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2005-NMCA-010: State v. Christopher Armijo

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Please allow 2-4 weeks for delivery. For more information contact Veronica at (505) 797-6039.
### FEBRUARY

**15**  
**Toil and Trouble: Avoiding Common Pitfalls in the Practice of Law**  
Video Replay • 9 - 11:30 a.m.  
1.0 Ethics and 2.0 Professionalism CLE Credits  

*Presented by:* Tonya Noonan Herring, Esq.; Anne Taylor, Esq.; & Christine Long, Esq.  
This seminar focused upon how to choose and satisfy clients, as well as how to avoid common ethical and professional pitfalls that result in equally common complaints.  

- $99 Standard and Non-Attorney

**15**  
**Update on Sales Contracts Under UCC Article 2**  
National Teleseminar • 11 a.m. - Noon  
1.2 General CLE Credits  

Article 2 of the Uniform Commercial Code is the most basic law governing the sale of goods. Article 2 has been recently revised to reflect developments in the sale of good, including the increasing prevalence of electronic commerce. This program will review both recently adopted and proposed revisions to UCC Article 2, as well as recent case law developments and practice trends.  

- $67 Standard and Non-Attorney

**18**  
**Expanding Equal Access to Credit Through Civil Rights and Consumer Protection Laws**  
Live Program • 9 a.m. - 4 p.m.  
6.6 General CLE Credits  

*Co-Sponsors:* Project Change Fair Lending Center, Institute of Public Law, National Community Reinvestment Coalition  
This workshop will provide tools for expanding equal access to credit through civil rights and consumer protection laws. Topics include recent case law, emerging issues in debt servicing, testing programs, community reinvestment act, and regulatory challenges. The afternoon session will include a New Mexico legislative update. In addition, participants will learn how to develop effective partnerships with community organizations that assist clients with lending issues. The session will conclude with an overview of the New Mexico foreclosure process as it relates to predatory lending.  

- $159 Standard and Non-Attorney  
- $149 Government & Paralegal

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- Purchase Order (Must be attached to be registered)  
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Professionalism Tip

With respect to my clients:
I will be courteous and civil, both in oral and in written communications.

Meetings

February
7 Attorneys Support Group, 5:30 p.m., First Methodist Church
10 Public Law Section Board of Directors, noon, RMD Legal Bureau, Santa Fe
10 Business Law Section Forms Committee, 2:30 p.m., State Bar Center
10 Business Law Section Board of Directors, 4 p.m., State Bar Center
12 Ethics Advisory Committee, 10 a.m., Dines & Gross, PC.
14 Taxation Section Board of Directors, noon, via teleconference
15 Children’s Law Section Board of Directors, noon, Juvenile Justice Center
16 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 12th floor

State Bar Workshops

February
7 Lawyer Referral for the Elderly Workshop, 10 a.m., San Felipe Pueblo
Senior Center, San Felipe Pueblo
8 “Your Life, Your Death, & Preventative Law” Estate Planning Workshop, 6 p.m.,
Santa Fe Library-La Farge Branch, Santa Fe
9 Landlord/Tenant Workshop LANDLORDS, 6 p.m., State Bar Center
16 Lawyer Referral for the Elderly Workshop, 10 a.m., Jemez Pueblo Elderly Program, Jemez Pueblo
22 Lawyer Referral for the Elderly Workshop, 10 a.m., Chavez County J.O.Y. Center, Roswell
23 Consumer Debt/Bankruptcy Workshop, 6 p.m., State Bar Center

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS
NM Supreme Court
Law Library
Retirement Reception
The Supreme Court Law Library will be hosting a reception at 3 p.m., Feb. 8 to honor Kevin M. Lancaster, Associate State Law Librarian, on his retirement after serving 25 years. The reception will be held at the Supreme Court Law Library, 237 Don Gaspar, Santa Fe. Contact Alice Robledo, (505) 827-4850 for more information.

Notice on Address Changes
All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court, Suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848.

Proposed New Children’s Court Form 10-471 NMRA
The Supreme Court is considering a proposed new Form 10-471 NMRA of the Children’s Court Rules. Attorneys who would like to comment on the proposed revisions should send written comments by Feb. 18 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

NM Board of Legal Specialization
Comments Solicited
The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon the applicant's qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

Proposed Amendments to Domestic Relations Form 4A-313 NMRA
The Supreme Court is considering proposed amendments to Domestic Relations Form 4A-313 NMRA. Attorneys who would like to comment on the proposed revisions should send written comments by Feb. 18 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

Proposed Amendments to the Magistrate, Metropolitan and Municipal Court Rules and Civil Forms
The Supreme Court is considering Proposed Amendments to the Magistrate, Metropolitan and Municipal Court rules and civil forms. Attorneys who would like to comment on the proposed revisions should send written comments by Feb. 18 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

Second Judicial District Court
Family Court Open Meetings
Second Judicial District Family Court judges will hold open meetings to discuss ongoing concerns and projects at noon on the first business Monday of each month in the Conference Center located on the third floor of the Bernalillo County Courthouse. The next regular meeting will be held on Feb. 7. Contact Mary Lovato, (505) 841-6778, for more information or to have an item placed on the agenda.

Judicial Nominees
The District Court Judges Nominating Commission convened Jan. 26, 2005, in Albuquerque, and completed its evaluation of the 14 applicants for the vacancy on the Second Judicial District Court. The commission recommends the following three applicants (in alphabetical order) to Gov. Bill Richardson:
Clay P. Campbell
Timothy V. Flynn-O’Brien
N. Monica Zamora

Fifth Judicial District Court
Judicial Appointment
Gov. Bill Richardson recently announced the appointment of Freddie J. Romero to serve as District Judge for the Fifth Judicial District in Chavez County. Romero received a J.D. at the University of New Mexico and a bachelor’s degree in government at New Mexico State University. He has more than 23 years of experience in the practice of law in New Mexico. He has served on the Board of Social Work Examiners, and was a two-term president of the Roswell Hispano Chamber of Commerce. Romero replaces Judge Alvin Jones, who retired from the bench in December.

Bernalillo County Metropolitan Court
Judges’ Meeting
The Bernalillo County Metropolitan Court judges have rescheduled their monthly judges’ meeting to noon, Feb. 8 in the Judicial/Administrative Conference Room (Room 849) of the Metropolitan Court Building, 401 Lomas

Federal Indian Law
Paul E. Frye

NM Compilation Commission
Volume 135 of NM Reports and 2004 NM Taxation Handbook Available
Volume 135 of the New Mexico Reports is now available for sale. The cost is $63. The New Mexico Selected Taxation and Revenue Laws and Regulation and CD ROM are also available. The price is $36.75.

To order, send a check to the New Mexico Compilation Commission, PO Box 15549, Santa Fe, NM 87592-5549.

First Judicial District Court
Family Law Brownbag Meeting
The First Judicial District Court will host its family law brownbag meeting at noon, Feb. 8 in the Grand Jury Room, second floor, of the Steve Herrera Judicial Complex in Santa Fe. The event will feature a meeting with the domestic relations judges. For more information, or to suggest agenda items to be discussed, contact Elege Simons, (505) 982-3610 or esimons@rubinkatzlaw.com.

Handbook Available
The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon the applicant's qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

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For reference: The proposed amendments were printed in the Jan. 31 (Vol. 44, No. 4) Bar Bulletin.

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For reference: The proposed amendments were printed in the Jan. 31 (Vol. 44, No. 4) Bar Bulletin.
NW, Albuquerque. The meeting is open to the public. Contact the Court Administrator's Office, (505) 841-8105 for more information or if accommodations for individuals with disabilities are needed.

**U.S. District Court for the District of New Mexico**

**Notice to Federal Practitioners**

The Omnibus Appropriations Act of 2005 included a provision raising the district filing fee by $100, from $150 to $250. The new fee will become effective on Feb. 7.

**Suspension of 2005 Annual Federal Bar Dues**

With the concurrence of all active Article III Judges in the District of New Mexico, it is ordered that the annual attorney bar dues of $25 shall be suspended for the calendar year 2005. All delinquent dues are still required to be paid. The administrative order may be viewed on the Court's Web site at www.nnmcourt.fed.us.

**U.S. Bankruptcy Court Brownbag Support Staff Discussion**

A brownbag session for Chapter 13 attorney's support staff is scheduled for 11:30 a.m. to 1:30 p.m., March 4 at the Chapter 13 Trustee's office, 625 Silver SW, Suite 350, Albuquerque. Attendees should bring their own lunch. The discussion will touch on various topics of importance to both debtor and creditor attorney staff members. Members of the Chapter 13 Trustee's staff will present the session. The event is an opportunity for legal assistants and paralegals to meet and to determine how best to work together. Call (505) 243-1335, ext. 3020 for more information or to R.S.V.P.

**STATE BAR NEWS**

**Attorney Support Group Monthly Meeting**

The next Attorney Support Group meeting will be held at 5:30 p.m., Feb. 7 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

For more information, contact Bill Stratvert, (505) 242-6845.

**Board of Bar Commissioners Meeting Summary**

The Board of Bar Commissioners met on Jan. 28 at the Bar Center in Albuquerque.

**Action taken at the meeting follows:**

- New commissioners Roxanna M. Chacon, Richard M. Jacquez, Linda A. Murphy and reappointed commissioner Jane Shuler Gray were sworn-in by NM Supreme Court Justice Pamela B. Minzner;
- Received reports from the following committees: Historical, Alternative Methods of Dispute Resolution, Lawyers Professional Liability and Technology Utilization;
- Received an update on ABA House Resolution 108 regarding mandatory malpractice insurance disclosure; the Lawyers Professional Liability Committee met with three other committees, which all have differing opinions; the LPL Committee will continue to pursue options this year and report back to the Board;
- Approved the Dec. 17, 2004, meeting minutes as submitted;
- Approved a non-budgeted item in the amount of $400 to assist with funding for the ABA National Client Protection Forum Workshop to be held in Santa Fe on April 1;
- Approved proceeding with building improvements to the State Bar Center in the maximum amount of $300,000, and staff will look into financing options for the Board’s approval;
- Approved fee waivers of the 2005 bar dues for those who met the criteria;
- Accepted the November 2004 financials and executive summary;
- Reviewed the accounts receivable aging report as well as the executive director’s travel reimbursements and credit card file;
- Accepted the Finance Committee report;
- Held an executive session at which no action was taken;
- Reported on the comments received from the membership regarding the draft reciprocity rule and decided not to take a position with regard to reciprocity; the draft rule, comments and information on the pros and cons arguments will be forwarded to the Supreme Court with the offer to conduct a referendum if requested by the Court;
- Approved section bylaw amendments as follows: Health Law Section regarding increasing the board composition from nine to 10 members; Employment and Labor Law Section regarding making the retiring chair a voting member; Natural Resources, Energy and Environmental Law Section regarding adding a representative of the UNM Law School faculty to the board composition for a one-year term; and the International and Immigration Law Section regarding suspending the requirement for a nine-member board and allowing five board members through the end of the year;
- Received a report on the Bylaws/Policies Committee meeting and approved amendments to the Editorial Policy and a new policy regarding committees; provided notice of two bylaw amendments regarding honorary judicial members and law student members; and approved amendments to the section bylaws regarding finances and budgets;
- Reported that insurance coverage was obtained to cover volunteers of the Lawyers Assistance Program;
- Reported that the 2005 Professionalism Program with the Lawyers Assistance Committee on substance and addiction abuse is scheduled to debut on Feb. 25;
- Reported that the 2004 CLE at Sea cruise was quite successful and that a 2005 program is being planned with limited availability;
- Reported that volunteers are still needed for the Feb. 19-20 High School Mock Trial Program;
- Reported that Common Cause is pursuing legislation to have appellate judicial races funded by public contributions and that Common Cause was contacting State Bar sections to relay this information;
- Denied a request for the State Bar’s Lawyer Referral for the Elderly Program to support or endorse the legislative effort regarding enforceable title insurance;
- Reported that the Family Law Section board met on Jan. 21 and voted to support legislation of an amended Guardian Ad Litem Statute, Section 40-4-8; the section board had notified section members and the Board of Bar Commissioners on Dec. 17 of its intent; and
- Reported that the Taxation Section board participated in a poll on Jan. 24 and voted unanimously to contact the New Mexico Taxation and Revenue Department regarding the department’s draft of proposed amendments to Section 7-1-73 of the New Mexico Statutes Annotated 1978 (“NMSA”); the section is advocating that the legislation should exclude from “willful counsel” counseling against fraud.

**Note:** The minutes in their entirety will be available on the Bar’s Web site following approval by the Board at the April 8 meeting.
Paralegal Division
Brownbag CLE’s for Attorneys and Paralegals

There will not be a February meeting of the division’s lunch time CLE program, but check the Bar Bulletin for the schedule of upcoming CLEs. Contact Debi Shoemaker-Scott, (505) 243-1443 with questions, speaker suggestions or to be added to the e-mail list.

Public Law Section
Board Meeting

The next Public Law Section board meeting will be held at noon, Feb. 10 in the Risk Management Division Legal Bureau Conference Room on the first floor of the Montoya Building, 1100 St. Frances Dr., Santa Fe. Contact Deborah Moll, (505) 827-2000, for more information.

Nominations Sought for
Public Lawyer Award

The State Bar Public Law Section is currently accepting nominations for the ninth annual public lawyer of the year award, which will be presented on Law Day, May 2. Prior recipients include Florence Ruth Brown, Frank Katz, Douglas Meiklejohn, Marty Daly, Nick Estes, Mary McInerny, Jerry Richardson, Peter T. White and Robert M. White. Send nominations by 5 p.m., March 1 to Doug Meiklejohn by e-mail, dmeiklejohn@nmelc.org or by mail to New Mexico Environmental Law Center, 1405 Luisa St. #5, Santa Fe. The selection committee (comprised of past chairs of the Public Law Section) will consider all nominated candidates and may nominate candidates on its own.

A complete listing of the qualifications for candidates can be found in the Jan. 24 issue of the Bar Bulletin (Vol. 44, No.3).

Taxation Section
Intent to Oppose/Amend Legislation

The Taxation Section board participated in a poll on Jan. 24 and voted to contact the New Mexico Taxation and Revenue Department regarding the department’s draft of proposed amendments to Section 7-1-73 of the New Mexico Statutes Annotated 1978 (“NMSA”). The section is advocating that the legislation should exclude from “willful counsel” counseling against fraud. Nine board members voted and the result was unanimous. Refer to the Jan. 24 issue (Vol. 44, No. 3) of the Bar Bulletin for more details.

Young Lawyers Division
2005 Summer Fellowship

The Young Lawyers Division (YLD) of the State Bar is currently accepting applications from law students interested in working in public interest law or the government sector during the summer of 2005. The purpose of the fellowship is to enable one law student to work in public interest law or the government sector in an unpaid legal position. The fellowship award is intended to provide the opportunity for a law student to work in a position that might not otherwise be possible because the position is unpaid. The fellowship award, depending on the circumstances of the position, could be up to $3,000 for the summer.

To be eligible for the fellowship, the applicant must be a current law student in good standing. Applications for the fellowship must include the following: a letter of interest from the applicant that details the student’s interest in public interest law or the government sector; a resume of the applicant; and a written offer of employment to the applicant for an unpaid legal position in public interest law or the government sector for the summer of 2005. Applications must be submitted to the following address: J. Brent Moore, YLD Summer Fellowship Coordinator, Office of General Counsel, New Mexico Environment Department, 1190 St. Francis Dr., Suite N-4050, Santa Fe, New Mexico 87505.

Applications must be postmarked by March 31. Any questions regarding the fellowship should be directed to J. Brent Moore at (505) 476-3783.

Other Bars
American Inns of Court
Warren E. Burger Writing Competition

The American Inns of Court is inviting judges, lawyers, scholars and other authors to participate in its Warren E. Burger writing competition. Authors need to submit an original, unpublished essay of 10,000 to 25,000 words on a topic of their choice addressing issues of legal excellence, civility, ethics and professionalism. The author of the winning submission will receive a $5,000 prize and the essay will be published in the South Carolina Law Review. Complete rules of the competition can be found on the American Inns of Court Web site www.insofcourt.org.

National Association of Women Lawyers
Upcoming Directory

The National Association of Women Lawyers (NAWL) is preparing to publish the 6th Edition of the National Directory of Women-Owned Law Firms and Women Lawyers. Attorney’s interested in being listed in the directory or who would like more information can visit the NAWL Web site at www.nawl.org.

Other News
Center for Civic Values
Judges Needed

Judges are needed for the regional rounds of the high school mock trial competition in Albuquerque and Las Cruces. Regionals are Feb. 19 and 20. Attorneys interested in participating, should register online at www.civicvalues.org/MT_registration.htm.

The mock trial program is a cosponsored activity of the Center for Civic Values, the State Bar of New Mexico and the UNM School of Law.

Mock Trial
Coaches Needed

Attorney coaches are needed for the Del Norte High School mock trial team in Albuquerque, the Pojoaque High School team and the Lordsburg High School team. Attorneys interested in participating in this exciting and rewarding program, should call (505) 764-9417, extension 13, or send e-mail to mocktrial@civicvalues.org. The mock trial program is a cosponsored activity of the Center for Civic Values, the State Bar of New Mexico and the UNM School of Law.

UNM Peace Studies Program
Peace Fair

The University of New Mexico Peace Studies program will host Albuquerque’s first Peace Fair, free and open to the public, from 10 a.m. to 2 p.m., March 1 in the Student Union Building ballroom.

UNM’s School of Law, Students Organizing Action for Peace (SOAP), International Programs, Women Studies, Women’s Resource Center, the sociology, political science, anthropology and communication and journalism departments, Religious Studies and College of Arts and Sciences are co-sponsors.

Peace Studies is dedicated to the study of the causes of violence and alternatives to violence and the practice of conflict resolution on all levels – from the interpersonal to societal to international. Call (505) 277-4032 for more information.

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<td>Protecting Business Assets Through Effective Lawyering</td>
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**WRITS OF CERTIORARI**  
**AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT**  
Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860  
**EFFECTIVE FEBRUARY 2, 2005**

**PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:**

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<td>State v. Stone (COA 24,096)</td>
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<td>State v. Salas (COA 25,038)</td>
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**CERTIORARI GRANTED BUT NOT SUBMITTED:**

(Submission = date of oral argument or briefs-only submission)

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<td>State v. Rogers (COA 23,837)</td>
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### WRITS OF CERTIORARI

**AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

**EFFECTIVE FEBRUARY 2, 2005**

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<td>UNM Police Officers v. UNM (COA 22,111)</td>
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### CERTIORARI GRANTED BUT NOT SUBMITTED:

(Submission = date of oral argument or briefs-only submission)  
ALL CASES HELD IN ABEYANCE PENDING DISPOSITION IN NO. 28,698, *STATE V. EUBANKS*

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NO. 05-8300
IN THE MATTER OF THE AMENDMENTS OF RULES 1-001 AND 1-004 AND FORMS 4-206, 4-207, AND 4-209A NMRA OF THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Civil Procedure for the District Courts Committee to adopt amendments of Rules 1-001 and 1-004 and Forms 4-206, 4-207, 4-209A NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 1-001 and 1-004 and Forms 4-206, 4-207, 4-209A NMRA of the Rules of Civil Procedure for the District Courts hereby are APPROVED; and

IT IS FURTHER ORDERED that the amendments of Rules 1-001 and 1-004 and Forms 4-206, 4-207, 4-209A NMRA of the Rules of Civil Procedure for the District Courts shall be effective for cases filed on or after March 1, 2005;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above rules by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 4th day of January, 2005.

Chief Justice Petra Jimenez Maes
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Richard C. Bosson
Justice Edward L. Chávez

1-001. Scope of rules; definitions.
A. Scope. These rules govern the procedure in the district courts of New Mexico in all suits of a civil nature whether cognizable as cases at law or in equity except to the extent that the New Mexico Rules of Evidence or existing rules applicable to special statutory or summary proceedings are inconsistent herewith. These rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action.
B. Definitions. As used in these rules and the civil forms approved for use with these rules:
(1) “defendant” includes a respondent;
(2) “plaintiff” includes a petitioner;
(3) “process” is the means by which jurisdiction is obtained over a person to compel the person to appear in a judicial proceeding and includes a:
   (a) summons and complaint;
   (b) summons and petition;
   (c) writ or warrant; and
   (d) mandate; and
(4) “service of process” means delivery of a summons or other process in the manner provided by Rule 1-004 NMRA of these rules.
C. Title. These rules shall be known as the Rules of Civil Procedure for the District Courts.
D. Citation form. These rules shall be cited by set and rule number of the New Mexico Rules Annotated, “NMRA”, as in Rule 1-____ NMRA.

1-004. Process.
A. Summons; issuance. Upon the filing of the complaint, the clerk shall issue a summons and deliver it to the plaintiff for service. Upon the request of the plaintiff, the clerk shall issue separate or additional summons. Any defendant may waive the issuance or service of summons.
B. Summons; execution; form. The summons shall be signed by the clerk, issued under the seal of the court and be directed to the defendant. The summons shall be substantially in the form approved by the Supreme Court and must contain:
(1) the name of the court in which the action is brought, the name of the county in which the complaint is filed, the docket number of the case, the name of the first party on each side, with an appropriate indication of the other parties, and the name of each party to whom the summons is directed;
(2) a direction that the defendant serve a responsive pleading or motion within thirty (30) days after service of the summons and file a copy of the pleading or motion with the court as provided by Rule 1-005 NMRA;
(3) a notice that unless the defendant serves and files a responsive pleading or motion, the plaintiff may apply to the court for the relief demanded in the complaint; and
(4) the name, address and telephone number of the plaintiff’s attorney. If the plaintiff is not represented by an attorney, the name, address and telephone number of the plaintiff.
C. Service of process; return.
(1) If a summons is to be served, it shall be served together with any other pleading or paper required to be served by this rule. The plaintiff shall furnish the person making service with such copies as are necessary.
(2) Service of process shall be made with reasonable diligence, and the original summons with proof of service shall be filed with the court in accordance with the provisions of Paragraph L of this rule.
D. Process; by whom served. Process shall be served as follows:
(1) if the process to be served is a summons and complaint, petition or other paper, service may be made by any person who is over the age of eighteen (18) years and not a party to the action;
(2) if the process to be served is a writ of attachment, writ of replevin or writ of habeas corpus, service may be made by any person not a party to the action over the age of eighteen (18) years designated by the court to perform such service or by the sheriff of the county where the property or person may be found;
(3) if the process to be served is a writ other than a writ specified in Subparagraph (2) of this paragraph, service shall be made as provided by law or order of the court.
E. Process; how served; generally.

(1) Process shall be served in a manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

(2) Service may be made, subject to the restrictions and requirements of this rule, by the methods authorized by this rule or in the manner provided for by any applicable statute, to the extent that the statute does not conflict with this rule.

(3) Service may be made by mail or commercial courier service provided that the envelope is addressed to the named defendant and further provided that the defendant or a person authorized by appointment, by law or by this rule to accept service of process upon the defendant signs a receipt for the envelope or package containing the summons and complaint, writ or other process. Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this paragraph. For purposes of this rule “signs” includes the electronic representation of a signature.

F. Process; personal service upon an individual. Personal service of process shall be made upon an individual by delivering a copy of a summons and complaint or other process:

(1) (a) to the individual personally; or if the individual refuses to accept service, by leaving the process at the location where the individual has been found; and if the individual refuses to receive such copies or permit them to be left, such action shall constitute valid service; or

(b) by mail or commercial courier service as provided in Subparagraph (3) of Paragraph E of this rule.

(2) If, after the plaintiff attempts service of process by either of the methods of service provided by Subparagraph (1) of this paragraph, the defendant has not signed for or accepted service, service may be made by delivering a copy of the process to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years and mailing by first class mail to the defendant at the defendant’s last known mailing address a copy of the process; or

(3) If service is not accomplished in accordance with Subparagraphs (1) and (2), then service of process may be made by delivering a copy of the process at the actual place of business or employment of the defendant to the person apparently in charge thereof and by mailing a copy of the summons and complaint by first class mail to the defendant at the defendant’s last known mailing address and at the defendant’s actual place of business or employment.

G. Process; service on corporation or other business entity.

(1) Service may be made upon:

(a) a domestic or foreign corporation, a limited liability company or an equivalent business entity by serving a copy of the process to an officer, a managing or general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. If the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the unincorporated association.

(b) a partnership by serving a copy of the process to any general partner;

(c) an unincorporated association which is subject to suit under a common name, by serving a copy of the process to an officer, a managing or general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. If the agent is one authorized by law to receive service and the statute so requires, by also mailing a copy to the unincorporated association.

(2) If a person described in Subparagraph (a), (b) or (c) of this subparagraph refuses to accept the process, tendering service as provided in this paragraph shall constitute valid service. If none of the persons mentioned is available, service may be made by delivering a copy of the process or other papers to be served at the principal office or place of business during regular business hours to the person in charge.

(3) Service may be made on a person or entity described in Subparagraph (1) of this paragraph by mail or commercial courier service in the manner provided in Subparagraph (3) of Paragraph E of this rule.

H. Process; service upon state and political subdivisions.

(1) Service may be made upon the State of New Mexico or a political subdivision of the state:

(a) in any action in which the state is named a party defendant, by delivering a copy of the process to the governor and to the attorney general;

(b) in any action in which a branch, agency, bureau, department, commission or institution of the state is named a party defendant, by delivering a copy of the process to the head of the branch, agency, bureau, department, commission or institution and to the attorney general;

(c) in any action in which an officer, official, or employee of the state or one of its branches, agencies, bureaus, departments, commissions or institutions is named a party defendant, by delivering a copy of the process to the officer, official or employee and to the attorney general;

(d) in garnishment actions, service of writs of garnishment shall be made on the department of finance and administration, on the attorney general and on the head of the branch, agency, bureau, department, commission or institution.

A copy of the writ of garnishment shall be delivered or served on the defendant employee in the manner and priority provided on Paragraph F of this rule;

(e) service of process on the governor, attorney general, agency, bureau, department, commission or institution may be made either by serving a copy of the process to the governor, attorney general or the chief operating officer of an entity listed in this subparagraph or to the receptionist of the state officer. A cabinet secretary, a department, bureau, agency or commission director or an executive secretary shall be considered as the chief operating officer;

(f) upon any county by serving a copy of the process to the county clerk;

(g) upon a municipal corporation by serving a copy of the process to the city clerk, town clerk or village clerk;

(h) upon a school district or school board by serving a copy of the process to the superintendent of the district;

(i) upon the board of trustees of any land grant referred to in Sections 49-1-1 through 49-10-6 NMSA 1978, process shall be served upon the president or in the president’s absence upon the secretary of such board.

(2) Service may be made on a person or entity described in Subparagraph (1) of this paragraph by mail or commercial courier service in the manner provided in Subparagraph (3) of Paragraph E of this rule.

I. Service upon minor, incompetent person, guardian or fiduciary.

(1) Service shall be made:
(a) upon a minor, if there is a conservator of the estate or guardian of the minor, by serving a copy of the process to the conservator or guardian in the manner and priority provided in Paragraph F, G or J of this rule as may be appropriate. If no conservator or guardian has been appointed for the minor, service shall be made on the minor by serving a copy of the process on each person who has legal authority over the minor. If no person has legal authority over the minor, process may be served on a person designated by the court.

(2) Service upon a personal representative, guardian, conservator, trustee or other fiduciary in the same manner and priority for service as provided in Paragraphs F, G or J of this rule as may be appropriate.

J. Service in manner approved by court. Upon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by this rule, the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all of the circumstances to apprise the defendant of the existence and pendency of the action and afford a reasonable opportunity to appear and defend.

K. Service by publication. Service by publication may be made only pursuant to Paragraph J of this rule. A motion for service by publication shall be substantially in the form approved by the Supreme Court. A copy of the proposed notice to be published shall be attached to the motion. Service by publication shall be made once each week for three consecutive weeks unless the court for good cause shown orders otherwise. Service by publication is complete on the date of the last publication.

(1) Service by publication pursuant to this rule shall be by giving a notice of the pendency of the action in a newspaper of general circulation in the county where the action is pending. Unless a newspaper of general circulation in the county where the action is pending is the newspaper most likely to give the defendant notice of the pendency of the action, the court shall also order that a notice of the action be published in a newspaper of general circulation in the county which reasonably appears is most likely to give the defendant notice of the action.

(2) The notice of pendency of action shall contain:
   (a) the caption of the case, as provided in Rule 1-008.1 NMRA, including a statement which describes the action or relief requested;
   (b) the name of the defendant or, if there is more than one defendant, the name of each of the defendants against whom service by publication is sought;
   (c) the name, address and telephone number of plaintiff’s attorney; and
   (d) a statement that a default judgment may be entered if a response is not filed.

(3) If the cause of action involves real property, the notice shall describe the property as follows:
   (a) If the property has a street address, the name of the municipality or county address and the street address of the property.
   (b) If the property is located in a Spanish or Mexican grant, the name of the grant.
   (c) If the property has been subdivided, the subdivision description or if the property has not been subdivided the metes and bounds of the property.

(4) In actions to quiet title or in other proceedings where unknown heirs are parties, notice shall be given to the “unknown heirs of the following named deceased persons” followed by the names of the deceased persons whose unknown heirs are sought to be served. As to parties named in the alternative, the notice shall be given to the “following named defendants by name, if living; if deceased, their unknown heirs” followed by the names of the defendants. As to parties named as “unknown claimants”, notice shall be given to the “unknown persons who may claim a lien, interest or title adverse to the plaintiff” followed by the names of the deceased persons whose unknown claimants are sought to be served.

L. Proof of service. The party obtaining service of process or that party’s agent shall promptly file proof of service. When service is made by the sheriff or a deputy sheriff of the county in New Mexico, proof of service shall be by certificate; and when made by a person other than a sheriff or a deputy sheriff of a New Mexico county, proof of service shall be made by affidavit. Proof of service by mail or commercial courier service shall be established by filing with the court a certificate of service which shall include the date of delivery by the post office or commercial courier service and a copy of the defendant’s signature receipt. Proof of service by publication shall be by affidavit of publication signed by an officer or agent of the newspaper in which the notice of the pendency of the action was published. Failure to make proof of service shall not affect the validity of service.

M. Service of process in the United States, but outside of state. Whenever the jurisdiction of the court over the defendant is not dependent upon service of the process within the State of New Mexico, service may be made outside the State as provided by this rule.

N. Service of process in a foreign country. Service upon an individual, corporation, limited liability company, partnership, unincorporated association that is subject to suit under a common name, or equivalent legal entities may be effected 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 Extra-judicial 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;
   (b) as directed by the foreign authority in response to a letter rogatory or letter of request; or
   (c) unless prohibited by the laws of the United States or the law of the foreign country, in the same manner and priority as provided for in Paragraph F, G or J of this rule as may be appropriate.

[As amended, effective January 1, 1987; October 1, 1998; March 1, 2005.]

Committee Comments
2005 Amendments to Rule 1-004

Introduction

New Mexico Rule 1-004 has its origins in an act of the first
Legislature of the State of New Mexico. 1912 N.M. Laws Ch. 26. When the New Mexico Supreme Court revamped the rules of civil procedure in 1942, 46 N.M. xix-lxxxiv (1942), largely using the 1938 Federal Rules as a model, the provisions of New Mexico Rule 4 continued to reflect some aspects of the service of process provisions of the former New Mexico provisions. Since then piecemeal amendments have occurred but there has been no previous attempt to restructure Rule 1-004 NMRA in light of evolving principles of due process and modern means of communication. The 2004 amendment to Rule 1-004 seeks to accomplish this goal.

**Summons; issuance; Rule 1-004(A)**

“Plaintiff” includes “Petitioner” and “Defendant” includes “Respondent”. See Rule 1-001(B)(1) and (2). The “Complaint” referred to in Rule 1-004(A) includes “Petition”. See Rule 1-001(B)(3).

Rule 1-004(A) previously provided that the clerk shall “forthwith” issue a summons upon filing of the complaint. The word is omitted from the 2004 Amendment because it was redundant; the rule already provides that the clerk “shall” issue a summons “[u]pon the filing of the complaint”.

Rule 1-004(A) previously provided that separate or additional summons may be issued “against any defendants”. Because it may be necessary to serve a summons on persons not formally denominated as a defendant, for example, upon a third-party defendant under Rule 1-014 NMRA, the rule has been modified to eliminate the implication that additional summons may issue only against defendants.

The committee considered but did not provide that a person other than the plaintiff or petitioner could request issuance of a summons.

**Summons; execution; form; Rule 1-004(B)**

Rule 1-011 NMRA requires that all “paper” shall contain the telephone number of the attorney or the pro se litigant. Except for the provision requiring that the summons include the telephone number as well as the name and address of the plaintiff’s attorney or the pro se plaintiff, only technical changes have been made in this section.

A form summons approved by the New Mexico Supreme Court may be found at 4-206 NMRA.

**Service of Process; return; Rule 1-004(C)**

“Process” is defined in Rule 1-001(B)(3) NMRA.

Sometimes a summons is not served in conjunction with the pleading instituting an action. For example, writs, warrants and mandates are not accompanied by a summons. See Rule 1-001((B)(3)(c) and (d) NMRA. Rule 1-004(C)(1) acknowledges that service of process sometimes does not include the service of a summons.

Rule 1-004(C)(2) is new. Unlike Federal Rule 4(m), which contains a specific time limit within which service of the summons and complaint ordinarily must be made, Rule 1-004(C)(2) provides only that service shall be made “with reasonable diligence”. This reflects the standard established in New Mexico case law. E.g., Romero v. Bachicha, 2001 NMCA-048 Par. 23-25, 130 N.M. 610, 616, 28 P.3d 1151, 1157.

**Process; by whom served; Rule 1-004(D)**

Rule 1-004(D) formerly provided that process could be served by a sheriff of the county where the defendant could be found, or by any person over the age of eighteen and not a party to the action. Because the latter category necessarily includes the sheriff of a county, the reference to service by the sheriff has been omitted.

Rule 1-004(D)(2) carries over, unchanged, former Rule 1-004(D)(2).

Rule 1-004(D)(3) is new. It provides a means for determining who shall serve process when the process is a writ other than those mentioned in Rule 1-004(D)(2).

**Process; how served; generally; Rule 1-004(E)**

Rule 1-004(E)(1) makes explicit in the rule the general test for constitutionally-adequate service of process established in Mullane v. Central Hanover Bank, & Trust Co., 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”).

Rule 1-004(E)(2) accepts the premise that matters of procedure are for the judiciary to determine but that legislation affecting procedure is valid unless and until contradicted by a rule of procedure promulgated by the Supreme Court. Rule 1-091 NMRA; Section 38-1-2 NMSA 1978. The section thus provides that service of process shall be made in accordance with Rule 1-004 NMRA, or in accordance with applicable statutes but shall not be accomplished by a means authorized by a statute that conflicts with Rule 1-004.

Rule 1-004(E)(3) provides a much-simplified method of service by mail. It is no longer necessary that the defendant open the mailed packet containing the summons and complaint and then voluntarily choose to accept service by returning a signed Receipt of Service of Summons and Complaint as formerly was required. Instead, service is accomplished when the summons and complaint are mailed to the named defendant in a manner that calls for the recipient to sign a receipt upon receiving the envelope containing the summons and complaint and the defendant-recipient or a person authorized by appointment or by law to accept service of process on behalf of the defendant signs the receipt upon receiving the mailed envelope or package.

Service by mail need not be at the home address or usual place of abode of the defendant. Service is complete when the receipt is signed.

This section also provides the same mechanism for service of the summons and complaint when a “commercial courier service” is utilized instead of the mails. The phrase, though not entirely self-explanatory, has been used in this context by other states without apparent problems. See, e.g., Kansas Rules of Civil Procedure, KSA 60-303 (c)(1); Utah Rules of Civil Procedure 4(d)(2)(A)and (B). The Advisory Committee Note to Utah Rule 4 provides that “[t]he term ‘commercial courier service’ refers to businesses that provide for the delivery of documents. Examples of ‘commercial courier service’ include Federal Express and United Parcel Service”. The committee endorses the definition provided in the Utah Advisory Committee Note.

In this context, “signs” and “signed” is equivalent to “signature” which “means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law”. Rule 1-011 NMRA.

**Process; personal service upon an individual; Rule 1-004(F)**

*In General.* The 2004 Amendment makes substantial changes in Rule 1-004(F). The “post and mail” method found in the former rule has been eliminated. A provision for service at the place of work of the defendant has been added. The provision for mail service has been simplified and the rule now authorizes the use of commercial courier services as well as mail for service of process. A hierarchy of methods of service has been established.
Rule 1-004(F)(1)(a). This subparagraph remains the same as in the former Rule.

Rule 1-004(F)(1)(b). This subparagraph authorizes service by mail or commercial courier service as provided in Rule 1-004(E)(3).

Rule 1-004(F)(2). The means of service provided in this section may only be used if there first was an attempt to serve process “by either of the methods of service provided by Subparagraph (1) of this paragraph”. This means that the person serving process need only attempt one of the two methods—personal service or mail/commercial courier service before using the alternative provided in this subparagraph.

This provision allows service to a person over the age of 15 who resides at the usual place of abode of the defendant. This is the same procedure as that formerly provided in Rule 1-004(F)(1) before the 2004 amendment. The former rule, however, required only delivery of the summons and complaint to such a person for service to be valid. The 2004 amendment provides that service is not accomplished until, in addition, the person serving the summons and complaint mails a copy of the summons and complaint to the defendant at the defendant’s last known mailing address. This mailing address will often, but not always, be the usual place of abode of the defendant. The cost of mailing is minimal and increases the likelihood that the defendant will get actual, timely notice of the institution of the action.

Rule 1-004(F)(1) formerly provided that if no qualified person was at the usual place of abode to accept service of process, service could be made by posting process at the abode and then mailing a copy of the process to the last known mailing address. This alternative method of service has been omitted in the 2004 amendment.

Rule 1-004(F)(3) is new. It may be used only when service of process has been attempted, unsuccessfully, in accordance with Rule 1-004(F)(1) and Rule 1-004(F)(2). Rule 1-004(F)(3) provides that service may be made by delivering a copy of the summons and complaint to the person apparently in charge of the actual place of business of the defendant and mailing a copy of the summons and complaint to the defendant both at the defendant’s last known mailing address and also the defendant’s actual place of business.


Process; Service on corporation or other business entity; Rule 1-004(G)

In addition to providing for service of process on corporations, Rule 1-004(G)(1) now includes limited liability companies as well as any “equivalent business entity” to a corporation or limited liability company. Courts should construe that phrase to assure that Rule 1-004 provides appropriate guidance about proper service of process upon legislatively-created variations on the traditional corporation.

The substance of the former provisions concerning service of process on partnerships and unincorporated associations have been carried over unchanged in Rule 1-004(G)(1)(b) and (c) of the 2004 amendment.
court to fashion a constitutionally-adequate method of service under any circumstances.

Where service can be accomplished pursuant to Rule 1-004(F)(G)(H) or (I), there will seldom be need for resort to Rule 1-004(K). Where the court orders service by publication, the court should consider, pursuant to this Paragraph, whether supplemental means of service should accompany notice by publication. Where no method of service specifically provided for by Rule 1-004 is likely to satisfy or achieve the goal of actual notice, this Paragraph authorizes the court to create a method of service suited to the circumstances of the particular facts presented.

Service by publication; Rule 1-004(K)

This paragraph requires that no service by publication take place without a prior court order authorizing service by publication. This is a significant modification of prior practice in situations where statutes authorized publication without prior court approval. See, e.g., Section 42-2-7(B) NMSA 1978 (authorizing service by publication in condemnation proceeding “[i]f the name or residence of any owner be unknown”); Section 45-1-401 NMSA 1978 (authorizing service by publication in probate proceedings under some circumstances and providing that the court for good cause can provide a different manner of service). Publication notice is seldom likely to achieve actual notice and thus its use should be monitored carefully by the courts. The Supreme Court is authorized to modify statutes providing for notice by publication by requiring prior court approval for service by publication. Legislation affecting procedure is valid unless and until contradicted by a rule of procedure promulgated by the Supreme Court. Rule 1-091 NMRA; Section 38-1-2 NMSA 1978.

This paragraph also provides the required content of the notice to be published, the frequency of publication and the place of publication. Omitted from the 2004 amendment is the former provision (Rule 1-004(H)(3)) requiring that publication be “in some newspaper published in the county where the cause is pending” and providing for publication in a newspaper of general circulation in the county only when “no newspaper [was] published in the county”. Publication now always will include publication in a paper of general circulation in the county where the action is pending whether or not the newspaper is published in that county. Where appropriate to the goal of achieving actual notice, the court is free to require, in addition, that publication also be in a newspaper not of general circulation that is published in the county where the cause is pending.

Where the court determines that actual notice by publication is more likely to be achieved by publishing the notice elsewhere, the court must provide for additional published notice in the county that the court deems such notice is most likely to achieve the goal of actual notice to the defendant.

Former Rule 1-004(H)(7), dealing with the required content of repeated publications due to misnomers in the initial publication, has been omitted. The court that orders additional publication will craft an appropriate order concerning its content.

Former Rule 1-004(I) calling for publication to be accompanied by mail notice to persons whose residence is known has been omitted. The court that orders publication has the obligation to fashion means of service reasonably calculated to provide actual notice, Rule 1-004(E)(1), and thus can provide for mailed notice to accompany service of process by publication where reasonable. See Rule 1-004(J).

The publication requirements of Rule 1-004(K) embrace all proceedings in district court, including special statutory proceedings, because assuring constitutionally-acceptable notice in judicial proceedings is a core obligation of the judiciary. See State ex rel. Bliss v. Greenwood, 63 N.M. 156, 162, 315 P.2d 223, 227 (1957) (Supreme Court has an obligation to modify procedural statutes where necessary “to enable it effectively to administer its judicial functions.” Resort to publication notice is suspect and thus should be subject to judicial control: “An elementary and fundamental requirement of due process in any proceeding [that] is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 314 (1950) (citations omitted). Publication notice is especially vulnerable to constitutional attack: “It is clear that due process prohibits the use of constructive service where it is feasible to give notice to the defendant in some manner more likely to bring the action to his attention.” Clark v. LeBlanc, 92 N.M. 672, 673, 593 P.2d 1075, 1076 (1979).

Subjecting special statutory proceedings to the requirements of Rule 1-004 does not prevent the use of publication notice in special statutory proceedings in district court; it merely requires that judicial approval be obtained, upon a proper showing, prior to using publication notice. Publication may still be a valid means of providing notice to persons whose whereabouts could not with due diligence be ascertained. Mullane, 339 U.S. at 317. So too, Rule 1-004(K) gives the court ample authority to modify the manner of publication from that provided in Rule 1-004 when good cause is shown.

Proof of service; Rule 1-004(L)

The person obtaining service of process rather than the person serving process is now responsible for filing proof of service.

The means of proof of service when service is accomplished by mail or commercial courier service pursuant to Rule 1-004(F)(1)(b) and when service is made by publication pursuant to Rule 1-004(J) or (K) are provided in those paragraphs.

Service outside the state but in the United States; Rule 1-004(M)

This provision replaces former Rule 1-004(J) (Service of summons outside of state equivalent to publication). Where, as in the case of long arm jurisdiction pursuant to Section 38-1-16 NMSA 1978, service of process can be made outside of New Mexico, this rule requires that service be accomplished in the manner and priority provided in this rule. The Committee considered but rejected a proposal that the method of service need not meet the requirements of this rule so long as it met the requirements for service of process in the place where service occurred.

Service in a foreign country; Rule 1-004(N)

Service in foreign countries is sometimes subject to treaties or other international agreements. This rule, adopted from Federal Rule 4(f) and Rule 4(h)(2) takes into account the special considerations required by international law.

4-206

[For use with District Court Civil 1-004 NMRA]

STATE OF NEW MEXICO

COUNTY OF __________________________

JUDICIAL DISTRICT 

________________________, Plaintiff

v.

________________________, Defendant

SUMMONS

THE STATE OF NEW MEXICO
TO: __________________________, Defendant

ADDRESS: ________________________

You are required to serve upon ________________________ (name of plaintiff or plaintiff’s attorney) an answer or motion in response to the complaint which is attached to this summons within thirty (30) days after service of this summons upon you, exclusive of the day of service, and file a copy of your answer or motion with the court as provided in Rule 1-005 NMRA.

If you fail to file a timely answer or motion, default judgment may be entered against you for the relief demanded in the complaint.

Attorney or attorneys for plaintiff:

Address and telephone number of attorneys for plaintiff (or of plaintiff, if no attorney):

(Street or P.O. box)

(City, state and zip code)

(Telephone number)

WITNESS the Honorable _______________________, district judge of the ____________ judicial district court of the State of New Mexico, and the seal of the district court of _______ County, this ______ day of ____________, ______.

Clerk of court

By ______________________

Deputy

Dated: ____________________

RETURN

STATE OF NEW MEXICO

COUNTY OF ____________________________ ss

I, being duly sworn, on oath, state that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I served this summons in __________ county on the ______ day of ________, ______, by delivering a copy of this summons, with a copy of complaint attached, in the following manner:

(check one box and fill in appropriate blanks)

[ ] to the defendant ________________________ (used when defendant accepts a copy of summons and complaint or refuses to accept the summons and complaint)

[ ] to the defendant by [mail] [courier service] as provided by Rule 1-004 NMRA (used when service is by mail or commercial courier service).

After attempting to serve the summons and complaint on the defendant by personal service or by mail or commercial courier service, by delivering a copy of this summons, with a copy of complaint attached, in the following manner:

[ ] to ________________________, a person over fifteen (15) years of age and residing at the usual place of abode of defendant ________________________, (used when the defendant is not presently at place of abode) and by mailing by first class mail to the defendant at ________________________, (insert defendant’s last known mailing address) a copy of the summons and complaint.

[ ] to ________________________, the person apparently in charge at the actual place of business or employment of the defendant and by mailing by first class mail to the defendant at ________________________, (insert defendant’s business address) and by mailing the summons and complaint by first class mail to the defendant at ________________________, (insert defendant’s last known mailing address).

[ ] to ____________________________________, an agent authorized to receive service of process for defendant ________________________.

[ ] to ___________ (name of person), [parent] [guardian] [custodian] [conservator] [guardian ad litem] of defendant ________________________, (used when defendant is a minor or an incompetent person).

[ ] to ____________________________________, (name of person), (title of person authorized to receive service. Use this alternative when the defendant is a corporation or an association subject to a suit under a common name, a land grant board of trustees, the State of New Mexico or any political subdivision).

Fees: ___________________________

Signature of person making service

______________________________

Title (if any)

Subscribed and sworn to before me this _____ day of ________, ______.

______________________________

Judge, notary or other officer

authorized to administer oaths

Official title

USE NOTES

1. Unless otherwise ordered by the court, this return is not to be filed with the court prior to service of the summons and complaint on the defendant.

2. If service is made by the sheriff or a deputy sheriff of a New Mexico county, the signature of the sheriff or deputy sheriff need not be notarized.

4-207. Withdrawn.

4-209A

[For use with District Court Civil 1-004 NMRA]

STATE OF NEW MEXICO

COUNTY OF __________

______________ JUDICIAL DISTRICT

No. ____________

v.

______________________________, Defendant

ORDER FOR SERVICE OF PROCESS!

BY PUBLICATION IN A NEWSPAPER

[Plaintiff] [Petitioner] has filed a motion requesting that the court approve service of process upon ______ (name of person to be served) by publication in a newspaper of general circulation.

The court finds that the [plaintiff] [petitioner] has made diligent efforts to make personal service, but has not been able to complete service of process. The last known address of ______ (name of person to be served) is ______.

The court further finds that the newspaper of general circulation in this county is ______________ (name of newspaper) [and that this newspaper is most likely to give the defendant notice of the pendency of the action] [and in the county of _____________. State of _____________.], a newspaper most likely to give notice of the pendency of this proceeding to the person to be served is: ______________ (name of newspaper).
THEREFORE, IT IS HEREBY ORDERED that the petitioner serve process on ____________ by publication once a week for three consecutive weeks in the ________________ (newspaper) [and one a week for three consecutive weeks in ________________ (newspaper) in ____________ (county)]. The [plaintiff] [petitioner] shall file a proof of service with a copy of the affidavit of publication when service has been completed. Dated this ____ day of _______________, ______.

________________________________________
District Judge

USE NOTE
1. Use applicable alternative. Unless the newspaper of general circulation in the county where the action is pending is most likely to give notice of the pendency of the action to the person to be served, the notice must also be published in a newspaper of general circulation in the county where the person to be served is most likely to get notice.
Two days after the district court entered its final order in this case, our Supreme Court decided *In re Estate of Duran*, 2003-NMSC-008, 133 N.M. 553, 66 P.3d 326 (hereinafter *Duran*). In *Duran*, the Court clarified the legal requirements for a tenant in common to establish individual title to common land by adverse possession. Those requirements are stringent and robust. In this case, we have the advantage of being able to add *Duran* to the existing precedent in a way that clarifies the problem faced below. Determining that the district court’s decision in this matter did not apply the elevated evidentiary quantum required to support a legal conclusion that title to common lands in a land grant rests in Defendants by adverse possession pursuant to NMSA 1978, § 37-1-21 (1973), we reverse the district court and remand for further proceedings.

**PROCEDURAL BACKGROUND**

The Board of Trustees of the Tecolote Land Grant (the Board) sued Defendants Ignacio, Jake, and Zeke Griego (the Griegos) in an action for ejectment and trespass. The Griegos counterclaimed for quiet title and adverse possession. At trial, the Griegos abandoned their quiet title counterclaim and proceeded with their assertion of adverse possession. The district court awarded the Griegos 572.20 acres of land, which included approximately 147 acres that the Board conceded belonged to the Griegos. The Board appeals this award.

**FACTS**

The Tecolote Land Grant (the Land Grant) was granted a patent by Congress in 1858, which was filed in 1903. The patent recognized that the Land Grant was a community land grant containing common land for the use of all heirs of the original members of the Town of Tecolote. The Land Grant is governed by the Board pursuant to NMSA 1978, §§ 49-10-1 to -6 (1903, as amended through 1971). The members of the Land Grant are collectively referred to as “heirs.” The parties agree that the Griegos are heirs of the Land Grant. At trial, the parties also agreed that the land at issue in this case is located within the exterior boundaries of the Land Grant.

The Griegos claim that they acquired ownership and title to the land at issue through numerous deeds which were executed starting around 1940. They also contend that they acquired title to the 572.20 acres of land by adverse possession in that, among other activities, they built a road on the land, grazed and raised animals, fenced the land, removed natural resources, and constructed and collected money from a racetrack on the land. As noted, the Griegos do not claim to have paid taxes either before or after the adverse possession statute was amended in 1979. Instead, the Griegos claim that their adverse possession met all the requirements before 1979.

The Board argues that the Griegos did not acquire the land in question by either deeds or adverse possession. The Board maintains that the Griegos’ use of the land, except for the 147 acres upon which the Griegos built a home, was permissive and did not amount to adverse possession. The Board argues that cotenants must give actual notice to the Land Grant of their claims of exclusive rights.

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1 Section 37-1-21 was amended in 1979 to add the requirement that taxes must be paid on the claimed property for the statutory period of ten years. Otherwise, the statute remains the same as the 1973 statute. Section 37-1-21. The parties agree that, apparently because the Griegos did not pay taxes on the disputed portions of land before or after 1979, their claim of adverse possession would have to ripen and vest under the pre-1979 statute.
to the land to satisfy the requirements of adverse possession. The Board asserts that actual notice of the Griegos’ adverse possession did not occur until 1989 and 1994, when the Griegos confronted other heirs over those heirs’ use of the land at issue. After the 1994 dispute over this land, the Griegos hired surveyor D. Rodger Kretz to survey and plat the land based on various deed descriptions. Kretz determined that the land in question amounted to approximately 572 acres.

On February 6, 2003, the district court found that “Defendants and their grantors and predecessors in interest and title have for more than fifty years occupied and possessed the subject land and real estate, and their possession has at all time been open, exclusive, uninterrupted, notorious, hostile and adverse to Plaintiff.” The district court then listed the acts and conduct that should have put the Board on notice of the Griegos’ hostile occupation of the land. The district court also found that the Griegos’ “claim and ownership ripened and vested . . . before 1979,” so that they did not have to show that they paid taxes on the land in compliance with Section 37-1-21. The district court entered its judgment and decree on March 3, 2003, dismissing Plaintiff’s complaint with prejudice and granting the Griegos’ counterclaim for quiet title to the 572.20 acres. Two days later, our Supreme Court issued its opinion in Duran. As Duran clarified, claims of adverse possession asserted by cotenants require both a heightened degree of notice of a cotenant’s intent to oust the other cotenants, plus unequivocal and direct action evidencing an intent to repudiate their permissive use in favor of their sole title to land. Duran, 2003-NMSC-008, ¶¶ 18-19, 31, 36. We evaluate this case in light of that opinion.

DISCUSSION

Standard of Review and Burden of Proof

We review the district court’s conclusions of law de novo. Garcia v. Herrera, 1998-NMCA-066, ¶ 6, 125 N.M. 199, 959 P.2d 533. We defer to the district court’s factual findings. Id. The burden of proving adverse possession is on the party asserting it, and it must be proven by clear and convincing evidence. Birrong v. Coronado Bldg. Corp., 90 N.M. 670, 672, 568 P.2d 196, 198 (1977). We therefore consider whether the district court erred in concluding that the Griegos established title by adverse possession under Section 37-1-21 and the case law interpreting this statute. See Duran, 2003-NMSC-008, ¶¶ 8-9; Section 37-1-21 (governing adverse possession when cotenants in a land grant are involved).

Cotenants: A Heightened Standard of Proof

The Griegos, and all other heirs to the Land Grant, own the land as tenants in common. “Cotenants under our case law are treated as a class that need special protection.” Duran, 2003-NMSC-008, ¶ 31. Because cotenants have equal right to use of the land, we require a heightened quantum of proof to establish the elements of adverse possession. Id.

Requirements for Adverse Possession

Title by adverse possession can be lawfully acquired and established as to the communal land of a community land grant. Section 37-1-21; H. N. D. Land Co. v. Suazo, 44 N.M. 547, 555, 105 P.2d 744, 749 (1940). Adverse possession requires actual, visible, exclusive, hostile and continuous possession, under color of title, for the statutory period of ten years. Merrifield v. Buckner, 41 N.M. 442, 448, 70 P.2d 896, 899 (1937); Section 37-1-21. After 1979, Section 37-1-21 also required the payment of taxes for the statutory period. Section 37-1-21. The Griegos, however, did not meet their heightened burden of satisfying these requirements.

Hostile and Continuous Possession

The relationship of the parties and the nature of their holdings is important to determining whether the possession is continuous and hostile. “Adverse possession must be openly hostile. Divestiture of title by adverse possession rests upon the proof or presumption of notice to the true owner of the hostile character of possession.” Apodaca v. Hernandez, 61 N.M. 449, 454, 302 P.2d 177, 180 (1956). However, all the heirs to the Land Grant are considered to hold title as tenants in common, each of whom is entitled to the reasonable use, occupancy, benefit, and possession of the common property. Northcutt v. McPherson, 81 N.M. 743, 745, 473 P.2d 357, 359 (1970). Therefore, “[p]ossession originating in [co]tenancy is presumably permissive, not hostile.” Hernandez, 61 N.M. at 454, 302 P.2d at 180. Also, since permissive occupation alone cannot easily be distinguished from hostile occupation, “[w]e require one cotenant to do something which amounts to an ouster.” Duran, 2003-NMSC-008, ¶ 18 (internal quotation marks and citation omitted); Prince v. Charles Ilfeld Co., 72 N.M. 351, 359, 383 P.2d 827, 832 (1963) (stating that “[t]here must be something which amounts to an ouster, either actual notice or acts and conduct that will clearly indicate that the original permissive use has changed to one of an adverse character”). This is so because “mere possession of the property by one cotenant is consistent with the rights of all the other cotenants.” Duran, 2003-NMSC-008, ¶ 18; see Apodaca, 91 N.M. at 596, 577 P.2d at 1242 (stating that “[t]enants in common are each entitled to the reasonable use, occupancy, benefit and possession of the common property[,]” and paying taxes and erecting a fence are not sufficient notice of adverse possession). “Permissive occupation of a family estate by one of the family is so usual that acts of occupation thereof, while adequate to show hostile occupation as to strangers, are not sufficient as between near relatives.” Velasquez v. Mascarenas, 71 N.M. 133, 143, 376 P.2d 311, 318 (1962). Mere possession by the Griegos is not enough for hostile possession between cotenants. Hernandez, 61 N.M. at 454, 302 P.2d at 180.

Other uses of the land the Griegos engaged in through the years were likewise not such as would defeat the presumption that the

2 Duran was actually decided under NMSA 1978, § 37-1-22 (1973), which is the general adverse possession statute. Section 37-1-21 applies specifically to lands that were part of Spanish or Mexican land grants. Stacy v. Simpson, 91 N.M. 350, 353, 573 P.2d 1205, 1208 (1978). However, to satisfy adverse possession under Section 37-1-21, one must also satisfy the adverse possession requirements of Section 37-1-22. Apodaca v. Tome Land & Improvement Co. (NSL), 91 N.M. 591, 596, 577 P.2d 1237, 1242 (1978). Thus, we will use case law interpreting Section 37-1-22.
Griegos’ use was permissive. Selling gravel and renting land may have wrongly deprived the other cotenants of their share of profits on the common lands, but without an unequivocal ouster of the Land Grant’s cotenancy, these acts do not establish adverse possession by the Griegos. Fencing off or paying taxes on the land is not enough for an ouster. Apodaca, 91 N.M. at 596, 577 P.2d at 1242. The same is true with regard to the racetrack built in the 1960’s. An actual ouster did not occur until 1989 when the Griegos refused to allow an heir to remove some resources from the common lands. The Griegos do not contend that their adverse possession started in 1989, or at any point after the new 1979 tax requirement. Until that point, the Griegos, like all heirs, were owners of common lands and as such were entitled to use the common areas for activities such as grazing, planting, herding, and removal of resources. Again, “[a] cotenant must give clear notice of his or her adverse possession claim.” Duran, 2003-NMSC-008, ¶ 17. “There must be express denial of the title and right to possession of the fellow tenant, brought home to the latter openly and unequivocally.” Torrez v. Brady, 37 N.M. 105, 111, 19 P.2d 183, 186 (1932). These occasional pursuits before 1989 did not amount to hostile possession of the land, but merely permissive use that did not and could not amount to the ouster required by Duran.

{12} We require a heightened form of notice for adverse possession between cotenants. “Since tenants in common are each entitled to the reasonable use, occupancy, benefit and possession of the common property, then nothing short of clear notice to the co-tenants apprising them of the adverse claim will be sufficient to cause the statutory ten-year period to begin to run.” Apodaca, 91 N.M. at 597, 577 P.2d at 1243. We hold that title by adverse possession requires nothing short of unequivocal conduct by a claimant to commonly held land. Such a claimant must give specific notice to cotenants of an intent to claim exclusive ownership of part of the common estate. Clear notice can include both use of the land and the express exclusion of other interests, but also requires explicit notice of an intent to oust the cotenant, particularly when the cotenant is a land grant.

Color of Title

{13} Having held that the Griegos did not satisfy the ouster requirement for adverse possession by cotenants, we need not address whether the Griegos possessed color of title under Section 37-1-21.

CONCLUSION

{14} The heightened standard applied to cotenants to prove adverse possession was not met in this case. See Duran, 2003-NMSC-008, ¶¶ 31-33. Based on the evidence presented below, we hold that the Griegos’ occupation of the land, excluding the approximately 147 acres upon which they built a house, was permissive before 1989, and that the Griegos failed to show that their possession was hostile by clear and convincing evidence. The requirements of Section 37-1-21 were not met in that the Griegos did not unequivocally and expressly inform the Board of their hostile intent until 1989. We hold that the district court erred in deciding that the Griegos acquired title to the land through adverse possession. We therefore reverse and remand for proceedings consistent with this opinion.

{15} IT IS SO ORDERED.
RODERICK T. KENNEDY,
Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
CYNTHIA A. FRY, Judge
OPINION

MICHAEL E. VIGIL, JUDGE

{1} Appellant Stephen Klinsiek’s motion for rehearing is denied. The opinion filed in this case on August 23, 2004, is withdrawn and this opinion is substituted in its place.

{2} Father appeals from a district court order awarding child support arrears, establishing Father’s ongoing child support obligations, and awarding attorney fees to Mother. Father contends the district court erred in: (1) excluding rent Mother received from a tenant from her gross income for child support purposes; (2) denying Father any credit for travel expenses to have visitation with his children; (3) allowing Mother to claim work-related child care expenses for a full year, when she worked only during part of the year; and (4) awarding attorney fees to Mother. We hold that the district court erred in excluding all of the rental payments from Mother’s gross income and that the wrong factors were considered in refusing to allow Father any travel expense credit. We hold that the district court did not abuse its discretion in allowing Mother the work-related child care expenses, and in awarding attorney fees to Mother. However, since we reverse on two of the four issues, we remand for the district court to consider an adjustment of the amount of attorney fees.

BACKGROUND

{3} When they divorced in 1997, Mother and Father agreed on the division of their community property and liabilities, and on the custody and support of their two minor children. The district court approved their stipulations in the final decree. They were subsequently able to reach agreements that were approved by the district court when Mother wanted to move to Virginia with the children, and also when other disputes subsequently arose. Although the original child support agreement between the parties slightly deviated from the child support guidelines, subsequent agreements between the parties specifically stated child support was to be consistent with the child support guidelines. In 2001, Mother and Father were unable to agree on what Father’s past and future child support obligations were under the last agreement, and they filed cross motions for the district court to decide the dispute. At all material times, Father was enrolled as a doctoral candidate in physics at the University of New Mexico, and he was employed as a graduate research assistant. Mother was also attending college, majoring in geology and minoring in anthropology. Following a trial on the merits, the district court assessed child support arrears against Father, determined his ongoing child support obligations, and awarded Mother attorney fees. Father appeals.

DISCUSSION

A. The District Court Improperly Excluded All Rent from Mother’s Gross Income

{4} The determination of child support is within the district court’s discretion and we review it on appeal only for an abuse of discretion. Styrka v. Styka, 1999-NMCA-002, ¶ 8, 126 N.M. 515, 972 P.2d 16. However, that discretion must be exercised in accordance with the child support guidelines. Id. “[T]he trial court abuses discretion when it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law.” Aragon v. Brown, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913. To the extent that Father’s appeal requires us to determine questions of law, we review these questions de novo. Quintana v. Eddins, 2002-NMCA-008, ¶ 9, 131 N.M. 435, 38 P.3d 203.

{5} The divorce decree approved the property settlement, which divided the community assets and debts. Mother was awarded real property and a building valued at $125,000, and she was obligated to pay an interest-free loan of $70,000, secured by a mortgage on the property. The loan was made by Mother’s parents to the parties while they were married. Mother rented the building to a tenant for $700 per month for twenty-eight months for a total of $19,600. Mother testified she turned the rental payments over to her parents, who applied them to pay the cost of maintenance, insurance, taxes, and other expenses related to the upkeep of the building, and to reduce the mortgage debt. While it is unclear how the expenses of maintaining the building were managed or accounted for, Mother said her mortgage debt was reduced from $70,000 to $58,800.

{6} In calculating Mother’s gross income, the district court completely excluded the rent payments she received because all the money was used “to pay the outstanding mortgage and to defray taxes, maintenance and other expenses related to the building; and the property has not appreciated since the divorce, and prospects for any future appreciation are not good.” Father contends that the district court’s determination was based on a misinterpretation of the applicable statute. We agree.

{7} “In any action to establish or modify child support, the child support guidelines as set forth in this section shall be applied to determine the child support due and shall be a rebuttable presumption for the amount of such child support.” NMSA 1978, § 40-4-11.1(A)

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-008

MAURINA GONZALES KLINKSIEK, Petitioner-Appellee, versus
STEPHEN ALEXANDER KLINKSIEK, Respondent-Appellant.
No. 23,683 (filed Nov. 24, 2004)

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY

JAY G. HARRIS, District Judge

NANCY ANN RICHARDS
Las Vegas, New Mexico
for Appellee

EDWARD RICCO
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Albuquerque, New Mexico
for Appellant
To determine the “rebuttable presumption” of the child support due, the district court must first determine the gross income of both parents. Section 40-4-11.1(K). “Gross income” means “income from any source,” Section 40-4-11.1(C)(2), and rent is specifically included: “[F]or income from . . . rent . . . ‘gross income’ means gross receipts minus ordinary and necessary expenses required to produce such income, but ordinary and necessary expenses do not include expenses determined by the court to be inappropriate for purposes of calculating child support.” Section 40-4-11.1(C)(2)(b). Pursuant to the plain language of Section 40-4-11.1(C)(2)(b), the rent payments Mother received constitute “gross receipts” in calculating her “gross income.”

[8] We next determine whether all the rental payments Mother turned over to her parents constitute “ordinary and necessary expenses” to produce the rental income. We hold they do not. Before Mother turned over any payments to her parents, she had an equity of $55,000 in the property and building, and since this was an interest-free loan, all payments made by Mother to her parents which reduced the principal mortgage indebtedness, increased her equity in the property. In the present case, the district court appears to have determined it necessary to deviate from the guidelines by excluding the mortgage payments from “gross receipts” and justifying the deviation on the ground that the value of the property had not appreciated and was not likely to appreciate in the future. The district court erred in failing to include in “gross receipts” to Mother any payments that increased Mother’s equity in the property even if the value of the property decreased. There is no evidence showing that the mortgage payments did not increase Mother’s equity in the property. See Merrill v. Merrill, 587 N.E.2d 188, 190 (Ind. Ct. App. 1992) (stating that payment on principal of loan for business and real estate venture increases net worth of parent in child support proceeding); Zakrowski v. Zakrowski, 594 N.E.2d 821, 824 (Ind. Ct. App. 1992) (stating that in properly allocating mortgage principal and interest, payments of principal may be considered contributions to parent’s net worth, rather than ordinary and necessary business expenses under child support guidelines); Schubert v. Tolivar, 905 S.W.2d 924, 929 (Mo. Ct. App. 1995) (affirming trial court deduction for interest payments on rental property mortgage but not on principal payments, because principal payments increase asset value); Barham v. Barham, 487 S.E.2d 774, 778 (N.C. Ct. App. 1997) (reaffirming that mortgage principal payments on rental property are not “ordinary and necessary” under state child support guidelines because they constitute value which is retained).

[9] It is clear to us that the district court must reconsider whether any of the rental payments can or should be excluded from Mother’s gross income. All the rental payments to Mother are “gross receipts” to Mother. Mother is entitled to deduct from the “gross receipts” the “ordinary and necessary expenses” required to produce the rental income to determine her “gross income” from the rent. “The parent claiming a business expense must show not only that it is ordinary and necessary to the business, but also that it is irrelevant to calculating support obligations,” Jurado v. Jurado, 119 N.M. 522, 530, 892 P.2d 969, 977 (Ct. App. 1995). Such expenses include, but are not necessarily limited to, expenses for repairs, property management and leasing fees, real estate taxes, and insurance. See Barham, 487 S.E.2d at 778. However, the district court never ruled on what expenses, if any, Mother is entitled to deduct. Furthermore, this record is not clear on how the expenses of maintaining the building and property were managed or accounted for. Mother will be given an opportunity on remand to introduce evidence on the “ordinary and necessary” expenses she asserts should be deducted from her “gross receipts,” consistent with Section 40-4-11.1(C)(2)(b). See Jurado, 119 N.M. at 530, 892 P.2d at 977 (remanding for a determination, pursuant to Section 40-4-11.1(C)(2)(b), of how much of the business’s income was required to be reinvested as an ordinary and necessary expense which would be excluded from the father’s gross income for child support purposes where the father was under-compensated from that business income); Roberts v. Wright, 117 N.M. 294, 297-98, 871 P.2d 390, 393-94 (Ct. App. 1994) (holding that the expense of purchasing inventory could be deducted from gross income for child support purposes as an ordinary and necessary expense under Section 40-4-11.1(C)(2)(b) where the purchase was “reasonably necessary to sustain the one contract that made [the] business successful”).

[10] Application of Section 40-4-11.1(C)(2)(b) establishes a rebuttable presumption of Mother’s gross income from the rent to determine child support. Section 40-4-11.1(A). However, other factors may have a bearing on the amount of child support. See Henderson v. Lekvold, 99 N.M. 269, 271, 657 P.2d 125, 127 (1983). Mother argues that Jurado, Roberts, and Major v. Major, 1998-NMCA-001, 124 N.M. 436, 952 P.2d 37, involved businesses and parents who were “self-employed,” whereas her rental property in this case cannot be considered as a business in the same sense. She further argues that the principal question in determining child support is the actual cash flow or money reasonably available to apply towards support of the children, see id. ¶ 12, and that a mechanical application of the statute ignores the reality of her economic situation. The child support guidelines allow Mother to make a proper showing that there should be a deviation from the presumptive amount of her gross income. NMSA 1978, § 40-4-11.2 (1989) states:

Any deviation from the child support guideline amounts set forth in Section 40-4-11.1 NMSA 1978 shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate. Circumstances creating a substantial hardship in the obligor, obligee or subject children may justify a deviation upward or downward from the amount that would otherwise be payable under the guidelines.

[11] Mother will also be allowed to establish, if she can, that deviation from the guidelines is appropriate under Section 40-4-11.2, and the district court, if warranted by the evidence, has discretion to make such a finding. See generally Jurado, 119 N.M. at 529-30, 892 P.2d at 976-77; see also § 40-4-11.1(A) (“Every decree or judgment of child support that deviates from the guideline amount shall contain a statement of the reasons for the deviation.”).

[12] The order of the district court is reversed and the case remanded for a re-determination of Mother’s gross income and any recalculation of child support that may be required upon the redetermination of gross income.

B. The District Court May Consider Father’s Visitation-Related Travel Expenses When Computing Father’s Child Support Obligations

[13] We review the district court’s denial of Father’s travel-related expenses to exercise visitation with his children for an abuse of discretion. See Styka, 1999-NMCA-002, ¶ 8 (“The setting of child support is . . . reviewed on appeal only for an abuse of discretion.”). “An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances of the case.” Bustos...
v. Bustos, 2000-NMCA-040, ¶ 24, 128 N.M. 842, 999 P.2d 1074. {14} Since his children no longer reside in New Mexico, Father asked for a credit of $2000 against his child support arrears for visitation-related travel expenses and for an allowance of $102 per month against future child support payments to cover the cost of travel for visitation. See § 40-4-11.1(I)(3) (stating child support may include payment of “transportation and communication expenses necessary for long distance visitation or time sharing”). Mother agreed with Father. Specifically, she requested that Father get a travel credit of $39 per month for the year 2000, and for the year 2001, she requested that Father get a $102 credit per month for travel expenses. She also asked the district court to conclude that “Father is entitled to a reasonable credit against child support arrears for actual travel expenses,” and that the district court “grant Father a $2000 credit against child support arrears from July, 1997 through calendar year 2001.” On appeal, Mother “acknowledges that Father should be given credit for actual travel costs with respect to arrears and future travel expenses.”

{15} Related to this travel expense issue is a parenting plan approved by the court which provided that the parents would not unilaterally make a major change affecting the children in the areas of education or major recreational activities. Mother enrolled the children in recreational activities and music lessons in Virginia and asked that Father help pay for these expenses in addition to the basic child support. Father argued that since he did not consent to the recreational activities and music lessons as required by the parenting plan, he should not have to help pay for them. Mother replied that the children’s activities in Virginia were not new activities but ones in which the children had engaged before the divorce and therefore he should have to contribute to their cost beyond the basic support. The district court agreed with Father and found that the “activities for which [M]other is seeking reimbursement were not discussed with [F]ather and were not agreed upon by [F]ather.” However, it then ruled that Mother had paid the costs that benefitted the children then, and now for the rest of their lives, and [F]ather is unwilling to pay a share of those costs, so [F]ather will provide a benefit to the children in another way by paying his own transportation costs for child visitation in the past and in the future.

{16} The district court order combines several related concepts: the role of recreational expenses and music lessons in computing child support, whether travel expenses can be awarded to reduce child support, and the role of the parties’ agreement. We address each.

{17} Recreational expenses are included within the basic child support provided by the child support guidelines. In Rosen v. Lantis, 1997-NMCA-033, ¶ 10, 123 N.M. 231, 938 P.2d 729, we agreed that there is no statutory authority to add “sports” as an additional expense to be shared beyond basic child support. “The [child support] statute lists only a few expenses that can justify exceeding basic child support. Recreational activities is not one of the listed categories.” Id. We added, “[t]he child support awarded under the guidelines should be adequate to feed and shelter the children, and to provide for recreational activities.” Id. ¶ 11. The district court’s judgment does not indicate whether the child support arrears include the costs of recreational activities above the basic support.

{18} Educational expenses are likewise provided for within basic child support because Section 40-4-11.1(I)(2) provides that the payment of “extraordinary educational expenses” that are “not covered by the basic child support obligation” may be added to the child support. However, the district court did not make a finding on whether the music lessons are recreational expenses, educational expenses, or extraordinary educational expenses. We have no authority to supply missing findings not made by the district court. Rosen, 1997-NMCA-033, ¶ 12. How these expenses are characterized has an impact on how the district court exercises its discretion in its overall evaluation of what child support is appropriate. We must therefore remand the case for a determination of these issues.

{19} The statute relating to travel expenses is not clear. Section 40-4-11.1(I)(3) states that child support may also include “transportation and communication expenses necessary for long distance visitation or time sharing.” Father seeks an expense deduction or credit, not “payment” of child support in connection with his travel for visitation with his children. We assume that this provision was intended to include such expenses in considering how much child support is payable, permitting the court to reduce the child support obligation by an amount required for the travel of a parent to visit a child. We also assume that such a determination, like all other determinations relating to child support, is committed to the district court’s discretion. See Styka, 1999-NMCA-002, ¶ 8. Again, the court made no finding on this question consistent with Section 40-4-11.1(I)(3), so a remand is necessary.

{20} Finally, the parties have agreed that Father should be entitled to a credit of $2000 against the child support arrears for visitation-related travel expenses and an allowance of $102 per month in the future for such expenses. Parties can agree to a waiver of child support arrears. See Williams v. Williams, 109 N.M. 92, 99, 781 P.2d 1170, 1177 (Ct. App. 1989) (stating that an agreement to waive child support arrears already accrued constitutes a valid waiver to collect these arrears as long as the agreement is supported by sufficient consideration and does not infringe on the rights of others, as well as from intentional conduct or acts inconsistent with claiming the legal right). The fact that the parties have agreed to offset the arrears will not dictate to the district court how it must exercise its discretion. See Ottino v. Ottino, 2001-NMCA-012, ¶ 25, 130 N.M. 168, 21 P.3d 37 (stating that an agreement cannot be used to control the discretion of the court and deny the right of the court to exercise its statutory powers). We reiterate the overarching principle where child support is involved: “The paramount concern is the welfare of the child.” Spingola v. Spingola, 91 N.M. 737, 743, 580 P.2d 958, 964 (1978). Of course, any “adequate standard of support for children [is] subject to the ability of parents to pay.” Section 40-4-11.1(B)(1).

{21} We remand to the district court to reconsider and enter findings in regard to Father’s obligation for arrearages and future child support in accordance with this opinion’s discussion of recreational, educational, and travel expenses and the parties’ agreements regarding those expenses.

C. The District Court Did Not Err in Allowing Mother to Claim Work-Related Child Care Expenses for a Full Year When Mother Was Actually Employed During Only a Few Months of the Year, But Was Attending College

{22} We determine whether the law was correctly applied to the facts by the district court in making the award of work-related child care expenses, and we view the facts in a manner most favorable to Mother, the prevailing party, on this issue. See Alverson v. Harris, 1997-NMCA-024, ¶ 6, 123 N.M. 153, 935 P.2d 1165.
{23} Mother claimed work-related child care expenses for each year after the divorce except 1999, when she did not work at all. In 1997, 1998, and 2000, Mother worked for three or four months per year. She incurred child care expenses for all twelve months of these years. Mother averaged her child care expenses each year and used the average monthly child care amount on her child support worksheets as the basis for her claimed child care expenses. She divided her annual child care expenses in half before averaging them, on the theory that she was working only part-time while also taking courses toward her college degree. For example, in 2000, Mother incurred child care costs of $4350; she averaged half of that amount over a twelve-month period and claimed $181 per month in child care expenses for that year. The district court adopted Mother’s approach.

{24} Father concedes that if Mother is entitled to claim child care expenses incurred while attending college in good faith pursuit of a reasonable and attainable goal of future employment at a significantly higher wage than she reasonably could be expected to earn without such education, then the district court’s approach “achieves a rough justice.” In fact, Mother may well have been entitled to all of the child care expenses by attending college under these circumstances. Id. ¶ 22. However, Father argues that Mother did not make the Alverson showing of a reasonable and attainable goal of higher wages by going to college, because when asked about the expected date of her graduation, she responded, “I can’t promise things for sure.” However, she only had fifteen hours remaining in her program of study at the time of the trial. Further, Father argues, when she was asked what she was planning to do after obtaining her degree, Mother only replied she was majoring in geology and minoring in anthropology.

{25} We reject Father’s argument. The district court made a specific finding that Mother “had to go to school in order to get an education that would allow her to earn a living that would be sufficient to support herself and her children.” As in Alverson, a finding that Mother’s college education will increase her earning capacity can properly be implied from the district court’s finding. Id. ¶ 21. Furthermore, there is nothing in this record to show Mother is not attending college in good faith to obtain future employment at a higher wage than she could obtain without the education. The public policy of New Mexico is to encourage parents to increase their earning capacity by obtaining additional education, thereby leading to an increase in the total support their children receive. Id. ¶ 13.

{26} Mother now argues on appeal that she could have claimed an allowance for all of her child care costs. See § 40-4-11.1(H); Alverson, 1997-NMCA-024, ¶ 22. She also now argues, without citing authority, that because one of the children was under six years of age, she could have insisted on staying home to care for her instead of going to school and working. Therefore, she asserts, she could have asked for all of her child care expenses, and she is entitled to at least the one-half of child care expenses she was awarded. We decline to address these arguments. See State ex rel. State Highway Dept v. Yurcic, 85 N.M. 220, 224, 511 P.2d 546, 550 (1973) (stating issue waived where no cross appeal); City of Sunland Park v. Macias, 2003-NMCA-098, ¶ 20, 134 N.M. 216, 75 P.3d 816 (stating appellate court will not consider propositions in briefs that are unsupported by citation to authority).

{27} For the reasons stated above, we affirm the district court’s order on child care expenses.

D. The Award of Attorney Fees

{28} The district court awarded Mother $2100, plus gross receipts tax for attorney fees, citing the economic disparity between Mother and Father, and Father’s failure to pay child support, which required Mother to file a motion for child support arrears. Father contends the award was improper. We review the district court decision for an abuse of discretion. See Weddington v. Weddington, 2004-NMCA-034, ¶ 25, 135 N.M. 198, 86 P.3d 623.

{29} Father acknowledges the financial disparity between the parties, and he also acknowledges that he stopped paying child support for a period of time under the advice of his attorney. These are proper considerations for a district court to consider when exercising its discretion to award attorney fees. Id. ¶ 27. However, another consideration which is applicable is Mother’s degree of success. Id.; see also Rule 1-127 NMRA 2004 (enumerating factors that may be considered in awarding attorney fees in domestic relations cases, including disparity of parties’ resources, prior settlement offers, total amount of fees and costs expended by each party, and success on the merits). We have partially affirmed and partially reversed the district court order. Under these circumstances, while we affirm the award of attorney fees, we hold that it is appropriate for the district court to reconsider the amount of the attorney fees. See Rabie v. Ogaki, 116 N.M. 143, 149, 860 P.2d 785, 791 (Ct. App. 1993) (stating district court should ordinarily reconsider award of attorney fees when judgment is reversed and matter is remanded).

CONCLUSION

{30} The order of the district court is affirmed in part and reversed in part, and the case is remanded for further proceedings in accordance with our opinion.

{31} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

IRA ROBINSON, Judge
OPINION
A. JOSEPH ALARID, JUDGE

{1} This is an appeal from the district court’s dismissal with prejudice of a complaint to set aside a tax deed. We find no error and affirm the orders granting summary judgments to Defendants.

BACKGROUND

{2} Plaintiff-Appellant, Vivian Cordova (Cordova), and his wife Diana, purchased as joint tenants five acres of land located just west of the intersection of Central Avenue and 98th Street in Albuquerque, New Mexico (the Property). The Cordovas divorced in 1991. They continued to hold the Property as joint tenants.

{3} At all material times, Cordova received his mail at a residence on La Cabra Drive in Southeast Albuquerque owned by one of Cordova’s brothers. Cordova considered the La Cabra Drive residence his home. Cordova and his brother, Arturo, were the only persons living at the La Cabra Drive residence. In late September 1995, the Property Tax Division of the New Mexico Taxation and Revenue Department (the PTD) sent to the La Cabra Drive address a “Notice of Sale of Real Property” stating that taxes on the Property for 1991 and subsequent years were delinquent and that the Property would be sold at a public auction on October 24, 1995, unless the Cordovas paid or entered into an installment agreement for the payment of taxes, penalties, and interest in the amount of $7,819.03. Thereafter, Cordova met with Art Kavanaugh, a senior tax researcher with the Bernalillo County Treasurer’s Office (the BCTO). Cordova and Kavanaugh reached an agreement pursuant to which Cordova would make an initial payment of $3,922.02 by October 20, 1995. Cordova further agreed to pay the remaining balance together with the 1995 taxes by May 10, 1996. In return, the PTD would withhold the Property from auction. This agreement is documented in an October 20, 1995, letter from the BCTO to Cordova. On October 20, 1995, Cordova’s brother tendered a cashier’s check for $3,922.02 payable to the Bernalillo County Treasurer. There is no evidence that Cordova or anyone acting on his behalf made a second payment as contemplated by Cordova’s agreement with Kavanaugh.

{4} In June 1997, the Bernalillo County Treasurer sent a bill for property taxes to Cordova at the La Cabra Drive address. The bill stated that:

The 1994 property taxes for this property became delinquent Dec 10, 1994 for the first half and May 10, 1995 for the second half. They now have been delinquent for more than two years. If payment is not made directly to the County Treasurer by June 30, 1997, the property will be transferred to New Mexico Property Tax Division for collection. The State will then offer this property at public sale in 1998.

After July 1, 1997 you must pay all delinquent taxes to prevent tax sale action. All taxes due are listed below. The Treasurer’s Office will only accept cash, cashier’s check or money order as payment of 1994 taxes. Personal checks will not be accepted.

The bill showed taxes, penalties, and interest in the following amounts: $1,016.17 owed for 1993; $935.54 owed for 1994; $836.50 owed for 1995; and $763.33 owed for 1996, for a total liability of $3,551.54. Cordova concedes that he received the June 1997 bill.
In early August 1997, Cordova met with Kavanaugh and two representatives from the PTD. Kavanaugh recalled that Cordova was told that the taxes had to be paid by September 30, 1997, to avoid a tax sale. In contrast, Cordova recalled that Kavanaugh or one of the PTD representatives wrote on a tax notice that the taxes had to be paid by October 1, 1997, to prevent the Property from “going to the state,” and that nothing was said about an impending tax sale. Cordova claimed that he subsequently lost the notice with the handwritten notations when a friend cleaned out his vehicle as a favor.

On August 29, 1997, the PTD sent by certified mail, return receipt requested, a “Notice of Sale of Real Property” to Cordova and Diana at their separate addresses. The notices stated that the Property would be sold on September 30, 1997, at a public auction unless $3,670.97, representing taxes, penalties, and interest for 1993 and subsequent years was paid to the Bernalillo County Treasurer.

Cordova received her notice, which had been mailed to her mother’s address and forwarded to her. Diana decided to take no action and to allow the tax sale to proceed. She did not discuss the notice with Cordova.

Cordova conceded that his copy of the August 29, 1997, notice was mailed to him at his correct address. There was undisputed evidence that the post office made two, possibly three, attempts to deliver the letter to the La Cabra Drive address. At some point prior to the tax sale, the envelope containing Cordova’s copy of the August 29, 1997, notice was returned to the PTD as unclaimed with the unsigned return receipt still attached. At his deposition, Cordova admitted that either he or his brother would have picked up any mail delivered to the La Cabra Drive address during August and September 1997. Cordova was certain that if his brother had picked up a notice of certified mail, he would have told Cordova.

Cordova recalled that he sent one of his brothers to the BCTO on September 29 and 30, 1997, with a check for the full amount due, and that on both occasions Cordova’s brother could not find Kavanaugh, and left. Cordova himself stopped by the BCTO on October 1, 1997, with the check, but was told it was too late: the Property had been sold the previous day.

On October 23, 1997, Cordova filed a Complaint to Set Aside Tax Deed, naming the PTD and the BCTO as defendants. In his complaint, Cordova acknowledged that he had actual knowledge that property taxes on the Property were delinquent. Cordova asserted that he had been misled by the June 1997 notice stating that the Property would be offered for sale in 1998 and by alleged assurances during the August 1997 meeting that Cordova had until October 1, 1997, to pay delinquent taxes. Cordova further alleged that the PTD had not provided him with proper notice in violation of NMSA 1978, § 7-38-66 (1990) (amended 2001) and the United States and New Mexico constitutions. Cordova claimed that he had been deprived of property having a fair market value of $800,000. Cordova prayed that the tax deed be set aside; that Defendants be required to accept payment of delinquent property taxes; and, for such further relief as the court might deem proper.

In January 1998, Cordova filed an amended complaint joining W & P Real Estate, Inc. (W & P), the entity to which Floyd Wilson had transferred the Property following Wilson’s purchase of the Property at the September 30, 1997, tax sale. In his amended complaint, Cordova prayed that the tax deed be set aside; that W & P be reimbursed by the State; that the PTD and the BCTO be ordered to accept Cordova’s tender of payment for property tax delinquencies; and, for such further relief as the court might deem just and proper.

In a series of summary judgments, the district court dismissed the complaint as to W & P, the BCTO, and the PTD.

**DISCUSSION**

1. **Summary Judgment as to W & P Real Estate**

W & P was the first Defendant to file a motion for summary judgment. In its memorandum in support of its motion, W & P asserted that there were no genuine issues of material fact as to any ground for setting aside a tax deed. In his response, Cordova argued that there were genuine issues of material fact as to two grounds for invalidating the sale of the Property: prior payment and lack of notice. The district court rejected Cordova’s arguments and granted summary judgment in favor of W & P.

### a. Prior Payment

An appeal from a district court’s order determining that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law, Rule 1-056(C) NMRA, presents a question of law, subject to de novo review. *Bartlett v. Mirabal*, 2000-NMCA-036, ¶ 4, 128 N.M. 830, 999 P.2d 1062.

At the time of the tax sale, Section 7-38-66(E) (1990) provided that “[p]roof by the taxpayer that all delinquent taxes, penalties, interest and costs had been paid prior to the date of sale shall prevent or invalidate the sale.” In support of his claim of prior payment, Cordova attached an affidavit and two pages of deposition testimony. In his affidavit, Cordova stated:

2. [O]n October 20, 1995, the Bernalillo County Treasurer’s Office received a cashier’s check in the amount of $3,922.02, for payment of back taxes from 1990 thru 1995.[\textsuperscript{1}]

3. It is my understanding that the cashier’s check of October, 1995, in the amount of $3,922.02, brought my taxes current thru 1995 leaving an undue balance of $764.90, for tax year 1996.[\textsuperscript{1}]

Cordova’s deposition testimony contained similar assertions that Cordova had brought his taxes current by making a $3,922.02 payment to the BCTO on October 20, 1995. Cordova also attached to his response a photocopy of a cashier’s check dated October 20, 1995,

\[1\textsuperscript{1}\] Handwritten notations on the envelope containing the notice that apparently were made by post office personnel indicate that the post office took action on August 30, September 8, and September 14, 1997. We take judicial notice of the fact that September 14, 1997 fell on a Sunday.

\[2\textsuperscript{2}\] We apply the property tax law in effect at the time of the tax sale. *Hoffman v. N.M. Taxation & Revenue Dep’t*, 117 N.M. 263, 264, 871 P.2d 27, 28 (Ct. App. 1994).
in the amount of $3,922.02 payable to the Bernalillo County Treasurer; a copy of the September 1995 tax bill advising the Cordovas that they owed $7,819.03 in back taxes, penalties, and interest; and a copy of the October 20, 1995, letter from the BCTO to Cordova documenting Cordova’s agreement to make an initial payment of $3,922.02 by October 20, 1995, and to pay the remaining taxes, including 1995 taxes, by May 10, 1996.

{16} We agree with W & P that Cordova’s unilateral understanding that the initial payment of $3,922.02 brought his taxes current through 1995 is inconsistent with the agreement documented in the October 20, 1995, letter, which required Cordova to make a second payment by May 10, 1996. As W & P correctly observed in its reply in support of its motion for summary judgment, the initial payment of $3,922.02 corresponds to $7,819.03 (the amount of accrued taxes, penalties, and interest) plus $25.00 (the amount of an additional monthly penalty for late payment) divided by two. There is no evidence of the second payment contemplated by the installment agreement documented in the October 20, 1995, letter, from the BCTO. In the face of documentary evidence establishing that the $3,922.02 payment corresponded to payment of one-half of his delinquent taxes, penalties, and interest, Cordova’s self-serving testimony as to his subjective belief that he had paid his taxes for 1994 and 1995 was insufficient to create a genuine issue of material fact as to prior payment.

b. Notice

{17} Whether the PTD provided Cordova with adequate notice is a question of law, which we review de novo. See Patrick v. Rice, 112 N.M. 285, 290, 814 P.2d 463, 468 (Ct. App. 1991) (observing that after evidentiary hearing on adequacy of notice of tax sale, appellate court defers to district court’s findings that are supported by substantial evidence, but independently reviews the legal effect of the facts so established). Because the question of notice was resolved by summary judgment, rather than by an evidentiary hearing, we review the record under the standards summarized in Bartlett, 2000-NMCA-036, ¶¶ 4, 7, to determine whether the district court correctly determined that there were no genuine issues of material fact precluding summary judgment.

c. Statutory Notice

{18} The Property Tax Code required the PTD to send Cordova notice of the tax sale “by certified mail, return receipt requested, to the address as shown on the most recent property tax schedule.” Subsection 7-38-66(A) (1990). The Property Tax Code further provided that:

Failure of the department to mail a required notice by certified mail, return receipt requested, shall invalidate the sale: provided, however, that return to the department of the notice of the return receipt shall be deemed adequate notice and shall not invalidate the sale.

Subsection 7-38-66(D) (1990). Subsection 7-38-66(D) as amended in 1990 is a substantial simplification of this subsection as originally enacted in 1973; and, we believe, was intended to legislatively overrule the Supreme Court’s decision in State ex rel. Klineline v. Blackhurst, 106 N.M. 732, 749 P.2d 1111 (1988).

{19} In Klineline, the PTD had sent a notice by certified mail to the taxpayers’ residence, which was the address shown on the most recent tax schedule. Id. at 734, 749 P.2d at 1113. The envelope containing the notice, stamped “unclaimed,” and the unsigned return receipt form were returned to the PTD by the post office. Id. After the property was sold at a tax sale, the taxpayers resisted efforts to eject them from their residence, challenging the validity of the sale on the ground of inadequate notice.

{20} The pre-1990 version of the Property Tax Code in effect at the time provided that:

Failure of the division to mail the notice by certified mail, return receipt requested, or failure of the division to receive the return receipt shall invalidate the sale; provided, however, that the receipt by the division of a return receipt indicating that the taxpayer does not reside at the address shown on the most recent property tax schedule shall be deemed adequate notice and shall not invalidate the sale.

Id. at 735, 749 P.2d at 1114 (quoting NMSA 1978, § 7-38-66(C) (1973)). The Supreme Court held that the PTD’s receipt of the return receipt form without a signature showing that it had been accepted by or on behalf of the taxpayers amounted to a “failure of the division to receive the return receipt,” id. at 736, 749 P.2d at 1115, and that a return receipt form stamped unclaimed by the post office was not equivalent to “a return receipt indicating that the taxpayer does not reside at the address shown,” id. at 737, 749 P.2d at 1115. The Supreme Court held that the PTD had not substantially complied with the notice requirement of Section 7-38-66(C), currently Section 7-38-66(D), and that the tax sale was therefore invalid. The 1990 amendment eliminated the specific language relied upon by the Supreme Court in invalidating the sale in Klineline. As we read Section 7-38-66 as amended in 1990, the PTD’s receipt of the notice of return receipt “shall be deemed adequate notice” as long as the notice of the tax sale was mailed in compliance with Subsection 7-38-66(A). The fact that the notice of receipt form was not signed by or on behalf of the taxpayer or that the notice of the tax sale was returned marked unclaimed rather than indicating that the taxpayers no longer reside at the address of record is no longer dispositive of the adequacy of statutory notice.

{21} There is no dispute that the PTD mailed a notice of the tax sale to Cordova at his residence, which was “the address as shown on the most recent property tax schedule.” Under the 1990 version of Section 7-38-66(E), which was in effect at the time of the tax sale, the fact that the post office returned the envelope containing this notice to the PTD stamped “unclaimed” and with an unsigned return receipt does not invalidate the subsequent tax sale. The district court correctly determined that there were no genuine issues of material fact as to the question of the PTD’s compliance with statutory notice requirements. The August 29, 1997, notice mailed to Cordova at his address of record constituted statutorily adequate notice even though it was returned marked unclaimed.

d. Due Process Notice
Apart from satisfying statutory notice requirements, notice of a tax sale must provide constitutionally adequate notice to the delinquent taxpayer. E.g., Hoffman, 117 N.M. at 268, 871 P.2d at 32. To satisfy due process, notice must be given in a manner “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Efforts at effecting notice to absent parties should “be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Id. at 315.

Some courts measure the adequacy of mailed notice by considering only those circumstances known to the sender as of the date of the initial mailing. E.g., Sarvit v. DEA, 987 F.2d 10, 14 (1st Cir. 1993) (observing that “[k]nowledge of the likely effectiveness of the notice is measured from the moment at which the notice was sent”). Under this approach, the subsequent return of mailed notice as undeliverable or unclaimed does not affect the constitutional adequacy of the notice. Id. at 14. Other courts read Mullane’s phrase “under all the circumstances,” to extend to circumstances occurring after the original mailing. Under this approach, the return of mailed notice as undeliverable or unclaimed is a factor in deciding whether the sender utilized a method of notice “reasonably calculated, under all the circumstances, to apprise interested parties,” 339 U.S. at 314. E.g., Small v. United States, 136 F.3d 1334 (D.C. Cir. 1998); Jones v. Grieg, 829 A.2d 195, 199-200 (D.C. 2003) (characterizing return of notice as unclaimed as a “red flag”). To our knowledge, the United States Supreme Court has not decided a case that turned upon the application of Mullane to mailed notice which has been returned to the sender.

We consider it significant that Mullane’s endorsement of service by mail occurred in a context where there were numerous parties who were similarly-situated. The Supreme Court emphasized that:

"[t]he individual interest does not stand alone but is identical with that of a class. The rights of each . . . are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested . . . is likely to safeguard the interests of all . . . . We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.

339 U.S. at 319. Where, as here, the class of persons whose interests will be affected consists of one or two individuals, Mullane’s rationale that “notice reasonably certain to reach most of those [likely to be affected] is likely to safeguard the interests of all,” is not at all compelling. Id. While it may have been possible in Mullane to judge the adequacy of notice to a class of similarly-situated parties as of the date of the mailing, we do not think that it is possible in every case to determine the adequacy of notice by mail without regard to subsequent events such as the return of the notice as unclaimed or undeliverable. Thus, we reject a per se rule that examines the adequacy of notice solely by reference to the information available to the sender as of the date of mailing. Instead,

[w]e believe the correct approach is a fact-specific analysis under the due process standard set forth by the Supreme Court in Mullane, which requires us to consider all the circumstances of each case to determine whether the notice provided is reasonably calculated to apprise the [affected party] of the impending proceeding.

Garcia v. Meza, 235 F.3d 287, 291 (7th Cir. 2000).

We also reject W & P’s argument that we should apply a per se rule that notice to one joint tenant, constitutes constitutionally adequate notice to other joint tenants. Under the Property Tax Code, property taxes are personal obligations of the persons owning the property and a personal judgment may be rendered against the owners for delinquent taxes. NMSA 1978, § 7-38-47 (1973). However, “[a] sale properly made under the authority of and in accordance with the requirements of [the Property Tax Code] constitutes full payment of all delinquent taxes, penalties and interest that are a lien against the property at the time of the sale.” NMSA 1978, § 7-38-67(E) (1999) (amended 2001). It is clearly foreseeable that by the time property is turned over to the PTD for sale, joint tenants may have divergent interests: one tenant may be satisfied to have the property sold, thereby discharging any past tax liability and foreclosing future liability, while another tenant may wish to pay the taxes and retain the property. The fact that two or more taxpayers are co-tenants is merely one circumstance that may be considered in determining whether notice was constitutionally adequate; however, it is not of itself dispositive of the constitutional adequacy of notice.

In the district court, W & P moved for summary judgment arguing in the alternative that (1) Cordova had actual knowledge of the September 30, 1997, sale, or (2) the PTD had provided constitutionally adequate notice when it mailed the notice to Cordova’s correct address. In its Answer Brief in this Court, W & P has not addressed Cordova’s argument that a genuine issue of material fact existed as to Cordova’s lack of actual notice. We therefore deem W & P to have abandoned the argument that the summary judgment can be sustained on the ground that there was no genuine issue of material fact as to Cordova’s receipt of actual notice. We therefore focus on whether W & P was entitled to summary judgment on the question of constitutionally adequate notice.

W & P included the following paragraphs in its statement of undisputed material facts:

7. The Notice of Tax Sale which was sent to Plaintiff Vivian Cordova, was mailed, by certified mail, return receipt requested to Vivian Cordova, at 1500 La Cabra S.E., Albuquerque, New Mexico 87123.[.]

8. As of August-September, 1997, the Plaintiff, Vivian Cordova resided at 1500 La Cabra S.E., Albuquerque, New Mexico

3 The United States Postal Service has written guidelines governing non-delivery of mail. See generally USPS, Domestic Mail Manual ¶ F010 (Issue 58, updated 10-14-04). The Domestic Mail Manual can be accessed online at http://www.usps.com/publications/manuals/welcom.htm. By way of example, mail is endorsed “Unclaimed” when the addressee has abandoned or failed to call for mail, while mail is endorsed “Attempted—Not Known” when delivery has been attempted, but the addressee is not known at the place of address.
Cordova failed to demonstrate a genuine issue of material fact as to the constitutional adequacy of the notice provided by the PTD.

son is charged with knowledge of the facts reasonable inquiry would have revealed”) (internal quotation marks and citation omitted).

representatives of the PTD. Cordova claims that he was specifi-

into inaction by the reference to a sale “in 1998,” which he understood as a representation that the Property would not be sold prior to September 30, 1997, thereby implicating “notice requirements embodied in the Federal and State Constitutional due process require-

Mullane, the relevant inquiry is not whether Cordova actually received the notice, but rather, whether the PTD employed a method of service reasonably calculated to result in Cordova’s actual receipt of the notice. See Dusenbery v. United States, 534 U.S. 161, 170 (2002) (discussing Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983)).

We recognize that the fact that the notice was returned to the PTD marked unclaimed rebuts any presumption of actual receipt arising from the fact of mailing. See Wells Fargo Bank v. Carter (In re Carter), 511 F.2d 1203, 1204 (9th Cir. 1975). However, under Mullane, the relevant inquiry is not whether Cordova actually received the notice, but rather, whether the PTD employed a method of service reasonably calculated to result in Cordova’s actual receipt of the notice. See Dusenbery v. United States, 534 U.S. 161, 170 (2002) (discussing Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983)).

In our view, just as Mullane assumes a hypothetical sender “desirous of actually informing the absentee,” 339 U.S. at 315, Mullane assumes a hypothetical recipient desirous of actually being informed. In response to W & P’s motion, Cordova never directly denied receiving from the post office one or more notices of attempted delivery of the PTD’s notice. Indeed, in his brief in this Court, Cordova relies on the tepid assertion that “Plaintiff failed to accept delivery of the certified letter, which contained the . . . Notice of Tax Sale.” The fact that Cordova “failed to accept delivery” does not call into question the reasonableness of the PTD’s attempt to serve Cordova with notice by certified mail sent to Cordova’s correct address. See Maso v. N.M. Taxation & Revenue Dep’t, 2004-NMSC-028, ¶ 13, N.M. , 96 P.3d 286 (observing that “where circumstances are such that a reasonably prudent person should make inquiries, that person is charged with knowledge of the facts reasonably inquiry would have revealed”) (internal quotation marks and citation omitted).

Cordova failed to demonstrate a genuine issue of material fact as to the constitutional adequacy of the notice provided by the PTD.

2. Summary Judgment as to the Bernalillo County Treasurer’s Office Constructive Fraud

Cordova argues that there are genuine issues of material fact as to whether he was subjected to constructive fraud by the BCTO. Cordova points to the June 1997 letter from the BCTO informing Cordova that his account would be transferred to the PTD for collection and that “[t]he State will then offer this property at public sale in 1998.” (Emphasis added). Cordova claims that he was lulled into inaction by the reference to a sale “in 1998,” which he understood as a representation that the Property would not be sold prior to 1998. Cordova claims that he was further misled by statements made to him during the August 1997 meeting with Kavanaugh and representatives of the PTD. Cordova claims that he was specifically told that he could pay his delinquent taxes on October 1, 1997, and avoid having the Property “go[] to the state.”

Prior to 1973, constructive fraud by the officer selling property was a statutory ground for attacking a tax deed. Worman v. Echo Ridge Homes Coop., 98 N.M. 237, 647 P.2d 870 (1982) (discussing NMSA 1953, § 72-8-20). In 1973, the Legislature amended the Property Tax Code, omitting fraud by tax officials from the list of statutory grounds for attacking a tax deed. 1973 N.M. Laws ch. 258, § 110(D). Constructive fraud by tax officials is no longer a ground for attacking a tax deed. NMSA 1978, § 7-38-7(D) (1982).

To the extent the complaint can be construed as seeking damages as an alternative to setting aside the tax deed, the BCTO, as a governmental entity, is immune from liability for damages absent a statutory waiver. NMSA 1978, § 41-4-4(A) (1996) (amended 2000). Constructive fraud is not one of the activities for which sovereign immunity has been waived. Valdez v. State, 2002-NMSC-028, ¶ 9, 132 N.M. 667, 54 P.3d 71; Health Plus of New Mexico, Inc. v. Harrell, 1998-NMCA-064, ¶ 17, 125 N.M. 189, 958 P.2d 1239.

Cordova argues that the BCTO’s constructive fraud contributed to his lack of actual notice that his property would be sold on September 30, 1997, thereby implicating “notice requirements embodied in the Federal and State Constitutional due process requirements.” To the extent Cordova is attempting to recast his constructive fraud claim as a state constitutional claim, it is barred by Section 41-4-4(A). See Begay v. State, 104 N.M. 483, 488, 723 P.2d 252, 257 (Ct. App. 1985) (observing that Tort Claims Act extends to claims based on violations of the New Mexico Constitution), rev’d on other grounds by Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306 (1986).

However, we agree with Cordova that the Tort Claims Act does not immunize the BCTO from a federal constitutional claim for damages based upon his right to adequate notice. See Carter v. City of Las Cruces, 1996-NMCA-047, ¶ 6, 121 N.M. 580, 915 P.2d 336.

It is undisputed that the June 1997 bill from the BCTO referred to a tax sale in 1998. Further, for purposes of summary judgment we must view the evidence most favorable to the non-movant, Cordova, and therefore for purposes of summary judgment we accept as true Cordova’s testimony that he was told by the BCTO that he could pay his delinquent taxes on October 1, 1997, and still avoid having his property “go[] to the state.” We conclude that Cordova established genuine issues of material fact as to whether these representations precluded Cordova from having actual notice of the deadline by which he was required to pay his taxes in order to prevent a tax sale.

To the extent Cordova is attempting to recast his constructive fraud claim as a due process claim, we emphasize the principle that due process is satisfied by either actual notice or notice reasonably calculated, under all the circumstances, to apprise the affected party. We have already determined that Cordova subsequently received notice from the PTD reasonably calculated to apprise Cordova of the September 30, 1997, tax sale. The PTD’s August 29, 1997, notice, which correctly advised Cordova that the property was to be sold at
a public auction on September 30, 1997, at 10:00 a.m. unless delinquent taxes, penalties, and interest were paid to the BCTO prior to the sale, provided Cordova with the notice he was due. We consider it immaterial that this subsequent constitutionally adequate notice came from the PTD rather than the BCTO.

3. Summary Judgment as to the PTD

{37} The PTD was the last Defendant to move for summary judgment. The PTD argued that under the doctrines of collateral estoppel and law of the case it was entitled to the benefit of the prior orders granting summary judgment to W & P and the BCTO. The PTD pointed out that the only allegations against the PTD related to the adequacy of the notice mailed out to Cordova by the PTD. The PTD argued that “all claims made against the [PTD] have been adjudicated in the [PTD’s] favor in the summary judgments entered in favor of the other two [D]efendants in this case.” In his response, Cordova argued that in granting the prior summary judgments in favor of W & P and the BCTO, the district court had overlooked genuine issues of material fact created by the evidence in front of the district court when it granted the prior summary judgments. Cordova attached to his response the evidentiary materials that had been before the district court when it ruled on W & P’s motion. Cordova argued that the district court had the inherent authority to revisit its earlier rulings and that the district court should reverse its orders granting summary judgment to W & P and the BCTO and deny the PTD’s motion for summary judgment. The district court rejected Cordova’s arguments and granted the PTD’s motion for summary judgment.

{38} We conclude that the district court’s order granting summary judgment in favor of the PTD should be upheld as resting on a proper application of collateral estoppel. “[A] summary judgment is a decision on the merits of the case. Thus, a Rule 56 motion will be granted on the basis of former adjudication when an earlier summary judgment has disposed of the same issues between sufficiently related parties.” 10B Charles Alan Wright et al., Federal Practice & Procedure § 2735, at 303-04 (3d ed. 1998) (footnotes omitted). New Mexico case law has endorsed non-mutual, offensive collateral estoppel. Silva v. State, 106 N.M. 472, 476, 745 P.2d 380, 384 (1987). Non-mutual, offensive collateral estoppel applies where a defendant seeks to preclude the plaintiff from relitigating an issue the plaintiff has previously litigated and lost. Id. Although the district court did not explain the basis of its ruling, we may affirm its grant of summary judgment on any ground that is supported by the record if affirmance on that ground would not be unfair to the appellant. Moffat v. Branch, 2002-NMCA-067, ¶ 13, 132 N.M. 412, 49 P.3d 673. There is no unfairness in relying on this ground since it was raised by the PTD’s motion for summary judgment. Furthermore, the record conclusively establishes that Cordova had a full and fair opportunity to litigate the issue of adequate notice in response to W & P’s motion for summary judgment.

CONCLUSION

{39} The summary judgments granted in favor of W & P, the BCTO, and the PTD are affirmed.

{40} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
RODERICK T. KENNEDY, Judge

4 In its motion for summary judgment the PTD referred the district court to various “findings” that the district court had included in its orders granting summary judgments in favor of W & P and the BCTO. These orders were prepared by counsel for W & P and the BCTO. We once again emphasize that it is not necessary, nor is it even proper, for orders granting summary judgment to include findings of fact because such findings are inconsistent with the very premise of a motion for summary judgment. Durham v. Southwest Developers Joint Venture, 2000-NMCA-010, ¶ 45, 128 N.M. 648, 996 P.2d 911. We do not mean, however, to discourage district courts from designating each material fact as to which the court has determined there is no genuine issue.
Celia Foy Castillo, Judge

{1} Defendant Christopher Armijo was convicted of armed robbery (firearm enhancement), conspiracy to commit armed robbery, aggravated assault (deadly weapon) (firearm enhancement), conspiracy to commit aggravated assault (deadly weapon), tampering with evidence, conspiracy to commit tampering with evidence, and contributing to the delinquency of a minor. Defendant raises three issues on appeal: (1) whether there was insufficient evidence to support the convictions for tampering with evidence and conspiracy to tamper with evidence; (2) whether the convictions for aggravated assault and conspiracy to commit aggravated assault violate his right to be free from double jeopardy; and (3) whether the convictions for aggravated assault and armed robbery violate his right to be free from double jeopardy. We affirm in part and reverse in part.

I. BACKGROUND

{2} On May 30, 2000, David Brown (Victim) met Defendant and Travis Zabroski (Zabroski), a minor, in an alley behind a fast-food restaurant in Albuquerque. Victim was in his pickup truck; Defendant stood up against the truck on the driver’s side, and Zabroski slid into the passenger seat. Zabroski and Defendant stole marijuana that was on the seat beside Victim, and Victim was shot in the head. Victim also testified that Defendant struck him in the head with the butt of a gun. At trial, there was disputed testimony as to the purpose of the meeting among Victim, Defendant, and Zabroski; who shot Victim; and what occurred after the shooting.

II. DISCUSSION

A. Tampering with Evidence and Conspiracy to Tamper with Evidence

{3} Defendant claims that there is insufficient evidence to support his convictions for tampering with evidence and conspiracy to tamper with evidence. We agree.

1. Standard of Review

{4} In reviewing the sufficiency of the evidence in a criminal case, we must determine whether substantial evidence, either direct or circumstantial, exists to support a verdict of guilty beyond a reasonable doubt for every essential element of the crime at issue. State v. Rojo, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. Resolving all conflicts, indulging all permissible inferences to uphold the conviction, and disregarding all evidence and inferences to the contrary, this Court reviews evidence in the light most favorable to the verdict to ensure that a rational jury could have found each element of the crime established beyond a reasonable doubt. Id. Finally, we observe that it is for the fact-finder to evaluate the weight of the evidence, to assess the credibility of the various witnesses, and to resolve any conflicts in the evidence; we will not substitute our judgment as to such matters. State v. Roybal, 115 N.M. 27, 30, 846 P.2d 333, 336 (Ct. App. 1992).

2. Analysis

{5} To convict Defendant of tampering with evidence, the State had to prove, beyond a reasonable doubt, that Defendant “hid a handgun” and “intended to prevent the apprehension, prosecution or conviction of himself and/or Travis Zabro[ ]ski.” See NMSA 1978, § 30-22-5(A) (2003). To convict Defendant of conspiring to tamper with evidence, the State had to prove, beyond a reasonable doubt, that Defendant “and another person by words or acts agreed together to commit [t]ampering with [e]vidence.” See NMSA 1978, § 30-28-2 (1979). Finally, Defendant could be convicted as an accessory to tampering with evidence if he intended the crime to be committed and if he “helped, encouraged or caused the crime [ ] to be committed.” See NMSA 1978, § 30-1-13 (1972).

{6} The State presented the testimony of Officer Bieniek, who testified, without a hearsay objection, to an earlier statement made by Zabroski during the investigation. Bieniek testified that Zabroski told him that Defendant was with Zabroski when the shooting took place, when he ran down the alley, and when he ran back to get the marijuana. Bieniek then testified that Zabroski told him that they drove around and that he dropped Defendant, along with the marijuana, at Defendant’s apartment. When asked if Zabroski indicated what happened to the weapon, Bieniek responded, “He dumped it in a portapotty[,]” where it was later found. Officer Herrera testified that she located the gun in the portapotty. At trial, Zabroski testified he took the gun apart and threw the pieces out, one by one.

{7} Review of the trial transcript reveals no evidence placing Defendant with Zabroski when he disposed of the gun and no evidence suggesting that Defendant and Zabroski ever discussed disposal of the gun. See Roybal, 115 N.M. at 33-34, 846 P.2d at 339-40 (holding that there was insufficient evidence to convict the defendant of tampering because there was no evidence of an intentional act by the defendant, such as flushing evidence down the toilet, actively concealing a gun, or throwing a bottle of drugs into a waiting car). To the
contrary, Zabroski testified at trial that Defendant was not with him when Zabroski disposed of the gun. His trial testimony regarding
the gun was not contradicted by Bieniek’s testimony as to Zabroski’s earlier statement. Finally, Defendant testified that he was not with
Zabroski when he disposed of the gun.

{8} The State argues that Defendant’s tampering convictions are supported by State’s exhibit 28. This exhibit, a taped recording
of Zabroski’s earlier statement to Bieniek, was played to the jury at trial. In the taped statement, Zabroski states that Defendant was driv-
ing the car when Zabroski threw the gun into the portapotty.

{9} The State errs in relying on Zabroski’s earlier taped statement as substantive evidence supporting Defendant’s conviction because
the taped statement was admitted only for purposes of impeachment. See State v. Gutierrez, 1998-NMCA-172, ¶ 10, 126 N.M. 366,
969 P.2d 970 (holding that a prior inconsistent statement not under oath is inadmissible as substantive evidence). A prior inconsistent
statement is admissible as substantive evidence only if it is “given under oath subject to the penalty of perjury at a trial, hearing, or
other proceeding, or in a deposition.” Rule 11-801(D)(1)(a) NMRA. At trial, the court specifically instructed the jury that the tape was
only being played as a prior inconsistent statement going to Zabroski’s credibility. As Zabroski’s prior statement is not substantive
evidence, it cannot be used to support Defendant’s conviction. See Gutierrez, 1998-NMCA-172, ¶ 10.

{10} In the absence of the taped statement by Zabroski, there is no evidence suggesting that Defendant encouraged Zabroski to dispo-
se of the gun or was present when Zabroski threw it in the portapotty. Cf. State v. Nieto, 2000-NMSC-031, ¶¶ 9, 30, 129 N.M. 688,
12 P.3d 442 (holding that the defendant’s conviction as an accomplice for tampering with evidence was supported by testimony that
the defendant assisted in using and removing the shotguns from the crime scene and evidence that the defendant was present when
his accomplices burned the ski masks and gloves used to commit the crimes). Viewing the evidence in the light most favorable to the
verdict, we hold that there was insufficient evidence to support Defendant’s convictions for tampering with evidence and conspiracy
to tamper with evidence, and we reverse those convictions.

B. Conspiracy to Commit Aggravated Assault

{11} Defendant claims that his convictions for aggravated assault and conspiracy to commit aggravated assault violate his right to
be free from double jeopardy. We agree that the conviction for conspiracy to commit aggravated assault must be reversed because
the conviction for conspiracy to commit armed robbery is based upon the same agreement. Although we are not bound by the State’s
concession, State v. Foster, 1999-NMSC-007, ¶ 25, 126 N.M. 646, 974 P.2d 140, we note that the State does not oppose reversal of
Defendant’s conviction for conspiracy to commit armed assault.

{12} Defendant does not challenge his conviction for conspiracy to commit armed robbery. The evidence shows that before meeting
with Victim, Defendant and Zabroski had agreed to rob Victim of marijuana. Zabroski stated that they planned to get back from Victim
what he had previously stolen from Zabroski. However, there is no evidence of an additional, separate agreement to commit an
aggravated assault upon Victim. As there was only one agreement, there can only be one conviction for conspiracy. See State v. Ross,
86 N.M. 212, 214-15, 521 P.2d 1161, 1163-64 ( Ct. App. 1974) (holding that the number of conspiracies is determined by the number of
agreements—if there is one agreement to commit multiple criminal acts, the perpetrators are guilty of only one conspiracy); see also
State v. Jackson, 116 N.M. 130, 134, 860 P.2d 772, 776 ( Ct. App. 1993) (holding that the defendant’s conviction and punishment for
two conspiracies violated his double jeopardy rights because the evidence showed that the defendant and his accomplice had only one
agreement to find someone to rob, even though they eventually robbed two victims).

{13} Therefore, we reverse Defendant’s conviction for conspiracy to commit aggravated assault.

C. Aggravated Assault and Armed Robbery

1. Standard of Review

{14} Defendant contends that his convictions for aggravated assault and armed robbery violate his right to be free from double jeop-
dardy. We disagree.

{15} The constitutional prohibition against double jeopardy “protects against both successive prosecutions and multiple punishments
for the same offense.” State v. Mora, 1997-NMSC-060, ¶ 64, 124 N.M. 346, 950 P.2d 789. In this case, we are faced with multiple
punishments, rather than successive prosecutions; in particular, this is a so-called “double description” case. See State v. Meadors, 121
N.M. 38, 49-50, 908 P.2d 731, 742-43 (1995) (internal quotation marks and citation omitted). Our analysis of this issue relies on the
conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes.” Swafford, 112 N.M. at 13, 810 P.2d
at 1233. “The second step is to ask whether the [l]egislature intended to impose multiple punishments for the unitary conduct.” State
v. Carrasco, 1997-NMSC-047, ¶ 22, 124 N.M. 64, 946 P.2d 1075; see Swafford, 112 N.M. at 14, 810 P.2d at 1234. “The first inquiry,
whether the conduct is unitary, is a mixed question of law and fact . . . , which we review de novo. The second inquiry . . . is a legal
question involving scrutiny of the elements of the statutes in question.” State v. Duran, 1998-NMCA-153, ¶ 15, 126 N.M. 60, 966 P.2d
768 (citation omitted).

2. Analysis

{16} In determining whether the conduct was unitary, we consider whether the illegal acts are “separated by sufficient indicia of
distinctness.” Swafford, 112 N.M. at 13, 810 P.2d at 1233. We consider as “‘indicia of distinctness’ the separation of time or physical
distance between the illegal acts, ‘the quality and nature’ of the individual acts, and the objectives and results of each act.” Mora, 1997-
NMSC-060, ¶ 68 (quoting Swafford, 112 N.M. at 13-14, 810 P.2d at 1233-34).

{17} The State contends that the acts constituting the two offenses are not unitary because they were committed by different persons.
It argues that Zabroski committed the acts constituting the armed robbery and that Defendant was found guilty of armed robbery as an
accessory. The State further contends that Defendant personally committed the act constituting the assault (striking Victim with a gun).
Our review of the record does not indicate such a clear demarcation between the acts of Zabroski and those of Defendant.

{18} To the contrary, there was evidence from which the jury could infer that Defendant was an active participant in the armed robbery.

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Victim’s testimony suggests that Defendant hit him shortly before or after the marijuana was taken by either Defendant or Zabroski. Furthermore, the evidence suggests that in committing the armed robbery and aggravated assault, Defendant and Zabroski surrounded Victim in his pickup truck with Zabroski in the passenger-side seat and Defendant standing by the driver-side window, where Victim was seated. After taking the marijuana from Victim, Zabroski and Defendant drove off together. There was also testimony that Defendant took the marijuana with him, once Zabroski dropped him off. Finally, Victim’s testimony that Defendant struck him with the butt of a gun suggests that Defendant, as well as Zabroski, was armed at the time of the robbery. Based on the foregoing, the jury could have determined that both Zabroski and Defendant robbed Victim and that during the robbery, Defendant assaulted Victim. Therefore, we hold that the armed robbery and the aggravated assault were not sufficiently separated by time, space, or objective to be deemed non-unitary.

{19} We further observe that it is impossible to discern from the record whether Defendant was convicted as a principal on both the aggravated assault and the armed robbery charges. Our review of the jury instructions, the verdict forms, and the judgment and sentence do not clearly indicate that Defendant was in fact convicted of armed robbery as an accessory, rather than as a principal. Our case law provides that in such a situation, we must find that double jeopardy is implicated. See Foster, 1999-NMSC-007, ¶ 27-28 (stating that double jeopardy principles require reversal of a conviction when the jury instructions allow the jury to return a guilty verdict based on a legally inadequate alternative and when the record contains no indication of whether or not the jury relied on that alternative).

{20} The State has failed to provide us with any information establishing that Defendant was convicted of armed robbery as an accessory. Instead, the State merely argues that the evidence supports an accessory theory. However, the pertinent inquiry is not whether the jury could have convicted Defendant as an accessory, but whether the jury could also have found Defendant liable as a principal and, if so, whether it is possible to determine upon which theory the jury convicted Defendant. See id. As the record and transcripts indicate that the jury could have determined that both Zabroski and Defendant robbed Victim, we hold that Defendant’s actions in connection with the armed robbery are unitary with his act of assaulting Victim.

{21} Having determined that the conduct was unitary, we reach the second step in the Swafford analysis, which asks “whether the legislature intended multiple punishments for unitary conduct.” Swafford, 112 N.M. at 14, 810 P.2d at 1234. When, as in this case, the statutes at issue do not contain a clear expression of legislative intent, we apply the test articulated in Blockburger v. United States, 284 U.S. 299, 304 (1932), and examine the elements of each statute to determine whether one statute is subsumed within the other by determining whether one statute requires proof of an additional fact that the other does not. Id. “If that test establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both.” Swafford, 112 N.M. at 14, 810 P.2d at 1234. “Conversely, if the elements of the statutes are not subsumed one within the other, then the Blockburger test raises only a presumption that the statutes punish distinct offenses[,] but [t]hat presumption . . . is not conclusive and it may be overcome by other indicia of legislative intent.” Id.

{22} In this case, we are comparing the elements of aggravated assault, a compound offense that has three alternate ways of being charged, with armed robbery, another offense for which the statute contains alternatives. See NMMSA 1978, § 30-3-2 (1963); NMSA 1978, § 30-16-2 (1973). When applying the Blockburger test to compound offenses or offenses that may be charged in alternate ways, we look only to the elements of the statutes charged to the jury and disregard the inapplicable statutory elements. See Carrasco, 1997-NMSC-047, ¶ 27; State v. Lefebre, 2001-NMCA-009, ¶¶ 21-22, 130 N.M. 130, 19 P.3d 825.

{23} The jury instruction for aggravated assault required the jury to find, beyond a reasonable doubt, that

1. [D]efendant struck at David Brown with a handgun;
2. [D]efendant’s conduct caused David Brown to believe [D]efendant was about to intrude on David Brown’s bodily integrity or personal safety by touching or applying force to [him] in a rude, insolent or angry manner; . . .
3. [a] reasonable person in the same circumstances as David Brown[‘s] would have had the same belief; [and]
4. [D]efendant used a handgun.

See UJI 14-305 NMRA.

{24} In order to convict Defendant of armed robbery, the jury had to find, beyond a reasonable doubt, that

1. [D]efendant took and carried away a bag of marijuana from David Brown, or from his immediate control[,] intending to permanently deprive David Brown of the property;
2. [D]efendant was armed with a handgun, a deadly weapon; and
3. [D]efendant took the marijuana by threatened force or violence.

See UJI 14-1621 NMRA.

{25} A defendant could be convicted of aggravated assault by merely threatening the victim with bodily harm. See § 30-3-2 (“Aggravated assault consists of either . . . unlawfully assaulting or striking at another with a deadly weapon.”). However, in this case, the jury could only convict Defendant if it found, beyond a reasonable doubt, that Defendant struck at Victim. So, in this case, aggravated assault contains an element that armed robbery does not: striking at Victim, instead of just threatening him. Likewise, armed robbery contains an element that aggravated assault does not: taking Victim’s property with the intent to permanently deprive Victim of the property. See § 30-16-2.

{26} In the abstract, both aggravated assault and armed robbery may involve the use of force or the threat of force. Therefore, the two statutes share common ground in theory, and a defendant’s conviction could rely on similar, if not identical evidence. See State v. Fuentez, 119 N.M. 104, 106, 888 P.2d 986, 988 (Ct. App. 1994). However, under the alternatives presented to the jury in this case, the central element of armed robbery does not subsume the element of aggravated assault—the striking at Victim. Id. at 107, 888 P.2d at 989. Therefore, “each still requires proof of a fact the other does not, and a conviction of each may stand independently of the other.” Id. (internal quotation marks omitted). As each offense includes at least one statutory element not included in the other, the presumption is that the legislature intended to punish separately the two offenses. See Carrasco, 1997-NMSC-047, ¶ 28; Swafford, 112 N.M.
at 14, 810 P.2d at 1234.

{27} In his reply brief, Defendant argues that his convictions must be reversed, based upon our previous holding in State v. Maes, 100 N.M. 78, 81, 665 P.2d 1169, 1172 (Ct. App. 1983), in which we determined that the crimes of aggravated assault and robbery must merge, as the operative elements of the two are the same. In Maes, we stated that “it is plain that robbery requires proof of theft by use or threatened use of force and assault requires proof of an attempted battery of which the victim is reasonably in fear of receiving.” Id.

{28} We no longer consider Maes to be the controlling authority, however, because the analysis contained therein predates, and has been replaced by, the two-pronged analysis mandated by Swafford. See Fuentes, 119 N.M. at 106-07, 888 P.2d at 988-89 (overturning cases decided prior to Swafford that held aggravated battery was subsumed by the crime of robbery, since the Swafford test clarifies that the statutory elements of the crimes determine whether each requires proof of a fact that the other does not).

{29} Finally, we consider whether there are any other indicators of legislative intent that might serve to rebut the presumption that the statutes punish different offenses, thereby permitting separate punishments. See Fuentes, 119 N.M. at 108; 888 P.2d at 990. “In this context, ‘[t]he court must identify the particular evil sought to be addressed by each offense.’” Id. (quoting Swafford, 112 N.M. at 14, 810 P.2d at 1234). In determining legislative intent, we look first to the purposes of the two statutes because if they are “directed toward protecting different social norms and achieving different policies[, they] can be viewed as separate and amenable to multiple punishments.” Swafford, 112 N.M. at 14, 810 P.2d at 1234.

{30} Although there is some overlap in the purpose of the statutes, they are directed toward protecting different social norms. The armed robbery statute is directed primarily toward protecting against the loss of property. See Fuentes, 119 N.M. at 106, 888 P.2d at 988. The aggravated assault statute is directed toward preserving the integrity of a person’s body against the threat of injury or, in this case, actual serious bodily injury. Cf. State v. Vallejos, 2000-NMCA-075, ¶ 18, 129 N.M. 424, 9 P.3d 668 (recognizing that the “aggravated battery statute is directed at preserving the integrity of a person’s body against serious injury”). Therefore, we fail to discern any indication of legislative intent to rebut the Blockburger presumption. See Swafford, 112 N.M. at 14, 810 P.2d at 1234.

{31} Accordingly, for the reasons stated herein, we hold that Defendant’s right to be free from double jeopardy is not violated by his convictions for armed robbery and aggravated assault.

III. CONCLUSION

{32} Based upon the foregoing, we reverse Defendant’s convictions for tampering with evidence and conspiracy to tamper with evidence because there is insufficient evidence to support those convictions. We also reverse Defendant’s conviction for conspiracy to commit aggravated assault, as violating Defendant’s right to be free from double jeopardy. Finally, we affirm the remainder of Defendant’s convictions.

{33} IT IS SO ORDERED.

CElia FOY CASTILLO,
Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
MICHAEL E. VIGIL, Judge
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2005 Professionalism:
LAWYERS CONCERNED FOR LAWYERS
Substance Abuse and Addiction Issues in the New Mexico Legal Community

Friday, February 25, 2005, 10 a.m. to Noon
via Satellite at State Bar Center, Albuquerque

Also to be broadcast live via Internet Webcast and at the following Satellite locations
(Carlsbad, Gallup, Hobbs, Las Cruces, Portales, Raton, Santa Fe)

The 2005 Commission on Professionalism course, LAWYERS CONCERNED FOR LAWYERS: Substance Abuse and Addiction Issues in the New Mexico Legal Community, will focus on the serious issue of addiction and substance abuse. Over fifteen million Americans suffer from the disease of alcoholism -- roughly 10 percent of the general population. The percentage of professional men and women, including lawyers and judges who are chemically dependent, appears to be even higher with estimates as high as 15 to 20 percent for attorneys.

The 2005 Commission on Professionalism program will feature justices of the New Mexico Supreme Court and members of the State Bar’s Lawyers Assistance Committee in an informative and broad look at substance abuse. Participants will also receive a perspective from the UNM School of Law and the Disciplinary Board. The program will give participants the tools necessary to help identify abuse and addiction problems, address confidentiality issues, provide resources for how to handle such situations, and offer guidance to those who may be suffering through an illness.

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Friday, February 25, 2005, 10 a.m. to Noon • 2.0 Professionalism CLE Credits

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☐ Gallup - UNM Ext. Univ., 200 College Road  ☐ Hobbs - Cont. Ed, Rm. 113, 5317 Lovington Highway
☐ Las Cruces - NMSU, Corbett Center, S. of Jordan and University  ☐ Portales - KENW-TV, 52 Broadcast Center
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