

**PROPOSED REVISIONS TO THE CHILDREN’S COURT RULES AND FORMS  
PROPOSAL 2019-004**

**March 4, 2019**

The Children’s Court Rules Committee has recommended amendments to Rule 10-314 NMRA and the adoption of new Form 10-517 NMRA for the Supreme Court’s consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court’s web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
[nmsupremecourtclerk@nmcourts.gov](mailto:nmsupremecourtclerk@nmcourts.gov)  
505-827-4837 (fax)

**Your comments must be received by the Clerk on or before April 3, 2019**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s web site for public viewing.

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**10-314. Explanation of respondent’s rights at first appearance; ICWA advisement; appointed counsel.**

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

- (1) the allegations of the abuse or neglect petition or the termination of parental rights motion;
- (2) the right to an adjudicatory hearing on the allegations in the petition or the right to a trial on the allegations in the motion;
- (3) the right to an attorney and that if the respondent cannot afford an attorney, one will be appointed to represent the respondent free of charge; [~~and~~]
- (4) the possible consequences if the allegations of the petition or the motion are found to be true; and
- (5) the right to have the proceedings interpreted into a language the respondent understands.

B. **Indian Child Welfare Act advisements.** If the child is an Indian child or there is reason to know that the child is an Indian child as defined by the Indian Child Welfare Act, the court

shall further inform the respondent that:

- (1) the parent, Indian custodian, or tribe may request that the case be transferred to tribal court;
- (2) either parent may object to the request to transfer;
- (3) the department shall place the Indian child in accordance with the placement preferences set forth in the Indian Child Welfare Act, unless good cause is shown to depart from those preferences;
- (4) the department shall make active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and
- (5) if a motion for termination of parental rights motion is filed, the department shall prove the allegations beyond a reasonable doubt.

C. **Appointed counsel.** In any proceeding or case that may result in the termination of parental rights, an attorney may not be appointed to represent more than one respondent. [Approved, effective November 1, 1978, Rule 55 NMSA 1978; Rule 10-304 SCRA 1986; as amended, effective August 1, 1999; Rule 10-304 NMRA, recompiled and amended as Rule 10-314 NMRA by Supreme Court Order No. 08-8300-042, effective January 15, 2009; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

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

A new subsection (B) was added to encourage full compliance with the Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963, and its implementing regulations, 25 C.F.R. Part 23 (effective December 12, 2016). Subsection B provides the courts with a uniform advisement to alert the parties to the unique protections provided to Indian children, their families, and their tribe(s) in cases subject to the Act, and to highlight some of the Act’s procedural requirements. Because of the extensive protections included in the Act, it would be unwieldy to enumerate every provision in this advisement. Practitioners and judges are urged to familiarize themselves with all of the Act’s requirements.

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

**[NEW MATERIAL]**

**10-517. Respondent’s first appearance rights and ICWA advisement.**

[For use with Children’s Court Rule 10-314 NMRA]

STATE OF NEW MEXICO  
COUNTY OF \_\_\_\_\_  
\_\_\_\_\_ JUDICIAL DISTRICT

IN THE CHILDREN'S COURT

In the Matter of \_\_\_\_\_, a Child,  
And Concerning \_\_\_\_\_ and  
\_\_\_\_\_, Respondents.

No. \_\_\_\_\_

**RESPONDENT'S FIRST APPEARANCE RIGHTS AND  
INDIAN CHILD WELFARE ACT ADVISEMENT (IF APPLICABLE)**

\_\_\_\_\_ 1. Do you understand that you have a right to have the court hearings interpreted into the language that you understand? What is your primary language? \_\_\_\_\_ (insert primary language here). Do you wish to have an interpreter? YES or NO. (Choose one.)<sup>1</sup>

\_\_\_\_\_ 2. Now that I have read the allegations against you in the abuse or neglect petition (or termination of parental rights motion), do you understand the allegations?<sup>2</sup>

\_\_\_\_\_ 3. Do you understand that you have the right to [an adjudicatory hearing on the allegations in the petition] [the right to a trial on the allegations in the termination of parental rights motion]?

\_\_\_\_\_ 4. Do you understand you have the right to an attorney, and that one will be appointed to represent you free of charge if you cannot afford an attorney?<sup>3</sup>

\_\_\_\_\_ 5. Do you understand the possible consequences if the allegations of the [petition] [termination of parental rights motion] are found to be true?<sup>4</sup>

**IF THE CHILD IS AN INDIAN CHILD OR THERE IS REASON TO KNOW THAT  
THE CHILD IS AN INDIAN CHILD, THE COURT SHALL MAKE THE FOLLOWING  
INQUIRIES:**

\_\_\_\_\_ 1. Do you understand that either parent, the Indian Custodian, or the tribe may request that the case be transferred to tribal court?

\_\_\_\_\_ 2. Do you understand that either parent may object to the transfer if transfer is requested?

\_\_\_\_\_ 3. Do you understand that the Children, Youth and Families Department is required to place your child according to the placement preferences set forth in the Indian Child Welfare Act, unless the court finds good cause not to follow these placement preferences?

\_\_\_\_\_ 4. Do you understand that the Children, Youth and Families Department is required to make active efforts to provide services and programs designed to prevent the breakup of

your Indian family?

\_\_\_\_\_ 5. Do you understand that if a motion to terminate parental rights is filed, the Children, Youth and Families Department is required to prove the allegations beyond a reasonable doubt.

I hereby certify that I advised Respondent \_\_\_\_\_ (insert name here) of the foregoing rights and determined that Respondent understands these rights on this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

\_\_\_\_\_  
Children's Court Judge

### USE NOTES

1. If there are multiple Respondents, include answer for each Respondent.
2. Prior to completing this form, the Judge should read each allegation in the Petition or Motion aloud to the Respondent and ensure that the Respondent understands each allegation. Similarly, the Judge should read each right aloud and ensure that the Respondent understands each right. After determining that the Respondent understands the allegations or rights in each paragraph, the judges should initial the paragraph. Knowing that Respondents in abuse, neglect, and termination of parental rights cases are often overwhelmed by the information being provided in court, and that they may indicate understanding even when they do not fully understand what is happening, the Committee encourages the court to allow Respondents an opportunity to consult with counsel whenever it is not readily apparent that the Respondent truly understands each allegation and right. Furthermore, for this advisement to be meaningful, Respondent attorneys are encouraged to review this form with their clients before the hearing and should be prepared to explain the meaning of terms like "legal custody," "placement," "reunification," and "termination."
3. The Judge may appoint an attorney "in the interest of justice" even if the Respondent is not indigent. NMSA 1978, § 32A-4-10.
4. Respondent attorneys are encouraged to discuss fully the possible consequences of an abuse or neglect petition or termination of parental rights motion with their clients before the hearing. During the hearing, the judge may use the following language to inform the Respondent of possible consequences: These consequences may include the child(ren) remaining in the State's legal custody, the child(ren) living with someone else and you being ordered to work a case plan that requires you to complete services or other conditions. If ordered, the goal of the case plan would be to reunify your family. Additionally, if you are not successful in your attempts at reunification, then this could turn into a termination of parental rights case. The possible consequences of a motion to terminate parental rights are having all rights to your child(ren) severed permanently and the child(ren) being placed for adoption. The consequences may not be an inclusive list.
5. The completed and signed form should be filed with the court and distributed to the Respondents during the hearing.

[Approved by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]



New Mexico  
Courts

Terri Saxon <suptls@nmcourts.gov>

## Rule Proposal Comment Form

1 message

mailservices@sk.com <mailservices@sk.com>  
To: supjdm@nmcourts.gov, suptls@nmcourts.gov

Sun, Mar 24, 2019 at 7:49 PM

Your Name  
John Romero

Phone Number  
5054806640

Email  
jjulio347@gmail.com

Proposal Number  
2019-4

Comment  
The proposed amendment relating to ICWA is long overdue, necessary and will promote full compliance with the spirit and intent of the Federal Law.

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SUPREME COURT OF NEW MEXICO  
FILED

MAR 25 2019



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Courts

Terri Saxon <suptls@nmcourts.gov>

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## Rule Proposal Comment Form

1 message

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mailservices@sk.com <mailservices@sk.com>  
To: supjdm@nmcourts.gov, suptls@nmcourts.gov

Thu, Mar 28, 2019 at 11:20 AM

Your Name  
Kelly O'Neill

SUPREME COURT OF NEW MEXICO  
FILED

Phone Number  
5054128023

MAR 28 2019

Email  
kelly.oneill@state.nm.us

Proposal Number  
2019-004

Comment

Rule 10-314(B): The definition of "Indian child" is found in the Indian Child Welfare Act. The situations that trigger a finding that there is "reason to know" a child is an Indian child are not found in the Indian Child Welfare Act. The situations that trigger a finding that there is "reason to know" a child is an Indian child are found at 25 C.F.R. § 23.107 (c) (1)–(6) (2016).

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New Mexico  
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Terri Saxon <suptls@nmcourts.gov>

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## Rule Proposal Comment Form

1 message

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mailservices@sks.com <mailservices@sks.com>  
To: supjdm@nmcourts.gov, suptls@nmcourts.gov

Mon, Apr 1, 2019 at 10:20 AM

Your Name  
Robert Retherford

Phone Number  
5058600382

Email  
Robert.Retherford@state.nm.us

Proposal Number  
2019-004

Comment

I like the proposed change adding the ICWA requirements. I have one question about the proposed form: is this form intended for the Judge to fill out on the bench or is it something the Children's Court Attorney would need to prepare? I suggest making clear in the use notes who is supposed to prepare this form in a particular case.

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