. **Search warrants.** Search warrants may be issued by the children's court or the district court. The issuance, execution and return of the search warrant shall be in accordance with the Rules of Criminal Procedure for the District Courts. The search warrant shall be in the form approved by the supreme court.

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Rule 10-206 was formerly Rule 24. It was renumbered in 1978.

The rule governs the use of arrest, search and bench warrants in delinquency and need of supervision proceedings.

Under Paragraph A of Rule 10-206, arrest warrants are specifically authorized for both children alleged to be delinquent and those in need of supervision. The manner of obtaining, executing and returning the warrant does not differ materially from that used in adult criminal proceedings and is governed by Paragraph C of Rule 5-208 and by Rule 5-210 of the Rules of Criminal Procedure for the District Courts. However, in children's court proceedings, only the district court or children's court is authorized to issue the warrants.

Paragraph B of Rule 10-206 on bench warrants applies not only to respondents but to any other person who has agreed in writing to appear in court at a specified time and place or who is ordered by the court to appear at a specified time and place. Thus a bench warrant may be issued for the arrest of a parent, guardian, custodian or witness who disobeys a subpoena.

Paragraph C of Rule 10-206 technically allows the use of search warrants in both delinquency and need of supervision proceedings. The original committee felt that it would be an unusual case in which a search warrant would be justified in a need of supervision proceeding. Accordingly, the search warrant form approved by the supreme court is designed for use in cases involving allegations of delinquency. The issuance, execution and return of the search warrant is governed by Rule 5-211 of the Rules of Criminal Procedure for the District Courts.

Rule 10-206 does not apply to neglect or abuse proceedings. The original committee decided that neglect proceedings generally lack sufficient similarity to criminal cases for warrants to be appropriate.

Rule 10-206 supersedes the provisions of Section 32-1-22A NMSA 1978 when such arrests would require warrants if the person to be arrested were an adult. Nothing in the rule is designed to limit the authority of a law enforcement officer to make a warrantless

arrest in those situations when such an arrest would be valid if the person arrested were an adult.

ANNOTATIONS

Cross-references. - As to when taking child into custody is authorized, see 32A-2-9 NMSA 1978.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

10-207. Place of detention.

A. **Delinquents.** An alleged or adjudicated delinquent may not be detained in an adult facility.

B. **Youthful offender.** Notwithstanding the provisions of any other children's court rule, an alleged or adjudicated youthful offender may not be detained in an adult facility unless the court has determined to impose adult sanctions.

C. **Serious youthful offender.** Notwithstanding the provisions of any other children's court rule, a child alleged to be a serious youthful offender shall not be detained in an adult facility unless the court makes findings that such detention is appropriate.

[As amended, effective November 1, 1995.]

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Rule 10-207 was formerly Rule 25. It was renumbered in 1978.

The provisions for release provided in Rule 10-207 are essentially those contained in Section 32-1-23 NMSA 1978. The only significant difference is that release may be made upon the written promise of the child to appear before the court when directed to do so, rather than the written promise of the parents, guardian or custodian that the child will appear before the court when directed to do so. The rule is not meant to allow the issuance of a bench warrant to the child or his parents, guardian or custodian for failure to appear before probation services as part of the preliminary inquiry. Under Section 32-1-14B NMSA 1978, participation in the preliminary inquiry is voluntary.

Even if the child is released, the matter may be referred to probation services for further action. If the child is taken to a medical facility, the child also may be referred to probation services for determination of the appropriateness of detention prior to the detention hearing.

Paragraph B of Rule 10-207 is directed to advisement of rights by law enforcement officers. Subparagraphs (1), (2) and (4) of Paragraph B essentially restate Miranda v.

Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Subparagraph (3) is a right granted the child in Section 32-1-27 NMSA 1978. See the commentary to Rule 10-208 for a full discussion of the distinction between the use of the terms "in custody" and "detention".

ANNOTATIONS

Cross-references. - As to release or delivery of child from custody, see 32A-1-15 and 32A-2-10 NMSA 1978.

For criteria for detention of children, see 32A-2-11 NMSA 1978.

For basic rights of child alleged to be delinquent or in need of supervision, see 32A-1-16 and 32A-2-14 NMSA 1978.

The 1995 amendment, effective November 1, 1995, rewrote the rule to the extent that a detailed comparison is impracticable.

Compiler's note. - Section 32-1-23 NMSA 1978, referred to in the second paragraph of the committee commentary, was amended in 1981 to allow for the child to be released upon his written promise to appear. The section was subsequently repealed in 1993.

Delinquency proceedings "criminal". - Juvenile proceedings to determine delinquency, which may lead to commitment to state institution, must be regarded as "criminal" for purposes of privilege against self-incrimination. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Inadmissible confessions. - Use of confession obtained from minor, when one obtained from adult under similar circumstances would not be admissible, would be grossly unfair and could not be justified on any theory. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

Statements made without advice of counsel. - A child's statements manifesting truth of accusers' claims, but made to police after being taken into custody without benefit of advice of counsel, were inadmissible under former 32-1-27 NMSA 1978. State v. Doe, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

Confessions not tainted. - Where juveniles were advised of rights guaranteed in criminal proceedings, and there was no suggestion that they thought they were confessing as juveniles or to improve their position with police or juvenile authorities, fact that defendants were technically in custody of juvenile court, although not yet delivered to juvenile authorities, during taking of confessions by interrogating officers, did not taint confessions to such an extent as to make them involuntary or to make their use "fundamentally unfair". State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Children's Waiver of Miranda Rights and the Supreme Court's Decisions in Parham, Bellotti, and Fare," see 10 N.M.L. Rev. 379 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 10 et seq.

10-208. Placing child in detention.

A. **Referral to probation services.** Upon delivery of a child who may be held in custody to probation services or to a place of detention, a probation officer shall interview the child and, if possible, the child's parents, guardian or custodian to determine if continued detention is necessary under the criteria set forth in Rule 10-209 of these rules or the provisions of the Children's Code.

B. **Notice of detention.** If the probation officer determines that continued detention is necessary, the person in charge of the place of detention shall advise the child's parents, guardian or custodian as soon as practicable but no later than twenty-four (24) hours from the time the child was delivered to probation services or to a place of detention, including Saturdays, Sundays and legal holidays:

(1) the child has been placed in detention;

(2) the reason the child has been placed in detention;

(3) the place where the child is detained and the visiting hours there;

(4) if no petition is filed, the child will be released;

(5) if a petition is filed a detention hearing will be held to determine whether continued detention is necessary; and

(6) the child has a right to an attorney and, if they do not obtain an attorney for the child, the public defender will represent the child.

C. **Statement of probable cause.** In warrantless arrests, other than arrests for alleged parole violations, if the child is to be detained, at the time of the detention the arresting officer shall prepare a statement of probable cause and shall give a copy to the child. If a petition is filed the statement of probable cause shall be filed with the petition. A statement of probable cause shall be substantially in the form approved by the Supreme Court.

[As amended, effective November 1, 1995.]

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Rule 10-208 establishes the procedure for placing a child in detention when he is not released pursuant to Rule 10-207.

In the rules, the terms "custody" and "detention" have distinct meanings. "Detention" is never used in reference to alleged neglected or abused children; such children are "in custody". Children alleged to be delinquent or in need of supervision are "detained" or "placed in detention" upon their delivery to a place of detention or to probation services. The only time children alleged to be delinquent or in need of supervision are "in custody" is when they are under the supervision of a law enforcement officer or agency. The period of custody cannot exceed 24 hours under Section 32-1-23E NMSA 1978.

Within that 24 hours, the law enforcement officer must either release the child, deliver him to a medical facility or deliver him to a place of detention or to probation services. Whether or not delivery to a medical facility constitutes "detention" will depend on the circumstances of the case.

Delivery to probation services or to a place of detention does not constitute placing the child in detention. Under Paragraph A of Rule 10-208, probation services must determine whether continued detention is appropriate under the provisions of Sections 32-1-8 or 32-1-22 NMSA 1978 or the criteria set forth in Rule 10-209. The emphasis is on release.

If the child is detained, and a petition is or has been filed, the need for detention is reviewed by the court at a detention hearing under Rule 10-211. If no petition is filed within the time limits, the child must be released.

Paragraph B of Rule 10-208 specifies the provisions of the notice which must be given the parents, guardian or custodian if the child is continued in detention. The notice need not be in writing, and the person in charge of the place of detention gives the notice, not the person (i.e., the law enforcement officer) who originally took the child into custody. The notice must be given within 24 hours of the time the child is formally placed in detention, including Saturdays, Sundays and legal holidays. As in most of the other notice provisions, the person responsible for the notice is expected to make a good faith effort to locate the parents, guardian or custodian of the child. The notice need only go to one parent. If the parents, guardian or custodian cannot be located within the initial 24-hour period, the effort to give them notice should continue. See In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). A written notice of detention form has been provided and approved by the supreme court for this purpose.

ANNOTATIONS

Cross-references. - For Children's Code provisions relating to detention of children, see 32A-2-9 to 32A-2-13 NMSA 1978.

The 1995 amendment, effective November 1, 1995, substituted "the child's parents" for "his parents" in Paragraph A, deleted "or has been filed" following "filed" in Paragrph B(5), substituted "they" for "his parents, custodian or guardian" and "for the child" for "for him" in Paragraph B(6), and added Paragraph C.

Compiler's note. - Section 32-1-23E NMSA 1978, referred to in the last sentence in the second paragraph of the committee commentary, was amended in 1981 to no longer require a 24-hour limitation on the period of custody. The section was subsequently repealed in 1993.

Children's Code. - See 32A-1-1 NMSA 1978 and notes thereto.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 39 Am. Jur. 2d Habeas Corpus § 93; 47 Am. Jur. 2d Juvenile Courts § 62 et seq.

10-208A. Probable cause determination.

A. **When required.** A probable cause determination shall be made in all cases in which the arrest has been made without a warrant and the child has not been released. The probable cause determination shall be made promptly by a district judge, metropolitan court judge, magistrate or special master, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the child whichever occurs earlier.

B. **How conducted.** The determination that there is probable cause shall be nonadversarial and may be held in the absence of the child and of counsel. No witnesses shall be required to appear unless the court determines that there is a basis for believing that the appearance of one or more witnesses might lead to a finding that there is no probable cause.

C. **Amended statement of probable cause.** If the statement of probable cause fails to make a written showing of probable cause, an amended statement of probable cause may be filed with sufficient facts to show probable cause for detaining the child.

D. **Dismissal for failure to show probable cause.** If the court finds that there is no probable cause to believe that the child has committed an offense, the court shall order the immediate release of the child.

[Adopted effective November 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated September 12, 1995, this rule is effective November 1, 1995.

10-208B. First appearance; explanation of rights.

Upon the first appearance of a child before a court in response to summons or warrant or following arrest, the court shall inform the child of the following:

A. the offense charged;

B. the penalty provided by law for the offense charged;

C. the right, if any, to bail;

D. the right, if any, to trial by jury;

E. the right to the assistance of counsel at every stage of the proceedings;

F. the right, if any, to representation by an attorney at state expense;

G. the right to remain silent, and that any statement made by the child may be used against the child; and

H. the right, if any, to a preliminary examination.

[Adopted effective November 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated September 12, 1995, this rule is effective November 1, 1995.

10-209. Criteria for detention.

A child shall not be placed in detention prior to the court's disposition unless probable cause exists to believe that:

A. if not detained, the child will commit injury to the persons or property of others, cause self-inflicted injury or be subject to injury by others;

B. the child has no parent, guardian, custodian or other person able to provide adequate supervision and care for the child;

C. the child will run away or be taken away so as to be unavailable for proceedings of the court or its officers; or

D. the custody or detention is otherwise authorized by the provisions of the Children's Code.

[As amended, effective November 1, 1995.]

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A child may be detained only when authorized by Sections 32-1-8 or 32-1-22 NMSA 1978 or by the provisions of these rules.

Rule 10-209 sets forth three criteria for detention which are in addition to the statutory criteria. In addition to the other criteria set forth in Rule 10-209, the child may be detained if probable cause exists to believe that if not detained the child will "be subject to injury by others." This language is contained in Section 32-1-24A(1) NMSA 1978. The other criteria are also taken from Section 32-1-24 NMSA 1978.

The criteria for placing children who are alleged to be neglected or abused in the custody of the Human Services Department is contained in Rule 10-303.

ANNOTATIONS

Cross-references. - For criteria for detention of child, see 32A-2-11 NMSA 1978.

The 1995 amendment, effective November 1, 1995, substituted "self-inflicted injury" for "injury to himself" in Paragraph A, substituted "for the child" for "for him" in Paragraph B, and added Paragraph C and redesignated former Paragraph C as Paragraph D.

Children's Code. - See 32A-1-1 NMSA 1978 and notes thereto.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

10-210. Explanation of rights at first appearance.

At his first appearance before the court in a delinquency or need of supervision proceeding, the respondent and the parent, guardian or custodian of the respondent shall be informed by the court:

A. of the allegations against him;

B. of the right, if any, to a release hearing and the right, if any, to trial by jury;

C. of the right of the child to an attorney and that if he cannot afford an attorney, the public defender will represent the child;

D. of the right to remain silent and that any statement made by him may be used against him; and

E. of the possible consequences if the allegations of the petition are found to be true.

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Rule 10-210 was split into two parts in 1978: Rule 27 (now see Rule 10-210) governing advisement of rights in delinquency and need of supervision proceedings and Rule 55 (now see Rule 10-304) governing advisement of rights in neglect and abuse proceedings.

Rule 10-210 is patterned after Rule 5-301 of the Rules of Criminal Procedure for the District Courts. It relates to advisement of rights once a petition has been filed and the respondent is before the court; it does not apply to advisement of rights by probation services at the commencement of a preliminary inquiry (see Rule 10-202) or to advisement of rights when a child is first placed in detention or in the custody of the human services department (see Rules 10-208 and 10-302).

Two provisions of Rule 10-210 require special comment. The advisement of the right to an attorney is made to the respondent; if the respondent cannot afford counsel, the public defender will represent the child. The parents, guardian or custodian of a child alleged to be delinquent or in need of supervision cannot waive this right for the child, nor is appointment of an attorney for their child dependent on their financial status. (See Rules 10-202, 10-205 and 10-208 on advising the parents, guardian or custodian that they may be assessed attorney's fees under Section 32-1-27B or Section 32-1-41B NMSA 1978.) Under Rule 10-205, a respondent not in detention should already have an attorney by the time he first appears before the court. The detained respondent's first appearance before the court will be the detention hearing which, under Rule 10-205, may be the point at which counsel is appointed for the respondent in detention. For a discussion of waiver of the right to counsel by the child, see Bouldin v. Cox, 76 N.M. 93, 412 P.2d 392 (1966).

Secondly, the requirement that the respondent be advised of the possible consequences if the allegations of the petition are found to be true does not mean that every possible disposition must be reviewed. Rather, the intent of the original committee was that the respondent be advised of the most serious consequences if the allegations of the petition are proved. For example: on a delinquency petition, advisement that the child might be kept at the boys' school at springer or the girls' welfare home until twenty-one years of age; and on a need of supervision petition, advisement that the child might be placed on probation for a period of up to two years and/or committed for diagnostic evaluation for a period of up to sixty days.

Rule 10-210 supersedes a number of Children's Code provisions. Specifically, Sections 32-1-26, 32-1-27 and 32-1-31 NMSA 1978 requiring that there be advisement of rights at each appearance before the court, that all "parties" or "persons" before the court be advised of their rights and that these parties or persons be advised of their basic rights under the Children's Code and any other rights existing under other laws are replaced by the provisions of Rule 10-210.

ANNOTATIONS

Cross-references. - For basic rights of child alleged to be delinquent or in need of supervision, as set forth in Children's Code, see 32A-1-16 and 32A-2-14 NMSA 1978.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 75 et seq.

Right of juvenile court defendant to be represented during court proceedings by parent, 11 A.L.R.4th 719.

10-211. Detention hearing; conditions of release.

A. **Time limits.** A detention hearing shall be held within twenty-four (24) hours, excluding Saturdays, Sundays and legal holidays, from the time:

(1) the petition is filed if the child is in detention at the time the petition is filed; or

(2) the child is placed in detention if the child is placed in detention after the petition is filed.

B. **Conditions of release.** The court shall review the need for detention pursuant to Rule 10-209. If none of the criteria for detention exist, the court shall release the child on the child's written promise to appear before the court at a stated time and place or impose the first of the following conditions of release which will reasonably assure the appearance of the child at the adjudicatory hearing or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the child in the custody of a designated person or organization agreeing to supervise the child;

(2) place restrictions on the travel, association or place of abode of the child during the period of release;

(3) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the child return to detention as required.

C. **Review.** A denial of release may be reviewed at any time.

D. **Notice.** The parents, guardian or custodian of the child shall be given reasonable notice of the time and place of the hearing.

E. **Special master.** The provisions of this rule may be carried out by a special master appointed by a district judge, a district judge, a metropolitan court judge or a magistrate.

[As amended, effective November 1, 1995.]

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This rule was not substantively revised in 1978.

The rule governs the procedure at the first formal court appearance for a child in detention who is alleged to be delinquent or in need of supervision.

Paragraph A requires that the detention hearing be held within one day after a petition is filed or within one day of the date the respondent was placed in detention if a petition had previously been filed. The latter requirement is designed to cover those situations in which the petition has already been filed and a later determination is made to arrest the child. To compute the time limits see Rule 10-106.

Paragraph B specifies that the purpose of the detention hearing is to review the necessity for detention under the criteria established in Rule 10-209 and that it is not to determine probable cause. The rule does not provide for release on bail. Bail does not appear to be constitutionally required in juvenile cases if adequate substitutes for bail are provided. See Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

Paragraph C requires that reasonable notice of the hearing be given the parents, guardian or custodian of the child. The person giving the notice is expected to use good faith in providing notice to the parents, guardian or custodian of the child as soon as it appears that a petition will be filed and a date and time for the detention hearing is ascertained. The notice may be written or oral, although, because of the time restrictions, it would normally be oral or left in writing at the residence of the parents, guardian or custodian. Only one parent need be notified.

Paragraph D is designed to help judges, particularly in rural areas, meet the time limits for detention hearings.

Two other points should be noted. First, the Rules of Evidence do not apply to the detention hearing, Rule of Evidence 11-1101; also see the commentary to Rule 10-115. Secondly, since the detention hearing will be a detained child's first appearance before

the court, the provisions of Rule 10-210 on advisement of rights will be applicable to the detention hearing.

This rule is derived from 32-1-26 NMSA 1978. The time limit for the detention hearing is unchanged from the statutory period, although Subparagraph (2) of Paragraph A is a new provision. The rule supersedes Subsections C, D, F, H and I of 32-1-26 NMSA 1978 and Subsection A of the statute to the extent it sets time limits.

ANNOTATIONS

Cross-references. - As to detention hearing, see 32A-2-13 NMSA 1978.

The 1995 amendment, effective November 1, 1995, rewrote Paragraph A, added Paragraph C and redesignated former Paragraphs C and D as Paragraphs D and E, rewrote the paragraph heading and substituted "special master" for "referee" and "a district judge, a metropolitan court judge or a magistrate" for "the judge" in Paragraph E, and made gender neutral changes throughout the rule.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

10-212. Withdrawn.

ANNOTATIONS

Withdrawals. - Pursuant to a court order dated September 12, 1995, this rule, relating to release hearing and probable cause determination, is withdrawn effective November 1, 1995.

10-213. Disclosure by the state.

A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, within ten (10) days after the date of filing of a petition alleging delinquency or need of supervision, subject to Paragraph E of this rule, the state shall disclose or make available to the respondent:

(1) any statement made by the respondent, or co-respondent, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the children's court attorney;

(2) the respondent's prior record or delinquent acts or other children's court or probation record, if any, as is then available to the state;

(3) any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use

by the state as evidence at the adjudicatory hearing, or were obtained from or belong to the respondent;

(4) any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the children's court attorney;

(5) a written list of the names and addresses of all witnesses which the children's court attorney intends to call at the adjudicatory hearing, together with any statement made by the witness and any record of prior convictions of any such witness which is within the knowledge of the children's court attorney; and

(6) any material evidence favorable to the respondent which the state is required to produce under the due process clause of the United States Constitution.

B. **Examining, photographing or copying evidence.** The respondent may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. **Depositions.** The state may move the court to perpetuate the testimony of any such witness by taking his deposition pursuant to Rule 10-216.

D. **Certificate.** The children's court attorney shall file with the clerk of the court at least ten (10) days prior to the adjudicatory hearing a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the children's court attorney to the respondent after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the respondent.

E. **Information not subject to disclosure.** The children's court attorney shall not be required to disclose any material required to be disclosed by this rule if:

(1) the disclosure will expose a confidential informer; or

(2) there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

F. **Failure to comply.** If the state fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 10-215 or hold the children's court attorney in contempt or take other disciplinary action pursuant to Rule 10-113 of these rules.

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Rule 10-213 was revised in 1982 to be consistent with the revised discovery rule for criminal cases in the district courts. The information discoverable under Rule 10-213 is the same that the state must disclose in adult cases pursuant to Rule 5-501 of the Rules of Criminal Procedure for the District Courts. Appropriate language changes have been made in this rule to reflect the children's court terminology.

See the commentary to Rule 5-501 of the Rules of Criminal Procedure for the District Courts for the derivation of this rule.

The definition of "statement" is found in Rule 10-102.

10-214. Disclosure of evidence and witnesses by the respondent.

A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, within thirty (30) days after the date of the filing of a petition or not less than ten (10) days before the adjudicatory hearing, whichever date occurs earlier, the respondent in a petition alleging delinquency or need of supervision shall disclose or make available to the state:

(1) books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the respondent, and which the respondent intends to introduce in evidence at the adjudicatory hearing;

(2) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the respondent, which the respondent intends to introduce in evidence at the adjudicatory hearing or which were prepared by a witness whom the respondent intends to call at the adjudicatory hearing if the results or reports relate to his testimony; and

(3) a list of the names and addresses of the witnesses the respondent intends to call at the adjudicatory hearing, together with any statement made by the witness.

B. **Examining, photographing or copying evidence.** The state may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. **Information not subject to disclosure.** Except as to scientific or medical reports, this rule does not authorize the discovery or inspection:

(1) of reports, memoranda, or other internal defense documents made by the respondent, his attorneys or agents, in connection with the investigation or defense of the case; or

(2) of statements made by the respondent to his agents or attorneys.

D. **Certificate.** The respondent shall file with the clerk of the court at least ten (10) days prior to the adjudicatory hearing a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the respondent after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the state.

If the respondent fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 10-215 or hold the respondent or the defense counsel in contempt or take other disciplinary action pursuant to Rule 10-113 of these rules.

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Rule 10-214 was amended in 1982 to be consistent with Rule 5-502 of the Rules of Criminal Procedure for the District Courts. See commentary to Rule 5-502 of the Rules of Criminal Procedure for the District Courts for the derivation of this rule. It governs discovery by the state in delinquency and need of supervision proceedings.

See Rule 10-102 for the definition of "statement" as used in this rule.

10-215. Continuing duty to disclose; failure to comply.

A. **Duty to disclose.** If, subsequent to compliance with a request or order for discovery pursuant to Rule 10-213 or 10-214 of these rules, and prior to or during the adjudicatory hearing, a party discovers additional material or witnesses which he would have been under a duty to produce or disclose at the time of such previous compliance if it were then known to the party, he shall promptly give written notice to the other party of the existence of the additional material or witnesses.

B. **Failure to comply.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate under the circumstances, including, but not limited to, holding an attorney in contempt of court pursuant to Rule 10-113 of these rules.

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See Rule 5-505 of the Rules of Criminal Procedure for the District Courts and commentary to Rule 5-505 of those rules. This rule was added in 1978.

This rule was amended in 1982 to be consistent with Rule 5-505 of the Rules of Criminal Procedure for the District Courts.

10-216. Depositions.

A. **When allowed.** Upon motion, and after notice to opposing counsel, at any time after the filing of a petition alleging delinquency, the children's court may order the taking of the deposition of any person other than the respondent upon a showing that his testimony may be material and relevant to the offense charged, that it is necessary to take his deposition to prevent injustice, and either:

(1) the person will not cooperate in giving a statement to the moving party; or

(2) the person may be unable to attend the adjudicatory hearing or any other hearing.

B. **Scope of discovery.** Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the respondent, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the adjudicatory hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

C. **Time and place of deposition.** Unless otherwise stipulated to by the parties, any deposition allowed under this rule shall be taken at such time and place as ordered by the court.

D. **Persons before whom depositions may be taken.**

(1) Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(2) In a foreign country, depositions may be taken:

(a) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States;

(b) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony; or

(c) pursuant to a letter rogatory.

A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(3) No deposition shall be taken before a person who is a relative, employee, attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is interested in the action.

E. **Notice of examination: general requirements; nonstenographic recording.**

(1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place set for taking the deposition and the name and address of each person to be examined.

(2) The court may for cause shown enlarge or shorten the time previously set for taking the deposition.

(3) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means including by videotape, in which event the order shall designate the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

F. **Record of examination.** The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness.

G. **Depositions of corporations, partnerships and governmental agencies.** A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors or managing agents or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules.

H. **Examination and cross-examination; objections.** Examination and cross-examination of witnesses may proceed as permitted at the adjudicatory hearing under the provisions of Rule 11-611 of the New Mexico Rules of Evidence. All objections made at time of the examination to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented or the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer taking the deposition who shall propound them to the witness and record the answers verbatim.

I. **Motion to terminate or limit examination.** At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, the court in which the action is pending, or the court in the district where the deposition is being taken, may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition pursuant to Rule 10-218. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

J. **Submission to witness; changes; signing.** When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill, cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver, the illness or absence of the witness, or the fact of the refusal by the witness to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

K. **Certification and filing by officer; copies; notice of filing.**

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

L. **Stipulations regarding discovery procedure.** Unless the court orders otherwise, the parties may by written stipulation:

(1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; or

(2) provide for other methods of discovery.

M. **Attendance.** A resident of the state may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business, in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued. The deposition of any witness confined in prison shall be taken where the witness is confined.

N. **Use of depositions.** At the adjudicatory hearing, or at any other hearing, any part or all of a deposition may be used as evidence if:

(1) the witness is unavailable, as unavailability is defined in Paragraph A of Rule 11-804 of the Rules of Evidence;

(2) the witness gives testimony at the adjudicatory or any other hearing inconsistent with his deposition; or

(3) it is otherwise admissible under the Rules of Evidence.

If only part of a deposition is offered in evidence by a party, any adverse party may require him to offer any other part or parts relevant to the part offered, and any party may introduce any other parts, subject to the Rules of Evidence.

O. **Objections to admissibility.** Subject to the provisions of Subparagraph (3) of Paragraph Q, objection may be made at the adjudicatory hearing or any other hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

P. **Effect of taking or using depositions.** A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition. At the adjudicatory hearing or any other hearing any party may rebut any

relevant evidence contained in a deposition whether introduced by him or by any other party.

Q. **Effect of errors and irregularities in depositions.**

(1) All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) (a) Objections to the competency of a witness or admissibility of evidence are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(b) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(c) Objections to the form of written interrogatories submitted pursuant to this rule are waived unless served in writing upon the party propounding them within three (3) days after service of the interrogatories.

(4) Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the officer under this rule are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

R. **Contempt.** If a witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the county in which the deposition is being taken, the refusal may be considered a contempt of that court.

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See Rule 5-503 of the Rules of Criminal Procedure for the District Courts and commentary to that rule. Depositions may not be taken in need of supervision proceedings.

10-217. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

A. **Videotaped depositions.** Upon motion, and after notice to opposing counsel, at any time after the filing of a petition in children's court alleging criminal sexual penetration or criminal sexual contact on a child under thirteen (13) years of age, the children's court may order the taking of a videotaped deposition of the victim, upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The children's court judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

B. **Use of videotaped depositions.** At the adjudicatory hearing of a respondent charged with criminal sexual penetration or criminal sexual contact on a child under thirteen (13) years of age, any part or all of the videotaped deposition of a child under thirteen (13) years of age taken pursuant to Paragraph A of this rule, may be shown to the children's court judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

(2) the deposition was presided over by a children's court judge and the respondent was present and was represented by counsel or waived counsel; and

(3) the respondent was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

C. **Other uses.** In addition to the use of a videotaped deposition as permitted by Paragraph B of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph N of Rule 10-216.

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Rule 10-217 is almost identical to Rule 5-504 of the Rules of Criminal Procedure for the District Courts. See the commentary to that rule for a discussion of the history of that rule.

10-218. Depositions; protective orders.

A. **Motion.** Upon motion by a party or by a person to be examined pursuant to Rule 10-216 and for good cause shown, the children's court in which the action is pending, or the children's court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden, or from the risk of physical harm, intimidation, bribery or economic reprisals. The order may include one or more of the following restrictions:

(1) the deposition requested not be taken;

(2) the deposition requested be deferred;

(3) the deposition may be had only on specified terms and conditions including a designation of time or place;

(4) certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) the deposition be conducted with no one present except persons designated by the court;

(6) a deposition after being sealed be opened only by order of the children's court;

(7) a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; or

(8) the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the children's court.

B. **Showing of good cause.** Upon motion, the children's court may permit the showing of good cause required under Paragraph A of this rule to be in the form of a written statement for inspection by the court in camera, if the court concludes from the statement that there is a substantial need for the in camera showing. If the children's court does not permit the in camera showing, the written statement shall be returned to the movant upon request. If no such request is made, or if the court enters an order granting the relief sought, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court having jurisdiction in the event of an appeal.

C. **Denial.** If the motion for a protective order is denied in whole or in part, the children's court may, on such terms and conditions as are just, order that any person provide or permit discovery.

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See Rule 5-507 of the Rules of Criminal Procedure for the District Courts and commentary to Rule 10-213. This rule was added in 1978.

10-219. Notice of alibi.

A. **Notice.** In delinquency proceedings, upon the written request of the children's court attorney, specifying as particularly as is known to the children's court attorney, the place, date and time of the commission of the delinquent act charged, a respondent child who intends to offer evidence of an alibi in his defense shall, not less than ten (10) days before the adjudicatory hearing or such other time as the children's court may direct, serve upon such children's court attorney a notice in writing of his intention to

claim such alibi. Such notice shall contain specific information as to the place at which the respondent child claims to have been at the time of the alleged offense and, as particularly as known to respondent or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five (5) days after receipt of respondent's witness list or at such other time as the children's court may direct, the children's court attorney shall serve upon the respondent the names and addresses, as particularly as known to the children's court attorney, of the witnesses the state proposes to offer in rebuttal to discredit the respondent's alibi at the adjudicatory hearing.

B. **Continuing duty to give notice.** Both the respondent and the children's court attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule.

C. **Failure to give notice.** If a respondent fails to serve a copy of such notice as herein required, the children's court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the respondent himself. If such notice is given by a respondent, the children's court may exclude the testimony of any witness offered by the respondent for the purpose of proving an alibi if the name and address of such witness was known to respondent or his attorney but was not stated in such notice. If the children's court attorney fails to file a list of witnesses and serve a copy thereof on the respondent as provided in this rule, the children's court may exclude evidence offered by the state to contradict the respondent's alibi evidence. If such notice is given by the children's court attorney, the children's court may exclude the testimony of any witnesses offered by the children's court attorney for the purpose of contradicting the defense of alibi if the name and address of such witness is known to the children's court attorney but was not stated in such notice. For good cause shown the children's court may waive the requirements of this rule.

D. **Notice inadmissible.** The fact that a notice of alibi was given or anything contained in such notice shall not be admissible as evidence in the adjudicatory hearing.

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See Rule 5-508 of the Rules of Criminal Procedure for the District Courts and commentary to Rule 10-213. This rule applies only to delinquency proceedings since a need of supervision charge typically involves a course of conduct rather than a specific act. This rule was added in 1978.

10-220. Insanity at time of commission of delinquent act; notice of incapacity to form specific intent.

A. **Notice of insanity as a defense.** In delinquency proceedings, notice of the defense of insanity of the respondent child at the time of the commission of the delinquent act must be given within ten (10) days after service of the petition or within ten (10) days

after an attorney is appointed or enters his appearance on behalf of the respondent child, whichever is later, unless upon good cause shown the court waives the time requirement of this rule.

B. **Mental examination.** Upon motion and upon good cause shown the children's court judge shall order a mental examination of the respondent child before making any determination of competency.

C. **Determination of issue of insanity.** When the defense of insanity at the time of the commission of the delinquent act is raised, the issue shall be determined in nonjury trials by the court and in jury trials by a special verdict of the jury. When the determination is made and the respondent child is discharged on the ground of insanity, a judgment dismissing the petition with prejudice shall be entered, and any proceedings for commitment of the respondent child because of any mental disorder or developmental disability shall be pursuant to law.

D. **Statement made during psychiatric examination.** A statement made by a person during a psychiatric examination or treatment subsequent to the commission of the alleged delinquent act shall not be admissible in evidence in any proceeding on any issue other than that of respondent's sanity or competency.

E. **Notice of incapacity to form specific intent.** If the respondent child intends to call an expert witness on the issue of whether he was incapable of forming the specific intent required as an element of an alleged delinquent act, notice of such intention shall be given in the same manner and time as notice of insanity as a defense.

[As amended, effective January 1, 1987.]

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This rule, which was added in 1978, sets forth the procedure to be used in delinquency proceedings if either the defense of insanity or incapacity to form specific intent is raised. The procedure is similar to that in Rule 5-602 of the Rules of Criminal Procedure for the District Courts. However, the time for filing the notice of insanity or incapacity to form specific intent is tied to service of the petition on the respondent or entry of appearance by counsel, rather than arraignment as provided in Rule 5-602.

Paragraph B is similar to Paragraph C of Rule 5-602 of the Rules of Criminal Procedure for the District Courts. Reference to court payment in cases of indigency is deleted. Pursuant to 32-1-32B NMSA 1978, the court may order examination by a psychiatrist or psychologist of any child before the court prior to the adjudicatory hearing if there are indications that the child is mentally ill or mentally retarded. The statutory provision is not limited to the issue of competency. Section 32-1-35 NMSA 1978 further allows the court at any stage of the proceeding to transfer legal custody of the child for a period of up to 30 days for evaluation if the child appears to be mentally ill or mentally retarded. If at any time in the proceedings, the evidence indicates that the child is mentally retarded

or mentally ill, the court may proceed pursuant to 32-1-35 NMSA 1978. Initiation of commitment proceedings is discretionary with the court. State v. John Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

Paragraph C follows Subparagraph (2) of Paragraph A of Rule 5-602 and Paragraph D of Rule 5-602; and Paragraph D follows Paragraph E of Rule 5-602.

Section 32-1-35 NMSA 1978 deals generally with the alternatives available when any child appears before the court and shows signs of mental illness or mental retardation. This rule does not modify the general provisions of 32-1-35 NMSA 1978; rather, this rule provides a structure in delinquency proceedings in which the issue of insanity or incapacity to form specific intent can be raised as a legal defense to a specific charge. If the issue of mental illness or mental retardation arises in need of supervision cases, reference should be made to 32-1-35 NMSA 1978 and to Rule 10-221. In neglect cases, 32-1-35 NMSA 1978 governs.

ANNOTATIONS

Effective dates. - Pursuant to an order of the supreme court dated September 24, 1986, the above rule is effective on or after January 1, 1987.

Compiler's note. - Section 32-1-35 NMSA 1978, referred to in the second and last paragraphs in the committee commentary, was extensively amended in 1981 to no longer deal with all of the subject matter discussed in the commentary. The section was subsequently repealed in 1993.

10-221. Determination of competency to stand trial; lack of capacity.

A. **How raised.** The issue of respondent's competency to stand trial in delinquency or child in need of supervision proceedings may be raised by motion, or upon the court's own motion, at any stage of the proceedings.

B. **Mental examination.** Upon motion and upon good cause shown the children's court judge shall order a mental examination of the respondent child before making any determination of competency.

C. **Determination.** The issue of competency shall be determined by the children's court judge, unless the judge finds there is evidence which raises a reasonable doubt as to the respondent child's competency to stand trial.

(1) If a reasonable doubt is raised prior to the adjudicatory hearing, the children's court, without a jury, may determine the issue of competency; or, in its discretion, may submit the issue to a jury, other than the jury sitting at the adjudicatory hearing.

(2) If the issue of competency is raised during the adjudicatory hearing, the children's court judge in nonjury cases shall determine the issue; in jury cases, the jury shall be instructed upon the issue. If, however, the respondent child has been previously found to be competent to stand trial in the proceedings, the issue of competency shall be redetermined in accordance with this rule only if the children's court judge finds that there is evidence not previously submitted which raises a reasonable doubt as to the respondent child's competency to participate in the proceedings.

D. **Proceedings on finding of incompetency.** If a respondent child is found incompetent to stand trial:

(1) further proceedings on the petition shall be stayed until the respondent becomes competent to participate in the proceedings;

(2) where appropriate, the children's court judge may order treatment to enable the respondent to attain competency to stand trial; and

(3) the children's court judge may review and amend the conditions of release pursuant to Rules 10-209 and 10-211 of these rules.

E. **Mistrial.** If the finding of incompetency is made during the adjudicatory hearing, the children's court judge shall declare a mistrial.

[As amended, effective January 1, 1987.]

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See Paragraph B of Rule 5-602 of the Rules of Criminal Procedure for the District Courts. This rule applies to both delinquency and need of supervision proceedings. See commentary to Rule 10-220 for a discussion of the interrelationship of Rule 10-220 and this rule and the provisions of 32-1-35 NMSA 1978 relating generally to the mental illness or mental retardation of children appearing before the court.

Paragraph B is similar to Paragraph C of Rule 5-602 of the Rules of Criminal Procedure for the District Courts. Reference to court payment in cases of indigency is deleted. Pursuant to 32-1-32B NMSA 1978, the court may order examination by a psychiatrist or psychologist of any child before the court prior to the adjudicatory hearing if there are indications that the child is mentally ill or mentally retarded. The statutory provision is not limited to the issue of competency. Section 32-1-35 NMSA 1978 further allows the court at any stage of the proceeding to transfer legal custody of the child for a period of up to 30 days for evaluation if the child appears to be mentally ill or mentally retarded. If at any time in the proceedings, the evidence indicates that the child is mentally retarded or mentally ill, the court may proceed pursuant to 32-1-35 NMSA 1978. Initiation of commitment proceedings is discretionary with the court. State v. John Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

ANNOTATIONS

Effective dates. - Pursuant to an order of the supreme court dated September 24, 1986, the above rule is effective on or after January 1, 1987.

Compiler's note. - Section 32-1-35 NMSA 1978, referred to in the committee commentary, was extensively amended in 1981 to no longer deal with all of the subject matter discussed in the commentary. The section was subsequently repealed in 1993.

Subparagraph (1) of Paragraph C of this rule controls over 32-1-35B NMSA 1978, providing for the dismissal of a delinquency petition without prejudice when a child is committed as a mentally disordered child. State v. Doe, 97 N.M. 189, 637 P.2d 1244 (Ct. App. 1981).

10-222. Youthful offender hearing; general procedure.

A. **Filing of notice.** Within ten (10) days after the filing of a petition, the children's court attorney may file with the children's court a notice of intent to request the court to treat the respondent as a youthful offender. At any time prior to the commencement of the adjudicatory proceeding, upon good cause shown, the court may permit the filing of a notice of intent to invoke an adult sentence.

B. **Bail.** If a notice is filed pursuant to this section and the offense is a bailable offense, the court shall prescribe conditions of release pursuant to Rule 5-401 of the Rules of Criminal Procedure for the District Courts.

C. **Criminal proceedings.** If a notice of intent to invoke an adult sentence has been filed:

(1) a preliminary hearing shall be held by the children's court or the charges shall be presented to a grand jury within a reasonable time but in any event not later than ten (10) days following such notice;

(2) if there is probable cause to adjudicate the charges filed, a plea shall be taken as provided by the Rules of Criminal Procedure for the District Courts;

(3) further proceedings against the respondent, except disposition or sentencing, shall be governed by the Rules of Criminal Procedure for the District Courts.

[As amended, effective July 1, 1995.]

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Rule 10-222 was formerly Rule 30. It was renumbered in 1978.

Rule 10-222 establishes procedures for the hearing to determine whether a child should be transferred to district court to be tried as an adult. Rule 10-223 prescribes time limits for holding a transfer hearing.

Paragraph A of Rule 10-222 requires that the children's court attorney initiate proceedings with a motion for transfer prior to the adjudicatory hearing on the petition. See Breed v. Jones, 421 U.S. 519, 99 S. Ct. 1779, 44 L. Ed. 2d 346 (1975) and State v. Doe, 96 N.M. 515, 632 P.2d 750 (Ct. App. 1981). The committee believes that the term "adjudicatory hearing" is synonymous to the use of the term "trial" for purposes of double jeopardy. See State v. Rhodes, 76 N.M. 177, 413 P.2d 214 (1966).

A motion to transfer is not a preadjudicatory motion and therefore the time limits of Rule 10-114 for filing preadjudicatory motions do not apply to Rule 10-222. State v. Doe, supra.

Paragraph B of Rule 10-222 again emphasizes that the child has a right to be represented by counsel. That question was left undecided in Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968), but is guaranteed by Section 32-1-27H NMSA 1978. However, under Neller, the right may be waived if not timely raised. See also State v. Salazar, 79 N.M. 592, 446 P.2d 644 (1968) and State v. Gallegos, 82 N.M. 618, 485 P.2d 374 (Ct. App. 1971).

Under Paragraph B of Rule 10-222, the hearing is both a probable cause determination and a determination of whether the criteria for transfer set forth in Sections 32-1-29 and 32-1-30 NMSA 1978 exist.

The specific provisions of Paragraph D of Rule 10-222 relating to the conduct of the hearing are taken from the preliminary examination procedures contained in Rule 5-302 of the Rules of Criminal Procedure for the District Courts.

If transfer is ordered, the transfer hearing, although substantially similar to a preliminary examination under Rule 5-302 of the Rules of Criminal Procedure for the District Courts, is not a substitute for the defendant's constitutional right to a preliminary examination if transferred to the district courts. The committee specifically rejected a proposal to that effect as constitutionally impermissible and as unwise in view of the varying considerations present at the two hearings. A child transferred to district court to be tried as an adult is entitled to all the rights afforded an adult defendant. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969); Neller v. State, supra.

Paragraph E of Rule 10-222 is designed to allow immediate setting of conditions of release by the judge presiding at the transfer hearing if the child is transferred to the district court.

An order transferring the child is immediately appealable. In the Matter of Doe II, 86 N.M. 37, 519 P.2d 133 (Ct. App. 1974).

The statutory bases for Rule 10-222 are Sections 32-1-29 and 32-1-30 NMSA 1978. The statutory provisions relating to the basis for transfer, age for transfer, etc., are substantive and therefore beyond the scope of the supreme court's rulemaking authority. The provisions relating to notice, specifically Sections 32-1-29A(3) and 32-1-30A(3), are procedural and thus are superseded by Rule 10-104 of these rules.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "Youthful offender" for "Transfer" in the section heading and rewrote this rule to an extent that a detailed analysis is impracticable.

Rule 10-114 does not apply to filing of motions to transfer because: (1) preadjudicating motions contemplate a subsequent hearing on the merits of a petition, while a transfer motion is filed with the expectation that there will be no adjudication in the children's court; (2) the fact that this rule requires a transfer motion to be made prior to the adjudicating hearing does not make a preadjudicating motion for purposes of Rule 10-114; and (3) neither this rule nor former 32-1-30 NMSA 1978 provide a time limit for filing motions to transfer. State v. Doe, 96 N.M. 515, 632 P.2d 750 (Ct. App. 1981) (decided prior to 1982 and 1995 amendment).

Therefore, transfer motion must be filed within "reasonable" time. - Rule is not applicable to a motion to transfer a child to the district court to be prosecuted as an adult; therefore, reasonableness is the test when there is an issue concerning the timeliness of the filing of a motion to transfer. State v. Doe, 96 N.M. 515, 632 P.2d 750 (Ct. App. 1981) (decided prior to 1982 and 1995 amendment).

And where child's counsel notified, transfer motion not dismissed. - Where a detention order put the child's counsel on notice that a motion to transfer the child to the district court for prosecution as an adult would be forthcoming, and where the defense counsel did not claim a lack of adequate preparation time, surprise or prejudice, or request a continuance, the court did not abuse its discretion by refusing to dismiss the transfer motion. State v. Doe, 96 N.M. 515, 632 P.2d 750 (Ct. App. 1981)(decided prior to 1995 amendment).

"Findings," before transfer, as to child's amenability to treatment not required. - "Findings," before a child is transferred, as to amenability of a child to treatment or rehabilitation are not a statutory requirement, nor are they a requirement under this rule. If findings are made, their function is to show that consideration was given. State v. Doe, 97 N.M. 598, 642 P.2d 201 (Ct. App. 1982)(decided prior to 1995 amendment).

Denial of a transfer motion under either 32-1-29 or 32-1-30 NMSA 1978 is not final; it simply leaves the case in the children's court for further proceedings. State v. Doe, 99 N.M. 460, 659 P.2d 912 (Ct. App. 1983)(decided prior to 1995 amendment).

And court empowered to reconsider denial. - The children's court has the inherent power to reconsider, by reason of its nonfinal nature, an order denying a motion to transfer. State v. Doe, 99 N.M. 460, 659 P.2d 912 (Ct. App. 1983)(decided prior to 1995 amendment).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult, 22 A.L.R.4th 1162.

43 C.J.S. Infants § 45.

10-223. Transfer hearing; time limits.

A. **Respondent in detention.** If the respondent is in detention, the transfer hearing shall be commenced within thirty (30) days from whichever of the following events occurs latest:

(1) the date the motion for transfer is filed;

(2) if the proceedings have been stayed on a finding of incompetency to participate in the transfer hearing, the date an order is filed finding the defendant competent to participate in a transfer hearing; or

(3) if the respondent fails to appear at any time required by the court, the date the respondent is taken into custody after the failure to appear.

B. **Respondent not in detention.** If the respondent is not in detention, the transfer hearing shall be commenced within ninety (90) days from whichever of the following events occurs latest:

(1) the date the motion for transfer is filed;

(2) if the proceedings have been stayed on a finding of incompetency to participate in the transfer hearing, the date an order is filed finding the defendant competent to participate in a transfer hearing; or

(3) if the respondent fails to appear at any time required by the court, the date the respondent is taken into custody after the failure to appear.

C. **Failure to appear.** If the respondent fails to appear as required, and the respondent is not in custody, the children's court may order the respondent taken into custody.

D. **Extension of time.** The time for commencement of a transfer hearing may be extended only by the supreme court, a justice thereof or a judge designated by the

supreme court, for good cause shown. The party seeking an extension of time shall file with the clerk of the supreme court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause for an extension of time to commence the transfer hearing. The petition shall be filed within the applicable time limits prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limits if it is based on exceptional circumstances beyond the control of the state or children's court which justify the failure to file the petition within the applicable time limit. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Hearings on such petitions will be held in Santa Fe, or such other place as may be designated by the supreme court, on five (5) days notice to the parties. If the supreme court finds that there is good cause for the granting of an extension beyond the applicable time limit, it shall fix the time limit within which the transfer hearing must be commenced.

E. **Effect of noncompliance with time limits.** If the transfer hearing on any petition is not begun within the times specified in Paragraph A or B of this rule or within the period of any extension granted as provided in this rule, the petition shall be dismissed with prejudice.

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This rule was drafted to eliminate the problem of the lack of time limits for holding transfer hearings. In State v. Doe, 94 N.M. 446, 612 P.2d 238 (Ct. App. 1980), the New Mexico Court of Appeals reversed an order transferring a child under Rule 10-222 because the delay of 94 days after the motion was filed was unreasonable in that it went beyond the time limits prescribed for holding adjudicatory hearings. This rule supersedes State v. Doe, supra, insofar as it allows in certain cases a transfer hearing to be held after the time limits of Rule 10-226.

The time limits of this rule are mandatory and may only be extended by the New Mexico Supreme Court.

ANNOTATIONS

Hearing need not be completed in 30 days. - No words in this rule mandate that the hearing be both commenced and completed within 30 days. The requirement is met even if the hearing is not completed within that time period. State v. Taylor, 107 N.M. 66, 752 P.2d 781 (1988).

Expedited schedule not applied to unrelated charges. - When a juvenile was taken into detention on a charge of aggravated assault, the state was not required to provide a transfer hearing on an unrelated murder charge within the 30-day limit set forth in this rule for respondents in detention. The fact that a juvenile is in detention in one case does not ordinarily affect the time schedule of another different case alleging delinquency. In re Dominick Q., 113 N.M. 353, 826 P.2d 574 (Ct. App. 1992).

10-224. Admissions and consent decrees.

A. **Admissions.** The respondent may make an admission by:

(1) admitting sufficient facts to permit a finding that the allegations of the petition are true; or

(2) declaring his intention not to contest the allegations in the petition.

B. **Consent decrees.** A consent decree is an order of the court, after an admission has been made, that suspends the proceedings on the petition and places the child under supervision for a period not to exceed six (6) months under terms and conditions negotiated and agreed to by the respondent and the children's court attorney.

C. **Inquiry of respondent.** The court shall not accept an admission or approve a consent decree without first, by addressing the respondent personally in open court, determining that:

(1) he understands the charges against him;

(2) he understands the dispositions authorized by the Children's Code for the offense;

(3) he understands that he has the right to deny the allegations in the petition and have a trial on the allegations;

(4) he understands that if he makes an admission or agrees to the entry of the consent decree, he is waiving the right to a trial; and

(5) the admission or provisions of the consent decree are voluntary and not the result of force or threats or of promises other than any consent decree agreement reached.

D. **Basis for admission or consent decree.** The court shall not enter a judgment upon an admission or shall not approve a consent decree without making such inquiry as shall satisfy it that there is a factual basis for the admission and consent decree.

E. **Disposition on admission by respondent.** After acceptance of an admission made by the respondent, unless made for the purpose of a consent decree, the court shall proceed to make any disposition permitted by law as it deems appropriate under the circumstances.

F. **Disposition on acceptance of consent decree.** If the court accepts a consent decree, the court shall approve the disposition provided for in the consent decree or another disposition more favorable to the respondent than that provided for in the consent decree. If the court rejects the consent decree, the decree shall be null and void.

G. **Inadmissibility of discussions.** Evidence of an admission or agreement to a consent decree, later withdrawn, or of statements made in connection therewith are not admissible in any proceeding against the respondent.

H. **Time limits.** If the respondent is in detention, the court shall accept or reject the admission or consent decree within five (5) days after the admission is made or within five (5) days after a consent decree has been submitted to the court for its approval.

I. **Rules of Evidence.** The Rules of Evidence do not apply to inquiries made to determine whether there is a factual basis for an admission or a consent decree.

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Rule 10-224 was substantially revised in 1978 to clarify the admission and consent decree procedure.

The rule now defines two types of admissions: the traditional "guilty" plea and a nolo contendere plea. The child must enter one of these two pleas in order to utilize the consent decree procedure. However, the making of an admission in itself does not entitle a child to enter a consent decree.

Consent decrees are still negotiated settlements, approved by the court, under which the child is placed on probation for a period of up to six months, with the possibility of extension for another six months or revocation of the consent decree. See commentary to Rule 10-225 for a discussion of the extension and revocation provisions.

In the event a consent decree has not been negotiated, a child who makes an admission is subject to the discretion of the court in terms of disposition, limited only by the provisions of Section 32-1-38 NMSA 1978. (See Paragraph E of Rule 10-224.) The court is not bound to accept an admission. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

Prior to the 1978 revision, a consent decree required that the child "admit sufficient facts to invoke the jurisdiction of the court." In practice, this requirement proved too vague to be workable. Section 32-1-36 NMSA 1978, which deals with consent decrees, does not govern consent decrees in abuse or neglect cases. Consent decrees, like stipulated judgments in civil cases, are procedural matters, governed by court rules.

The statute does provide for reinstatement of the original petition if the child does not fulfill the terms of the consent decree or if a new delinquency or need of supervision petition is filed against the child during the period the consent decree is in effect. See Section 32-1-36D NMSA 1978.

Before entry of the consent decree, the child is fully advised that he will have no rights to an adjudicatory hearing if he enters the consent decree, Paragraph C of Rule 10-224.

The original petition is not "reinstated"; rather, the consent decree is revoked. See Rule 10-225.

Prior to approval of a consent decree or acceptance of a formal admission of the allegations of a petition by the court, a petition must have been filed. (See definition of "respondent" in Rule 10-102.) This requirement does not prohibit probation services and the child from agreeing to an informal supervision or informal probation prior to the filing of a petition. However, once the jurisdiction of the court is invoked, only a court order may resolve the case.

Paragraph F of Rule 10-224 defines the dispositional limits of a consent decree. A consent decree cannot be used to place the respondent in an institution or a department of corrections facility, unless the decree is revoked and such placement is appropriate for the original offense. (See Rule 10-225.) The initial term of the consent decree is six months. While probation services may actually negotiate the terms of the decree, the rule requires that the children's court attorney agree to the terms of the consent decree. The original committee believed that once the jurisdiction of the court had been invoked by filing of a petition, the children's court attorney was charged with responsibility for the case and his agreement was essential. To provide otherwise would allow probation services to remove cases from the authority of the children's court attorney.

Paragraph C of Rule 10-224 follows the determination required in Rule 5-303 of the Rules of Criminal Procedure for the District Courts and Rule 11 of the Federal Rules of Criminal Procedure. The determination is required in cases involving either a consent decree or an admission. The original committee believed that such an inquiry is constitutionally mandated. In re Appeal No. 544, 25 Md. App. 26, 332 A.2d 680 (1975); Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

Paragraph D of Rule 10-224 requires that there be a factual basis for the admission or consent decree agreement.

Paragraph F of Rule 10-224 prohibits the court from accepting the admissions contained in a consent decree, and then imposing a more stringent disposition than that negotiated. If the court accepts the consent decree, it must do so on the terms negotiated or on terms more favorable to the respondent. It is entirely within the discretion of the court whether or not to accept a consent decree agreement. Nothing prohibits the court from rejecting the offered decree prior to conducting the hearing required by Paragraph F of Rule 10-224. However, the decree cannot be accepted until after the determination required by Paragraph C is made.

Paragraph G of Rule 10-224 follows the general policy in civil cases and adult criminal cases in the district courts that negotiations leading toward settlements should be encouraged and thus negotiation discussions should not be admissible if the negotiation efforts fail.

Paragraph H of Rule 10-224 is designed to assure a prompt final disposition for detained children when an admission is made or agreement reached on a consent decree. For computation of the time limit, see Rule 10-106.

Paragraph I of Rule 10-224 was added in 1978.

Rules 10-224 and 10-225 are procedural rules and supersede any conflicting provisions of Section 32-1-36 NMSA 1978. They are designed to clarify the procedure to be used when the respondent in a delinquency or need of supervision proceeding admits the factual allegations of the petition. The rule does not envision the use of any "notice of intent to admit the allegations of the petition" (Section 32-1-32 NMSA 1978) and to the extent this "notice" is called for in the Children's Code, it is superseded by the provisions of Rule 10-224.

In addition to the changes made in the "reinstatement" procedure previously discussed, consent decree procedure also varies from the statute in that supervision may be in the home of another person and the children's court attorney must approve the consent decree.

Subsection F of Section 32-1-36 NMSA 1978, establishing a basis for disqualification of a judge in consent decree situations, is not affected by Rule 10-224 since it deals with a substantive right.

ANNOTATIONS

Cross-references. - As to consent decrees, see 32A-2-22 NMSA 1978.

Children's Code. - See 32A-1-1 NMSA 1978 and notes thereto.

Motion for consent decree held admission. - Where a motion for a consent decree signed by the child and his attorney states that the child does not object to the entrance of a consent decree, that statement declares the child's intention not to contest the allegations in the petition and thus is an admission under this rule. State v. Doe, 92 N.M. 354, 588 P.2d 555 (Ct. App. 1978).

Court may properly call for information in deciding whether to accept or reject a consent decree or provide for a more favorable disposition of the child, as predisposition reports are relevant in deciding an appropriate disposition of the case and calling for information on the child's background is consistent with the legislative purpose in 32-1-2B NMSA 1978 of providing a "program of supervision, care and rehabilitation." State v. Doe, 92 N.M. 354, 588 P.2d 555 (Ct. App. 1978).

Court has discretionary power to accept or refuse admission by a child, and so it was not an abuse of discretion to refuse to accept an admission when the consequence of such an acceptance would foreclose transfer specifically authorized by former 32-1-

30 NMSA 1978. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978) (decided before 1978 amendment).

Court may protect transfer option. - Although former 32-1-27 NMSA 1978 and Paragraph A of this rule authorize admissions by a child, they do not state that the court must accept the admission and are not to be interpreted as requiring the court to accept the admission; such an interpretation would place the child in a position to prevent a transfer because acceptance of the admission moves the proceedings into the adjudicatory stage, thereby preventing a transfer, and the clear intent of the statutes and rules is that a transfer may be accomplished, if transfer requirements are met, without regard to the wishes of the child. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978) (decided before 1978 amendment).

Defendant does not have absolute right under federal constitution to have his guilty plea accepted. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation," see 9 N.M.L. Rev. 45 (1978-79).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

10-225. Extension, revocation or termination of consent decree.

A. **Extension.** The children's court attorney may move the court for an order extending the original consent decree for a period not to exceed six (6) months from the expiration of the original decree. The motion for extension shall be filed prior to the expiration of the original decree. If the respondent objects to the extension, the court shall hold a hearing to determine if the extension is in the best interests of the respondent and the public.

B. **Revocation of consent decree.** If, prior to the expiration of the consent decree, the respondent allegedly fails to fulfill the terms of the decree, the children's court attorney may file a petition to revoke the consent decree. Proceedings on the petition shall be conducted in the same manner as proceedings on petitions to revoke probation. If the respondent is found to have violated the terms of the consent decree, the court may:

(1) extend the period of the consent decree; or

(2) make any other disposition which would have been appropriate in the original proceeding.

C. **Termination.** The original petition shall be dismissed with prejudice if the respondent completes the period under the consent decree and any extension thereof without a petition to revoke the decree being filed and the state shall not again proceed against the respondent for the same offense alleged in the original petition or for an offense based upon the same conduct alleged in the original petition.

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Rule 10-225 was formerly Rule 33. It was renumbered in 1978. The rule governs three situations: extension of a consent decree, termination of a consent decree and violation of a consent decree.

Paragraph A of Rule 10-225 allows extension of a consent decree for a period not to exceed six months if the children's court attorney moves the court for an extension of the decree prior to expiration of the original decree. The child must be given notice of the motion under Rule 10-104. A hearing must be held if the child objects to the motion. The original committee envisioned that such a hearing would be in the nature of a dispositional hearing. However, because the possible reasons for seeking the extension are varied (i.e. the child may have allegedly committed another delinquent act which did not warrant revoking the consent decree), the actual format of the hearing has been left open. It is not an ex parte hearing.

Paragraph B of Rule 10-225 governs revocation of the consent decree. Since a consent decree is essentially a negotiated probationary period, the original committee felt that the proceedings to revoke the consent decree should follow the procedure to revoke probation contained in Rule 10-232 of these rules. The petition is to be filed by the children's court attorney. (See commentary to Rule 10-224 for a discussion of the jurisdictional basis for the court's authority to order disposition appropriate in the original proceeding.) If the consent decree is revoked and the original petition alleged delinquency, the respondent could be committed to the boys' school at Springer or the girls' welfare home until twenty-one years of age. See Section 32-1-38 NMSA 1978.

Paragraph C of Rule 10-225 prohibits the state from proceeding against the respondent for the offense or conduct which gave rise to the consent decree if he completes the consent decree period without a petition to revoke being filed. Nothing in the rule precludes a civil action against the respondent for damages arising from his conduct.

Section 32-1-36C NMSA 1978 was amended in 1981 to be consistent with Paragraph A of Rule 10-225.

Section 32-1-36D NMSA 1978 was amended in 1981 to include the provisions of Paragraph B of Rule 10-225.

Paragraph C of Rule 10-225 supersedes Section 32-1-36E NMSA 1978.

ANNOTATIONS

Cross-references. - For procedure governing parole revocation, see Rule 10-232.

As to extension, revocation or termination of consent decrees, see 32A-2-22 NMSA 1978.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

10-226. Adjudicatory hearing; time limits.

A. **Respondent in detention.** If the respondent is in detention, the adjudicatory hearing shall be commenced within thirty (30) days from whichever of the following events occurs latest:

(1) the date the petition is served on the respondent;

(2) if the proceedings have been stayed on a finding of incompetency to stand trial, the date an order is filed finding the defendant competent to participate in an adjudicatory hearing;

(3) if a mistrial is declared or a new adjudicatory hearing is ordered by the children's court, the date such order is filed;

(4) in the event of an appeal, the date the mandate or order is filed in the children's court disposing of the appeal;

(5) if the respondent fails to appear at any time set by the court, the date the respondent is taken into custody after the failure to appear; or

(6) in the event a motion for transfer is filed by the children's court attorney, the date an order is filed denying the motion.

B. **Respondent not in detention.** If the respondent is not in detention or has been released from detention prior to the expiration of the time limits set forth in Paragraph A of this rule, the adjudicatory hearing shall be commenced within ninety (90) days from whichever of the following events occurs latest:

(1) the date the petition is served on the respondent;

(2) if the proceedings have been stayed on a finding of incompetency to participate in the adjudicatory hearing, the date an order is filed finding the defendant competent to participate in an adjudicatory hearing;

(3) if a mistrial is declared or a new adjudicatory hearing is ordered by the children's court, the date such order is filed;

(4) in the event of an appeal, the date the mandate or order is filed in the children's court disposing of the appeal;

(5) if the respondent fails to appear at any time set by the court, the date the respondent is taken into custody after the failure to appear; or

(6) in the event a motion for transfer is filed by the children's court attorney, the date an order is filed denying the motion.

C. **Failure to appear.** If the respondent fails to appear as required, and the respondent is not in custody, the children's court may order the respondent taken into custody.

D. **Extension of time.** The time for commencement of an adjudicatory hearing may be extended only by the supreme court, a justice thereof, or a judge designated by the supreme court, for good cause shown. The party seeking an extension of time shall file with the clerk of the supreme court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause for an extension of time to commence the adjudicatory hearing. The petition shall be filed within the applicable time limits prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limits if it is based on exceptional circumstances beyond the control of the state or children's court which justify the failure to file the petition within the applicable time limit. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Within five (5) days after service of the motion, opposing counsel may file an objection to the extension setting forth the reasons for such objection. No hearing shall be held except upon order of the supreme court. If the supreme court finds that there is good cause for the granting of an extension beyond the applicable time limit, it shall fix the time limit within which the adjudicatory hearing must be commenced.

E. **Effect of noncompliance with time limits.** If the adjudicatory hearing on any petition is not begun within the times specified in Paragraph A or B of this rule or within the period of any extension granted as provided in this rule, the petition shall be dismissed with prejudice.

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Rule 10-226 was revised in 1978.

The time limits for the commencement of the adjudicatory hearing depend upon whether or not the respondent is in detention. Prior to the 1978 revisions to this rule, the time limits were measured only by the date of service of the petition on the respondent. In conformity with similar changes in the Rules of Criminal Procedure for the District Courts, five other events were added from which the time limits are computed. The

events are the same whether or not the respondent is in detention and are substantively similar to those added to Rule 5-604 of the Rules of Criminal Procedure for the District Courts.

Paragraph C relating to failure to appear was added in 1978 and Paragraphs D and E concerning time extensions and failure to comply with the time limits were modified in accord with changes in Rule 5-604 of the Rules of Criminal Procedure for the District Courts.

See commentary to Rule 5-604 of the Rules of Criminal Procedure for the District Courts for a discussion of these changes.

The time limits in Rule 10-226 are jurisdictional. See commentary to Rule 10-204.

Rules 10-226 and 10-227 use the term "adjudicatory hearing" rather than the statutory "hearing on the petition" to describe what is the equivalent of a trial in the adult criminal system.

The statutory time limit runs from the date of filing of the petition. Obviously, the time limits do not apply if no adjudicatory hearing is required because an admission has been accepted or because a consent decree agreement has been approved.

Paragraph B of Rule 10-226 was amended in 1982 to clarify when adjudicatory hearings may be held when a child is released prior to the expiration of the time limits for commencement of hearings for children in detention.

ANNOTATIONS

Cross-references. - As to time limitations on adjudicatory hearings, see 32A-2-15, 32A-4-18 and 32A-4-19 NMSA 1978.

Parole revocation. - The children's court procedure for an original petition alleging delinquency applies to petitions for revocation of parole. State v. Doe, 90 N.M. 568, 566 P.2d 117 (Ct. App. 1977).

Time limits jurisdictional. - Time limits set forth in this rule are jurisdictional; thus, an issue involving the improper extension of time for conducting a trial on the merits did not require preservation for appellate review. In re Ruben O., N.M. , 899 P.2d 603 (Ct. App. 1995).

Calculation of time period. - The time period for holding a hearing becomes fixed by presence or absence of the detention of the child after the detention hearing. State v. Doe, 90 N.M. 568, 566 P.2d 117 (Ct. App. 1977).

Since the child was released from detention prior to expiration of the 30-day deadline, an adjudicatory hearing was timely when it was held within the 90-day time limit prescribed by Paragraph B. In re Ruben O., N.M. , 899 P.2d 603 (Ct. App. 1995).

Effect of subsequent detention. - A revocation of a child's release for a violation of the conditions thereof did not change the applicable time period for holding the hearing. State v. Doe, 90 N.M. 568, 566 P.2d 117 (Ct. App. 1977).

Tolling provisions limited to 30- or 90-day period respectively. - The tolling provided by Subparagraphs A(6) and B(6) of this rule is limited to a 30- or 90-day period, respectively. State v. Doe, 94 N.M. 446, 612 P.2d 238 (Ct. App. 1980).

When 30-day limitation begins to run. - The 30-day period for holding a hearing on a motion to extend custody begins to run after the later of: (1) the termination date of the prior custody, or (2) the date the child is arrested after his failure to appear. State v. Doe, 93 N.M. 748, 605 P.2d 256 (Ct. App. 1980).

When 90-day period begins to run. - The time limit for commencing an adjudicatory hearing in a delinquency proceeding involving a child not held in custody begins to run when the summons and a copy of the petition are personally served on the child, and not when a copy is given to the child's attorney. State v. Jody C., 113 N.M. 80, 823 P.2d 322 (Ct. App. 1991).

Good cause for continuance. - The absence of witnesses and the fact that the judge was occupied with a jury trial constituted good cause for continuances. State v. Doe, 90 N.M. 568, 566 P.2d 117 (Ct. App. 1977).

Where a special master lacks authority to hear a probation revocation petition, the court is without jurisdiction at the hearing on the petition. When the district judge disposes of the case more than 30 days after the petition is filed, the petition should be dismissed with prejudice. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

"Appeal". - The term "appeal" in Subparagraph A(4) includes a request for review over which the appellate court lacks jurisdiction. State v. Michael C., 106 N.M. 440, 744 P.2d 913 (Ct. App. 1987).

"Appeal", for purposes of Paragraph B(4), should be defined as a seeking of review by a higher court, including seeking supreme court review under a peremptory writ. State v. Felipe V., 105 N.M. 192, 730 P.2d 495 (Ct. App. 1986).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

10-227. Adjudicatory hearing; general procedure.

A. **Conduct.** Except as otherwise provided, adjudicatory hearings shall be conducted in the same manner as trials are conducted under the Rules of Criminal Procedure for the District Courts.

B. **Children's court attorney.** The children's court attorney shall represent the state at all adjudicatory hearings.

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Rule 10-227 was formerly Rule 35. It was renumbered in 1978.

The rule establishes general procedures for both jury and nonjury adjudicatory hearings and, by reference, adopts the specific provisions of Rules 5-606 through 5-611 of the Rules of Criminal Procedure for the District Courts. However, the procedure for demanding a jury trial and certain other aspects of jury trials established by the Rules of Criminal Procedure for the District Courts are not applicable to jury trials in the children's court under Rule 10-227. See commentary to Rule 10-228 of these rules.

Paragraph A of Rule 10-227, by requiring that adjudicatory hearings be conducted in the same manner as adult criminal trials, follows the recommendation of the national advisory commission on criminal justice standards and goals. The original committee agreed with the NAC commentary that when "the juvenile contests the facts upon which court jurisdiction is sought, the procedure for resolving the dispute should not differ substantially from that used in adult cases." The adoption of the provisions of the Rules of Criminal Procedure for the District Courts also brings the rules into compliance with the due process and fair hearing requirements of In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), and In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Paragraph B of Rule 10-227 requiring the children's court attorney to represent the state in adjudicatory hearings specifically follows NAC Standard 14.4 that: "In all delinquency cases, a legal officer representing the State should be present in court to present evidence supporting the allegation of delinquency." The original committee decided that: (1) a juvenile probation officer is not an attorney and should not be serving in the role of an attorney; (2) that if the juvenile probation officer were allowed to be the "chief prosecutor," his ability to counsel and deal with the respondent on a more informal basis would be compromised; and (3) it is part of the duties of the children's court attorney to represent the state as prosecutor. See Rule 10-102 for the definition of "children's court attorney."

Subsection B of Section 32-1-31 NMSA 1978 provides that all hearings on petitions alleging delinquency shall be open to the public unless the court makes a finding of exceptional circumstances. Hearings on petitions alleging need of supervision are closed to the public.

ANNOTATIONS

Cross-references. - As to children's court attorney, see 32A-1-6 NMSA 1978.

As to conduct of hearings, see 32A-2-16 NMSA 1978.

For Rules of Criminal Procedure for the District Courts, see Rule 5-101 et seq.

Nature of proceedings. - Juvenile proceedings to determine "delinquency," which may lead to a commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Applicability of double jeopardy to juvenile court proceedings, 5 A.L.R.4th 234.

10-228. Jury trial; delinquency proceedings.

A. **Demand.** A demand for trial by jury in delinquency proceedings shall be made in writing to the court within ten (10) days from the date the petition is filed or within ten (10) days from the appointment of an attorney for the respondent or entry of appearance by counsel for the respondent, whichever is later. If demand is not made as provided in this paragraph, trial by jury is deemed waived.

B. **Peremptory challenges.** In all trials by jury in delinquency proceedings, the state shall be entitled to two peremptory challenges and the defense, three. When two or more respondents are jointly tried, two additional challenges shall be allowed to the defense and one (1) to the state for each additional respondent.

[As amended, effective September 1, 1995.]

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Rule 10-228 was formerly Rule 36. It was renumbered in 1978. This rule was readopted after the decision in State v. Doe, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980) to make it clear that the provisions of this rule and Section 32-1-31 NMSA 1978 govern the procedure for demanding a jury trial.

The rule contains special provisions relating to jury trials in the children's court.

Paragraph A of Rule 10-228 requires that the demand for jury trial be in writing and that it be filed within certain time limits.

Paragraph B of Rule 10-228 is patterned after Subparagraph (1)(b) of Paragraph D of Rule 5-606 of the Rules of Criminal Procedure for the District Courts.

Except as provided in Rule 10-228, jury trials are conducted in the same manner as trials are conducted under the Rules of Criminal Procedure for the District Courts. See Rule 10-227.

See also, Section 32-1-31A NMSA 1978 and Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Historical Background

Until the adoption of the first juvenile law in New Mexico in 1917 (Laws 1917, Chapter 4), New Mexico handled juvenile criminal offenders in the same manner as adult criminal offenders. From 1917 until 1968, New Mexico followed the general rule that, under the theory of parens patriae, juvenile proceedings were civil proceedings and therefore juveniles were not entitled to a right to a jury trial. See In re Santillanes, 47 N.M. 140, 152, 138 P.2d 503 (1943).

In 1968, the Supreme Court of New Mexico in Peyton v. Nord, 78 N.M. 717, 724, 437 P.2d 716 (1968) relied in part on In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) and held that a juvenile was entitled to a jury trial under the jury trial guaranties of Article 2, Section 14 of the New Mexico Constitution "as well as those of the Sixth Amendment of the United States Constitution . . .." In holding that a juvenile is entitled to a jury trial, the court reasoned that since juveniles were entitled to a jury trial as adult offenders at the time of the adoption of our state Constitution, under Article 2, Section 12, they cannot be denied this right merely because of a "change in terminology or procedure."

It is almost universally decided that a jury trial is not required by either the state or federal constitutions in delinquency proceedings unless a jury trial is provided for by statute. 100 A.L.R. 2d 1241. The United States Supreme Court has held a juvenile proceeding is not a "criminal prosecution" under the Sixth Amendment of the United States Constitution and therefore juveniles are not entitled to a jury trial under the United States Constitution. McKeiver v. Pennsylvania, 403 U.S. 528, 95 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

In State v. Doe, 90 N.M. 776, 568 P.2d 612 (Ct. App. 1977) the court referred to McKeiver v. Pennsylvania, supra, to support its conclusion that a jury trial in juvenile proceedings is not constitutionally mandated by the Sixth and Fourteenth Amendments of the United States Constitution and explains that the decision in Peyton v. Nord, supra, is applicable only to those situations where a felony is charged and not where the offense is a petty misdemeanor. The court held that Section 32-1-31A NMSA 1978 authorizes a jury trial only if the juvenile has committed a "district court offense." Rule 10-228 should not be construed as extending a right to trial by jury in cases where the delinquent act would have been a petty misdemeanor if committed by an adult.

The 1972 session of the legislature repealed the Juvenile Code of 1955 and enacted a new Children's Code, Section 32-1-31 NMSA 1978 of which provided that the child,

parent, guardian, custodian or counsel in proceedings alleging delinquency may demand a jury trial. The New Mexico Supreme Court subsequently adopted Children's Court Rule 10-228 requiring that the demand for jury trial be made in writing within 10 days from the date the petition is filed or within 10 days from the appointment of an attorney, whichever is later.

In State v. Doe, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980), the New Mexico Court of Appeals held that under Peyton v. Nord, supra, a juvenile has a right to a jury trial unless there is a waiver. Although there is dictum in Peyton v. Nord, supra, relating to waiver, the committee does not believe that case law in criminal cases relating to the issue of waiver was extended to juvenile proceedings by the Peyton decision. The supreme court by readopting Rule 10-228 concurs in this belief. If a jury is demanded and the child is entitled to a jury trial, the jury's function is limited to that of trier of the factual issue of whether or not the child committed the alleged delinquent acts. If no jury is demanded, the hearing will be by the court without a jury and all hearings on petitions other than those alleging delinquency will be without a jury. Jury trials will be conducted in accordance with rules promulgated under the provisions of Subsection C of Section 32-1-4 NMSA 1978.

ANNOTATIONS

Cross-references. - As to jury trial on issue of alleged delinquent acts, see 32A-2-16 NMSA 1978.

The 1995 amendment, effective September 1, 1995, added "delinquency proceedings" in the rule heading and, in the first sentence in Paragraph B, substituted "delinquency proceedings" for "children's court", and changed the number of preemptory challenges allowed from three and five to two and three, respectively.

Right to trial by jury. - Since at the time of the adoption of the state constitution, a juvenile could not have been imprisoned without trial by jury, no change in terminology or procedure may be invoked whereby incarceration might now be accomplished in manner involving the denial of the right to a jury trial. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Timeliness of demand. - Since the state was unable to establish the date the child's attorney was served with a copy of her appointment, the 10-day period within which to demand a jury trial began to run on the day following the appearance of the attorney at the detention hearing. In re Ruben O., N.M. , 899 P.2d 603 (Ct. App. 1995).

Waiver of jury trial. - Where a child has a right to a trial by jury, such right may be waived, but only by an express waiver. State v. Doe, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980).

Jury trial may be waived, but waiver should be permitted only when the juvenile has been advised by counsel and it is amply clear that an understanding and intelligent

decision has been made; if the juvenile, after considering the advantages and disadvantages and having been advised by counsel, waives trial by jury, he would enjoy the benefits generally felt to attach through trial to court. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts §§ 43, 88.

10-229. Dispositional hearing.

A. **Access to reports.** In dispositional hearings:

(1) copies of any social, diagnostic or other predisposition reports ordered by or submitted to the court shall be provided to the parties at least five (5) days before the hearing is scheduled; and

(2) counsel for the parties shall be permitted to subpoena and examine in court the person who prepared the report.

B. **Time limits.** When the respondent is in detention, the dispositional hearing shall begin within twenty (20) days from the date the adjudicatory hearing was concluded or an admission of the factual allegations of the petition was accepted by the court, except as provided herein. The court may order that the respondent be transferred to an appropriate facility of the department of corrections for a period of not more than sixty (60) days with respect to a child adjudicated as a child in need of supervision and for a period of not more than ninety (90) days with respect to a child adjudicated as a delinquent for purposes of diagnosis and education. If the respondent is so transferred, the dispositional hearing shall begin within twenty (20) days from the date the court receives the diagnostic report of the department. If the hearing is not begun within the times specified in this paragraph, the petition shall be dismissed with prejudice after notice and hearing if:

(1) the child has not agreed to the delay or has not been responsible for the failure to comply with the time limits; and

(2) the child has been prejudiced by the delay.

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Rule 10-229 was formerly Rule 37. It was renumbered in 1978.

The rule establishes dispositional procedures for use after entry of a judgment that the respondent is a delinquent child or a child in need of supervision.

Paragraph A of Rule 10-229 reflects the original committee's concern that the dispositional hearing is often the crucial stage in children's court proceedings, particularly those involving children in need of supervision in which the facts have been stipulated. As noted in the report by the president's commission on law enforcement and administration of justice, The Challenge of Crime in a Free Society 86-87 (1967):

. . . children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger adheres that the court's coercive power will be applied without adequate knowledge of the circumstances.

The purpose of Paragraph A of Rule 10-229 is to assure that if the accuracy of social, medical, psychological and psychiatric reports which form the basis for disposition is questioned, the respondent has a means to test that accuracy. The original committee was concerned with those instances in which the dispositional reports are conclusionary in nature or substantially based on hearsay. In such cases, the reports are admissible, but defense counsel is allowed an opportunity to show that the conclusion is erroneous or the hearsay unreliable, and the state is allowed the same means to challenge the respondent's evidence under Subparagraph (2) of Paragraph A of Rule 10-229.

Subparagraph (1) of Paragraph A of Rule 10-229 sets a time limit for providing copies of the reports to the parties.

Paragraph B of Rule 10-229 establishes time limits for beginning the dispositional hearing if the respondent is in detention or if the respondent is transferred to a corrections division facility for diagnosis. The statutory maximum period for a diagnostic confinement is ninety days for a child adjudicated as a delinquent and sixty days for a child adjudicated a child in need of supervision. See Section 32-1-32 NMSA 1978. If the respondent is not undergoing diagnosis at a corrections division facility, but is in detention, the dispositional hearing must begin within twenty days from the date the adjudicatory hearing was concluded or an admission accepted by the court. This time limit is to prevent continued detention without prompt final disposition.

The dispositional hearing must begin twenty days after the court receives the diagnostic report of the department. The additional twenty-day leeway is allowed to provide adequate time for receipt and examination of diagnostic reports and to schedule the hearing. This rule supersedes Section 32-1-32 NMSA 1978 in this respect.

There is no time limit for the dispositional hearing of children who are not in detention or undergoing diagnosis.

The time periods of this rule are mandatory. See Rule 10-117. The court must dismiss any case in which the dispositional hearing has not been held within time limits prescribed by this rule. See State v. Doe, 93 N.M. 31, 595 P.2d 1221 (Ct. App. 1979), for a decision issued prior to the amendment of Rules 10-117 and 10-229, clarifying

when a proceeding must be dismissed. For decisions discussing "prejudice" in criminal cases where prejudice to the defendant was found, see State v. Orona, 92 N.M. 450, 589 P.2d 1041 (1979); State v. Vigil, 87 N.M. 345, 533 P.2d 578 (1975); State v. Caputo, 94 N.M. 190, 608 P.2d 166 (Ct. App. 1980); Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975); State v. Johnson, 84 N.M. 29, 498 P.2d 1372 (Ct. App. 1972) and Barker v. Wingo, 407 U.S. 514 (1972). For decisions where no prejudice to the defendant was found, see State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979); State v. Gallegos, 92 N.M. 370, 588 P.2d 1045 (Ct. App. 1978) and State v. Gutierrez, 91 N.M. 542, 577 P.2d 440 (Ct. App. 1978).

ANNOTATIONS

Cross-references. - As to hearing regarding disposition of child, see 32A-2-13 NMSA 1978.

As to predisposition studies, reports and examinations, see 32A-2-17 NMSA 1978.

Absence of hearing and two-year commitment improper under statutory provisions. - Where there is no hearing prior to the entry of an order to commit a child to a boys' school for two years, the absence of a hearing is contrary to former 32-1-27 NMSA 1978, which gave the child a right to be heard concerning the diagnostic evaluation. State v. Doe, 93 N.M. 206, 598 P.2d 1166 (Ct. App. 1979).

Purpose of time requirements is to ensure prompt handling of children's court matters. State v. Doe, 93 N.M. 31, 595 P.2d 1221 (Ct. App. 1979).

Court's discretion does not permit it to delay a hearing. - There is no conflict between the time limit within which a dispositional hearing must be held under Paragraph B of this rule and Subsection H of 32-1-31 NMSA 1978 granting discretion to the children's court in a wide variety of circumstances; the rule simply states that in one specific circumstance that discretion should not be exercised to delay a hearing. In re Paul T., 118 N.M. 538, 882 P.2d 1051 (Ct. App. 1994).

Consequence of violating Paragraph B is dismissal. - Consistent with Rule 10-101, and giving effect to the mandatory aspect of the time requirements of this rule, the consequence of violating Paragraph B is dismissal. State v. Doe, 93 N.M. 31, 595 P.2d 1221 (Ct. App. 1979).

If Paragraph B violated, judgment void. - Judgment entered by the children's court revoking probation and committing a juvenile to the custody of the Children, Youth and Families Department was void because the dispositional hearing following the conclusion of the adjudicatory hearing was not held within the time period mandated by Paragraph B. In re Paul T., 118 N.M. 538, 882 P.2d 1051 (Ct. App. 1994).

Requirements for Subparagraph (2) of Paragraph B dismissal. - Dismissal under Subparagraph (2) of Paragraph B for delay does not operate unless both prejudice and

absence of the child's agreement to or responsibility for delay are present. State v. Doe, 100 N.M. 357, 670 P.2d 968 (Ct. App. 1983).

When time limit not waived. - A child does not waive the time limit of this rule either by requesting a delay in transportation to the Youth Diagnostic Center or by requesting a continuance of a dispositional hearing which itself would have been untimely. State v. Doe, 94 N.M. 282, 609 P.2d 729 (Ct. App. 1980).

Time limit in Paragraph B is not suspended by special master's proceedings. - The running of the twenty-day time limit in Paragraph B, within which a dispositional hearing must be held, is not suspended until exceptions are filed under Paragraph E of Rule 10-111, and the children's court judge acts on the report of the special master. In re Paul T., 118 N.M. 538, 882 P.2d 1051 (Ct. App. 1994).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

10-230. Judgments and appeals.

A. **Entry of judgment.** If the respondent is found to have committed a delinquent act or is found to have committed an offense defined as need of supervision, a judgment to that effect shall be entered. If it is also determined that the respondent is in need of care or rehabilitation, a judgment that the child is a delinquent child or a child in need of supervision shall be entered. If the respondent is found not to be a delinquent child or a child in need of supervision, a judgment to that effect shall be entered. The judgment and disposition shall be rendered and thereafter a written judgment and disposition shall be signed by the judge and filed. The clerk shall give notice of entry of judgment and disposition.

B. **Advisement of right to an appeal.** At the time of disposition in a case which has gone to an adjudicatory hearing on a denial of the allegations of the petition, the court shall advise the respondent of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to proceed at state expense. Failure of the court to so advise the respondent shall toll the time for taking an appeal.

C. **Appeals.** Appeals from judgments and dispositions on petitions alleging delinquency or need of supervision shall be governed by the Rules of Appellate Procedure.

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This rule (formerly Rule 38) was not substantially changed in 1978.

The rule deals with the conclusion of the adjudicatory hearing and the onset of the time for appeal.

Under 32-1-3N and P and 32-1-31 NMSA 1978, a determination of guilt in a delinquency or need of supervision proceeding requires a two-pronged inquiry: (1) did the child commit a delinquent act or commit an offense defined as need of supervision, and, if so, (2) is the child also in need of care or rehabilitation? If the answer to both inquiries is in the affirmative, then the respondent is either a delinquent child or a child in need of supervision. Such a conclusion is equivalent to a finding of guilty in an adult criminal case.

Accordingly, Paragraph A reflects this two-faceted inquiry. The first entry of judgment goes only to whether or not it has been proven that the acts alleged were committed by the child. This determination, standing alone, does not make the child a "delinquent child" and is therefore not a sufficient basis for the court to proceed to disposition. The court also must determine whether the respondent is in need of care or rehabilitation. If it so determines, the judgment that the respondent is a delinquent child or a child in need of supervision is then entered and has the equivalent effect of a determination of guilty in adult criminal cases. Failure to hold a hearing to determine whether or not the child is in need of care or rehabilitation is reversible error. State v. John Doe, 91 N.M. 356, 573 P.2d 1211 (Ct. App. 1977).

If the answer to either of the two inquiries is in the negative, the judgment to be entered is that the respondent is not guilty.

Paragraph B provides that the time for appeal begins to run from disposition, not from the conclusion of the adjudicatory hearing. See In re John Doe III, 87 N.M. 170, 531 P.2d 218 (Ct. App. 1975).

Section 32-1-39A NMSA 1978 simply allows "a party" to appeal from a judgment of the children's court to the court of appeals "in the manner provided by law." Paragraph C specifies that the appeal will be governed by the New Mexico Rules of Appellate Procedure.

ANNOTATIONS

Cross-references. - As to appeals from children's court, see 32A-1-17 NMSA 1978.

As to judgment in proceedings under Children's Code, see 32A-2-18 NMSA 1978.

As to disposition of child, see 32A-2-19 and 32A-4-22 NMSA 1978.

As to limitations on dispositional judgments, and modification, termination or extension of court orders, see 32A-2-23 NMSA 1978.

As to periodic review of dispositional judgments, see 32A-4-25 NMSA 1978.

There are two aspects to the determination that child is delinquent child: (1) the act which he committed; and (2) the need for care or rehabilitation. State v. Doe, 90 N.M. 249, 561 P.2d 948 (Ct. App. 1977).

State has the right to appeal judgments of the children's court. State v. Doe, 92 N.M. 354, 588 P.2d 555 (Ct. App. 1978).

Effect of admission on transfer to district court. - Since acceptance of an admission involves accepting that the child has committed a delinquent act and is a delinquent child, and this rule requires entry of judgment once the child is found to have committed a delinquent act, a transfer to district court pursuant to former 32-1-30 NMSA 1978 cannot occur once an admission is accepted. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978) (decided before 1978 amendment of Rule 44 (now Rule 10-224)).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 106 et seq.

Interference with enforcement of judgment in criminal or juvenile delinquent case as contempt, 8 A.L.R.3d 657.

10-231. Commitment information.

Whenever a child is committed to either the girls' school, the boys' school or the youth diagnostic and development center, the committing court shall provide the following information to that facility if available:

A. medical information. A complete medical report including any psychological and drug involvement information, if applicable;

B. family information. This shall include information relating to number of siblings, family income, and religious background;

C. educational information;

D. employment information;

E. delinquent history; and

F. any other information which is relevant to the background of the child.

10-232. Probation revocation.

A. **Procedure.** Proceedings to revoke probation shall be conducted in the same manner as proceedings on petitions alleging delinquency or need of supervision, and the respondent whose probation is sought to be revoked shall be entitled to all rights that a respondent alleged to be delinquent or in need of supervision is entitled to under law and these rules, except that:

(1) no preliminary inquiry shall be conducted;

(2) the hearing on the petition shall be to the court without a jury;

(3) the petition shall be styled as a "Petition to Revoke Probation" and shall state the terms of probation alleged to have been violated and the factual basis for these allegations; and

(4) the petition may be filed any time prior to expiration of the period of probation.

B. **Disposition.** If the respondent is found to have violated a term of his probation, the court may:

(1) extend the period of probation; or

(2) make any other disposition which would have been appropriate in the original proceedings.

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Rule 10-232 was formerly Rule 39. It was renumbered in 1978.

The children's court attorney must sign the petition. See also Section 32-1-43 NMSA 1978.

There is no provision in the Children's Code similar to Section 31-21-15B NMSA 1978 regarding credit for probation for adults. See State v. Sublett, 78 N.M. 655, 436 P.2d 515 (Ct. App. 1968). Section 32-1-38G NMSA 1978 of the Children's Code provides that any time "prior to the expiration of a judgment of probation," a court may extend the judgment for one year. Section 32-1-38G NMSA 1978 seems to require less than Rule 10-232 does for initiating a petition to revoke probation. However, Section 32-1-43 NMSA 1978, regarding probation revocation, provides that the court not only may extend the judgment, but it may "make any other judgment or disposition that would have been appropriate in the original disposition of the case." Rule 10-232 was amended in 1982 to require the filing of the petition for revocation prior to expiration of the probation period. By requiring that the petition to revoke probation be filed prior to the expiration of the probation period, this rule would be consistent with Rule 10-225 regarding the extension of consent decrees.

Rule 11-509 of the Rules of Evidence establishing a privilege between probation officers and the respondent is inapplicable to probation revocation proceedings since it applies only to statements made during a preliminary inquiry, and none is conducted under Subparagraph (1) of Paragraph A of Rule 10-232. See State v. Doe, 91 N.M. 364, 574 P.2d 288 (Ct. App. 1978).

The 1982 amendments deleting "parole" from this rule were made to be consistent with the amendment of Section 32-1-43 NMSA 1978 by the 1981 legislature. Section 32-1-43.1 NMSA 1978 now requires the field community services division of the corrections department to establish procedures for parole revocations.

ANNOTATIONS

Cross-references. - As to establishment of probation services, see 32A-2-5 NMSA 1978.

For powers and duties of probation officers under Children's Code, see 32A-2-5 NMSA 1978.

As to probation and parole revocation, see 32A-2-24 and 32A-2-25 NMSA 1978.

Compiler's note. - Section 32-1-43.1 NMSA 1978, referred to in the second sentence in the last paragraph of the committee commentary, was amended in 1992 to refer to the children, youth and families department, not the field services division. The section was subsequently repealed in 1993.

Where a special master lacks authority to hear a probation revocation petition, the court is without jurisdiction at the hearing on the petition. When the district judge disposes of the case more than 30 days after the petition is filed, the petition should be dismissed with prejudice. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts § 25 et seq.

43 C.J.S. Infants § 78.

ARTICLE 3
ABUSE AND NEGLECT PROCEEDINGS

Rule

10-301. Ex parte custody orders.

A. **Issuance.** At the time a petition is filed or any time thereafter, the children's court or district court may issue an ex parte custody order upon a sworn written statement of facts showing probable cause exists to believe that the child is abused or neglected and that custody under the criteria set forth in Rule 10-303 of these rules is necessary.

B. **Service.** The order shall be served on the respondent by a person authorized to serve arrest warrants and shall direct the officer to take custody of the child and deliver him to a place designated by the court.

C. **Evidence.** The Rules of Evidence do not apply to the issuance of an ex parte custody order.

D. **Referees.** The provisions of this rule may be carried out by a referee appointed by the court.

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Rule 10-301 was revised in 1978 to allow court-appointed referees to issue ex parte custody orders when the children's court or district court judge is unavailable.

The rule establishes a procedure similar to an arrest warrant to cover situations in which a child alleged to be abused or neglected may be taken into custody. Section 32-1-22A(4) NMSA 1978 authorizes immediate seizure of an alleged abused or neglected child by a law enforcement officer in certain emergency situations. Section 32-1-26 NMSA 1978 provides for detentions prior to the filing of a petition. In any other circumstances, an ex parte custody order is required to take the child into custody or to continue custody. See also Section 32-1-18 NMSA 1978 for ex parte custody orders. Rule 10-303 requires a custody hearing to be held within two days after the petition has been filed.

Under Paragraph A of Rule 10-301, the sworn statement of probable cause may be made by anyone who could make such a statement for issuance of an arrest warrant under Paragraph C of Rule 5-208 of the Rules of Criminal Procedure for the District Courts.

The showing of probable cause must go to two issues: (1) that the child is abused or neglected and (2) that the child needs to be placed in the custody of the human services department for his protection. The specific criteria for custody are contained in Rule 10-303.

Paragraph B of Rule 10-301 authorizes service of the order by those persons delineated in Paragraph A of Rule 5-210 of the Rules of Criminal Procedure for the District Courts. The order is to be served on the respondent, i.e., parent, guardian or custodian allegedly neglecting or abusing the child.

Paragraph C of Rule 10-301 makes the Rules of Evidence inapplicable to the issuance of an ex parte custody order because of the order's similarity to the arrest warrant procedure. See Rule 11-1101 of the Rules of Evidence.

ANNOTATIONS

Cross-references. - As to taking of child into custody, see 32A-2-9 NMSA 1978.

For definition of "neglected child," see 32A-4-2 NMSA 1978.

As to whom arrest warrants may be directed, see Rule 5-210.

Law reviews. - For note, "Children's Code - Neglect - State ex rel. Health & Social Services Department v. Natural Father," see 12 N.M.L. Rev. 505 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 42 Am. Jur. 2d Infants §§ 16, 17; 47 Am. Jur. 2d Juvenile Courts § 45 et seq.

Sexual abuse of child by parent as ground for termination of parent's right to child, 58 A.L.R.3d 1074.

43 C.J.S. Infants § 5 et seq.; 67A C.J.S. Parent and Child §§ 31 to 46.

10-302. Notice of custody.

A. **Time for filing and contents.** Within twenty-four (24) hours, including Saturdays, Sundays and legal holidays, from the time the child is taken into custody, the person taking the child into physical custody shall give notice to the parents, guardian or custodian of the child that:

(1) the child has been taken into custody;

(2) if no petition alleging abuse or neglect is filed, the child will be released;

(3) if a petition alleging abuse or neglect is filed, a hearing will be held no later than ten (10) days after the date the petition is filed to determine whether the child should remain in the custody of the department pending adjudication; and

(4) if they are the respondents, they have a right to an attorney, and if they cannot afford an attorney, one will be appointed to represent them free of charge.

B. **Indians.** If the alleged abused or neglected child taken into custody is an Indian, the Human Services Department shall give such additional notice as may be required by law.

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Rule 10-302 was amended in 1978 to delete the requirement that the parents, guardian or custodian of the child be advised that communications they make to a social services worker during the preliminary inquiry are privileged. The privilege still exists under Rule of Evidence 11-509. A similar requirement was deleted in delinquency and need of supervision proceedings. See the commentary to Rule 10-202 for a discussion of the rationale for deleting this requirement.

Rule 10-302 sets forth the notice requirements if a child is taken into custody as an alleged abused or neglected child. The notice may be oral or written and goes to the parents, guardian or custodian of the alleged abused or neglected child.

Although the requirement is that the notice be given within twenty-four hours of the time the child was taken into custody, the committee does not intend that the person required to give the notice cease his efforts to locate or contact the parents, guardian or custodian if this cannot be done within the initial twenty-four hours. Accordingly, a written notice of custody form has been approved by the supreme court.

See Section 32-1-22 NMSA 1978 for the requirement of notice to the agent of the appropriate Indian tribe by the Human Services Department in cases where the child is an Indian.

See also Section 32-1-23 NMSA 1978.

ANNOTATIONS

Cross-references. - As to notice of custody, see 32A-2-10 NMSA 1978.

Right to attorney denied only where waived intelligently and knowingly. - The waiver of a right created by the constitution, a statute or a court-promulgated rule, such as the right to an attorney, must be done intelligently and knowingly if the right is to be denied the one claiming it. State ex rel. Department of Human Servs. v. Perlman, 96 N.M. 779, 635 P.2d 588 (Ct. App. 1981).

Law reviews. - For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 43 C.J.S. Infants § 20.

10-303. Custody hearing.

A. **Time limits.** If the child alleged to be abused or neglected is in the custody of the department or the department has petitioned the court for temporary custody, a custody hearing shall be held within ten (10) days from the date the petition is filed to 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 parents, guardian or custodian of the child alleged to be abused or neglected shall be given reasonable notice of the time and place of the hearing.

C. **Conduct.** At the hearing, the court shall release the child to his parents, guardian or custodian unless probable cause exists to believe that:

(1) the child is suffering from an illness or injury, and no parent, guardian, custodian or other person is providing adequate care for him;

(2) the child is in immediate danger from his surroundings, and removal from those surroundings is necessary for his safety or well-being;

(3) the child will be subject to injury by others if not placed in the custody of the department;

(4) the child has been abandoned by his parent, guardian or custodian; or

(5) no parent, guardian, custodian or other person is able or willing to provide adequate supervision and care for the child.

D. **Conclusion.** At the conclusion of the hearing, if the court determines that custody pending adjudication is appropriate, the court may:

(1) award custody of the child to the department with or without rights of visitation for the parents, guardian or custodian of the child; or

(2) return the child to his parents, guardian or custodian upon such conditions as will reasonably assure the safety and well-being of the child; and

(3) in either event, order the respondent or child alleged to be neglected or abused, or both, to undergo appropriate diagnostic examinations or evaluations. Copies of any diagnostic or evaluation reports ordered by the court shall be provided to the parties at least five (5) days before the adjudicatory hearing is scheduled; the reports shall not be sent to the court.

E. **Referees.** The provisions of this rule may be carried out by a referee appointed by the court.

F. **Evidence.** The Rules of Evidence shall not apply to custody hearings conducted under this rule.

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Rule 10-303 was revised in 1978. Subparagraph (3) of Paragraph D was amended to require that copies of any court-ordered diagnostic or evaluation reports be provided to the parties at least five days before the adjudicatory hearing. In the case of the alleged abused or neglected child, the report would go to his guardian ad litem. The rule prohibits the reports from going to the court in accord with Canon 21-300 which provides:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

The examinations or reports can be introduced into evidence by any party at the adjudicatory hearing if the proper foundation is laid.

The custody hearing required by Rule 10-303 is the equivalent of the detention hearing in delinquency and need of supervision cases. It also covers those situations in which the human services department does not have custody, but desires to take custody of the child pending the adjudicatory hearing. See Rule 10-102 for the definition of "in the custody of the department."

Paragraph A of Rule 10-303 requires that the hearing be held within ten days from the date the petition is filed, and it may be held sooner upon written request of the respondent. If the child is in custody, the hearing must be held within two days after the petition is filed. See Section 32-1-28.1 NMSA 1978.

Paragraph B of Rule 10-303 requires that reasonable notice be given the parents, guardian or custodian of the child. The timeliness of the notice must be interpreted in view of the fact that a longer time limit for the custody hearing is allowed than for a detention hearing in a delinquency or need of supervision proceeding. The notice need be given only to one parent.

Paragraph C of Rule 10-303 provides for the continued preadjudicatory custody of a child if there is probable cause to believe the child is an abused or neglected child. See Subsections L and M of Section 32-1-3 NMSA 1978 for the definitions of "neglected" and "abused" children. See also Section 32-1-22A(4) NMSA 1978 (grounds for taking into custody) and Section 32-1-24 NMSA (criteria for detention). The original committee believed that the criteria for detention in Section 32-1-24 NMSA 1978 were almost exclusively aimed at detention of alleged delinquents and children in need of supervision and did not cover the possible grounds for custody in a neglect or abuse case.

Paragraph D of Rule 10-303 provides guidelines for the court to use if the child is placed in the custody of the department pending the adjudicatory hearing. Section 32-1-26 NMSA 1978 appears to deal only with detention or conditional release of an alleged delinquent or child in need of supervision and has been superseded by Rule 10-211.

Subparagraph (3) of Paragraph D is similar to Section 32-1-32C NMSA 1978 which allows the court, after hearing, to order examination by a physician, psychiatrist or psychologist of a parent, guardian or custodian who gives his consent and whose ability to care for or supervise a child is an issue before the court. Section 32-1-32C NMSA 1978 applies only after a determination as to the validity of the allegations of the petition has been made. The original committee believed that such reports are needed for the adjudicatory hearing and that they could be ordered regardless of the consent of the respondent since a neglect proceeding is essentially civil in nature. (See Rule 1-035 of the Rules of Civil Procedure for the District Courts.) The original committee also believed that such reports on the child were necessary in neglect cases.

Paragraph E of Rule 10-303 allows referees to conduct the custody hearing.

Paragraph F of Rule 10-303 makes the Rules of Evidence inapplicable to custody hearings under the general policy of Rule 11-1101 of the Rules of Evidence and Section 32-1-26 NMSA 1978. See commentary to Rule 10-115.

ANNOTATIONS

Cross-references. - As to criteria for detention of children, see 32A-2-11 NMSA 1978.

As to disqualification of judge in proceedings where his impartiality might be questioned, see Code of Judicial Conduct, Rule 21-400 SCRA 1986.

Post-deprivation hearing within reasonable period constitutional. - In the context of child abuse and neglect proceedings, a parent's familial and due process rights are balanced against the state's interest in protecting and caring for neglected children. In achieving a balance of these interests, a post-deprivation hearing within a reasonable period does not violate the minimum federal due process rights of the parent. Yount ex rel. Shane P. v. Millington, 117 N.M. 95, 869 P.2d 283 (Ct. App. 1993).

Parties' stipulation to custody in department creates consent decree. - A stipulation entered into between the parties, following a hearing in which a physician testified that the child's condition was the result of neglect and in which the natural parents did not contest the neglect allegations and agreed to temporary custody in the department, was in effect a consent decree under Rule 10-307, and not a temporary custody order under this rule. State ex rel. Department of Human Servs. v. Doe, 103 N.M. 260, 705 P.2d 165 (Ct. App. 1985).

Law reviews. - For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

For note, "Children's Code - Neglect - State ex rel. Health & Social Services Department v. Natural Father," see 12 N.M.L. Rev. 505 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 43 C.J.S. Infants § 22.

10-304. Explanation of rights at first appearance.

At the first appearance of the respondent before the court in an abuse or neglect proceeding, the respondent shall be informed by the court of:

A. the allegations of the petition;

B. the right to a trial on the allegations in the petition;

C. the right to an attorney and that if he cannot afford an attorney, one will be appointed to represent him free of charge; and

D. the possible consequences if the allegations of the petition are found to be true.

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Rule 10-304 is a new provision added in 1978. Prior to the 1978 revisions, former Rule 15 governed the advisement of rights at the respondent's first appearance before the court in delinquency, need of supervision or neglect cases. However, former Rule 15 did not adequately advise a respondent in a neglect action. Thus a new Rule 10-210 was drafted for delinquency and need of supervision provisions and Rule 10-304 was added for neglect cases. Rule 10-304 was extended in 1982 to apply to abuse cases also. Rule 10-304 omits the references found in Rule 10-210 to fifth amendment rights which normally are not available in civil actions and to a right to trial by jury, which is not available in abuse or neglect actions. 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, 47 N.M. 140, 138 P.2d 503 (1943). Modern abuse and neglect proceedings are typically based on statute. Absent statutory authorization for a right to a jury trial, it has been held that the parents have no such right. In re Fred S., Terry S., Mary S., 322 N.Y.S.2d 170, 66 Misc. 2d 683 (1971); In re John Children, 306 N.Y.S.2d 797, 61 Misc. 2d 347 (1969).

ANNOTATIONS

Right to attorney denied only where waived intelligently and knowingly. - The waiver of a right created by the constitution, a statute or a court-promulgated rule, such as the right to an attorney, must be done intelligently and knowingly if the right is to be denied the one claiming it. State ex rel. Department of Human Servs. v. Perlman, 96 N.M. 779, 635 P.2d 588 (Ct. App. 1981).

Law reviews. - For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

10-305. Filing of petition; appointment of guardian ad litem.

A. **Procedure.** Petitions alleging abuse or neglect shall be signed and filed in the same manner as petitions alleging delinquency or need of supervision.

B. **Form and contents.** Petitions alleging abuse or neglect shall be in a form approved by the supreme court. The petition shall set forth:

(1) the facts necessary to invoke the jurisdiction of the court;

(2) the name, birthdate and residence address of the child alleged to be abused or neglected;

(3) the name and residence address of the respondent;

(4) whether the child alleged to be abused or neglected is in the custody of the department and, if so, the date that he was placed in the custody of the department; and

(5) if any of the matters required to be set forth by this rule are not known, a statement of those matters and the fact that they are not known.

C. **Time limits.** Petitions shall be filed:

(1) within ninety (90) days from the date that the complaint is referred to the department if the child is not in the custody of the department; or

(2) within two (2) days from the date that the child alleged to be abused or neglected is taken into custody.

If a petition is not filed within the time set forth in this paragraph, the child shall be released to his parents, guardian or custodian.

D. **Appointment of guardian ad litem.** The court shall appoint a guardian ad litem to represent the child alleged to be abused or neglected no later than the filing of the petition alleging abuse or neglect.

[As amended, effective May 1, 1986.]

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Rule 10-305 sets the general procedure and time limits for filing of petitions alleging abuse or neglect. Several provisions were changed in the 1978 revision of the rules.

The general procedure for filing an abuse or neglect petition set forth in Paragraph A of Rule 10-305 remains the same. (See Rule 10-204 for the procedure used in filing petitions in delinquency and need of supervision proceedings.) An investigation to

determine the best interests of the child is conducted by the human services department and is required by statute, Section 32-1-14 NMSA 1978, before any petition may be filed. Rule 10-113 of these rules makes the endorsement on each petition that the filing of the petition is in the best interest of the child unnecessary.

There is no substantive change in the form and contents of the petition.

The time limit provision was amended in 1982 to require that petitions in noncustody cases be filed within ninety days from the date the complaint is referred to the Human Services Department. The phrase, "in the custody of the department," is defined in Rule 10-102.

Previously the rule contained no time limit for filing a petition when the alleged abused or neglected child was not in custody. (See commentary to Rule 10-101 for a discussion of the rulemaking authority of the supreme court.) The Children's Code does not clearly define the time limit for filing an abuse or neglect petition in a noncustody case. See Section 32-1-14 NMSA 1978.

The time limit for filing of the petition when the child is in the custody of the department remains two days from the date the child is taken into custody. The provision that the time limit runs from the date the child is taken into custody "pursuant to court order" has been deleted so that any taking into custody, whether or not pursuant to court order, starts the time limit running. An example of a taking into custody without a court order is an emergency seizure by a police officer. See Section 32-1-22A(4) NMSA 1978.

It should be noted that the rules do not use the terms "detention" or "placed in detention" in reference to abused or neglected children. The term "custody" is used instead and was adopted because it more accurately connotes the concept of the child as victim rather than alleged wrongdoer. See also the commentary to Rule 10-208.

Paragraph D of Rule 10-305 requires that the guardian ad litem for a child alleged to be neglected or abused be appointed no later than the filing of the abuse or neglect petition. This provision was not changed in 1978. See also Rule 10-108.

Rule 10-305 supersedes those portions of Sections 32-1-17, 32-1-18, 32-1-19 and 32-1-26 NMSA 1978 which set forth requirements for filing of petitions contrary to Rules 10-204 or 10-305. See commentary to Rule 10-204.

Paragraph B of Rule 10-305 supersedes Section 32-1-19 NMSA 1978.

ANNOTATIONS

Cross-references. - For Children's Code provisions relating to petitions, see 32A-1-10, 32A-1-11 and 32A-2-8 NMSA 1978.

Law reviews. - For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

For note, "Children's Code - Neglect - State ex rel. Health & Social Services Department v. Natural Father," see 12 N.M.L. Rev. 505 (1982).

10-306. Discovery.

A. **Court orders.** Upon motion, at any time after the filing of a petition alleging abuse or neglect, upon a showing that his testimony will be material and relevant to the allegations in the petition the children's court may order:

(1) the taking of the deposition of any person; or

(2) the disclosure of any information subject to disclosure pursuant to Rule 10-213 or 10-214 of these rules, insofar as they may be applicable.

B. **Rules of Civil Procedure govern.** The Rules of Civil Procedure for the District Courts shall govern discovery in abuse and neglect proceedings.

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Prior to the 1978 revisions to the rules, discovery in children's court proceedings was governed by former Rule 11. An entire discovery scheme has been adopted for delinquency and need of supervision proceedings. (See Rules 10-213 to 10-220.) Rule 10-306 was added for abuse and neglect proceedings. Depositions and other discovery, as set forth in Rules 10-213 and 10-214, are available upon court order.

10-307. Admissions and consent decrees.

A. **Admissions.** The respondent may make an admission by:

(1) admitting sufficient facts to permit a finding that the allegations of the petition are true; or

(2) declaring his intention not to contest the allegations in the petition.

B. **Consent decrees.** A consent decree in an abuse or neglect proceeding is an order of the court, after an admission has been made, that suspends the proceedings on the petition and in which, under terms and conditions negotiated and agreed to by the respondent and the children's court attorney:

(1) the legal custody of the child is transferred to the department for a period not to exceed six (6) months from the date of the consent decree; and

(2) the child is allowed to remain with the respondent or other person and the respondent will be under supervision of the department for a period not to exceed six (6) months.

C. **Inquiry of respondent.** The court shall not accept an admission or approve a consent decree without first, by addressing the respondent personally in open court, determining that:

(1) he understands the allegations of the petition;

(2) he understands the dispositions that the court may make if the allegations of the petition are found to be true;

(3) he understands that he has a right to deny the allegations in the petition and to have a trial on the allegations;

(4) he understands that if he makes an admission or agrees to the entry of the consent decree, he is waiving the right to a trial; and

(5) the admission or provisions of the consent decree are voluntary and not the result of force or threats or of promises other than any consent decree agreement reached.

D. **Basis for admission or consent decree.** The court shall not enter judgment upon an admission or approve a consent decree without making such inquiry as shall satisfy the court that there is a factual basis for the admission or consent decree.

E. **Disposition.** After acceptance of an admission, unless made for the purpose of a consent decree, the court shall proceed to make any disposition permitted by law as it deems appropriate under the circumstances.

F. **Acceptance of consent decree.** If the court accepts a consent decree, the court shall approve the disposition provided for in the consent decree or another disposition more favorable to the respondent than that provided for in the consent decree. If the court rejects the consent decree, the decree shall be null and void.

G. **Inadmissibility of discussions.** Evidence of an admission or agreement to a consent decree, later withdrawn, or of statements made in connection therewith, is not admissible in any proceeding against the respondent.

H. **Time limits.** If the child is in the custody of the department, the court shall accept or reject the admission or consent decree within five (5) days after the admission is made or within five (5) days after a consent decree has been submitted to the court for its approval.

I. **Rules of Evidence.** The Rules of Evidence do not apply to inquiries made to determine whether there is a factual basis for an admission or a consent decree.

J. **Extension, termination.** Consent decrees in abuse and neglect proceedings may be extended by the department and terminated in accordance with Rule 10-225.

K. **Revocation.** If, prior to the expiration of the consent decree, the respondent allegedly fails to fulfill the terms of the decree, the children's court attorney may file a petition to revoke the consent decree. If the respondent is found to have violated the terms of the consent decree, the court may:

(1) extend the period of the consent decree; or

(2) make any other disposition which would have been appropriate in the original proceedings.

[As amended, effective May 1, 1986.]

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Rule 10-307 was expanded in 1978. The rule institutes consent decree and admissions procedures for abuse and neglect cases. The consent decree in an abuse or neglect case differs from that in a delinquency or need of supervision proceeding in that the parties may agree that the department have legal custody of the child for a period of up to six months or the child may be placed under supervision in his own home or the home of another for the six-month period.

See generally Rules 10-224 and 10-225 and the commentaries thereto.

ANNOTATIONS

Parties' stipulation to custody in department creates consent decree. - A stipulation entered into between the parties, following a hearing in which a physician testified that the child's condition was the result of neglect and in which the natural parents did not contest the neglect allegations and agreed to temporary custody in the department, was in effect a consent decree under this rule, and not a temporary custody order under Rule 10-303. State ex rel. Department of Human Servs. v. Doe, 103 N.M. 260, 705 P.2d 165 (Ct. App. 1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 43 C.J.S. Infants §§ 23, 24, 28 to 30.

10-308. Adjudicatory hearing; time limits.

A. **Time for hearing.** The adjudicatory hearing shall be commenced within ninety (90) days after whichever of the following events occurs latest:

(1) the date that the petition is served on the respondent;

(2) if a mistrial is declared or a new trial is ordered by the trial court, the date that such order is filed; or

(3) in the event of an appeal, the date that the mandate or order is filed in the district court disposing of the appeal.

B. **Children's court attorney.** The children's court attorney shall represent the state at the adjudicatory hearing.

C. **Extension of time.** The time for commencement of an adjudicatory hearing may be extended only by the supreme court, a justice thereof, or a judge designated by the supreme court, for good cause shown. The party seeking an extension of time shall file with the clerk of the supreme court a verified petition for extension concisely stating the facts that petitioner deems to constitute good cause for an extension of time to commence the adjudicatory hearing. The petition shall be filed within the applicable time limits prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limits if it is based on exceptional circumstances beyond the control of the state or children's court which justify the failure to file the petition within the applicable time limit. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Within five (5) days after service of the motion, opposing counsel may file an objection to the extension setting forth the reasons for such objection. No hearing shall be held except upon order of the supreme court. If the supreme court finds that there is good cause for the granting of an extension beyond the applicable time limit, it shall fix the time limit within which the adjudicatory hearing must be commenced.

D. **Effect of noncompliance with time limits.** If the adjudicatory hearing on any petition is not begun within the time specified in Paragraph A of this rule or within the period of any extension granted as provided in this rule, the petition shall be dismissed with prejudice.

[As amended, effective May 1, 1986.]

*** * * * * * * * * * * * * * * * * * ***

Rule 10-308 was revised in 1978 to expand the time limit for commencement of the adjudicatory hearing when the alleged abused or neglected child is in the custody of the Human Services Department and to expand the "events" which start the time limit running.

The time limit when the child is in the custody of the department was expanded from thirty to sixty days to allow sufficient time for preparation of evaluation and diagnostic reports, which are frequently essential evidence in the adjudicatory hearing in an abuse or neglect proceeding. See Rule 10-102 and commentary to Rule 10-305 for a discussion of the definition of the phrase, "in the custody of the department."

Whether or not the alleged abused or neglected child is in the custody of the department, the time limits for commencement of the adjudicatory hearing begin to run from the latest of the three "events" set forth in Paragraphs A and B of Rule 10-308. Before the 1978 revisions, the time limits were keyed to service of the petition on the respondent. In 1978, the "event" approach was adopted for commencement of the time limits in neglect, delinquency and need of supervision proceedings. See Rule 10-226 and the commentary thereto.

Like the time limits in Rule 10-226, the time limits in Rule 10-308 are jurisdictional.

Pursuant to Section 32-1-27J NMSA 1978, the respondent in an abuse or neglect proceeding has a right to appointment of an attorney if indigent. Section 32-1-31 NMSA 1978 provides that adjudicatory hearings on abuse or neglect petitions shall be held separate from other proceedings. The confidentiality provisions of Section 32-1-31 NMSA 1978 are applicable to abuse or neglect cases. The standard of proof is clear and convincing evidence, Section 32-1-31F NMSA 1978. These statutory provisions are not superseded. There is no right to a jury trial in any proceeding other than a hearing or a petition alleging a delinquent act. See commentary to Rule 10-304.

ANNOTATIONS

Cross-references. - As to conduct of hearings on petitions, see 32A-2-16 NMSA 1978.

Law reviews. - For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

For note, "Children's Code - Neglect - State ex rel. Health & Social Services Department v. Natural Father," see 12 N.M.L. Rev. 505 (1982).

10-309. Dispositional hearings.

A. **Access to reports.** In dispositional hearings:

(1) copies of any social, diagnostic or other predisposition reports ordered by or submitted to the court shall be provided to the parties and guardian ad litem at least five (5) days before the hearing is scheduled; and

(2) counsel for the parties shall be permitted to subpoena and examine in court the person who prepared the report.

B. **Time.** If, at the conclusion of an adjudicatory hearing, the child is found to be abused or neglected, the court may proceed immediately to make disposition of the case.

C. **Findings.** Before the court may place the child in the custody of the department or in substitute care, the court must find that the department has made reasonable efforts to leave the child in its home or to return the child to its home if it is in temporary custody.

D. **Reports.** If, at the conclusion of the dispositional hearing, legal custody of the child is granted to the department, as frequently as the court deems appropriate, but in no case less than once each six (6) months, the department shall file a status report with the clerk of the court and mail a copy to the court, the attorneys and the guardian ad litem.

[As amended, effective May 1, 1986.]

*** * * * * * * * * * * * * * * * * * ***

See Rule 10-230 and commentary thereto.

Three changes were made in Rule 10-309 in 1978. First, the guardian ad litem was added to the list of those to receive predisposition reports. As the attorney for the child, who is a party to the action, the guardian ad litem must receive all pleadings, reports, etc. (See Rule 10-103.) The rule has not always been followed, and the 1978 committee wished to emphasize that the guardian ad litem is entitled to the reports.

The second change made in 1978 was the addition of the requirement that status reports be filed at least every six months, rather than once a year, if legal custody of the child is granted to the human services department. The last change made was the addition of the requirement that the status report be filed and copies sent to the court, the attorneys and the guardian ad litem. (See the commentary to Rule 10-108 for a discussion of the duties of a guardian ad litem.) These changes were made to provide a better monitoring system of children in the custody of the department.

Section 32-1-32A NMSA 1978 requires that the court direct the preparation of a predisposition study and report.

ANNOTATIONS

Cross-references. - As to hearing of evidence on disposition of child, see 32A-2-16 NMSA 1978.

As to predisposition studies, reports and examinations, see 32A-2-17 NMSA 1978.

As to disposition of child, see 32A-2-19 and 32A-4-22 NMSA 1978.

Compiler's note. - Section 32-1-32A NMSA 1978, referred to in the last paragraph of the committee commentary, was amended in 1981 to give the court discretion as to the preparation of a predisposition study and report.

10-310. Judgment and appeals; proceedings.

A. **Entry of judgment.** The judge shall sign a written judgment and disposition in abuse and neglect proceedings. The judgment and disposition shall be filed. The clerk shall give notice of entry of the judgment and disposition.

B. **Appeals.** Appeals from judgments on petitions alleging abuse or neglect shall be governed by the Rules of Appellate Procedure.

[As amended, effective May 1, 1986; as amended, effective January 1, 1987.]

*** * * * * * * * * * * * * * * * * * * ***

Rule 10-310 was formerly Rule 46. It was renumbered in 1978.

The appeal time in abuse and neglect cases runs from the date of disposition, rather than the conclusion of the adjudicatory hearing.

Paragraph B of Rule 10-310 clarifies Section 32-1-39 NMSA 1978 by providing that appeals in abuse and neglect cases shall be handled as civil appeals.

ANNOTATIONS

Cross-references. - As to appeal from judgment of children's court, see 32A-1-17 NMSA 1978.

As to disposition of child, see 32A-2-19 and 32A-4-22 NMSA 1978.

For Rules of Appellate Procedure, see Rule 12-101 et seq.

Effective dates. - Pursuant to an order of the supreme court dated September 24, 1986, the above rule is effective on or after January 1, 1987.

Parent's custodial right ends upon notice of judgment. - A parent's legal right to the custody of his child does not end until the entry of, and the giving of, notice of a judgment in compliance with this rule. State v. Sanders, 96 N.M. 138, 628 P.2d 1134 (Ct. App. 1981).

Law reviews. - For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

10-311. Periodic review of dispositional judgment.

A. **Review of disposition.** Within thirty (30) days after the filing of a motion for review of a dispositional order by the children's court attorney on behalf of the department, the court shall conduct a hearing to review an order adjudicating a child as an abused or neglected child.

B. **Notice.** Not less than twenty (20) days prior to the date set for hearing on the motion for review, the children's court attorney shall give notice to all parties.

C. **Order.** Based on its findings, the court may enter a dispositional order as set forth in the Children's Code.

D. **Rules of Evidence.** The Rules of Evidence shall not apply to hearings held pursuant to this rule.

*** * * * * * * * * * * * * * * * * * ***

Section 32-1-38.1 NMSA 1978 requires the children's court to review dispositional judgments every six months. Rule 10-311 was drafted to implement this 1981 enactment of the legislature. The rule requires the children's court attorney to initiate the proceedings through the filing of a motion in the original cause of action. If the Human Services Department fails to request a hearing within the six months' period, the dispositional order expires and if the child is not released from custody, a writ of habeas corpus would be appropriate.

Rule 10-102 defines "court" as including special masters.

The committee believes that a review of a dispositional judgment is a miscellaneous proceeding under Rule 11-1101 of the Rules of Evidence and therefore the Rules of Evidence do not apply. See also Section 32-1-38.1 NMSA 1978.

ANNOTATIONS

Children's Code. - See 32A-1-1 NMSA 1978 and notes thereto.

ARTICLE 4
CHILDREN'S COURT - FORMS

Rule

10-401.

[Rule 10-104]

STATE OF NEW MEXICO COUNTY OF

_____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

[State of New Mexico
v.
_____ , Respondent]
[State of New Mexico ex rel.
Children, Youth and Family Department, Petitioner]
[_____ , Petitioner]
[In the Matter of
_____ , a Child, and Concerning
_____ , Respondent(s)]. No. _____

CERTIFICATE *1*

_____ , as the attorney for the _____ *(set forth department or entity)* hereby certifies that after diligent inquiry and search efforts petitioner has been unable to serve process on the above-named party by any other means permitted by this rule and further certifies the following diligent efforts were made to locate and serve respondent:

(check appropriate box)

[ ] service by mail pursuant to Rule 10-104
[ ] at the respondent's last known residential address;
[ ] at the respondent's last known business address;
[ ] at the address listed at the motor vehicle division for the respondent's driver's license;
[ ] at the address listed in the last telephone directory listing in the following county or counties:
_____ *(list counties);*
[ ] after search of the records of the following courts _____ *(list courts);*
[ ] after _____ *(describe other attempts to locate respondent);*

On information and belief, the respondent:
[ ] is concealed to avoid service; or
[ ] cannot be discovered, though reasonably diligent efforts have been made.

_____
Children's Court Attorney

_____
Address

_____

Telephone number

USE NOTE

1 This form may be used in abuse or neglect actions or for service by publication on a party, other than the child in a delinquency proceeding.

[As amended, effective September 1, 1995.]

ANNOTATIONS

The 1995 amendment, effective September 1, 1995, rewrote the form and rewrote the use note to the extent that a detailed comparison is impracticable.

10-402.

[Rule 10-104]

STATE OF NEW MEXICO COUNTY OF

_____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

[State of New Mexico
v.
_____ , Respondent]
[State of New Mexico ex rel.
Children, Youth and Families
Department
In the Matter of
_____ , a Child, and Concerning
_____ , Respondent(s) *1*]

No.

_____

NOTICE OF PENDENCY OF ACTION

TO THE ABOVE-NAMED RESPONDENT(S):

You are hereby notified that an action has been filed

against you in the said court and county by the State of New Mexico in which the State of New Mexico has filed a petition alleging that [you have (neglected) (abused) _____ *(child's initials),* a child] [_____ *(set forth relief sought in petition)*]. The above proceeding could ultimately result in the termination of your parental rights. You are further notified that this matter will be heard in the Children's Court Division of the District Court in _____ County, New Mexico, thirty (30) days after the last publication of this notice.

WITNESS my hand and the seal of the District Court of the State of New Mexico.

_____

Clerk of the District Court
Children's Court Division
By

_____
Deputy

(COURT SEAL)

The name of the State's attorney is _____ , whose post office address is _____ , New Mexico, and telephone number is _____.

USE NOTE

1 This form is to be used for service by publication. See Paragraph J of Rule 10-104. See also Form 10-401.

[As amended, effective September 1, 1995.]

ANNOTATIONS

The 1995 amendment, effective September 1, 1995, rewrote the caption, substituted "Children, Youth and Families Department" for "Human Services Department", inserted the blank for relief sought in the first sentence, added the second sentence, rewrote the third sentence to provide the 30 day period, added the blank for the attorney's telephone number, and added the use note.

10-403.

[Rule 10-104]

STATE OF NEW MEXICO COUNTY

OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

[State of New Mexico
v.
_____ , Respondent]
[State of New Mexico ex rel.
Children, Youth and Families
Department,
In the Matter of
_____ , a Child and Concerning
_____ , Respondent(s)
1] No. _____

SUMMONS

TO: _____
Respondent

_____
Address
You are hereby summoned and required to serve upon _____ , the attorney for the Children, Youth and Families Department, whose address is set forth below, an answer to the petition which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service.

This proceeding could ultimately result in termination of parental rights.

_____
_____
Clerk, District Court
Children's Court Division
By

_____
Deputy
Dated: _____

RETURN OF SERVICE

I, _____ , certify that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I

served the within summons in said county on the _____ day of _____ , 19_____ , by delivering a copy thereof, with a copy of petition attached, in the following manner:

(check one box and fill in appropriate blanks)

[ ] by delivering the summons and petition to respondent _____ *(used when respondent receives copy of summons or refuses to receive summons)*

[ ] by delivering the summons and petition to _____ , (a person of suitable age and discretion and then residing at the usual place of abode of respondent _____ .

[ ] to _____ , (custodial parent) (guardian) (custodian) (conservator) of respondent _____ *(used when respondent is a minor or an incompetent person)*

Fees: _____

_____

Signature of person making service

_____

Title *(if any)*

Children, Youth and Families Department

_____

(Name of attorney)

_____

(Mailing address)

_____

(Telephone number)

USE NOTE

1 A copy of the summons and a copy of the petition must be served on each respondent.

[As amended, effective September 1, 1995.]

ANNOTATIONS

The 1995 amendment, effective September 1, 1995, rewrote the form and rewrote the use note to the extent that a detailed comparison is impracticable.

10-404.

[Rule 10-104.1]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

State of New Mexico
v. No. _____
_____ , Respondent

SUMMONS

DELINQUENCY PROCEEDING*1*

TO: _____
Name of the respondent child

_____
Address

YOU ARE NOTIFIED that a petition, a copy of which is attached hereto, has been filed in this court alleging that you

[ ] committed the following delinquent acts _____ *(common name and description of each delinquent act).*

[ ] violated your conditions of probation by _____ *(briefly describe conditions imposed and acts violating those conditions).*

YOU ARE ORDERED TO PERSONALLY APPEAR before the Children's Court Division of the District Court at _____ *(set forth address of court)* on _____ , 19_____) at the hour of _____ (a.m.) (p.m.) to answer the allegations contained in the attached petition.

If you fail to appear at such time and place, a warrant will be issued for your arrest.

Service of this summons shall be by mail unless otherwise ordered by the court.

Dated this _____ day of _____ , 19_____ .

_____
_____
Clerk, District Court
Children's Court Division

_____

_____
Address

_____

_____
Telephone number

CERTIFICATE OF MAILING

I certify that I mailed a copy of the summons and a copy of the petition filed herein to:

_____
Name of child

_____
Address
on the _____ day of _____ , 19 _____ .

_____

_____
Signature of Children's Court Attorney

_____

_____
Title

CERTIFICATE OF PROCESS SERVER*2*

(check one box and fill in appropriate blanks)

I, _____ , certify that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I served the within summons in the state of New Mexico on the _____ day of _____ , 19_____ , by delivering a copy thereof, with a copy of petition attached, in the following manner:

(check one box and fill in appropriate blanks)

[ ] by delivering the summons and petition to the above named child *(used when respondent receives copy of summons or refuses to receive summons)*

[ ] by delivering the summons and petition to _____ , (parent) (guardian) (custodian) (conservator) (guardian *ad litem*) of the above named child

[ ] by delivering the summons and petition to _____ , a person of suitable age and discretion then residing at the usual place of abode of the above named child

[ ] by delivering the summons and petition to _____ *(name of person),* _____ *(title of person authorized to receive service) (used when the child is in the custody of a legal entity, including the Children, Youth and Families*

Department).

[ ] by delivering the summons and petition to _____ *(if another manner of service has been ordered by the court, set forth how served.)*

_____

Signature of person making service

_____

Title *(if any)*

USE NOTE

1. This form is to be used for service on a child alleged to have committed a delinquent act. A copy of the summons and petition must be served on the respondent child.

2. To be completed only if personal service is ordered by the court.

[As amended, effective September 1, 1995.]

ANNOTATIONS

The 1995 amendment, effective September 1, 1995, rewrote the form and rewrote the use note to the extent that a detailed comparison is impracticable.

10-404A.

[Rule 10-104.1]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

State of New Mexico

v. No. _____

_____ , Respondent

SUMMONS

DELINQUENCY PROCEEDING*1*

TO: _____
Name of parent or custodian

_____
Address

YOU ARE NOTIFIED that a motion has been filed in this court alleging that you are the (parent) (custodian) of a child who is alleged to have

[ ] committed the following delinquent acts _____ *(common name and description of each delinquent act)*

[ ] violated the conditions of your probation by _____ *(briefly describe conditions imposed and acts violating those conditions).*

and requesting that you be joined as a party to this proceeding. A copy of the motion to join you as a party and a copy of the petition alleging delinquency have been attached to this summons.

YOU ARE ORDERED TO PERSONALLY APPEAR before the Children's Court Division of the District Court at _____ *(set forth address of court)* on _____ , 19_____) at the hour of _____ (a.m.) (p.m.) to participate in these proceedings.

If you do not appear at the time and place set forth above, you may be held in contempt of court and punished by fine or imprisonment.

Service of this summons shall be by mail unless otherwise ordered by the court.

Dated this _____ day of _____ , 19_____ .

_____
_____
Clerk, District Court
Children's Court Division

_____
_____
Address

_____
_____
Telephone number

CERTIFICATE OF MAILING

I certify that I mailed a copy of the summons and a copy of the petition filed herein to:

_____
Name of parent or custodian

_____
Address

_____
City and zip code
on the _____ day of _____ , 19_____ .

_____
Signature of children's court attorney

_____
Title

CERTIFICATE OF PROCESS SERVER*2*

(check one box and fill in appropriate blanks)

I, _____ , certify that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I served the within summons in the state of New Mexico on the _____ day of _____ , 19_____ , by delivering a copy thereof, with a copy of petition and a copy of the motion to join the parent or custodian as a party attached, in the following manner:

(check one box and fill in appropriate blanks)

[ ] by delivering the summons, petition and motion to _____ *(set forth name of parent or custodian to be served) (This alternative is used when the person to be served is served or refuses to accept summons).*

[ ] by delivering the summons, petition and motion to _____ , a person of suitable age and discretion then residing at the usual place of abode of _____ *(set forth name of parent or custodian served).*

[ ] by delivering the summons, petition and motion to _____ *(if another manner of service has been ordered by the court, set forth how served).*

_____
Signature of person making service

_____
Title *(if any)*

USE NOTE

1. This form is to be used for service on a parent or custodian of a child alleged to have committed a delinquent act. A copy of the summons, petition and motion to join the parent or custodian must be served on the respondent.

2. To be completed only if personal service is ordered by the Court.

[Adopted, effective September 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 17, 1995, this form is effective September 1, 1995.

10-405.

[Rule 10-202]

NOTICE OF PRELIMINARY INQUIRY

TO: _____
, _____
Respondent
Address

TO: _____
, _____
Parents, guardian or
custodian
Address

YOU ARE HEREBY NOTIFIED that the above-named child is alleged to be a

[] delinquent child or [] a child in need of supervision.

The child is reported to have:

_____
_ *(set forth time, place and nature of acts resulting in the allegations)* .

A preliminary inquiry will be conducted to determine whether the best interests of the above-named child and the public

require that a Petition, based upon the allegations set forth above, be filed in the District Court, Children's Court Division.

The initial conference of the Preliminary Inquiry will be held on the _____ day of _____, 19_____, at _____ m. at _____, *(location)* New Mexico.

The above-named child has a right to have an attorney present at any conference of the Preliminary Inquiry in which the child is a participant and if the child wants an attorney but cannot afford one, the public defender will represent him. If the child's parents, guardian or custodian can afford an attorney to represent the child and the public defender represents him, they will be assessed reasonable attorney's fees.

Notice sent this _____ day of _____, 19_____

Probation Services,
_____ Judicial District.
By

10-406.

[Rule 10-204]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of
_____, a Child No_____

PETITION

The undersigned states that _____, a child, is

(check one) [] a delinquent child or [] a child in need of supervision, and is in need of care or rehabilitation.

The child's birthdate is:
_____

The child's address is:
_____
_____
_____

The facts giving rise to this Petition are:
_____
_____
_____
contrary to _____ *(citation to criminal statute or other law or ordinance allegedly violated)* *1*

The names and addresses of the child's parents, guardian or custodian are:
_____
_____

Probation Services has completed a Preliminary Inquiry in this matter and has determined that the best interests of the child and the public require that this Petition be filed.

The child (is) (is not) in detention. He is being detained at
_____
_____, New Mexico. The child has been in detention since _____ *(date)* at _____ m., *(time)* 19_____

_____
_____
Children's Court Attorney

1 For ordinances, 35-15-2 NMSA 1978 requires that the section or subsection defining the offense, the title of the ordinance and the date of passage be set forth.

ANNOTATIONS

Compiler's note. - Section 35-15-2 NMSA 1978, referred to in the footnote, does not require that the date of passage be set forth.

10-407.

[Rule 10-205]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

STATE OF NEW MEXICO
v. No____

_____
DOE (_____)
(Actual name of child)

NOTICE OF REQUIREMENT TO PAY ATTORNEY'S FEES

FOR LEGAL REPRESENTATION OF THE ABOVE-NAMED CHILD

TO: _____ *(Name of parents, custodian or guardian)*

_____
___ *(Address)*

Please take notice that pursuant to New Mexico law if you can afford to pay, you may be required to pay for the costs of representing the above-named child. If you cannot afford to pay, you must complete the enclosed affidavit and return it to this office by the _____ day of _____, 19 _____

Office of Public Defender
By

_____

_____
_____

Address

CERTIFICATE OF MAILING

I certify that on this date I mailed a copy of this notice to _____, *(Name)* at the address indicated.

Date of Mailing:

_____, 19 _____ By: _____

10-408.

[Children's Court Rule 10-205]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

IN THE MATTER OF

_____,

A CHILD

ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES

CHILD'S NAME: _____ D.O.B.: _____ AGE: _____

AKA: _____ SEX: M F SS#: _____

CHILD'S ADDRESS: _____ PHONE: _____

*P/G/C ADDRESS: _____ PHONE: _____

*P/G/C ADDRESS: _____ PHONE: _____

CHARGES:

_____

CHILD LIVES WITH: PARENTS ____ GUARDIAN ____ CUSTODIAN ____

FRIEND ____ OTHER ____
PARENT'S MARITAL
STATUS: SINGLE ____ MARRIED ____ DIV. ____ SEP. ____ WIDOWED ____

NUMBER OF DEPENDENTS IN HOUSEHOLD: _____

[ ] Child is in custody.

[ ] Child is not in custody.

PRESUMPTIVE ELIGIBILITY:

____ Parent's/guardian/custodian does not receive public assistance.

____ Parent's/guardian/custodian receives the following type of public assistance in _____ County:

____ DEPARTMENT OF HEALTH CASE MANAGEMENT SERVICES (DHMS)

AFDC $_____ Food Stamps $_____ Medicaid $_____

DSI $_____ Public Housing $_____

NET INCOME:	**CHILD**	**PARENTS, GUARDIANS OR CUSTODIANS**
Employer's name _____	$_____	$_____
Employer's phone _____	$_____	$_____
Pay period *(weekly, every second week, twice monthly, monthly)*	$_____	$_____
Net take home pay *(salary/wages minus deductions required by law)*	$_____	$_____
Other income sources *(please specify)*	$_____	$_____
TOTAL ANNUAL INCOME	$_____ +	$_____ =

SCREENING USE ONLY

____/____/____ A

ASSETS:

Cash on hand	$_____	$_____
Bank accounts	$_____	$_____
Real estate Equity	$_____	$_____
.. Equity	$_____	$_____
Motor vehicles Equity	$_____	$_____
.. Equity	$_____	$_____
Other personal property: *(describe)*		
__ Equity	$_____	$_____

__ Equity $_____ $_____ **SCRE**
ENING USE

ONLY

TOTAL ASSETS

$_____ +

$_____ =

____/____/____ B

EXCEPTIONAL EXPENSES
(total exceptional expenses of parent, guardian, custodian)):

Medical Expenses *(not covered by insurance)* $_____

Court-order support payments/alimony $_____

Child-care payments *(e.g. day care)* $_____

Other *(describe)* __ $_____

_____ $_____ **SCRE**
ENING USE

ONLY

TOTAL EXCEPTIONAL EXPENSES

$_____ =

____/____/____ C

*"P/G/C/" means parent(s)/guardian/custodian

STATE OF NEW MEXICO

COUNTY OF _____

This statement is made under oath. I hereby state that the above information is correct to the best of my knowledge. I hereby authorize the screening agent, district defender and the court to obtain information regarding my financial condition from financial institutions, employers, relatives, the IRS and other state agencies. I understand that I will be charged $550.00 if the above-named child is represented by the Public Defender and I am not indigent as determined by the Public Defender standard.

_____ _____

_____

Date Signature of parent(s)/

guardian/custodian

State of _____)
) ss
County of _____)

Signed and sworn to (or affirmed) before me on _____ (date) by _____ (name of parent, guardian or custodian).

_____
Notary

(Seal, if any) My commission expires: _____

I UNDERSTAND THAT IF IT IS DETERMINED THAT I AM NOT INDIGENT, I MAY APPEAL TO THE CHILDREN'S COURT WITHIN TEN (10) DAYS AFTER THE DATE I AM ADVISED OF THIS DECISION.

____ I wish to appeal.

____ I do not wish to appeal.

COLUMN "A" (net income)
plus COLUMN "B" (assets) SCREENING USE ONLY
minus COLUMN "C" (exceptional expenses) AVAILABLE FUNDS
equals AVAILABLE FUNDS /_____/
.....

INDIGENCY TABLE:

Household Size (Child & Family Only)	1	2	3	4	5	6
Available Funds (annually)	$8512	$11,487	$14,462	$17,437	$20,412	$23,387

Add $2975.00 for each additional dependent member.

____ The parent(s)/guardian/custodian is indigent.

____ The parent(s)/guardian/custodian is **not** indigent.

____ The parent(s)/guardian/custodian (has) (have) (has not) (have not) paid the $10.00 application fee.

_____ _____
Signature of Screening Agent Title

Based on the above answers and information, I find that the child (is) (is not) indigent.

(Complete the following only if the court has determined the child is unable to pay the $10.00 application fee).

____ I find that the child is unable to pay the $10.00

indigency application fee, and I therefore waive the payment of the $10.00 application fee.

_____
_____
Judge or authorized designee

GUIDELINES FOR DETERMINING ELIGIBILITY

Pursuant to Sections 31-15-7 and 32A-2-30 NMSA 1978 and Rule 10-205 of the Children's Court Rules and Forms, the following guidelines are established for determination of indigency and eligibility for public defender services in juvenile cases.

I. PRESUMPTION OF INDIGENCY

A parent(s), guardian or custodian is presumed indigent if the parent(s), guardian or custodian is a current recipient of a state or federally administered public assistance program for the indigent: aid to families of dependent children (AFDC), food stamps, medicaid, disability security income (DSI), public assisted housing or department of health case management services (DHMS). Proof of assistance must be attached to the application and no further inquiry is necessary. Home equity, etc. is not to be taken into account if the parent(s), guardian or custodian is a current recipient of one of the six programs described above. If the child is in the physical custody of the Department of Human Services, the parent(s), guardian or custodian is presumed indigent and no further inquiry is necessary.

If the interviewer is unable to complete the indigency application or believes the information to be unreliable because of communication or other problems associated with a mental disability of the child, indigency will be presumed until the child's competency to stand trial and indigency is determined by the public defender or court. If because of the mental disability of the child, the interviewer is unable to complete the indigency application or believes the information is unreliable, the Department of Health case management services (DHMS) section should be checked.

II. FINANCIAL RESOURCES

If the parent(s), guardian or custodian is not presumptively indigent, the screening shall examine the financial resources of the parent(s), guardian or custodian with consideration given to:

A. Net Income

B. Assets

C. Exceptional Expenses

A. Net Income

The screening agent shall include total household salary and wages of the child and the parent(s), guardian and custodian of the child who have a legal obligation of support to the child, minus deductions required by law (FICA, state and federal withholding). In order to calculate the salary of an individual, the screening agent shall use one of the two methods:

(1) if the individual is presently unemployed, the screening agent shall ask about employment during the twelve (12) months preceding the interview date and calculate the amount of money earned during such twelve (12) months. Proof of this income must be attached to the application; or

(2) if the individual is presently employed, the screening agent shall project the current income for twelve (12) months into the future. Proof of this income must be attached to the application. If the parent(s), guardian or custodian is unemployed and has no income, the screening agent shall inquire as to how the parent(s), guardian or custodian "gets by". Proof of income is not required, but responses should be documented on the eligibility form (i.e. eats on soup line, street person, sleeps in car, etc.). If the parent(s), guardian or custodian gets by on "odd jobs", the income from the odd jobs should be noted. Proof of income must be provided (i.e. income tax returns, etc.). Zeros will not be accepted for income. If there is no income an explanation is needed as to why there is no income.

If the child's parent(s), guardian or custodian does not pay for the child's housing, the fair rental value of the housing shall be included as part of the parent(s), guardian or custodian's income. The fair rental value of the child's housing may be determined by the chief public defender or designee. Also to be considered are funds from any other sources including but not limited to: social security payments, union funds, veteran's benefits, worker's compensation, unemployment benefits, regular support from any family member, public or private employee pensions, or income from dividends, interests, rents, estates, trusts or gifts. If the child lives alone but receives food or rent from a family member, the food or rent shall be considered as regular support from the child's family and shall be included as income.

The income of each of the child's parent(s), guardians or custodians who have a legal obligation to support the child must be included in the calculation of income even though the child is not living in the same household.

B. Assets

The screening agent shall consider all household assets of the parent(s), guardians and custodians of the child which are convertible into cash within a reasonable period of time. Assets include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates of deposit, and tax refunds. All real estate shall be considered in terms of the amounts which could be raised by a loan on the property.

C. Exceptional Expenses

The screening agent shall consider any unusual expenses of the parent(s)/guardian/custodian which would, in all probability, prohibit the parent, guardian or custodian from being able to secure private counsel. The following expenses are not exceptional expenses: rent, food, utilities, gas money, consumer loans and student loans. Exceptional expenses shall include, but not be limited to, costs for medical care, family support obligations and child care payments. In order to be included as an exceptional expense:

(1) the cost of medical care cannot be covered by insurance;

(2) family support expense obligations must be court ordered and actually paid on a regular basis; and

(3) child care must be paid on a regular basis. If the parent(s)/guardian/custodian says that child support or child care is paid when the parent(s)/guardian/custodian can, the payments do not qualify as exceptional expenses.

The parent(s)/guardian/custodian must provide proof of the exceptional expense incurred and proof that payment is being made on a regular basis. If proof is provided, the regular monthly payment for the exceptional expense is multiplied by twelve (12) months and the calculated amount can be deducted from total income.

Other exceptional expenses shall include: payroll garnishments, internal revenue service claims, court ordered attorney fees or other court ordered payments and funeral expenses not covered by insurance.

III. INDIGENCY FORMULA

The screening agent shall calculate the amount of available funds by adding the total for net income for the household (Column A) together with the total for assets for the household (Column B) and subtracting the total for exceptional expenses (Column C). If the available funds (net income plus assets minus exceptional expenses) are at or below the amounts in the indigency table, the parent(s)/guardian/custodian is indigent and is therefore eligible for free representation. If the available funds exceed the amounts in the indigency table, the chief public defender or designee may deem the parent(s)/guardian/custodian not to be indigent.

If a parent, guardian or custodian does not know the income or assets of all other persons who are legally responsible for the child's support, the child is presumed not indigent and is not eligible for free representation unless the parent, guardian or custodian produces the necessary information within two (2) working days after the interview.

IV. APPEAL

If the parent(s)/guardian/custodian is found by the screening agent or the court not to be indigent, the parent(s)/guardian/custodian may appeal the decision to the district defender in those districts with public defender offices. If a parent(s), guardian or custodian wishes to appeal the decision of the district defender, the parent(s), guardian or custodian shall file a notice of appeal in the district court. In those districts without public defender offices the parent, guardian or custodian may appeal directly to the court. If the parent, guardian or custodian wishes to appeal a finding that the parent, guardian or custodian is not indigent:

(1) in those districts with district public defender offices, the screening agent shall notify the public defender of the appeal;

(2) in those districts without public defender offices, the screening agent shall notify the court of the appeal.

All appeals shall be filed within ten (10) days after the date of the decision.

V. REIMBURSEMENT

Pursuant to Section 32A-2-14 NMSA 1978 and Rule 10-205 of the rules of procedure for the children's court, the public defender will be appointed in delinquency proceedings even though the parent(s)/guardian/custodian is not indigent. In those cases, the court will order the parent(s)/guardian/custodian to reimburse the Public Defender Department for the costs of representation. In reimbursement cases, the chief public defender or designee may ask the parent(s)/guardian/custodian to sign a contract and a promissory note to pay reimbursement to the State of New Mexico. The reimbursement shall cover legal fees, expert witness fees and private investigation. The legal fees shall be governed by schedule adopted by the Public Defender Department. The expert witness fees and private investigation fees shall be governed by the fees paid by the Public Defender Department.

First payment shall be due thirty (30) days from the date of completion of the contract and note. If the parent(s), guardian or custodian fail to complete a contract and note, the order of appointment with reimbursement shall serve as notice for collection if payments are not made. If this is the case, a copy of the order of appointment and a copy of the application shall be sent to the administration office instead of the contract and note.

VI. NEW CHARGES

If a child has applied for public defender services within six (6) months prior to the filing of new charges or a probation violation, completion of a new eligibility determination form is not necessary. A copy of the last eligibility determination form should be placed in the new file being opened. If a child has applied for public defender services more than six (6) months prior to the filing of new charges or a probation violation, completion of a new eligibility determination form is necessary. If less than six (6) months have

elapsed but there has been a change in circumstance for the child, completion of a new eligibility determination form is necessary.

[Adopted, effective October 15, 1986; as amended, effective August 1, 1989; December 1, 1993.]

ANNOTATIONS

Cross-references. - For indigency determination, see 31-15-12 NMSA 1978.

For appointment of public defender under Delinquency Act, see 32A-2-14B NMSA 1978.

For indigency standard under Delinquency Act, see 32A-2-30 NMSA 1978.

The 1989 amendment, effective on and after August 1, 1989, rewrote this form to the extent that a detailed analysis would be impracticable.

The 1993 amendment, effective December 1, 1993, rewrote the form and guidelines to such an extent that a detailed comparison would be impracticable.

10-408A.

[Section 32-1-56]

STATE OF NEW MEXICO (COUNTY OF
_____

IN THE CHILDREN'S COURT

STATE OF NEW MEXICO

v. No.
_____
John Doe

ORDER OF APPOINTMENT

This matter having come before the court, the court finds:
(please check appropriate box or boxes)
[ ] The child is indigent and unable to obtain counsel.

[ ] The child is not indigent, desires counsel, but is unable to obtain counsel.

IT IS THEREFORE ORDERED THAT:

[ ] public defender shall represent the child in the above-entitled case.

[ ] _____, an attorney on contract with the public defender department, shall represent the child in the above-entitled case.

[ ] _____ and _____, the (parents) (guardians) (custodians) of the child shall reimburse the State of New Mexico in an amount of not less than $_____ for legal representation and related expenses.

_____

Judge

CERTIFICATE OF MAILING

I certify that I mailed a copy of this order to the above-named child at _____ *(set forth address)*, to the child's (parents) (guardians) (custodians) at _____ *(set forth address)* and to the public defender on the _____ day of _____, 19_____

_____

(Clerk) (Judge)

_____

Date

[Adopted, effective August 1, 1989.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated May 16, 1989, this form is effective on and after August 1, 1989.

Compiler's note. - Section 32-1-56 NMSA 1978 was repealed in 1993. For present comparable provisions, see 32A-2-20 NMSA 1978.

10-409.

[Rule 10-206]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of
_____, a
Child No._____

AFFIDAVIT FOR ARREST WARRANT*1*

The undersigned, being duly sworn, on his oath states that he has reason to believe that on or about the _____ day of _____, 19_____, in _____ County, New Mexico, the above-named respondent, a child,

(check appropriate boxes)

[] committed the delinquent act of:

_____ *(state common name of delinquent act or acts)*

[] contrary to the law of the State of New Mexico

[] contrary to ordinance

_____

_____

(specify the number of the section or subsection defining the offense, the title of the ordinance and the date of passage) *2*

[] is a child in need of supervision by reason of

_____

_____

(state acts or standard of conduct giving rise to allegations of need of supervision)

The undersigned further states the following facts on oath to establish probable cause to believe that the above-named respondent is

[] delinquent

[] in need of supervision:

_____

__ *(include facts in support of the credibility of any hearsay relied upon)*

_____

Affian

t's Signature

_____

_____

T

itle (if any)

_____

_____

Affiant's Name

(please

print or type)

Subscribed and sworn to before me in the above-named county of the State of New Mexico this _____ day of _____, 19_____

_____

_____

Officer Authorized to

Administer Oaths

_____

_____

Title

1 Either this form or the form approved for arrest warrants in adult criminal proceedings may be used in delinquency cases in the Children's Court. However, only this form may be used in need of supervision cases in the Children's Court.

2 Section 35-15-2 NMSA 1978.

10-410.

[Rule 10-206]

STATE OF NEW MEXICO COUNTY OF

_____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of

_____, a

Child No_____

ARREST WARRANT *1*

THE STATE OF NEW MEXICO TO ANY OFFICER

AUTHORIZED TO EXECUTE THIS WARRANT

YOU ARE HEREBY COMMANDED to arrest the above-named respondent, a child, and deliver said child without unnecessary delay to probation services or to a place of detention authorized under the Children's Code. Said child is alleged to be:

(check one)

[] a delinquent child

[] a child in need of supervision.

Dated this _____ day of _____, 19_____

_____

_____

Judge, District Court

Children's Court Division

RETURN WHERE RESPONDENT IS FOUND

I arrested the above-named respondent on the _____ day of _____, 19_____, and served a copy of this Warrant on the _____ day of _____, 19_____

_____

_____

Signature

_____

_____

Title

1 Either this form or the form approved for arrest warrants in adult criminal proceedings may be used in delinquency cases in the Children's Court. However, only this form may be used in

need of supervision cases in the Children's Court.

10-411.

[Rule 10-206]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of
_____, a
Child No_____

AFFIDAVIT FOR SEARCH WARRANT *1*

_____, being duly sworn, on his oath, states that:
(check one)
[] he has reason to believe [] he is positive
that:
(check one or both)
[] on the following described premises
[] on the person of
_____ *(here name person and/or describe premises)*
in the above-named county of this state there is now being concealed
certain property, namely:
_____
_____ *(describe property as particularly as possible)*
which: *(check appropriate boxes)*
[] has been obtained in a manner which constitutes a delinquent act

[] is designed or intended for use, or which has been used as a means of committing a delinquent act

[] would be material evidence in a delinquency proceeding and

that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

_____

_____

_____

_____

(include facts in support of the credibility of any hearsay relied upon; if necessary, continue on reverse side of this form)

_____

_____

Affiant's Name (please print or type)

_____

_____

Affiant's Signature

_____

_____

Official Title (if any)

Subscribed and sworn to before me in the above-named county of the State of New Mexico this _____ day of _____, 19 _____.

_____

_____

Officer Authorized to Administer Oaths

_____

_____

Title

1 Either this form or the form approved for an affidavit for search warrant in an adult criminal proceeding may be used in the Children's Court.

10-412.

[Rule 10-206]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of
_____, a
Child No_____

SEARCH WARRANT *1*

THE STATE OF NEW MEXICO TO ANY OFFICER

AUTHORIZED TO EXECUTE THIS WARRANT

Proof by Affidavit for Search Warrant, which is attached to and hereby made a part of this Warrant, having been submitted to me by _____, who

(check one)

[] has reason to believe
that there is now being concealed

[] is positive

(check one or both)

[] on the premises described in the Affidavit

[] on the person named in the Affidavit

the property described in the Affidavit, which

(check appropriate boxes)

[] has been obtained in a manner which constitutes a delinquent act

[] is designed or intended for use or which has been used as a means of committing a delinquent act

[] would be material evidence in a delinquency proceeding, and that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are set forth in the Affidavit for Search Warrant, which is attached to and hereby made a part of this Search Warrant.

I am satisfied that there is probable cause to believe that the property described in the Affidavit is being concealed on

the *(check one or both)* [] person [] premises described in the Affidavit and that grounds for the issuance of the Search Warrant exist.

[] I further find that there is probable cause to believe that the property described in the Affidavit may be moved or destroyed unless seized immediately.

YOU ARE HEREBY COMMANDED to search forthwith
(check one or both)
[] the person [] the place described in the Affidavit for the property described in the Affidavit, serving this Warrant and copy of the Affidavit, and making the search
[] between the hours of 6:00 a.m. and 10:00 p.m.,
[] at any time of the day or night,*2*
and if the property be found there, to seize it, leaving a copy of this Warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this Warrant, the return and inventory list to this Court within three (3) days after seizing the property described.

Dated this _____ day of _____, 19_____

_____

Judge, District Court

Children's Court Division

RETURN AND INVENTORY

I received the attached Search Warrant on _____, 19_____, and executed it on _____, 19_____, at _____ m. I searched the [] person [] the premises described in the Warrant and I left a copy of the Warrant with

_____
(name the person searched or owner at the place of search)
together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the Warrant:

_____
(attach separate inventory if necessary)

This inventory was made in the presence of _____ *(Signature)* and

_____ *(Signature)*

This inventory is a true and detailed account of all the property taken by me on the Warrant.

_____

Officer

Return made this _____ day of _____, 19_____, at _____ m.

_____

Judge, District Court

Children's Court Division

After careful search, I could not find at the place, or on the person described, the property described in the Warrant.

_____

Officer

_____

Date

1 Either this form or the form approved for search warrants in adult criminal proceedings may be used in the Children's Court.
2 Paragraph B of Rule 5-211 of the Rules of Criminal Procedure for the District Courts provides that if the sworn written statement is positive that the property is on the person or in the place to be searched and states probable cause to believe that the property may be moved or destroyed unless seized immediately, the Warrant may direct that it be served at any time.

ANNOTATIONS

Compiler's note. - Paragraph B of Rule 5-211, R. Crim. P. (Dist. Cts.) referred to in the second footnote, was amended in 1980 and now provides that the issuing judge, for reasonable cause shown, may authorize the search warrant's execution at any time.

10-413.

[Rule 10-208]

In the Matter of
_____, a Child

NOTICE OF DETENTION *1*

To:
_____, _____
relationship

_____,
_____
relationship

The above-named child was placed in detention on the _____ day of _____, 19_____, at _____, _____ m. as an alleged [] delinquent child, [] child in need of supervision or [] child who has violated the terms or conditions of probation.

The child is in detention at _____, *(place of detention and address)* New Mexico. The visiting hours are from _____ to _____, and from _____ to _____ on weekends and legal holidays.

If a petition alleging that the above-named child is delinquent, in need of supervision or has violated the terms or conditions of probation has been filed or is filed in the District Court, Children's Court Division, of this judicial district, a hearing will be held to determine whether continued detention of the above-named child is necessary. If no petition alleging delinquency, need of supervision or violation of probation is filed, the above-named child will be released.

The child has a right to an attorney and if you cannot afford one, the public defender will represent the child. If you can afford an attorney to represent the child, and the public defender represents the child, you will be assessed reasonable attorney's fees.

Notice sent this _____ day of _____, 19

_____

Probation Services,

_____

Judicial District.

By:

_____

1 This notice is directed to the child's parents, guardian or custodian and should be used only if notice cannot be given orally.

10-414.

[Rule 10-212]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of

_____, a Child No_____

DEMAND FOR RELEASE HEARING

_____ by his attorney states that he was denied release from detention after hearing on the _____ day of _____, 19_____, and hereby demands a release hearing pursuant to Children's Court Rule 10-212.

_____

_____

Signature

10-415.

[Rule 10-225]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of _____, a Child No_____

MOTION FOR EXTENSION OF CONSENT DECREE

The undersigned, pursuant to Children's Court Rule 10-225, moves the Court for a _____ month extension of the Consent Decree entered in this matter on the _____ day of _____, 19_____, and in support thereof states that:

_____ *(facts supporting motion)*

_____

_____

Children's Court Attorney

10-415A.

[10-210]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of _____, a Child No.

_____

DENIAL OF PETITION

AND

EXPLANATION OF RIGHTS

I understand that a petition has been filed charging me with the following delinquent acts under the law of the State of New Mexico: _____

_____ *(list all offenses charged).*

I understand that I am entitled to personally appear before the children's court and deny the delinquent acts charged and to have my rights explained to me.

I hereby acknowledge receipt of a copy of the petition, which I have read and had explained to me by my attorney. I understand the delinquent acts alleged and the penalty provided by law for these acts.

I further understand that: I have a right to the assistance of an attorney at all stages of the proceeding, and to an appointed attorney, to be furnished free of charge, if I cannot afford one; I have a right to confront the witnesses against me and to cross-examine them as to the truthfulness of their testimony; I have a right to present evidence on my own behalf and to have the state compel witnesses of my choosing to appear and testify; I have a right to remain silent and that any statement made by me may be used against me; I may have a right to trial by jury and, if I do have a right to a trial by jury, that all jurors must agree that I committed the delinquent acts charged in order for me to be adjudicated as a delinquent child.

After reading and understanding the above, I waive my right to a personal appearance before the judge and I hereby deny the allegations set forth in the petition.

_____ _____

Date Signature of child

I have explained to the child the rights set forth above. I have explained the maximum possible consequences if the allegations of the petition are found to be true and whether the child has a right to a jury trial. The above child understands that if the child does not wish to sign this form, the child may personally appear before the judge (with the child's parents) to

deny the allegations of delinquency petition in this case and to have the child's basic rights explained by the judge. I am satisfied that the above named child understands the rights set forth above.

_____
_____
Defense Counsel

Approved:

_____
Children's Court Judge

[Adopted, effective July 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated April 19, 1995, this form is effective for cases filed in the Children's Court on and after July 1, 1995.

10-416.

[Rule 10-230]

STATE OF NEW MEXICO COUNTY OF
_____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of
_____, a
Child No_____

JUDGMENT AND DISPOSITION

On this _____ day of _____, 19_____, the Respondent, a Child, appeared in person and with _____, his attorney, and _____ appeared on behalf of the State of New Mexico as Children's Court attorney.

(DENIAL OF ALLEGATIONS OF THE PETITION)

1. The Respondent having denied the allegations of the petition

(check one)
[] a jury was impaneled and the jury finding:
[] a jury was waived and the court finding:
[] the Respondent not being entitled to trial by jury and the court finding:
(check one)

(a) [] the Respondent committed a delinquent act in that he _____
_____ *(state delinquent acts)*

(b) [] the Respondent committed an offense defined as in need of supervision in that he
_____
_____ *(state need of supervision offenses)*

(c) [] the Respondent did not commit a delinquent act.

(d) [] the Respondent did not commit an offense defined as in need of supervision.

THE Court further finding that *(check one)*

(a) [] the Respondent is in need of care or rehabilitation.

(b) [] the Respondent is not in need of care or rehabilitation.
(ADMISSION OF THE ALLEGATIONS OF THE PETITION)

2. The Respondent having admitted the allegations of the petition, the court so finds that the Respondent *(check one)*
[] committed a delinquent act in that he
_____ *(state delinquent acts)*
[] committed an offense defined as in need of supervision in that he _____
_____ *(state need of supervision offenses)*
and *(check one)*
[] is in need of care or rehabilitation.
[] is not in need of care or rehabilitation.

JUDGMENT OF COURT

(Check one)

[] IT IS ADJUDGED that the Respondent is a delinquent child.

[] IT IS ADJUDGED that the Respondent is a child in need of supervision.

[] IT IS ORDERED that the Respondent not be adjudged a delinquent child and be released from all detention.

[] IT IS ORDERED that the Respondent not be adjudged a child in need of supervision and be released from all detention.

IT IS ADJUDGED that the Respondent is hereby _____ *(state disposition)*

_____

_____

Children's Court Judge

10-417.

[Rules 10-230 and 10-310]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of

_____, a Child

No_____

NOTICE OF

ENTRY OF JUDGMENT AND DISPOSITION

NOTICE is hereby given that a Judgment and Disposition was entered in the above matter on the _____ day of _____, 19_____

_____

_____

Clerk of the Children's Court

This is to certify that this notice was mailed to_____

_____

on the _____ day of _____, 19_____

_____

Clerk of the Children's Court

1 For neglect actions, the caption should be the same as that used on the neglect petition form.

10-418.

[Rules 10-232 and 10-307]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of

_____, a Child No_____

PETITION TO REVOKE

(PROBATION) (CONSENT DECREE)

The undersigned states that the above-named child has violated the terms of (probation) (the consent decree) entered herein on the _____ day of _____, 19 _____, and is in need of care or rehabilitation.

The child's birthdate is:

_____

The child's address is:
_____

The facts giving rise to this Petition are:
_____
_____
_____
_____
(include herein the terms of probation or consent decree alleged to have been violated and the factual basis for such allegations)

The names and addresses of the child's parents, guardian or custodian are:
_____
_____

The best interests of the child and the public require that this Petition be filed.

The child (is) (is not) in detention. He is being detained at _____, _____, New Mexico.

The child has been in detention since _____, *(date)* _____ m. *(time)* 19 _____

_____
_____
Children's Court Attorney

10-419.

[Rule 10-301]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

State of New Mexico ex rel. Human Services Department, In the Matter of _____, a Child and Concerning _____,

Respondent(s) No_____

STATE OF NEW MEXICO)
) ss.
COUNTY OF _____)

AFFIDAVIT FOR EX PARTE CUSTODY ORDER

The undersigned, being duly sworn, on his oath states that he has reason to believe that the above-named child is (abused) (neglected) and that it is necessary for the protection of the child that he be placed in the custody of the Human Services Department.

The undersigned further states the following facts on oath to establish probable cause in support of this affidavit:

_____

_____

_____

(include facts in support of the credibility of any hearsay relied upon)

_____

_____

Affiant's Name (please print or type)

_____

_____

Affiant's Signature

_____

_____

Title (if any)

Subscribed and sworn to before me in the above-named county of the State of New Mexico this _____ day of _____, 19_____

_____

_____

Officer

Authorized To Administer Oaths

_____

Title

10-420.

[Rule 10-301]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

State of New Mexico ex rel. Human Services Department, In the Matter of _____, a Child and Concerning _____,
Respondent(s). No_____

EX PARTE CUSTODY ORDER

THE STATE OF NEW MEXICO TO ANY OFFICER

AUTHORIZED TO EXECUTE THIS ORDER

YOU ARE HEREBY COMMANDED to take _____, *(Name)* a child (children), born _____, _____, 19 _____, without unnecessary delay and deliver him into the custody of the Human Services Department. You are further commanded to serve a copy of this Order on _____ *(Respondent)* .

Said child is alleged to be neglected and it is necessary for the protection of said child that he be placed in the custody of the Human Services Department.

Dated this _____ day of _____, 19_____

_____

_____

D
istrict Judge

RETURN WHERE CHILD IS FOUND

I took the above-named child into custody and delivered him into the custody of the Human Services Department on the _____ day of _____, 19_____, and served a copy of this Ex Parte Custody Order on _____

Respondent
on the _____ day of _____, 19_____

_____
_____

Signature

_____
_____

Title

10-421.

[Rule 10-305]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

State of New Mexico ex rel. Human Services Department, In the Matter of _____, a Child and Concerning _____,
Respondent(s). No_____

ABUSE OR NEGLECT PETITION

The undersigned states that _____ is alleged to have (abused) (neglected) _____, a child.

The child's birthdate is: _____ *(month)* _____ *(day)* _____ *(year)*

The child's address is:
_____

The facts giving rise to this Petition are:
_____
_____
_____
contrary to _____ *(citation to statute allegedly violated)*

The name and address of the respondent is:
_____, *(Name)* _____,
(Relationship) _____ *(Address)*

The child (is) (is not) in the custody of the Human Services Department. The child has been in custody since _____ *(date)* _____ m., *(time)* 19_____

_____
_____
Children's Court Attorney

COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of
_____, a Child
1 No_____

NOTICE OF HEARING *2*

TO:
_____
_____

_____
_____

A _____ hearing to determine whether _____

_____
_____

will be held before the Hon. _____, Judge of the District Court, Children's Court Division, at _____ m. on the _____ day of _____, 19_____, in the Children's Court Division of the District Court, _____ County, New Mexico.

_____
_____

Clerk, District Court

Children's Court Division

1 In neglect actions, the caption should be the same as that used on the neglect form.

2 For all hearings for which notice is required, unless a specific form is provided.

10-422.

[RULE 10-310]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

State of New Mexico ex rel. Human Services Department, In the Matter of _____, a Child and Concerning _____, Respondent(s)

No____
_____

JUDGMENT AND DISPOSITION

This matter came on for hearing on this _____ day of _____, 19_____, _____, a child being represented by _____, guardian ad litem _____, appearing on behalf of the State of New Mexico as Children's Court attorney, and

(check one)

[] the Respondent having appeared in person and with _____, his attorney;

[] the Respondent not having appeared, but having been duly served on _____, 19_____, and no answer, motion or other pleading having been filed hereon on his behalf except _____

(DENIAL OF ALLEGATIONS OF THE PETITION)

[] The respondent having denied the allegations of the petition, the court finds that:

(check one)

(a) [] _____, a child, is (an abused) (a neglected) child by reason of the acts of the Respondent in that he _____ *(state acts of abuse or neglect)* and the Department has made reasonable efforts to leave the child in its home or to return the child to its home if in temporary custody.

(b) [] _____, a child, is not (an abused) (a neglected) child.

(ADMISSION OF THE ALLEGATIONS OF THE PETITION

OR FAILURE TO APPEAR)

(check one)

(a) [] The Respondent having admitted the allegations of the petition, the court so finds that _____, a child, is (an abused) (a neglected) child by reason of the acts of the Respondent in that he _____ *(state acts of abuse or neglect)* and the Department has made reasonable efforts to

leave the child in its home or to return the child to its home if in temporary custody.

(b) [] The Respondent not appearing and the court having heard the evidence adduced, the court finds that _____, a child, is (an abused) (a neglected) child by reason of the acts of the Respondent in that he

_____
(state acts of abuse or neglect) and the Department has made reasonable efforts to leave the child in its home or to return the child to its home if in temporary custody.

JUDGMENT OF COURT

[] IT IS ADJUDGED that _____, a child, is (an abused) (a neglected) child.

[] IT IS ADJUDGED that _____, a child, is not (an abused) (a neglected) child and should be released from all custody.

[] IT IS ADJUDGED that said child is hereby _____. *(state disposition)*

[] IT IS ORDERED that _____ *(name of parent or guardian)* pay $ _____ as reasonable costs of (support) (maintenance) (treatment) (defense) of _____ *name of child*

[As amended, effective May 1, 1986.]

10-430.

[10-208, 10-208A]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of No. _____

John Doe, a child

STATEMENT OF PROBABLE CAUSE

The above child has been arrested without a warrant for the following reasons *(set forth a plain, concise and definitive statement of facts establishing probable cause and the name of the offense charged):* _____

_____

_____

_____ *(continued on attached sheet)*

I SWEAR OR AFFIRM UNDER PENALTY OF PERJURY THAT THE FACTS SET FORTH ABOVE ARE TRUE TO THE BEST OF MY INFORMATION AND BELIEF. I UNDERSTAND THAT IT IS A CRIMINAL OFFENSE SUBJECT TO THE PENALTY OF IMPRISONMENT TO MAKE A FALSE STATEMENT UNDER OATH.

_____ _____

(Date) (Arresting officer)

Use Note

This form may be used to make a written showing of probable cause. It is used only in the absence of a written showing of probable cause being made in an arrest warrant.

[Adopted effective November 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated September 12, 1995, this form is effective November 1, 1995.

10-431.

[10-208, 10-208A]

STATE OF NEW MEXICO COUNTY OF _____

IN THE DISTRICT COURT

CHILDREN'S COURT DIVISION

In the Matter of John Doe, a child

No. _____

PROBABLE CAUSE DETERMINATION

(For use only if the child has been arrested without a warrant and has not been released)

Finding of probable cause

[ ] I find that there is probable cause to believe that an offense has been committed by the above named child.

It is ordered that the child be:

[ ] detained

[ ] released on personal recognizance.

[ ] released on the conditions of release set forth in the release order.

[ ] _____

Failure to make showing of probable cause

[ ] I find that probable cause has not been shown that an offense has been committed by the above named child. It is therefore ordered that the child be immediately discharged from custody.

_____
Date

_____
Judge

Use Notes

This form may be used for any child taken into custody. If the child has a right to bail, the amount of bail and any conditions of release must also be determined. This form is not necessary if: the child was arrested on an arrest warrant or a

finding of probable cause is endorsed by the judge on the petition or on a statement of probable cause.

[Adopted effective November 1, 1995.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated September 12, 1995, this form is effective November 1, 1995.

Delinquency/Need of Supervision Proceedings

DOUBLE CLICK TO VIEW DIAGRAM

Wikimedia Commons Image

Delinquency/Need of Supervision Proceedings

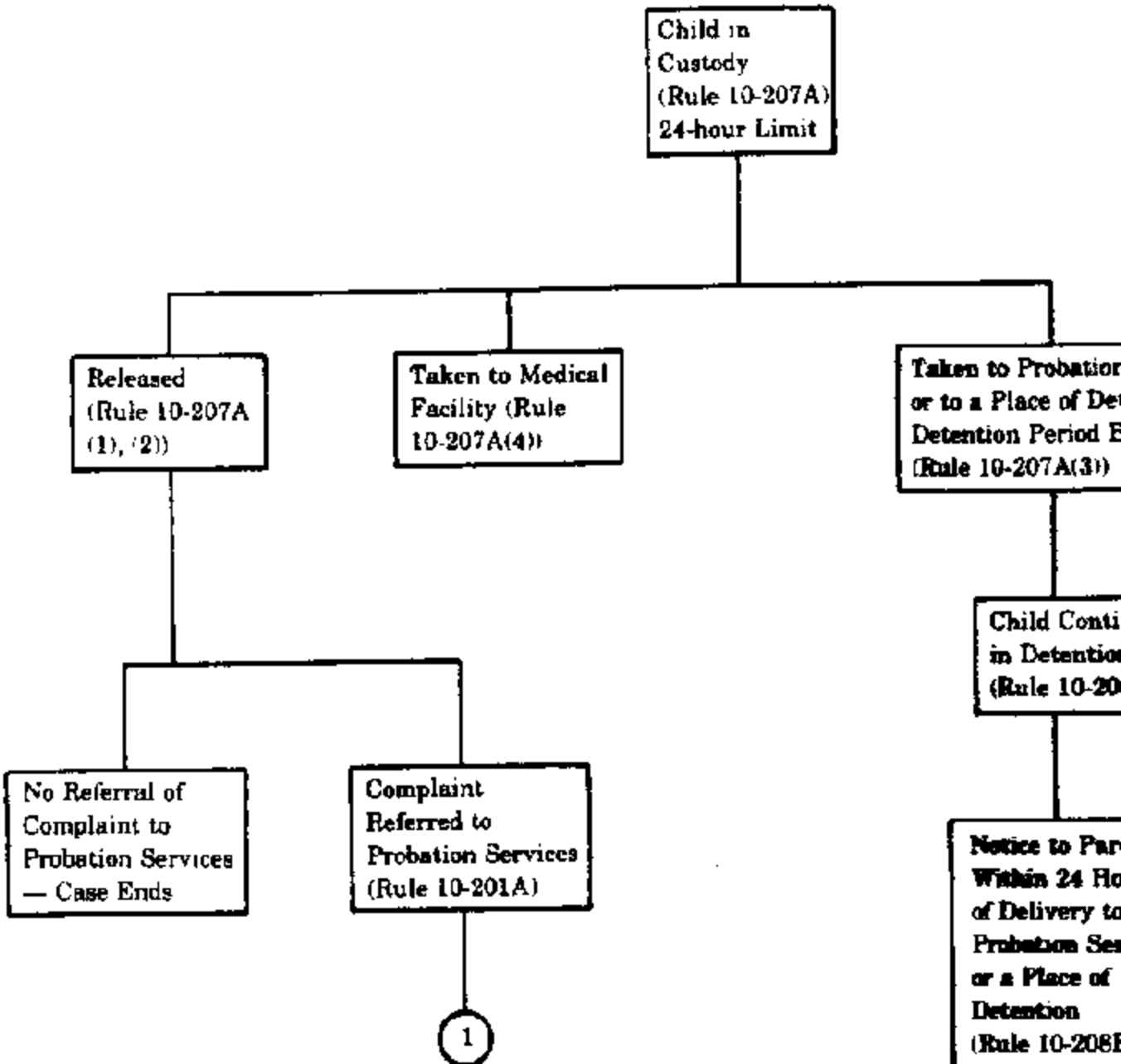
Child in Detention

DOUBLE CLICK TO VIEW DIAGRAM

APPENDIX 2.

DELINQUENCY/NEED OF SUPERVISION PROCEED

CHILD IN DETENTION



Abuse or Neglect

DOUBLE CLICK TO VIEW DIAGRAM

Wikimedia Commons Image

Table of Corresponding Rules

The first table below reflects the disposition of the former Rules of Procedure for the Children's Court. The left-hand column contains the former rule number, and the right-hand column contains the corresponding present Children's Court Rule.

The second table below reflects the antecedent provisions in the former Rules of Procedure for the Children's Court (right-hand column) of the present Children's Court Rules (left-hand column).

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37	10-218
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42	Withdrawn
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54	10-303
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56	Withdrawn
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