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Special Insert:

IOLTA News
We are pleased and proud to announce that the following lawyers have joined our firm:

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C. Shannon Bacon

Mark E. Chaiken

Susan G. Chappell

Peter S. Kierst

Derek V. Larson

SUTIN THAYER

&

BROWNE

A PROFESSIONAL CORPORATION

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(505) 883-2500

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SANTA FE, NM 87501
(505) 988-5521

www.sutinfirm.com
Recent Changes to the UCC in New Mexico

State Bar Center, Albuquerque
Wednesday, July 13, 2005
1.2 General CLE Credits

Standard Fee - $39

Presenter: Jack Burton

Co-Sponsor: Business Law Section

Lunch 11:30 a.m. to Noon
(provided at the State Bar Center)

CLE Noon to 1:00 p.m.

This seminar will feature attorney Jack Burton who, as a UCC Law Commissioner, helped to draft recent changes to the code in New Mexico. In 2004, he was named Business Lawyer of the Year by the SBNM Business Law Section and has spent the past thirty-six years with the Rodey Law Firm. The focus of his presentation will be on Articles 1, 7 and 9 of the code as they apply to general provisions, documents of title and secured transactions.

Legislative Process: A 2005 Update

State Bar Center, Albuquerque
Wednesday, July 20, 2005
2.4 General CLE Credits

Standard Fee - $59

Presenters:
Cisco McSorley, Esq., Chair,
New Mexico Senate Judiciary Committee and
Al Park, Esq.,
New Mexico House Judiciary Committee

Lunch Noon to 12:45 p.m.
(provided at the State Bar Center)

CLE 12:45 to 2:45 p.m.

Join us for an informative update on legislative issues before members of the New Mexico House and Senate Judiciary Committees. The speakers will discuss recent legislative developments that will be affecting New Mexico practitioners.

REGISTRATION

RECENT CHANGES TO THE UCC IN NEW MEXICO
Wednesday, July 13
1.2 General CLE Credits
☐ Standard Fee - $39

Name: ____________________________ NM Bar#: ____________________________
Firm: ____________________________
Address: ____________________________
City/State/Zip: ____________________________
Phone: ____________________________ Fax: ____________________________
E-mail address: ____________________________

Payment Options: ☐ Enclosed is my check in the amount of $ ____________ (Make Checks Payable to: CLE)
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Signature ____________________________

Mail this form to: CLE, PO Box 92860 Albuquerque, NM 87199 or Fax to (505) 797-6071.
Register Online at www.nmbar.org
HEALTH LAW
Schiavo Lite: Directive or Discordance
Professor Rob Schwartz
Assisted Reproduction and
Stem Cell Research
Ami Jaeger, Esq.
Live Program • Thursday, June 30, 2005
State Bar Center • 12:30 - 1:30 p.m.
Lunch - Noon • 12:30 p.m. • 1.2 General CLE Credits
☐ Standard Fee $39

5
DUI in New Mexico: Practical Problems
and Possible Solutions
Video Replay • Tuesday, July 5, 2005
State Bar Center • 9 a.m. • 5.3 General Credits
This full day seminar consists of a legal update on evidence issues and a panel discussion on DUI problems and ideas for solutions in New Mexico. The panel is composed of a police officer, a judge, a prosecutor, a defense attorney and a victim’s representative. Problems from Albuquerque and around the state are aired. The day concludes with a planning session for future actions.
☐ Standard Fee $169

13, 27
2005 Professionalism
Lawyers Concerned for Lawyers
Substance Abuse and Addiction Issues in the New Mexico Legal Community
Video Replay • Wednesday, July 13 and July 27
10 a.m. - Noon • State Bar Center
2.0 Professionalism CLE Credits
The 2005 Commission on Professionalism course, LAWYERS CONCERNED FOR LAWYERS: Substance Abuse and Addiction Issues in the New Mexico Legal Community, focuses on the serious issue of addiction and substance abuse. Over 15 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 features 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 also receive a perspective from the UNM School of Law and the Disciplinary Board. The program gives 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.
☐ Standard Fee $59

FOUR WAYS TO REGISTER
PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m
(Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbar.org, click CLE, then area of interest
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name ____________________________
NM Bar # ________________________
Street __________________________
City/State/Zip ____________________
Phone __________________________ Fax __________________________
Email __________________________

Program Title ____________________
Program Date ____________________
Program Location __________________
Program Cost ____________________
☐ Purchase Order (Must be attached to be registered)
☐ Check enclosed $ ______________
Make check payable to: CLE
☐ VISA ☐ MC ☐ American Express ☐ Discover
Credit Card # ____________________
Exp. Date ________________________
Authorized Signature ______________
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### Professionalism Tip

With respect to the courts and other tribunals:

I will be punctual for court hearings, conferences and depositions.

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### Meetings

**July**

- **1**
  - Board of Editors, noon, State Bar Center

- **6**
  - Employment and Labor Law Section Board of Directors, noon, State Bar Center

- **7**
  - Trial Practice Section Board of Directors, 4:30 p.m., State Bar Center

- **9**
  - Elder Law Section Board of Directors, noon, State Bar Center

- **11**
  - Ethics Advisory Committee, 10 a.m., State Bar Center

- **11**
  - Public Legal Education Committee, noon, State Bar Center

- **14**
  - Attorney Support Group, 5:30 p.m., First Methodist Church

- **14**
  - Public Law Section Board of Directors, noon, RMD Legal Bureau, Santa Fe

### State Bar Workshops

**June**

- **30**
  - Lawyer Referral for the Elderly Workshop, 1:15 p.m., Meadowlark Senior Center, Albuquerque

**July**

- **27**
  - Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces

- **27**
  - Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center

- **28**
  - Consumer Debt/Bankruptcy Workshop*, 5:30 p.m., Branigan Library, Las Cruces

**August**

- **10**
  - Landlord/Tenant Workshop - Landlords, 6 p.m., State Bar Center

- **24**
  - 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) 797-6045 or 1-800-876-6227, or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS

Supreme Court

Law Library Holiday Hours

The following are the hours of the New Mexico Supreme Court Law Library during the July Fourth holiday:

- July 1: Close at 5 p.m.
- July 2: Closed
- July 4: Closed
- July 5: Open at 8 a.m.

Compilation Commission

Request for Proposals for Attorney Services

Pursuant to Sections 13-1-111 through -119.1 NMSA 1978, the New Mexico Compilation Commission and its Advisory Committee request competitive sealed proposals for an attorney to provide legal drafting and research services. The duties of the Compilation Commission and the Advisory Committee are set forth in the NMSA 1978. A copy of the Request for Proposals may be obtained from:

New Mexico Compilation Commission
Kathleen Jo Gibson, Secretary
PO Box 848
Santa Fe, NM 87504-0848

Competitive Sealed Proposals must be received on or before 5 p.m., July 20.

First Judicial District Court

Criminal Bench and Bar Brownbag

The First Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, July 19 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court’s Criminal Divisions.

Second Judicial District Court

Children’s Court Monthly Judges’ and Managers’ Meeting

The Second Judicial District Court will hold its monthly judges’ and managers’ meeting at noon, July 5 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

Destruction of Exhibits: Criminal and Children

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the criminal cases for years 1980 to 1991, and children cases for years 1985 to 1989, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Attorneys who wish to have duplicates made, should verify exhibit information with the Special Services Division at (505) 841-6717, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after July 1.

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 July 11. Contact Sandra Partida, (505) 841-7531, for more information or to have an item placed on the agenda.

Thirteenth Judicial District Court

Sandoval County Court Operations Moving

The new Sandoval County Courthouse is now ready for occupancy. In order to accommodate moving the Bernalillo clerk’s office, the Thirteenth Judicial District Court will be closed for moving July 21 and July 22. The court will reopen on July 25 at its new location. The new address is: Thirteenth Judicial District Court 1500 Idalia Road, Building A, Bernalillo, NM 87004.

All current phone numbers will stay the same, but the court asks that you please be patient with your communications as our new phone and computer systems come on line. For more information call Theresa Valencia, chief clerk, (505) 867-2376.

Doña Ana County Magistrate Court

Judicial Vacancy

Gov. Bill Richardson announced recently that he is seeking candidates from Doña Ana County that are interested in serving as Magistrate Court Judge in Division III. Richardson will appoint a judge to fill the vacancy created by the resignation of Judge Reuben Galvan. Each interested candidate must send a letter of interest, resume and letters of recommendation to Gov. Bill Richardson, Attention Legal Division, State
Capitol Building, Suite 400, Santa Fe, New Mexico 87501 by 5 p.m., June 27. Materials may be mailed or faxed to (505) 476-2207. After submitting a letter of interest, candidates may be required to undergo a criminal background check.

**STATE BAR NEWS**

**Appellate Practice Section**

**Annual Meeting**

The annual meeting of the Appellate Practice Section will take place at 1 p.m., Aug. 19 at the State Bar Center. It will be held in conjunction with the 16th Annual Appellate Practice Institute, which will be held that day at the State Bar Center from 8:20 a.m. to 4:30 p.m. All members of the section and other interested persons are invited to attend and participate.

**Attorney Support Group Monthly Meeting**

The next Attorney Support Group meeting will be held at 5:30 p.m., July 11 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month, but is meeting on the second Monday due to the Fourth of July holiday.

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

**Board of Bar Commissioners Vacancy**

A vacancy in the Seventh Bar Commissioner District, representing Catron, Doña Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties, was created due to Commissioner Damon Martinez’ move from that district and resignation from the board. The board will make an appointment to fill the vacancy through the end of the year at its July 15 meeting. The remainder of Martinez’ unexpired term will be filled in the regular election in November. Applicants should be able to attend the three remaining board meetings scheduled for Sept. 22 in Ruidoso, Oct. 28 in Santa Fe and Dec. 9 in Albuquerque. Attorneys interested in serving on the board should submit a letter of interest and resume to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199, by July 1.

**Employment and Labor Law Section Board Meetings Open to Section Members**

The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be July 6. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Cindy Lovato-Farmer, section chair, (505) 667-3766.

**Lawyers Assistance Committee Wanted: Lawyers in Recovery in Las Cruces**

The Lawyers Assistance Committee is looking for attorneys in recovery in Las Cruces who are willing to make 12-Step calls. Attorneys who are able to help, call Bill Stratvert, (505) 242-6845.

**Paralegal Division Brownbag CLE**

Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., July 13 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. The topic for this month’s CLE is “Water Issues in New Mexico: The Pueblo Perspective,” presented by Jessica Aberly, Esq. For more information, contact Debi Shoemaker-Scott, (505) 243-1443.

**Pro Hac Vice**

The New Mexico Supreme Court has established a new rule for practice by non-admitted Lawyers before state courts (Pro Hac Vice). The new Rule 24-106 NMRA, is effective for cases filed on or after Jan. 20, 2005. Attorneys authorized to practice law before the highest court of record in any state or territory wishing to enter an appearance, either in person or on court papers, in a New Mexico civil case should consult the new rule. This rule requires non-admitted lawyers to file a registration certificate with the State Bar of New Mexico, file an affidavit with the court and pay a nonrefundable fee of $250. Fees collected under this rule will be used to support legal services for the poor. For more information on the rule, a copy of the registration certificate and sample affidavit, go to www.nmbar.org. For questions about compliance with the rule, please contact Richard Spinello, Esq., Director of Public and Legal Services, State Bar of New Mexico, (505) 797-6050, (800) 876-6227, or rspinello@nmbar.org.

**Public Law Section Board Meeting**

The next Public Law Section board meeting will be held at noon, July 14 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.

**Young Lawyers Division Judicial Luncheon with the Chief Justice**

The Young Lawyers Division (YLD) will sponsor a judicial luncheon with Chief Justice Richard C. Bosson of the New Mexico Supreme Court. This is a great opportunity to learn about the New Mexico State Supreme Court, appellate practice, and get to know YLD members. The luncheon is from noon to 1 p.m., July 12 at the New Mexico Supreme Court, 237 Don Gaspar Ave., Santa Fe. Lunch will be provided by the YLD. R.S.V.P. no later than July 7 to Erika Anderson, (505) 982-8405, eanderson@nm.net, or Brent Moore, (505) 476-3783, brent_moore@nmenv.state.nm.us.

**OTHER BARS**

**Albuquerque Bar Association Monthly Luncheon and CLE**

The Albuquerque Bar Association’s monthly luncheon will be held at noon, July 5 at the Albuquerque Petroleum Club. The luncheon speaker will be Ed Boles, who will present a special slide presentation of the Duke City's landmark and historic zones in observance of Albuquerque's 300-Year Celebration. This showing comes from his collection of many years of working in this area and will highlight Albuquerque’s cultural mix. The CLE program will follow the lunch at 1:30 p.m. Charles Price and Bill Dodge will present “Historic Preservation Laws and Regulation.” This CLE will be directed at the Albuquerque general practitioner who has little or no knowledge of the subject, but would benefit by knowing
the overall framework. The presenters will discuss the federal, state and local statutes and regulations, and provide examples of situations in which these laws might be applied. Register online at www.abqbar.com, by e-mail at abqbar@abqbar.com or by calling (505) 243-2615.

Hispanic National Bar Association
30th Annual Convention

Alm M. Varela, president of the Hispanic National Bar Association has announced the 30th Annual HNBA Convention in Washington D.C. at the Mandarin Oriental Hotel Oct. 16 to 20. The convention provides an opportunity to network with hundreds of the most influential Hispanics in the nation and will include world-class legal education seminars focusing on crucial issues facing the legal profession and the nation. On Oct. 19 a professional job fair will be held for law students and experienced attorneys seeking employment with Fortune 500 corporations and the nation’s most prestigious law firms. “Unidos in Washington” will feature social events at various venues, such as the Mexican Cultural Institute for a “Taste of Latin America and the Caribbean.”

Registration for the convention can be found at the HNBA Web site, www.hnba.com, and completed entirely online. The convention is open to all interested legal professionals. There are special discounted rates for HNBA members as well as those who sign up for the early bird rate now until Aug. 31. Job fair employers may also register online at the HNBA Web site for the job fair. The registration fee for job employers includes day passes for two interviewers, prominent listing in the convention program book and one full day of interviews with one of the highest caliber talent pools in the United States. The HNBA is a non-profit, national association that represents the interests of over 27,000 Hispanic American attorneys, judges, law professors, law students and legal professionals throughout the United States and Puerto Rico. For more information go to www.hnba.com or contact the HNBA Washington office, (202) 223-4777.

National Association of Counsel for Children
28th National Children’s Law Conference

This summer, the National Association of Counsel for Children will hold its annual national child advocacy training Aug. 25 to 28 at the Hollywood Renaissance Hotel in Los Angeles. Each year in America, over one million children suffer abuse and neglect. These are serious incidents of beatings, sexual assault, and the kind of neglect that results in serious health problems. NACC members serve as child advocates for these children and guide them through the difficult legal process that determines their fate. The NACC is a nonprofit agency that provides the professional training and technical assistance the child advocates need to do their work. For more information, contact NACC at (888) 828-6222, or visit its Web site at www.NACCchildlaw.org.

New Mexico Defense Lawyers Association
2005 Outstanding Civil Defense Lawyers Nominations

Nominations are being accepted for the 2005 Outstanding Civil Defense Lawyer. The award will be presented at the 2005 DLA Annual Meeting Oct. 27 in Albuquerque. This award is given to one or more attorneys who, over long and distinguished legal careers, have, by their ethical, personal, and professional conduct, exemplified for their fellow attorneys the epitome of professionalism and ability. Letters of nomination should be sent to: NMDLA, PO Box 94116, Albuquerque, NM 87199, faxed to (505) 797-6017 or e-mail to nmdefense@nmdla.org. Deadline for nomination submissions is July 31.

Advanced Trial Techniques

The NM Defense Lawyers Association will present a CLE program Aug. 25 at the State Bar Center entitled “Advanced Trial Techniques.” Registration information will be available soon. Visit the NMDLA Web site at www.nmdla.org or contact Rhonda Dahl, (505) 797-6021, for more information.

OTHER NEWS

ACLU of New Mexico Luncheon

The ACLU of New Mexico Amicus Club and the Federalist Society are presenting “An Independent Judiciary?” – a luncheon discussion featuring Judge Harris L. Hartz and Prof. James W. Ellis. The luncheon will take place from 11:30 a.m. to 1 p.m., June 30 in the second floor hospitality room of the Flying Star Downtown, 723 Silver SW, Albuquerque. Lunch and meet and greet begin at 11:30 a.m. Speakers begin at noon. Seating is limited so R.S.V.P. is required to George Bach, (505) 400-3423, gbach@alumn.org, or Wade Jackson, (505) 348-2243, wade.jackson@nmcourt.fed.us.

NM Board of Social Work Examiners

Attorney Position Available

The NM Board of Social Work Examiners is seeking to fill an attorney position on its board that meets six times per year. Attorneys interested in being appointed should contact Vedra Baca, (505) 476-4890.

UNM Law Library

Summer Hours

Law Library hours through Aug. 21:

- Mon. – Thurs. 8 a.m. to 9 p.m.
- Fri. 8 a.m. to 6 p.m.
- Sat. 9 a.m. to 6 p.m.
- Sun. noon to 9 p.m.

Reference:

- Mon. – Fri. 9 a.m. to 6 p.m.
- Sat. noon to 4 p.m.
- Sun. noon to 4 p.m.

Exceptions:

- July 4 Closed
“This program showed me specific strategies that are easy to implement. I had no idea marketing could be so easy.”

Elisabeth Kovac, NYC

“This program provided a crucial first step in educating me on how to start growing my law practice.”

Brian Stapleton, NYC

“Your presentation was great! I left feeling excited about my practice because I felt, for the first time, I could successfully market it.”

Alicia Gieck, IL

These are just a few of the comments this program and speaker received during the sold out “Becoming a Rainmaker” seminars held recently in New York City, Chicago, New Jersey, and Los Angeles. Now, through the State Bar of New Mexico, it’s available to New Mexico lawyers as well.

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Becoming A Rainmaker
Sales and Marketing Techniques to Grow Your Practice

State Bar of New Mexico
Wednesday, July 20, from 6 p.m. to 8 p.m.
State Bar of New Mexico Professional Development Center,
5121 Masthead NE, Albuquerque

Presenter: Stephen Fairley, M.A., RCC
Fairley is an international best-selling author and was recently named “America’s Top Marketing Coach” by Coachville, the world’s largest coaching association. His specialty is helping professional service firms rapidly increase revenues and find new clients fast. His information-packed seminar includes:

* The seven ways to find more clients and which ones work best for solo practitioners and small firms
* How to apply the five key steps to becoming a rainmaker
* The five major roles every firm must fill in order to succeed
* How to avoid the top four marketing mistakes attorneys make
* Why 90 percent of advertising doesn’t work
* A 90-day personal action plan
* A six-step process for developing a 12-month strategic marketing plan
* And much more!

You cannot afford to miss this program

To register and for complete information, click the Rainmaker link at www.nmbar.org or call the Legal Career Center at 1-800-659-5589.

www.nmbar.org
**Free Legal Advice**

*(For Attorneys)*

Questions and Answers from the Law Office Management Committee

**Q:** Should I trade my services for other services or products of a client?

**A:** Trade-outs for services deplete your cash. You may often be asked to trade-out your legal services for the services or products of a client. The client may want to keep the transaction “off the books.” Needless to say, this is not an option for the attorney. The attorney needs to recognize a fair value for the services or product received, pay gross receipts tax on its receipt as well as income tax on the “profit.” Agreeing on the value, in writing, is a good idea (but not binding on the tax authorities). Also, if your in a business transaction with a client, the terms must be in writing and must clearly be fair to the client.

As a “rule of thumb,” getting something which you promptly convert to cash (and use for reporting purposes) may be better than having an uncollectible bad debt. However, keeping something received as payment for your services is a forced savings/investment program, which may or may not be worthwhile, and it has a negative effect on your cash flow since you have to pay the taxes that are now due.

**Q:** Am I competent to give legal advice in a type of case I have never handled before?

**A:** At times, it may be tempting to take almost any case that comes to you from a client. The more experienced you are, the better. By virtue of having graduated from law school and having passed the bar exam, you are deemed competent to practice law in your state. However, it may be best in some cases for you to associate with another more experienced attorney in certain cases.

New Mexico’s Creed of Professionalism states in section E, “I will keep current in my practice areas, and, when necessary, will associate with or refer my client to other more knowledgeable or experienced counsel.” There are many considerations besides your actual knowledge of the substance of the law when deciding whether to take a case in a new area. Keep in mind, you may be taking on having to learn a whole new set of rules and procedures. You may not be familiar with the pleadings or methods of discovery. This means you will spend more time than you normally would on the case, which may not be appropriate to bill the client for. To best serve your client, it may be necessary to refer the case to an attorney who specializes in that field. It has been said, “you’ll never have a headache from the case you didn’t take.”

**Q:** When I hire my first staff person, what should I take into account?

**A:** First, its important to have a clear understanding of the work you are expecting the person to perform. This will help you determine what you need or do not need in a staff person. The skills and experience you would want for someone to do computer research would be different from what you would want for handling many telephone calls or disruptions.

Second, when you are looking at particular people for your position, do the following:

A. **Check References** – Pay particular attention to what is not said.

B. **Develop Choices** – Try to have several people for consideration so that you can compare their strengths and weakness for your particular needs.

C. **Know What You Expect** – How will the person’s work support yours? Are you looking for someone to provide knowledge or skills that you don’t have? Are you looking for someone who can provide experience you’re lacking? Are you looking for someone who will work independently or under close supervision?

D. **Aptitude and Potential Versus Specific Skills** – As a general rule, you’re better off hiring a person with a positive attitude and the potential to learn versus a person who has particular skills but a negative attitude about the work.

E. **Past Performance** – When someone says they have five years of experience, was it five years of doing the same task over and over again, or did it provide some depth and breath of experience? Did it involve the functions you’re going to need? In a small office, you may need someone with experience in bookkeeping (i.e. trust accounts); calendaring; dealing directly with clients and opposing attorneys; mailings; preparing trial notebooks; or other types of experience that are unique to your particular needs.

F. **Test Abilities** – Some on-the-job skills are subject to a simple test. For example, you could ask a person to prepare a simple pleading, and then use the reveal code function to determine how well they understand the system. You could have them take phone messages. One advantage of using a temporary employment agency is that you can see how the person actually performs in a variety of circumstances.

G. **Unique Circumstances** – Take into account any unique circumstances you have. Do you need someone who is multi-lingual, experienced in bookkeeping, understands a particular computer program, or could help you edit your pleadings?

When all is said and done, you should look for the person who will be the best “fit” to your business.

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For more advice or to submit a question, visit the State Bar’s Web site at www.nmbar.org, click on the “Attorney Services/Practice Resources” link and then scroll down to “Law Office Management.” The Law Office Management Committee provides “Free Legal Advice (For Attorneys)” as a public service to the legal community in New Mexico. No warranties are expressed or implied and the committee, along with the State Bar of New Mexico, assumes no liability for errors or omissions that may result from the use of the information.
JUNE

27 Protecting Business Assets Through Effective Lawyering
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28 Legal Ethics
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www.lorman.com

28 Orders of Protection in New Mexico
Albuquerque
Lorman Education Services
7.2 G
Albuquerque
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www.lorman.com

28 Charitable Giving - The Good News and Bad News
Teleconference
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28 Electronic Discovery Needn’t Be Shocking
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28 20th Annual Bankruptcy Year in Review
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12 2005 Update: Tax Considerations in Estate Planning
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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 JUNE 22, 2005

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

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<td>State v. Ponce (COA 23,913)</td>
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<td>State v. Montoya (COA 24,192)</td>
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<td>State v. Nyce (COA 25,075)</td>
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<td>Atler v. Murphy (COA 23,620)</td>
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<td>Callahan v. New Mexico (COA 23,645)</td>
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<td>State v. Morales (COA 24,061)</td>
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<td>Sanchez v. Pellicer (COA 25,082)</td>
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<td>29,206</td>
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</table>
**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 June 22, 2005**

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OPINION

JAMES J. WECHSLER, Judge

Defendant Arthur Garcia appeals a special condition of his probation included in the district court’s judgment and sentence in his criminal case. The condition prohibits Defendant from having direct or indirect contact with all children under the age of eighteen, including the victim of his crimes, absent a court order. Principally because of the district court’s authority in sentencing and the relationship of the special condition to Defendant’s conduct in this case, we affirm the district court’s judgment and sentence.

Background

Defendant pledged guilty to eight counts of criminal sexual contact of a minor in the fourth degree. The charges stemmed from a series of incidents that occurred over the course of several months between Defendant and one of his daughters adopted from Russia. After the sentencing hearing, the district court sentenced Defendant to incarceration for three years followed by five years of supervised probation. It partially suspended the sentence and imposed nine conditions of probation. Special condition number eight states that “Defendant shall have no contact, direct or indirect, with children under the age of eighteen (18) or with the victim unless it is pursuant to a Court order.” The terms of this provision effectively prohibit Defendant from having contact with his two biological daughters and two adopted daughters until they reach majority, without a court order.

Defendant filed a motion for reconsideration of the sentence. He contended that: (1) he fully cooperated with the authorities in the investigation and prosecution of the case and with the various psychological professionals involved with treating his family; (2) the proposed resolution of the case included treatment, intervention, and reunification of Defendant’s family “under stringent protective safeguards to ensure that the children are safe and that their urgent psychological need for contact with [Defendant] would be addressed;” (3) he was “caught entirely by surprise” by letters that requested a harsh sentence, which were submitted to the district court prior to the sentencing hearing; (4) he was unable to produce testimony rebutting the assertions made at the sentencing hearing; and (5) condition number eight would “cause significant emotional damage to [Defendant’s] other children and the [v]ictim.” Finding that its sentence was proper, the district court denied Defendant’s motion.

Defendant then moved the district court to reconsider its order denying his motion for reconsideration or, in the alternative, to reconsider certain portions of the sentence imposed. Defendant asserted that special condition number eight should be amended to provide for supervised contact between Defendant and his children in accordance with the recommendations of therapists who observed the children and concluded that special condition number eight was not in conformity with the children’s best interests. The prosecutor consented to supervised visitation so long as certain conditions were met. The district court denied Defendant’s motion. Defendant now appeals special condition number eight included in the district court’s judgment and order partially suspending sentence.

Issues Addressed in This Appeal

On appeal, Defendant contends that the district court did not have jurisdiction to impose special condition number eight prohibiting all contact with minors without a court order because that condition was a “de facto” termination of his parental rights to his four daughters. He argues that the children’s court has sole jurisdiction over child custody, contact, and visitation issues, and the Children’s Code provides the exclusive, exhaustive, and comprehensive procedure that a court must follow before it “de facto” terminates parental rights. Specifically, Defendant asserts that “when the [d]istrict [c]ourt terminated [his] parental rights by imposing probation condition number 8, it exceeded its jurisdiction, acted illegally, deprived [him] of all due process as proscribed by the Children’s Code and violated his family’s fundamental right of familial integrity.” Defendant urges this Court to strike special condition number eight and remand this case to the district court with instructions to transfer the case to the children’s court for proceedings in accordance with the Children’s Code to address the subject matter of Defendant’s contact with his children. Defendant further argues that special condition
number eight enjoined him from having contact with his children without following the proper procedures of Rule 1-066 NMRA.

{6} Defendant states that these issues were preserved in the district court. However, the record does not reflect that Defendant raised the arguments concerning the jurisdiction of the children’s court, the constitution, or the need for notice for injunctions before the district court. We generally do not consider issues on appeal that are not preserved below, Rule 12-216(A) NMRA; State v. Vandenberg, 2003-NMSC-030, ¶ 52, 134 N.M. 566, 81 P.3d 19 (“To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked.”) (internal quotation marks and citation omitted). Constitutional issues must also be properly preserved. See Aken v. Plains Elec. Generation & Transmission Corp., Inc., 2002-NMSC-021, ¶¶ 9–10, 132 N.M. 401, 49 P.3d 662. However, we will address an argument that a court lacked subject matter jurisdiction for the first time on appeal. See Gonzales v. Sur-gidev Corp., 120 N.M. 133, 138, 899 P.2d 576, 581 (1995) (stating that subject matter jurisdiction, or the power to decide a particular type of case, may not be waived and “may be raised for the first time on appeal”); see also In re Aaron L., 2000-NMCA-024, ¶ 10, 128 N.M. 641, 996 P.2d 431 (stating that on appeal the reviewing court will not consider issues not raised in the district court unless the issues involve matters of fundamental right or fundamental error). As a result, Defendant did not waive his argument concerning the children’s court jurisdiction by failing to preserve it.

{7} To the extent that Defendant appears to argue that the district court lacked personal jurisdiction, this argument has no merit. Defendant submitted to the jurisdiction of the district court when he pleaded guilty to the charges. See Stetz v. Skaggs Drug Ctrs., Inc., 114 N.M. 465, 470, 840 P.2d 612, 617 (Ct. App. 1992) (“The defense of lack of personal jurisdiction is subject to waiver when not properly asserted.”). Defendant also does not cite authority that states that Rule 1-066 is applicable in the criminal sentencing context. See In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (stating that an appellate court will not consider an issue if no authority is cited in support of the proposition). We therefore focus our review on Defendant’s substantive arguments that the children’s court had exclusive subject matter jurisdiction and that the district court acted improperly by imposing special condition number eight.

Subject Matter Jurisdiction of the District Court and the Children’s Court

{8} The State initiated this case as a criminal case under the Criminal Code, NMSA 1978, § 30-9-13 (2001). Defendant admitted criminal sexual contact with his adopted daughter who was under the age of eighteen. Upon conviction of a crime under the Criminal Code, the court sentences a defendant in accordance with the Criminal Sentencing Act. NMSA 1978, § 31-18-13 (1993). When sentencing, a district court may, as did the district court in this case, suspend the sentence and order the defendant placed on probation for all or part of the period of the suspension, and when doing so, may require the defendant to satisfy “conditions reasonably related to his rehabilitation.” See NMSA 1978, § 31-20-6(F) (1997) (stating conditions trial court is required and has discretion to attach to order deferring or suspending sentence); NMSA 1978, § 31-20-5(A) (1985) (allowing court to defer or suspend sentence and order probation for all or part of the period of deferment or suspension).

{9} The State did not bring this case as a termination of parental rights action under the Abuse and Neglect Act provisions of the Children’s Code. See NMSA 1978, §§ 32A-4-1 to 32A-4-33 (1993, as amended through 2001). The Abuse and Neglect Act contains comprehensive procedures concerning the termination of parental rights when children have been abused or neglected. Id. It includes within its purview “sexual abuse” defined as including, but not limited to, “criminal sexual contact.” Section 32A-4-2(G). The Children’s Code provides that “a court other than the children’s court division of the district court” shall transfer a criminal action to the children’s court division of the district court if it appears that the “jurisdiction is properly within the children’s court division.” NMSA 1978, § 32A-1-5(C) (1993).

{10} Defendant contends that the district court should have transferred this case to the children’s court because special condition number eight either was a termination of his parental rights or constituted a “de facto” termination of his parental rights subject to the comprehensive provisions of the Abuse and Neglect Act. Defendant’s argument poses a standard of review that is both de novo and deferential to the discretion of the district court. We review questions concerning subject matter jurisdiction and issues of law de novo. Tri-State Generation & Transmission Ass’n, Inc. v. King, 2003-NMSC-029, ¶ 4, 134 N.M. 467, 78 P.3d 1226; Ottino v. Ottino, 2001-NMCA-012, ¶ 6, 130 N.M. 168, 21 P.3d 37. We apply an abuse of discretion standard to determine whether a district court properly imposed a condition of probation. State v. Baca, 2004-NMCA-049, ¶ 13, 135 N.M. 490, 90 P.3d 509.

{11} Although special condition number eight affects Defendant’s relationship with his children, we do not agree with Defendant that it amounted to a “de facto” termination of his parental rights subject to the comprehensive provisions of the Abuse and Neglect Act. Defendant’s argument poses a standard of review that is both de novo and deferential to the discretion of the district court. We review questions concerning subject matter jurisdiction and issues of law de novo. Tri-State Generation & Transmission Ass’n, Inc. v. King, 2003-NMSC-029, ¶ 4, 134 N.M. 467, 78 P.3d 1226; Ottino v. Ottino, 2001-NMCA-012, ¶ 6, 130 N.M. 168, 21 P.3d 37. We apply an abuse of discretion standard to determine whether a district court properly imposed a condition of probation. State v. Baca, 2004-NMCA-049, ¶ 13, 135 N.M. 490, 90 P.3d 509.

{12} To fashion its sentence, the district court had before it Defendant’s psychological evaluation and other information, including letters from community members, family members, and a therapist. An international adoption agency submitted a letter expressing its shock and disappointment about Defendant’s charges and the potential jeopardy to future international adoptions. Letters from community members, including a teacher and other families who have adopted children, expressed concern for Defendant’s children and the treatment that they received under Defendant’s care. Defendant’s psychological evaluation, written by a licensed clinical psychologist, revealed, among other things, that Defendant’s wife observed that every few years Defendant “‘feels neglected’ and develops a crush on someone.” She stated that she had noticed a physical closeness between Defendant and the victim that “felt inappropriate.” The evaluation also revealed that Defendant was sexually aroused when he touched his daughter’s breasts and that although he knew what he was doing was wrong, he felt that he was unable to stop himself even after she told him not to touch her.
The clinical psychologist concluded that these behaviors revealed poor judgment and inadequate impulse control. Therefore, despite the fact that therapists recommended supervised visitation and that others, such as Defendant, Defendant’s wife, Defendant’s father-in-law, and the prosecutor, asked that supervised visitation be allowed, the district court could determine that due to the serious nature of the crimes, it would not agree to such visitation and would prohibit all contact with minors, subject to modification by court order. The district court’s prohibition of Defendant’s contact with all minors, including his daughters, is reasonably related to achieving the sentencing goal of deterring Defendant from engaging in similar criminal conduct to that charged in this case. See State v. Wacey C., 2004-NMCA-029, ¶ 11, 135 N.M. 186, 86 P.3d 611 (stating that the general considerations governing the appropriateness of probation conditions applicable in adult cases were consistent with this Court’s holding in a juvenile case that a probation condition forbidding a child from going to certain locations where he committed offenses was not a banishment and was a reasonable probation condition); State v. McCoy, 116 N.M. 491, 500, 864 P.2d 307, 316 (Ct. App. 1993) (holding that random drug testing as a condition of probation is reasonably related to deterring future criminal conduct), rev’d on other grounds sub nom. State v. Hodge, 118 N.M. 410, 882 P.2d 1 (1994). Case law from other jurisdictions addressing similar conditions of probation supports this conclusion. See, e.g., Nitz v. State, 745 P.2d 1379, 1381 (Alaska Ct. App. 1987) (holding that a defendant convicted of lewd and lascivious acts toward a child was properly subjected to a probation condition that prohibited contact with his daughter and other girls under eighteen); Rodriguez v. State, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979) (holding that after a guilty plea to aggravated child abuse, a special condition of probation that prohibited the defendant from having custody of her children was valid because the condition had a clear relationship to the crime); State v. Credeur, 328 So. 2d 59, 64 (La. 1976) (determining that a special probation condition that prevented contact with the defendant’s children was reasonable when sexual abuse crime involved the defendant’s children); People v. McAllister, 541 N.Y.S.2d 622, 622 (N.Y. App. Div. 1989) (upholding condition of probation preventing contact with stepdaughter and biological daughters when the defendant was convicted of sexual intercourse with his stepdaughter); State v. Crocker, 771 P.2d 1026, 1027-28 (Or. Ct. App. 1989) (stating that when the defendant was convicted of raping his stepdaughter, a condition that prohibited his presence in a residence or vehicle with a child of either gender under eighteen years was valid); see also State v. Kessler, 13 P.3d 1200, 1206 (Ariz. Ct. App. 2000) (holding that a reasonable relationship existed between a probation condition’s requirement that the defendant not have unsupervised contact with children and the goals of rehabilitating him and protecting the public from any further criminal acts he might commit); Ramaker v. State, 243 N.W.2d 534, 536-37 (Wis. 1976) (upholding a probation condition prohibiting association with minor children, not his own, when the defendant was convicted of child molestation).

Conclusion

The Abuse and Neglect Act requires the children’s court to “give primary consideration to the physical, mental and emotional welfare and needs of the child” in proceedings to terminate parental rights. Section 32A-4-28(A). The children’s court must consider the “physical, mental and emotional welfare and needs of the child.” NMSA 1978, § 32A-5-15(A) (1995). This focus on the child is different from the focus of sentencing in a criminal case. The prohibition of special condition number eight related to Defendant’s crime of criminal sexual contact with a minor. Given the purposes of special condition number eight of rehabilitation and deterrence, the district court had jurisdiction of this case and did not err by not transferring it to the children’s court. See State v. Ehli, 681 N.W.2d 808, 810-11 (N.D. 2004) (holding that a probation condition prohibiting the defendant from having contact with minor children under the age of eighteen, including his own, was proper and not a de facto termination of parental rights). We affirm the district court’s imposition of the probation condition prohibiting Defendant from having contact with all children under eighteen unless modified by court order.

IT IS SO ORDERED.

JAMES J. WECHSLER,
Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
IRA ROBINSON, Judge
OPINION

CYNTHIA A. FRY, JUDGE

{1} Both Shawna C. (Mother) and Benjamin O. (Father) appeal the district court’s adjudication that each parent abused and neglected their infant daughter (Child). We combined the appeals due to the shared record and related issues and in order to resolve Child’s status in one opinion. We conclude that the district court properly could have determined that clear and convincing evidence showed Mother neglected Child. We conclude that there was insufficient support for a finding of abuse or neglect as to Father. Finally, we hold that the abuse and neglect statute is not so vague as to violate substantive due process protections under the United States Constitution.

BACKGROUND

{2} We requested that the parties brief the issue of whether an abuse and neglect adjudication is a final, appealable order that would provide this Court with jurisdiction to hear such an appeal. Recently, we confirmed that this Court does have jurisdiction to hear appeals of abuse and neglect adjudications because such determinations are sufficiently final to justify our review. State ex rel. Children, Youth & Families Dep’t v. Frank G., 2005-NMCA-026, ¶ 39, ___ N.M. ___, ___ P.3d ___, cert. granted, 2005-NMCR-002 [Vol. 44, No. 11 SBB 21 (March 21, 2005)]. While we review the initial determination of abuse and neglect, the district court retains continuing jurisdiction for the required periodic reviews of the child’s custody. Id. ¶ 42; see NMSA 1978, § 32A-4-25.1 (1997) (providing that a permanency hearing shall take place within six months of the initial review with subsequent hearings to be held every three months as needed). Therefore, we have jurisdiction to consider both Mother’s and Father’s appeals as long as this appeal is not made moot by further actions of the district court.

{3} The Children, Youth and Families Department (CYFD) initiated the present action by filing a petition alleging abuse and neglect and an affidavit for an ex parte custody order. The following basic facts are set out in CYFD’s abuse and neglect petition, CYFD’s affidavit for custody, CYFD’s predispositional study, and testimony at the adjudication hearing held in late 2003. Mother and Father are not married, do not live together, and by Child’s birth were no longer in an ongoing relationship. Child was born at a hospital in early 2003. The day after Child’s birth, the hospital staff notified CYFD of concerns for Child’s safety due to heated arguments between Mother and Father, Mother’s odd behavior and apparent inability to care for Child, and Mother’s revelation that several of her prior children had been removed from her involuntarily. A CYFD social worker responded but opted not to file an abuse and neglect petition and released Child to Father, pending a mental health evaluation of Mother.

{4} When Child was one month old, Mother apparently contested custody before the domestic relations court. The domestic relations court gave legal custody to Child’s paternal grandmother (Grandmother), concluding that Father was not a suitable caretaker based in part on the court clinician’s view that he lacked empathy and parenting ability and had a criminal record. That court reportedly ordered that Grandmother take drug tests and not leave Child unattended with Father, and that both Mother and Father attend a consultation at the Court Clinic.

{5} Child then lived with Grandmother and Father from April 2003 to August 2003, during which time no reports of abuse or neglect

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were received by CYFD; Child attended day care and was being seen by a pediatrician during this time. After a home visit by CYFD to Grandmother’s home, the social worker reported that the “house was suitable” for Child. During these four months, Mother was not living with Child and was preparing to move out of New Mexico.

{6} Grandmother tested positive in August 2003 for use of controlled substances and, although the details are not clear from the record, the matter again came before the domestic relations court. That court determined that Child should be placed in protective custody and initiated an emergency referral to CYFD. Child has been in foster care since that time, with visitation provided for both parents. Additional facts relating to Mother and Father are set out below in connection with analysis of the adjudication of each parent.

**ANALYSIS**

**Sufficiency of the Evidence to Support Adjudication**

{7} Both parents challenge the sufficiency of the evidence underlying the district court’s adjudication that they abused or neglected Child. To meet the standard of proof in an abuse or neglect proceeding, the fact finder must be presented with clear and convincing evidence that the child was abused or neglected. NMSA 1978 § 32A-4-20(H) (1999); In re Melissa G., 2001-NMCA-071, ¶ 12, 130 N.M. 781, 32 P.3d 790. “For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder’s mind is left with an abiding conviction that the evidence is true.” In re Termination of Parental Rights of Eventyr J., 120 N.M. 463, 466, 902 P.2d 1066, 1069 (Ct. App. 1995) (internal quotation marks and citation omitted). Our standard of review “is a narrow one” and we may not re-weigh the evidence. Id. “Our standard of review is therefore whether, viewing the evidence in the light most favorable to the prevailing party, the fact finder could properly determine that the clear and convincing evidence standard was met.” Id. Although the record in this appeal contains descriptions of events taking place after the adjudication of abuse and neglect, such as permanency plan hearings, our review is limited to a determination of whether the district court could have found that the parents abused or neglected Child based upon the evidence before it. We therefore disregard any of the evidence contained in the record that arose after the adjudication of abuse and neglect.

{8} In adjudicating Child as abused or neglected at the hands of both parents, the court found that three statutory definitions of abuse or neglect were shown by clear and convincing evidence: NMSA 1978, § 32A-4-2(B)(1) (1999) (stating that “[a]n ‘abused child’ [is one] . . . who is at risk of suffering serious harm because of the action or inaction of the child’s ‘parent’” (internal quotation marks omitted)); Section 32A-4-2(E)(2) (stating that “[a] ‘neglected child’ [is one] who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child’s well being because of the faults or habits of the child’s ‘parent’” (internal quotation marks omitted)); and Section 32A-4-2(E)(4) (stating that “[a] neglected child [is one] whose parent . . . is unable to discharge his responsibilities to and for the child because of . . . mental disorder or incapacity”). We summarize the evidence before the district court as to each parent and then assess the findings made by the district court in light of that evidence.

**Mother**

{9} In its petition alleging abuse and neglect and its affidavit for custody, CYFD stated that its investigation showed that “[M]other has serious mental health problems to the extent that the staff at the hospital . . . did not believe that . . . [M]other could appropriately respond to the needs of the baby,” and that Mother “continues to have serious mental health issues and is unstable.” The petition recounted the fights at the hospital and Mother’s departure from New Mexico to Missouri. The affidavit detailed Mother’s “extensive criminal history and mental health concerns” as the reason why the domestic relations court decided not to place Child with Mother. CYFD’s investigative social worker reported that in his interview with Mother, she was visibly upset, discussed moving away, and disclosed that she did not know whether Mother was currently unable to care for Child. CYFD later stated that two of her older children had been taken away from her, but that she “could not give specifics” about those instances. Mother later stated that five of her older children had been removed from her involuntarily. The social worker reported that Mother refused to meet with a therapist at the hospital, as requested by the staff, that she inappropriately entered other patients’ rooms, and that the hospital staff believed Child would be in danger if left with Mother. CYFD concluded that Mother’s mental health history would endanger Child. Finally, the petition recounted the domestic relations hearing at which the guardian ad litem (GAL) and court clinician recommended that Child be placed with CYFD.

{10} CYFD ordered a psychological evaluation of Mother, particularly to assess any impact of her mental health on her ability to parent. The psychologist met with Mother in one session to evaluate her by means of a diagnostic interview and selected tests, but he did not observe Mother interacting with Child. The psychologist testified at the adjudication hearing that due to Mother’s limitations, he was not able to administer some of the test instruments, which require a sixth-grade reading level. He testified that Mother functions, with borderline intelligence, in the “extremely low range of intellectual functioning” and had “serious risk factors” in terms of “overall cognitive and neurological functioning.” The psychologist related Mother’s IQ scores as 55 for verbal, 62 for performance, and 55 for post-scale IQ. He testified that such scores would not necessarily render a person generally, nor Mother in particular, incompetent to parent, but he would have “reservations” about such a parent’s ability.

{11} In addition, the psychologist found Mother tested at a “high moderate range” of depression, although he found that parents typically have some level of depression once a child is removed from them. The psychologist diagnosed Mother as having: (1) dysthymic disorder, due to her long-term, moderate depression; (2) adjustment disorder with anxiety; (3) cognitive disorder, not otherwise specified, due to her apparent neurologic deficits; (4) mild mental retardation; and (5) personality disorder, not otherwise specified, with borderline features. The psychologist testified that the most significant factors to his diagnosis of the personality disorder were Mother’s history of having five children previously taken involuntarily, her self-reported difficulty in maintaining good relationships, and her overall lifestyle of being unhappy and “reactive,” instead of proactive, to situations. The psychologist concluded that Mother’s testing indicated a risk of poor judgment and poor impulse control, and generally he “would be concerned [about] the safety of any child placed with her[,] particularly an infant,” although he stated that he did not know whether Mother was currently unable to care for Child.

{12} Prior to the adjudication, CYFD issued a pre-dispositional study regarding Mother’s visitation with Child, which took place three times per week. CYFD concluded that Mother “does not appear to have an understanding of [Child’s] need[s] or how to appropriately
care for her needs.” This conclusion was based upon Mother’s attempts to feed Child solid food before Child could eat it, overfeeding Child, excessive changing of Child’s diaper, and inability to comfort Child. This report contained CYFD’s assessment that Mother would not be “able to safely care for [Child].”

13 Mother testified at the adjudication hearing and stated that she loved Child and could care for her. She testified that she had an apartment, which CYFD had visited and deemed safe, and that she had income from Social Security disability. She noted that she had not ever abused Child, had never even had custody of her, and that she very much wanted to raise Child.

14 The district court found that: (1) Mother’s conduct at the hospital indicated that she was not able to care for Child; (2) her mental health interferes with her ability to care for Child; (3) Mother has a history of prior involuntary terminations of parental rights; and (4) her “situation, mental health diagnosis and history create a significant risk of serious harm” if Child were placed in her care.

15 We conclude that the totality of the evidence presented supports the court’s findings and judgment. On appeal and at trial, Mother emphasized that she has not abused Child and has not had an opportunity to actually demonstrate her parenting skills with Child. While this is true, we note that she has had an opportunity to demonstrate her abilities with five older children. Her admission of involuntary termination of her parental rights to those older children operates as clear and convincing proof of that fact. In re State ex rel. Children, Youth & Families Dep’t v. Amy B., 2003-NMCA-017, ¶ 12, 133 N.M. 136, 61 P.3d 845. While this fact is not determinative for a finding of abuse and neglect, it is considered an aggravated circumstance under the Abuse and Neglect Act (the Act) in the context of termination of parental rights, as a basis to forego reunification efforts. § 32A-4-2(C)(4) (stating that “aggravated circumstances include those circumstances in which the parent, guardian or custodian has[ ] had his parental rights over a sibling of the child terminated involuntarily” (internal quotation marks omitted)). Using the prior involuntary terminations as background, we conclude that Mother has been provided a reasonable opportunity, without success, to demonstrate her ability to parent. Amy B., 2003-NMCA-017, ¶ 16 (noting the “very real relationship between the past conduct and the current abilities” to parent). Contrary to her contention, Mother need not be provided a reasonable opportunity, without success, to demonstrate her ability to parent.

16 The de

17 Father also met, for one session, with a CYFD-selected psychologist, but the psychologist never observed Father interacting with Child. The psychologist testified at the adjudication hearing that some tests would not be valid due to Father’s incomplete responses or due to Father’s lack of candor. The psychologist assessed Father as being highly dominant, which the psychologist associated with “high need for control, high need for power[,] and poor interpersonal function[,]” and mentioned a connection between such dominance and domestic violence and child abuse. He testified that Father also scored high within the mania category, which raised concerns about impulse control and paranoia. The psychologist based his concern regarding Father’s impulse control on Father’s prior criminal convictions as well as the argument at the hospital. He testified, “[I]f somebody has been involved in a crime and antisocial behavior, it just raises questions in my mind about the ability to raise a child . . . . [P]eople who commit crimes tend to be more self[-]centered and not have a great deal of empathy for others.” He testified that it is not generally possible to teach a person to be empathetic. Even with the assumption of a five-year period in which Father had had no criminal convictions, the psychologist’s opinion was unchanged because such criminal acts are indicative of personality disorders, which are resistant to change. The psychologist described Father as angry and oppositional, and the psychologist felt the anger was part of Father’s character and not just due to losing custody of Child.

18 The psychologist diagnosed Father as having: (1) adjustment disorder with anxiety, which was not unusual given the situation with CYFD; (2) a principal diagnosis of schizotypal personality disorder; (3) narcissistic personality disorder “primarily because [he] didn’t hear any awareness [from Father] of how this situation might be affecting [Child]”; and (4) antisocial personality disorder. The psychologist concluded that he had “very strong reservations about placing a child in [Father’s] care,” that if a bonding and interaction study was done “right now, [Father] would probably not do well,” and that Child was at the stage where empathy from a caregiver was “vital[y] important” to Child’s development. He based his conclusions on his view that Father lacked sufficient empathy to be able to read a child’s cues or facilitate attachment, and had high indicators of dominance and need for control, which “broadly correlate” with child abusers and domestic violence perpetrators. In addition, the psychologist feared how “[Father’s] anger might impact the child.” He also felt Father was evasive in the area of substance abuse. The psychologist recommended that Father meet with a child development specialist who could actually observe Father interacting with Child and give instruction on how to parent, and that Father receive ongoing psychiatric care.

19 The court clinician of the district court testified as to her involvement with the case, which she described as varying from being a passive observer to providing information to the district court about the parties. The clinician testified that she did not observe Father
with Child, other than perhaps once in passing. She concluded that Father, Mother, and Grandmother could not make “a whole parent” even if “you put all three of them together,” although they all clearly loved Child and were not responsible for their poor upbringing and personal histories. The clinician felt that, despite the recent period in which Father went without criminal activity, Father’s criminal history “raise[d] concern” for her. The court had before it a report of Father’s criminal history, which includes three felony convictions in the period from 1993 to 1995, and then five misdemeanor convictions from 1995 to 1999. There were a number of arrests or dismissed cases from 1993 to 2000 that did not result in convictions, and a 2002 arrest for domestic assault initiated by Mother that was dismissed. The court asked Father about his criminal history, which he had described in testimony as “several years ago,” to which the court replied, “It’s not that many years ago.” Finally, Father testified that he has a full-time job, was no longer living with Grandmother, had a suitable apartment, and would like to raise his daughter.

(20) The court found that: (1) in his meeting with the court clinician, Father showed a lack of awareness of Child’s needs and lack of empathy that would interfere with his ability to care for Child; (2) Father’s mental illnesses would put Child at risk of serious harm if placed with Father; (3) Father’s criminal history, lack of candor with the court about that history, and his failure to prevent placement of Child with Grandmother (who tested positive for use of controlled substances) indicate his inability to care for Child; and (4) Father’s actions and inactions placed Child at risk of serious harm.

(21) Father has had no other children and has had no prior allegations of child abuse or neglect. We find it significant that the first person to make a pronouncement on his inability to interact properly and “with empathy” with Child was the court clinician, who did not observe him more than momentarily with Child. The psychologist found Father “lacked empathy” and could not respond to Child’s cues, but the psychologist did not observe Father with Child and based his assessment on a single session in which Father failed to describe the situation’s impact on Child. Those who actually observed Father interacting with Child commented positively. This includes the CYFD investigative social worker and the CYFD employees who observed his visitation, who stated, “[Father] appears to be able to care for the basic needs such as feeding and changing.” The suggestion that Father permitted or allowed Grandmother’s drug use around Child was supported only by a positive urinalysis. There was no testimony that Grandmother actually took care of Child while under the influence, had neglected Child, or had drugs around Child. Father did, for some period, take care of Child without incident, including taking her to day care and her pediatrician. The court clinician alleged that Father failed to follow the domestic relations court’s stipulations, but there is no contention that these violations constituted abuse or neglect.

(22) Even when we view the evidence in the light most favorable to the State, the evidence is insufficient to support the district court’s conclusion that Father abused or neglected Child. The State’s evidence consisted of the following: (1) testimony of the court clinician and the psychologist, neither of whom observed Father with Child, who found Father to be not empathetic enough; (2) allegations that Father is angry, either at CYFD and Mother, or generally; (3) the psychologist’s opinion noting that Father’s personality traits are “broadly correlated” with those who may be violent, although there was no evidence of Father’s being violent to Child; and (5) Father’s criminal history, which rendered him presumptively at risk as a parent, in the psychologist’s view. This evidence does not meet a clear and convincing standard, instantly tilting the scales in the affirmative, for any of the statutory definitions. Evidence of Father’s somewhat aged criminal history, his anger, his mental health issues as diagnosed by the psychologist, and the fact that he “permitted” Grandmother to care for Child while Grandmother ingested drugs, while not reflecting exemplary behavior, does not support anything more than a vague inference of future harm. Such an inference provides an insufficient basis for finding either neglect or abuse within the meaning of the statute. We therefore reverse the district court’s judgment that Father abused or neglected Child.

Constitutionality of the Abuse and Neglect Act

(23) Mother contends that the abuse and neglect statute is so vague as to violate due process protections under the Fourteenth Amendment, particularly for the mentally disabled. In connection with this argument, Mother also contends that the district court effectively based its finding of abuse or neglect upon Mother’s character and mental deficiency “standing alone,” without any showing of actual errors or omissions in Mother’s parenting. We dispose of this latter concern and then address the core void-for-vagueness argument.

(24) We review a challenge to the constitutionality of a statute de novo. State v. Laguna, 1999-NMCA-152, ¶ 24, 128 N.M. 345, 992 P.2d 896. To the extent Mother asks us to interpret the Act, that also presents a question of law that is reviewed de novo on appeal. State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). A void-for-vagueness attack need not be preserved to enable our review. Laguna, 1999-NMCA-152, ¶ 23.

(25) Mother appears to be claiming that the Act permits an improper “status” judgment, which in the criminal context would violate the Eighth Amendment’s ban on cruel and unusual punishment. See Robinson v. California, 370 U.S. 660, 666-67 (1962) (stating that criminalizing the status of being addicted to narcotics violates the Eighth Amendment); see also Powell v. Texas, 392 U.S. 514, 533 (1968) (limiting Robinson to statuses and finding that being drunk while in public did involve an actus reus).

(26) Mother argues that she “committed no prohibited act; instead, her current mental state and her past conduct . . . condemned her to lose custody.” It is true that the psychologist suggested in his testimony that Mother’s low IQ was a concern and his testimony could be construed to mean that her status alone may have been sufficient to remove Child from Mother. Similarly, Mother contends that “there is no statutory authority for taking custody of a child, based on perceived future harm, in the absence of some actus reus by a parent . . . [and unless the] act or omission [is] affecting the child who is the current subject of . . . proceedings.” Mother is only partially correct. The State may indeed act based upon perceived future harm, and prior harm to other children may properly be considered as relevant to neglect or abuse of a different child. In re I.N.M. 105 N.M. at 668, 735 P.2d at 1174; § 32A-4-2(B)(1) (defining “abused child” as being “at risk of suffering serious harm”).

(27) We agree with Mother that low IQ, mental disability, or mental illness alone are not sufficient grounds for a finding of abuse or neglect. See In re Kidd, 261 N.W.2d 833, 835 (Minn. 1978) (explaining that in a termination context, mental illness alone is not “other conduct” detrimental to a child); In re J.L.B., 594 P.2d 1127, 1136 (Mont. 1979) (“[M]ental deficiencies alone do not justify termination if there is no evidence that the child is in some way harmed or likely to be harmed because of the parent’s condition.”). We also
agree with Mother that if the State fails to show any prior acts or omissions that constitute abuse or neglect and makes predictions of harm based solely on an unfavorable status, such as mental disability, then the State would fail to meet the statutory basis for abuse and neglect. However, we conclude that the Act does not permit a finding of neglect based solely upon the mental disability or mental illness of a parent. {28} It is true that the Act defines a neglected child as one “who is without proper parental care and control . . . because of the faults or habits of the child’s parent,” § 32A-4-2(E)(2) (emphasis added). Despite the use of the emphasized phrase, however, neglect may not be viewed as the automatic result of a person’s status. This phrase imposes a fault requirement in those cases where a parent fails or refuses to provide proper care for a child. This culpability requirement operates to exclude cases in which even an exemplary parent could not provide “proper parental care and control” due to circumstances beyond that parent’s control or where a parent is acting reasonably. See In re Melissa G., 2001-NMCA-071, ¶ 20 (stating that where a mother reasonably failed to notice harm to her child, but there was no evidence of mother’s culpability, through either intentional or negligent disregard, the claim of neglect failed as a matter of law). One could hypothesize many situations in which a parent could not properly care for his or her child temporarily, yet the inability would not be due to the “faults or habits” of the parent, or a situation where a reasonable parent would fail to protect or aid a child due to lack of notice. In either case, there would be no culpability.

{29} By contrast, the fault requirement in Section 32A-4-2(E)(2) is absent from Section 32A-4-2(E)(4), which states that a parent’s “incarceration, hospitalization or physical or mental disorder or incapacity” is a basis for neglect if that condition makes the parent “unable to discharge his responsibilities” as a parent. See State ex rel. Children, Youth & Families Dep’t v. Joe R., 1997-NMSC-038, ¶ 1, 123 N.M. 711, 945 P.2d 76 (stating that incarceration alone does not constitute neglect, as there must also be an inability to parent). Thus, the legislature has (1) imposed a culpability requirement in the section focusing on absence of “proper parental care and control or subsistence,” Section 32A-4-2(E)(2), and (2) defined certain circumstances in Section 32A-4-2(E)(4) that, regardless of the culpability of the parent, may constitute neglect if, and only if, such a status causes the parent to be unable to discharge his or her parental responsibilities.

{30} An unfavorable personal status, such as low IQ, poverty, mental illness, incarceration, prior convictions, or addiction, is therefore relevant only to the extent that it prompts either the harms defined as abuse, or the neglect which is defined as the failure to provide “proper parental care and control” or an inability “to discharge his responsibilities to and for the child.” In re Adoption of J.J.B., 119 N.M. 638, 646, 894 P.2d 994, 1002 (1995) (stating that to comport with due process, parental unfitness must be shown “by proof of substantive criteria demonstrating parental inadequacy or conduct detrimental to the child”). While such statuses, particularly if extreme in nature, may well lead to neglect or abuse as defined by the Act, we emphasize that the focus should be on the acts or omissions of the parents in their caretaking function and not on apparent shortcomings of a given parent due to his or her unfavorable status. While no child would ask to have a poor, incarcerated, or addicted parent, poverty, incarceration, or addiction alone do not perforce equate to neglect as set out in the statute. See State ex rel. Children, Youth & Families Dep’t v. Joe R. 1996-NMCA-091, ¶ 9, 122 N.M. 284, 923 P.2d 1169 (holding that father’s conviction for murdering child’s mother, and subsequent incarceration for life, did not establish neglect as a matter of law), rev’d on other grounds, 1997-NMSC-038. Thus, we conclude that the Act does not permit a court to find abuse or neglect based solely on a parent’s status. Here, the State showed that Mother’s status renders her unable to care for Child, and neglect was properly found under Section 32A-4-2(E)(4). The fact that this inability may spring from a mental disability is relevant under Section 32A-4-2(E)(4) only because the State showed that Mother is “unable to discharge [her] responsibilities to and for the child.” Since the statute requires a clear and convincing showing of an inability to parent in the specified circumstances, there is no basis for a court to find neglect solely based upon a parent’s unfavorable status, and the district court did not do so in Mother’s case.

{31} Mother also challenges the Act as being “void for vagueness” as applied to her. She claims that the phrases “without proper parental care . . . because of the faults or habits of the child’s parent” in Section 32A-4-2(E)(2), “unable to discharge his responsibilities . . . because of . . . mental disorder” in Section 32A-4-2(E)(4), and finally, “at risk of suffering serious harm” in Section 32A-4-2(E)(1), when read together, fail to give parents notice of what conduct is prohibited and vest “entirely too much discretion” in CYFD and the court in determinations of parental unfitness. We summarize the void-for-vagueness doctrine, apply the doctrine to the Act, and conclude that it is not unconstitutionally vague.

{32} In the criminal context, due process requires that a statute be drafted so that it provides fair warning of the conduct sought to be proscribed and so it does not encourage arbitrary or discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983); State v. Luckie, 120 N.M. 274, 276, 901 P.2d 205, 207 (Ct. App.1995). A strong presumption of constitutionality underlies each statute, and the defendant has the burden to prove unconstitutionality beyond all reasonable doubt. Laguna, 1999-NMCA-152, ¶ 24. A claim of vagueness is analyzed according to the particular facts of each case. Luckie, 120 N.M. at 276, 901 P.2d at 207. A defendant will not succeed if the statute clearly applied to the defendant’s conduct. Laguna, 1999-NMCA-152, ¶ 24.

{33} Although the void-for-vagueness doctrine typically arises in criminal cases, New Mexico courts have previously considered similar challenges to both abuse and neglect and termination of parental rights statutes. In re Candice Y., 2000-NMCA-035, 128 N.M. 813, 999 P.2d 1045; In re Doe, 100 N.M. 92, 666 P.2d 771 (1983); State ex rel. Health & Social Servs. Dep’t v. Natural Father, 93 N.M. 222, 598 P.2d 1182 (Ct. App. 1979). We first address the fair warning or notice aspect and then consider the arbitrary enforcement facet of the doctrine.

{34} In assessing whether a statute provides adequate notice, we ask if the statute “allows individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited.” Laguna, 1999-NMCA-152, ¶ 25. “If the language makes the statute understandable and sensible, that is all that is necessary to uphold it as valid.” State v. Andrews, 1997-NMCA-017, ¶ 11, 123 N.M. 95, 934 P.2d 289. In addition, the federal constitution does not require “impossible standards” of clarity in statutes, only that the language “convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” United States v. Petrillo, 332 U.S. 1, 7-8 (1947); see Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (stating that “c]ondemned to the
(35) In Natural Father, this Court addressed a vagueness challenge to the phrase “unable to discharge [his] responsibilities . . . because of . . . other physical or mental incapacity” in the predecessor statute to what is now Section 32A-4-2(E)(4). Natural Father, 93 N.M. at 225, 598 P.2d 1185. There, we held that the words “mental incapacity” gave sufficient notice that the inability to discharge one’s responsibilities as a parent because of mental incapacity constitutes neglect. Id. In 1987, the legislature expanded the definition, to what it is today, by adding the term “disorder” to mental incapacity and the phrase became “unable to discharge his responsibilities . . . because of . . . mental disorder or incapacity.” NMSA 1978, § 32-1-3(L)(4) (1972, repealed 1978) (current version at NMSA 1978, § 32A-4-2(E)(4) (1999) (emphasis added)). We consider that the addition of the term “disorder” did not make the statute any more vague; instead, it clarified the circumstances in which a parent’s inability to function as a parent would constitute neglect without a showing of culpability.

(36) Mother’s prior extensive history with abuse and neglect actions cuts substantially against her claim that she had no notice; her personal experience provided notice of what similar laws, if not those of New Mexico, proscribed. See United States v. Corrow, 941 F. Supp. 1553, 1562 (D. N.M. 1996) (holding that, in an “as applied” challenge, a criminal defendant was on notice from his own experience with Navajo culture that certain Navajo artifacts had cultural significance and therefore he could not claim that the term “cultural patrimony” failed to give him notice of what types of items were protected). It is well settled that where a person is aware his or her conduct is approaching the line of prohibited conduct, he or she bears the risk of treading near the line. Id.

(37) Also persuasive to us is that our Supreme Court has found that language that is arguably substantially more vague meets constitutional requirements of specificity. See In re Doe, 100 N.M. at 93, 96-97, 666 P.2d at 772, 775-76 (holding that the phrase “the parent/child relationship has disintegrated” was not vague, and properly could be a basis for termination of parental rights). We conclude that Mother herself had adequate notice of what was prohibited in light of common understanding and practices regarding parental responsibilities, combined with her own experiences. She has not shown beyond a reasonable doubt that the Act failed to provide her with a fair opportunity to know that an inability to discharge her responsibilities due to mental disorder or incapacity constituted neglect. Similarly, she has not raised any serious doubt that the phrases “proper parental care” or “risk of serious harm” are not understandable and sensible when considered in light of common understanding and practices regarding parenting. A law’s “[g]enerality is not the equivalent of vagueness.” Watso v. Dep’t of Soc. Servs., 841 P.2d 299, 309 (Colo. 1992) (en banc). We agree with a case cited in Natural Father, which states that when a statute “deals with children in need of care that they are not receiving[,] this may arise in so many ways that it would be impossible to state them all with great exactitude.” In re Minor Children of F.B., 323 S.W.2d 397, 401 (Mo. Ct. App. 1959).

(38) Finally, we conclude that the Act does not encourage standardless or arbitrary enforcement of the law. The United States Supreme Court has noted that “the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.” Kolender, 461 U.S. at 358 (internal quotation marks and citation omitted). Where a law does not provide “minimal guidelines, a . . . statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.” Id. (internal quotation marks and citation omitted). Since CYFD performs the law enforcement function under the Act, we therefore ask whether the relevant portions of the Act provide it with “carte blanche” that would permit “arbitrary or standardless enforcement power.” Laguna, 1999-NMCA-152, ¶ 33.

(39) In our view, the phrases “without proper parental care and control . . . because of the faults or habits of the child’s parent” in Section 32A-4-2(E)(2), “unable to discharge his responsibilities . . . because of . . . mental disorder” in Section 32A-4-2(E)(4), and “at risk of suffering serious harm” in Section 32A-4-2(B)(1) provide adequate standards to guide CYFD in its enforcement activities and do not invite or encourage arbitrary enforcement. Law enforcement always “requires the exercise of some degree of police judgment.” Grayned, 408 U.S. at 114. We are not faced here with anything like the kind of sweeping laws that have been struck down because they provide “no standards” to guide law enforcement and permit enforcers to effectively do as they please. See Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (stating that where there are no standards governing the exercise of the discretion granted by a law, “the scheme permits and encourages an arbitrary and discriminatory enforcement”). In addition, our prior decisions do not reveal a chronic over-reaching or propensity by CYFD to use the Act as an arbitrary basis to act against parents based upon mere disapproval of their lifestyle. The Act’s language is broad enough to cover the myriad harms that may confront children, but not so broad and standardless to give CYFD carte blanche to file petitions against any parent it chooses. See In re J.L.B., 594 P.2d at 1135 (upholding the Montana neglect act because there was no pattern of over-broad interpretation and the language was broad enough to include important harms to children).

CONCLUSION

(40) We affirm the finding of abuse or neglect as to Mother and reverse the finding of abuse or neglect as to Father. We also conclude that the challenged portions of the Abuse and Neglect Act are not so vague as to violate constitutional protections as applied to Mother.

(41) IT IS SO ORDERED.
CYNTHIA A. FRY, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE,
Chief Judge
CELIA FOY CASTILLO, Judge
{1} This case arises from a political and familial feud that has already resulted in two opinions from our Court. See VanderVossen v. City of Espanola, 2001-NMCA-016, 130 N.M. 287, 24 P.3d 319; Seeds v. VanderVossen, No. 22,718, (N.M. Ct. App. Aug. 11, 2003) (mem.). In this case, Plaintiffs Robert and Laura Seeds sued Robert’s sister, Kathy VanderVossen, and Kathy’s husband, Anthony VanderVossen, for alleged interference with Plaintiffs and their towing businesses in Espanola. Plaintiffs also sued Espanola’s mayor, Richard Lucero (who is Anthony VanderVossen’s uncle) and the city attorney, John Lenssen (together, City Defendants), contending that they used their official positions to assist the VanderVossens in their attempt to cause personal and financial harm to Plaintiffs. The issues in this appeal concern: (1) whether the City Defendants were acting within the scope of their duties and therefore were immune under the Tort Claims Act, NMSA 1978, §§ 41-4-1 to -29 (1976, as amended through 2004) (TCA), from a claim of conspiracy to commit certain tortious conduct; and (2) if so, whether the VanderVossens can be liable for civil conspiracy when the City Defendants, with whom they are alleged to have conspired, are immune. The trial court ruled that the City Defendants were immune under the TCA and also dismissed the civil conspiracy claim against the VanderVossens. We affirm the trial court’s ruling that the City Defendants are immune, but we reinstate the civil conspiracy claim against the VanderVossens.

BACKGROUND

{2} We set out facts as alleged in Plaintiffs’ first amended complaint, considering them undisputed for purposes of our disposition of the issues in this case. Plaintiffs and the VanderVossens are neighbors and business competitors. Each Plaintiff and each VanderVossen owns a towing business in Espanola. All licensed towing companies in Espanola are listed with local law enforcement agencies on 911 rotation logs. When a vehicle requires towing, the towing companies are called on a rotating basis. As we explain below, the rotation logs became a bone of contention between the parties.

{3} Plaintiff Robert Seeds and Defendant Lucero are political rivals. Mr. Seeds was an elected member of the Espanola City Council until the term ending in 1998. At that time he was defeated by a member of a slate of candidates that included Lucero as candidate for mayor. Lucero was elected mayor at that time, whereupon Mr. VanderVossen began to spend considerable time at the city offices, “where he used his position as nephew of the mayor to pressure city employees to take various actions” against Plaintiffs.

{4} Plaintiffs alleged that Lucero “directed city employees to take actions against [Plaintiffs] which were requested by Anthony VanderVossen, and which were designed to harass [Plaintiffs] and damage their businesses.” Among the actions allegedly taken were: threatening to remove one of Plaintiffs’ towing businesses from the 911 rotation logs and requesting law enforcement agencies to do so; filing baseless criminal complaints against Plaintiffs, at the behest of Mr. VanderVossen, for purported violations of municipal zoning ordinances, while at the same time refusing to prosecute the VanderVossens and others for their violations of the zoning ordinances; and providing assistance to the VanderVossens in their attempt to obtain utility easement rights across Plaintiffs’ property. In addition, Plaintiffs alleged that the VanderVossens asked the city council to set aside a special zoning exception Mr. Seeds had obtained from the planning and zoning commission. When the council denied the VanderVossens’ petition, Defendant Lenssen appealed the council’s decision to the trial court without the council’s permission in order to help the VanderVossens, who were his former clients.

{5} Relying on the above allegations, Plaintiffs asserted claims against the VanderVossens and the City Defendants for conspiracy, violation of 42 U.S.C. § 1983 (1996), malicious abuse of process, wrongful interference with business relations, prima facie tort, intentional infliction of emotional distress, and punitive damages. Defendants removed the case to federal court. Plaintiffs ultimately stipulated to the dismissal of their claim for wrongful interference with business relations and various aspects of the other claims. The federal trial court then granted Defendants summary judgment on the § 1983 claims and remanded the state claims to the state court.
{6} The City Defendants moved under Rule 1-012(B)(6) NMRA for dismissal of all claims against them on the ground that there was no applicable waiver of immunity under the TCA. The City Defendants also sought summary judgment on the ground that they were entitled to judgment on the various tort claims as a matter of law. The VanderVossens also sought summary judgment. The trial court dismissed all claims against the City Defendants on the basis of sovereign immunity. It also granted summary judgment to the VanderVossens on Plaintiffs’ claims for intentional infliction of emotional distress and Ms. Seeds’ claim for malicious abuse of process. In addition, the court granted the VanderVossens summary judgment on Plaintiffs’ conspiracy claims “because the City of Española and the employees identified by Plaintiffs as the basis for this claim are immune from liability under the New Mexico Tort Claims Act.” Plaintiffs appeal only from the order dismissing all claims against the City Defendants and the order granting the VanderVossens summary judgment on the conspiracy claims; they do not appeal from the summary judgment in favor of the VanderVossens on their other claims.

DISCUSSION

Whether the City Defendants Were Acting Within the Scope of Their Duties

{7} The parties treat the trial court’s judgment as a Rule 1-012(B)(6) dismissal. It is clear that the trial court dismissed Plaintiffs’ conspiracy claim in response to the City Defendants’ Rule 1-012(B)(6) attack based on sovereign immunity. However, we note that the City Defendants attached many documentary exhibits to their motion for summary judgment, and the trial court noted in its final judgment that it had considered both motions. Therefore, we consider the court’s ruling to be summary judgment in favor of the City Defendants. See Santistevan v. Centinel Bank of Taos, 96 N.M. 730, 731, 634 P.2d 1282, 1283 (1981) (explaining that a motion to dismiss will be treated as a motion for summary judgment when matters outside the pleadings are presented to the trial court).

{8} Summary judgment is warranted if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Koenig v. Perez, 104 N.M. 664, 665, 726 P.2d 341, 342 (1986). If the facts are not in dispute, and only their legal effect remains to be determined, summary judgment is proper. Gardner-Zemke Co. v. State, 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990). Our review of the trial court’s determination is de novo. Bartlett v. Mirabal, 2000-NMCA-036, ¶ 4, 128 N.M. 830, 999 P.2d 1062.

{9} Plaintiffs concede that the City Defendants are immune for any actions they performed while in the scope of their duties. See NMSA 1978, § 41-4-4 (2001) (providing that “any public employee while acting within the scope of duty [is] granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act [28-22-1 to 28-22-5 NMSA 1978] and by Sections 41-4-5 through 41-4-12 NMSA 1978”). But Plaintiffs contend the City Defendants were not acting within the scope of their duties when they conspired with the VanderVossens to harm Plaintiffs. Thus, they argue that the conspiracy itself places the City Defendants outside the protection of the TCA and subjects them to personal liability.

{10} “[S]cope of duty means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance.” NMSA 1978, § 41-4-3(G) (2003). Our case law establishes that a public employee is within the scope of authorized duty even if the employee’s acts are fraudulent, intentionally malicious, or even criminal. See Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, ¶¶ 12, 17, 129 N.M. 778, 14 P.3d 43 (explaining that TCA may require a governmental entity to defend and indemnify its employee even if the employee “acts fraudulently or with actual intentional malicious to injure another,” and that “the legislature likely foresaw the possibility that a public employee could abuse the duties actually requested, required or authorized by his state employer and thereby commit malicious, even criminal acts that were unauthorized, yet incidental to the performance of those duties”). Consequently, Plaintiffs misunderstand the scope of duty concept when they argue that the critical question is “whether [the City Defendants] were motivated solely by personal concerns or whether they were working with a view toward furthering the City’s interests.” As our Supreme Court stated in Celaya v. Hall, 2004-NMSC-005, ¶ 25, 135 N.M. 115, 85 P.3d 239, “the TCA clearly contemplates including [those] who abuse their officially authorized duties, even to the extent of some tortious and criminal activity.” The City Defendants’ wrongful motive is simply irrelevant, as long as there is “a connection between the public employee’s actions at the time of the incident and the duties the public employee was requested, required or authorized to perform.” Id. ¶ 26 (internal quotation marks and citation omitted).

{11} In this case, the City Defendants were generally performing their authorized duties at the time of the actions forming the basis of Plaintiffs’ claims. In broad terms, Plaintiffs alleged that the City Defendants selectively enforced city ordinances and filed groundless criminal charges against Plaintiffs. Yet even if we attribute malicious motives to these actions by the City Defendants, there was an obvious connection between the City Defendants’ authorized duties to enforce the city’s ordinances and the allegedly malicious conduct. Plaintiffs seem to concede as much in their briefs, stating that they “assume that Richard Lucero and John Lenssen will be immune from liability for acts they performed which were within the scope of their duties.” Plaintiffs point to only two categories of acts that they claim were outside the scope of the City Defendants’ duties: (1) the act of conspiring with the VanderVossens to injure Plaintiffs, and (2) the acts of the VanderVossens that are imputed to the City Defendants in accordance with the law of civil conspiracy.

{12} A civil conspiracy is a “combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.” Las Luminarias of the N.M. Council of the Blind v. Isengard, 92 N.M. 297, 300, 587 P.2d 444, 447 (Ct. App. 1978). “The purpose of a civil conspiracy claim is to impose liability to make members of the conspiracy jointly and severally liable for the torts of any of its members.” Ettenson v. Burke, 2001-NMCA-003, ¶ 12, 130 N.M. 67, 17 P.3d 440.

{13} With respect to Plaintiffs’ claim that the City Defendants’ act of conspiring with the VanderVossens was outside the scope of their duties, we do not agree. The purpose of the conspiracy, as alleged by Plaintiffs and developed through the evidence they presented, was to cause Plaintiffs financial harm by utilizing the machinery of city government. Therefore, by allegedly agreeing to this scheme,

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1Plaintiffs also claimed that Defendant Lenssen frivolously appealed the city council’s decision refusing to set aside Robert Seeds’s special exception, but they later admitted that Lenssen did not appeal that decision and that their allegation to this effect was inaccurate.
the City Defendants were doing nothing more than agreeing to use their authorized duties for malicious reasons. We see no basis, and Plaintiffs provide none, to separate the alleged agreement from the acts that carry out the agreement. Thus, a wrongful purpose of the alleged conspiracy was to utilize the functions the City Defendants were authorized to perform, such as the enforcement of zoning ordinances, to harm Plaintiffs. If the VanderVossens' actions are imputed to the City Defendants, it is as if the City Defendants themselves performed those actions. See Bryan A. Garner, A Dictionary of Modern Legal Usage 427 (2d ed. 1995) (defining “impute” as “to regard . . . as being done, caused, or possessed by”). Because the City Defendants’ only role in the conspiracy was to perform authorized acts in order to achieve their goal, any actions they undertook, even imputed actions, would necessarily be within the scope of their duties. Thus, as long as the act of conspiring is within the scope of a public employee’s duties, any co-conspirator’s acts that are imputed to the public employee (such as Mr. VanderVossen’s lying to the city council) will be, by definition, within the scope of the employee’s duties.

We hold that, as Celaya and McBrayer have construed scope of duty under the TCA, a public employee’s conspiratorial and wrongful intent does not remove the employee’s immunity when the employee’s acts are within the scope of his or her duties. To hold a public official’s immunity to be only qualified, as the dissent contends we should, would require a rejection of our rationale in McBrayer, if not legislative action.

Conspiracy Claim Against the VanderVossens

The VanderVossens convinced the trial court that summary judgment on the conspiracy count was proper once the City Defendants were found to be immune. “The standard of review for a motion for summary judgment is whether there are any genuine issues of material fact and whether the moving party is entitled to summary judgment as a matter of law.” Williams v. Cent. Consol. Sch. Dist., 1998-NMCA-006, ¶ 7, 124 N.M. 488, 952 P.2d 978; see also Rule 1-056(C) NMRA; Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (reviewing questions of law de novo). Because the relevant facts are not in dispute, we consider whether the trial court’s legal interpretation of the facts was appropriate. Garrity v. Overland Sheepskin Co., 1996-NMSC-032, ¶ 29, 121 N.M. 710, 917 P.2d 1382.

Civil conspiracy consists of showing “(1) that a conspiracy between two or more individuals existed; (2) that specific wrongful acts were carried out by the defendants pursuant to the conspiracy; and (3) that the plaintiff was damaged as a result of such acts.” Silva v. Town of Springer, 1996-NMCA-022, ¶ 25, 121 N.M. 428, 912 P.2d 304. “Unlike a conspiracy in the criminal context, a civil conspiracy by itself is not actionable, nor does it provide an independent basis for liability unless a civil action in damages would lie against one of the conspirators.” Ettenson, 2001-NMCA-003, ¶ 12 (internal quotation marks and citation omitted). “Without an actionable civil case against one of the conspirators, however, an agreement, no matter how conspiratorial in nature, is not a separate, actionable offense.” Id.

The VanderVossens rely heavily on Ettenson for the proposition that a claim of conspiracy cannot lie “unless a civil action in damages would lie against one of the conspirators.” Id. (internal quotation marks and citation omitted). The VanderVossens and the trial court read this to mean that, once the City Defendants were found to be immune, then there could be no civil action in damages against one of the co-conspirators, and therefore, the conspiracy falls away as a matter of law. We disagree. Ettenson did not involve a situation in which the co-conspirators were immune under the TCA. See id.; see also State v. Wenger, 1999-NMCA-092, ¶ 10, 127 N.M. 625, 985 P.2d 1205 (stating that cases are not authority for propositions not considered) rev’d on other grounds sub nom. State v. Johnson, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233. In addition, and more importantly, a claim of civil conspiracy is a claim seeking to impute liability from one co-conspirator to another. Ettenson, 2001-NMCA-003, ¶ 12. Consequently, even if the City Defendants cannot be made to respond in damages for their actions in furtherance of the conspiracy, liability for those actions can be imputed to the VanderVossens if Plaintiffs can prove the existence of a conspiracy between the VanderVossens and the City Defendants.

As our Supreme Court said in Armijo v. National Surety Corporation, “[t]he gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination.” 58 N.M. 166, 177-78, 268 P.2d 339, 346 (1954) (internal quotation marks and citation omitted). We find it significant that this observation refers to “damage” rather than “damages.” The operative focus for determining whether liability may be imputed is on the acts and the injury resulting from those acts, not on whether a given conspirator may be held liable for damages.

Thus, if Plaintiffs can prove that the VanderVossens conspired with the City Defendants and that the City Defendants took actions constituting malicious abuse of process, the City Defendants’ actions can be imputed to the VanderVossens, who will then be jointly and severally liable for Plaintiffs’ resulting damages. We find support for this view in a recent case involving another type of vicarious liability, Juarez v. Nelson, 2003-NMCA-011, 133 N.M. 168, 61 P.3d 877. In that case, we held that the dismissal of a medical
malpractice claim against a doctor pursuant to the Medical Malpractice Act’s statute of repose could not be asserted by the doctor’s employer as a defense to vicarious liability. Id. ¶ 2. We concluded that “a judgment against a plaintiff in favor of an employee-defendant does not preclude an action against the employee’s principal where the judgment in the action against the employee was based solely on a defense that was personal to the employee.” Id. ¶ 28; see also Restatement (Second) of Judgments § 51(1)(b) (1982) (same). We see no reason why this principle should not apply under the circumstances in the present case. As the statute of repose in Juarez shielded the employee from liability, the TCA similarly shields the City Defendants from liability, not from suit. See Allen v. Bd. of Educ., 106 N.M. 673, 675, 748 P.2d 516, 518 (Ct. App. 1987) (explaining that the TCA “provides a defense to liability, but not absolute immunity from suit”). The City Defendants’ immunity defense is personal to them and cannot be raised as a defense by the VanderVossens.

22] The VanderVossens rely on Bauer v. College of Santa Fe, 2003-NMCA-121, 134 N.M. 439, 78 P.3d 76, and cases from other jurisdictions for the proposition that “where the underlying claim fails as a matter of law, there can be no derivative liability under the doctrine of civil conspiracy.” We are not persuaded. In Bauer and the other cases cited by the VanderVossens, the underlying claim failed on the merits. See, e.g., Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1194-95 (5th Cir. 1995) (stating that if alleged tort underlying a conspiracy is determined not to have occurred, there can be no liability for conspiracy); Applied Equip. Corp. v. Litton Saudi Arabia, Ltd., 869 P.2d 454, 463 (Cal. 1994) (concluding that as a matter of substantive law, a party to a contract may not be liable under a conspiracy theory for interference with the contract); Bauer, 2003-NMCA-121, ¶¶ 12, 15, 16 (holding that no claim for civil conspiracy would lie where summary judgment was properly granted on underlying breach of contract claim). Here, there has been no determination on the merits of whether the City Defendants actually engaged in the acts in which they are alleged to have conspired. Cf. Juarez, 2003-NMCA-011, ¶ 28 (explaining that exoneration of a servant operates to exonerate the employer only when the exoneration is on the merits of the claim against the servant).

23] The VanderVossens further argue that permitting Plaintiffs’ conspiracy claim would result in the City Defendants remaining involved in the litigation as “hypothetical” parties, which would defeat the TCA’s goals of protecting government entities from functioning without the threat of suit. We do not agree. The City Defendants will not be parties, hypothetical or otherwise, to this litigation because they are immune from liability. Although they may be called as witnesses, the TCA does not protect government actors from the courts’ subpoena power. It is Plaintiffs’ burden to demonstrate that the City Defendants’ actions were wrongful and may serve as a basis for the VanderVossens’ imputed liability. The VanderVossens may defend themselves by establishing that the City Defendants’ actions were proper and did not result in any injury to Plaintiffs. This is no different from the burdens imposed in comparative negligence cases where the parties must deal with evidence of the negligence of non-party tortfeasors. See Bartlett v. N.M. Welding Supply, Inc., 98 N.M. 152, 159, 646 P.2d 579, 586 (Ct. App. 1982) (explaining that non-party tortfeasors must be included in the apportionment of comparative fault), superseded in part on other grounds by NMSA 1978, § 41-3A-1 (1987).

24] In summary, if Plaintiffs are able to prove the elements of a civil conspiracy, including the element that the City Defendants carried out specific wrongful acts in furtherance of the conspiracy, the liability for those acts may be imputed to the VanderVossens despite the City Defendants’ immunity from liability. We hold that Plaintiffs’ claim of civil conspiracy against the VanderVossens is not barred as a matter of law, and it is for a jury to evaluate the legitimacy of the claim.

25] The VanderVossens make an additional argument, apparently raised but not ruled on below, that Plaintiffs failed to state a claim for civil conspiracy in their complaint. We disagree. The complaint contains a count entitled “Conspiracy/Joint Participation,” and it is for a jury to evaluate the legitimacy of the claim.

CONCLUSION

26] For these reasons, we affirm the trial court’s dismissal of the City Defendants. We reverse the trial court’s summary judgment on the conspiracy count against the VanderVossens, and remand for proceedings consistent with this opinion.

27] IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

I CONCUR:
JONATHAN B. SUTIN, Judge
IRA ROBINSON, Judge (concurring in part and dissenting in part)

IRA ROBINSON, JUDGE

(CONCURRING IN PART AND
DISSENTING IN PART)

28] I would not recognize a grant of immunity from liability for the Mayor, or any of the City Defendants who are accused of malicious conduct by intentionally carrying out their personal and political vendettas against their political adversaries. I do not believe that the law should or does provide them with a place to safely hide from civil prosecution under the Tort Claims Act.

29] Those with whom the City Defendants conspire to accomplish their wrongful goals do not escape liability. Neither should the City Defendants. I therefore dissent.

30] I am convinced that New Mexico ought to follow those states that do not recognize immunity for public employees or officials who are guilty of malicious acts. See Aspen Exploration Corp. v. Sheffield, 739 P.2d 150, 158 (Alaska 1987) (stating that “[u]nder a
rule of qualified immunity, a public official is shielded from liability only when discretionary acts within the scope of the official’s authority are done in good faith and are not malicious or corrupt”); Trimble v. City & County of Denver, 697 P.2d 716, 729 (Colo. 1985) (stating that “an official performing discretionary acts within the scope of his office enjoys only qualified immunity. He is shielded from liability for civil damages only insofar as his conduct is not willful, malicious or intended to cause harm”); Podruch v. State Dept of Pub. Safety, 674 N.W.2d 252, 254 (Minn. Ct. App. 2004) (stating that “[t]he doctrine of official immunity protects from personal liability a public official charged by law with duties that call for the exercise of judgment or discretion unless the official is guilty of willful or malicious wrong”); Huber v. N.C. State Univ., 594 S.E.2d 402, 408 (N.C. Ct. App. 2004) (stating that “[p]ublic official immunity does not protect a public official from liability based on corrupt or malicious actions”).

{31} The TCA also mentions malice in the indemnity section. See § 41-4-4(E). That section provides that a government entity has the right to indemnification from a public employee for sums expended in defending the employee or paying a judgment if the employee “acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage.” Id. Although this section is somewhat puzzling because the public employee must have been sued and suffered a judgment, it shows the legislature’s disdain for a public employee who demonstrates the same malice that I find so despicable.

{32} The majority believes that there is no clear indication that the legislature wanted to waive immunity for a public official, other than a law enforcement officer, who misuses the enforcement machinery of government.

{33} I would rely on Oldfield v. Benavidez, 116 N.M. 785, 867 P.2d 1167 (1994), which explains that opposing these policies is the concern that sovereign immunity can result in unfairness and deny the public the right to any redress for the abuse of government power. I certainly share this concern when public officials misuse their governmental authority and power to the point of maliciousness.

{34} Where these same officials misuse the machinery of government and do so maliciously, they shatter the public trust and injure those who they are sworn to protect. The majority believes the legislature has resolved the conflict presented in this case in favor of granting public officials broad latitude to proceed without fear of lawsuits. I suspect that is why public officials do wrong—because they have no such fear.

{35} The majority relies on McBrayer, which dealt with a university instructor who lured a student to his apartment and sexually assaulted her. This Court upheld that public employee’s immunity from prosecution. I do not agree with the holding in McBrayer. I ask the question: “Are these public officials or employees serving the public interest or violating it?”

{36} The majority states that the “City Defendants’ wrongful motive is simply irrelevant, as long as there is ‘a connection between the public employee’s actions at the time of the incident and the duties the public employee was requested, required or authorized to perform.’”’ Majority Opinion ¶ 10 at 5. I cannot agree that wrongful motive is simply irrelevant. I would hold that malicious actions by a public official disconnect him from his scope of public duty.

{37} Let me be quite clear. I appreciate the difficulty of serving as a public official whether elected or appointed. It may well be that the legislature drew a line in the sand keeping members of the public from harassing and frivolously suing public officials. But once a public official crosses over that line and commits malicious acts against others, he loses that cloak of immunity.

CONCLUSION

{38} I concur with the majority in reversing and remanding the trial court’s summary judgment on the conspiracy count against the VanderVossens.

{39} For the reasons stated above, I respectfully dissent from the majority’s affirmance of the dismissal of the City Defendants under Tort Claims immunity.

IRA ROBINSON, Judge
OPINION

MICHAEL D. BUSTAMANTE,
CHIEF JUDGE

{1} This case involves the interpretation of a right of first refusal (ROFR) provision in a limited partnership agreement. The district court decided the ROFR was triggered when the corporate great-great-grandparent of one of the general partners was sold in a stock transfer transaction. Defendant appeals the district court’s basic decision that the ROFR was triggered. Plaintiffs and Defendant below both appeal from the district court’s calculation of the price required to exercise the ROFR. We affirm.

FACTS AND PROCEEDINGS

{2} We first provide an overview of the relevant corporate and partnership structures. The El Dorado Partnership (EDP) is a New Mexico limited partnership formed in 1984 for the purpose of acquiring an interest in the El Dorado Hotel (the Hotel) in Santa Fe, New Mexico. EDP owns a 25% interest in another partnership, Guardian Santa Fe Partnership, which actually owns the Hotel. EDP has three partners: Defendant Aircoa Hospitality Services, Inc. (AHS) is a Delaware Corporation and owns a 40% general partnership interest. NZ EDP, Ltd. Company (NZ) is a New Mexico limited liability company which also owns a 40% general partnership interest. Not a party to the action initially, NZ intervened as a Plaintiff seeking to enforce the ROFR. Plaintiff H-B-S Partnership (H-B-S) is a New Mexico limited partnership which in turn owns a 20% limited partnership interest in EDP. H-B-S was the original plaintiff in this action.

{3} The issues in this case revolve around the ROFR language of the EDP Partnership Agreement. The relevant provisions of the agreement provide:

9.1 Offer to Other Partner. Except as provided in section 9.6, if at any time a Partner proposes to sell, assign, or otherwise dispose of all or any part of his interest in the Partnership, such Partner (“Offeror”) shall first make a written offer to sell such Partnership interest to the other Partners on the same terms and conditions on which the Offeror proposes to transfer the Partnership interest. Such offer shall state the name of the proposed transferee and all the terms and conditions of the proposed transfer, including the price to the proposed transferee, and shall be accompanied by a copy of the offer from the proposed transferee if available.

9.2 Acceptance of Offer. The other Partners shall have the right for a period of 30 days after receipt of the offer from the Offeror to elect to purchase all of the Partnership interest offered. In exercising their right to purchase such Partners may divide the offered interest in any manner to which they all agree and in the absence of agreement, the offered interest shall be divided among such Partners in such group in proportion to their relative Sharing Ratios; provided, however, the right to purchase shall not be effective unless such Partners elect to purchase all of the Partnership interest offered. To exercise its right to purchase, a Partner shall give written notice to the Offeror. Upon exercise of a right to purchase and provided the right is exercised with respect to all of the Partnership interest offered, the purchase shall be closed and payment made on the same terms as applicable to the offer received by the Offeror from the proposed transferee.

9.3 Failure to Accept Offer. If the other Partners do not elect to purchase all of the Partnership interest offered in accordance with the provisions of sections 9.2, the Offeror may transfer the offered interest to the proposed transferee named in the offer to the other Partners. However, if that transfer is not made within 90 days after the end of the 30 day period

1As a visual aid to understanding, we attach two organizational charts. Appendix 1 shows the corporate/ownership structure just prior to the sale. Appendix 2 depicts the structure after the sale.
provided for in section 9.2, a new offer shall be made to the other Partners and the provisions of this Article 9 shall again apply.

9.4 **Cash Equivalents.** If the proposed offer under section 9.1 is for consideration other than cash or cash plus deferred payments of cash, the purchasing Partners may pay the cash equivalent of such other consideration. The Offeror and the purchasing Partners shall attempt to agree upon a cash equivalent of such other consideration. If they cannot agree and such disagreement continues for a period of ten business days, any of such Partners may, by five days’ written notice to the others, initiate arbitration proceedings for determination of the cash equivalent in Denver, Colorado, according to the rules and practices of The American Arbitration Association with respect to a sole arbitrator. The arbitrator shall determine the cash equivalent without regard to income tax consequences to the Offeror as a result of receiving cash rather than other consideration. The purchasing Partners may give notice of election to purchase to the Offeror within ten days after the arbitrator’s decision, if they choose to purchase the interest.

9.5 **Direct and Indirect Transfers.** For purposes of this agreement, restrictions upon the sale, assignment or disposition of a Partner’s interest shall extend to any direct or indirect transfer including, without limitation: (a) an involuntary transfer such as a transfer pursuant to a foreclosure sale; (b) a transfer resulting by operation of law, or as a result of any merger, consolidation or similar action; and (c) the transfer of an equity interest in a Partner which is a corporation, partnership or other entity if the transfer of the equity interest results in a change in control of such corporation, partnership or other entity. The transfer of a limited partner interest in a Partner which is a limited partnership shall not be considered to result in a change in control of such limited partnership for purposes of the prior sentence.

9.6 **Permitted Transfers.** Notwithstanding the above, the following transfers shall be permitted without first offering the interest to the other Partners or otherwise complying with this Article 9.

(a) A transfer of all or a portion of a Partner’s interest in the Partnership to (i) any partner of a Partner who or which has such status as of the date of this Agreement, including any shareholders or partners of such partner, (ii) an affiliate of such Partner, (iii) a limited or general partnership, provided that the transferor is a general partner of such transferee partnership and such transferee partnership shall be subject to the restrictions on transfer provided in this agreement; (iv) a revocable living trust established by a Partner who is a natural person; (v) the spouse, parents, and lineal descendants of the transferor and any partnership or corporation in which such persons own all of the equity interest; or (vi) the estate, beneficiaries and legatees of a Partner who is a natural person or any partner of a Partner;

(c) Horwitch shall have the right to sell all or any part of its interest in the Partnership to such transferees as it determines; provided that such sales are made as part of a single offering pursuant to Regulation D of the Securities Act of 1933, as amended, and sales are made to not more than seven “nonaccredited” investors . . . .

(d) No permitted transferee of a Partner under this section 9.6 shall be admitted as a Partner in the partnership without the written consent of all of the remaining General Partners. . . .

{4} **Article 2.7 provides:**

2.7 **Affiliate.** An “affiliate” of a Partner is a person or entity that controls, is controlled by or is under common control with such Partner. A person or entity that has a 20 percent or more interest, directly or indirectly, in another person or entity shall be conclusively deemed to be a controlling person.

{5} H-B-S’s complaint arose when AHS’s corporate great-great-grandparent was sold. As reflected in Appendix 1, AHS was the last in a chain of wholly-owned subsidiaries beginning with Richfield Holding Corporation I (RHC I). The identities of the purchasing entity (or entities) is not germane to our analysis. Suffice it to say that after the sale RHC I was wholly owned by a new corporate parent and AHS acquired a new great-great-grandparent, CDL Hotels, Inc. (CDL). See Appendix 2. The district court detailed the sale in its findings of fact and none of the parties question its ruling in this regard.

{6} **The terms of the proposed sale were first outlined in a Memorandum of General Agreement in which the seller proposed to sell a 100% equity interest in RHC I* “including its interest in . . . the assets more specifically detailed in Schedule ‘A.’” Among the scheduled assets was a “40% equity interest in the El Dorado Partnership, Limited.” The final purchase agreement included a schedule of all entities being transferred including the seller’s interest in EDP. One of the “Minimum Condition[s]” to the final purchase agreement was receipt of a “Consent to transfer of Shares and [W]aiver of Right of First Refusal” from William Zechendorf, Jr. and Horwich [sic] Brothers Number Three.” Zechendorf and the Horwitch Brothers Number Three (a general partnership) were the named partners in the Agreement and Certificate of Limited Partnership for EDP. They are the predecessors in interest to H-B-S and NZ.

{7} H-B-S was first informed of the proposed sale by a “Form of Consent of [EDP],” which it received from AHS on December 2, 1999, for “review and comment.” The relevant predecessor of the consent form read:

D. The Outside Partners [HBS and NZ EDP] understand that certain indirect owners of [AFS] plan to transfer their interests in [AFS] to CDL Hotels USA, Inc. or its affiliates (“CDL”) . . . [and] the Outside Partners hereby agree as follows:

(c) The right of first refusal granted to the Outside Partners under Article 9 of the Partnership Agreement, to the extent it may be construed to apply, is hereby expressly waived in connection with the transfers of interests described above.

H-B-S demanded AHS provide it with a written offer on the same terms and conditions as required by Articles 9.1 and 9.5 of the EDP Agreement, and notified AHS that it fully intended to enforce the ROFR. AHS denied that it was selling “or otherwise disposing of its interest” in EDP or that any interest of its owner, Richfield Hospitality Services, Inc. (RHS), was being transferred. On December
15, 1999, H-B-S was advised that “the parties intend to go forward with the closing of the [RHC I] transaction . . . subject to any right of first refusal H-B-S may have.” The sale closed on December 17, 1999.

On that same day, H-B-S filed its complaint seeking actual and punitive damages, as well as specific performance for the alleged breach of partnership agreement and breach of the implied covenant of good faith and fair dealing. NZ was permitted to intervene. It sought a declaratory judgment, specific performance for breach of partnership agreement, and damages for AHS’s breach of fiduciary duty and breach of the good faith duty.

The case was tried to the bench. The parties testified regarding the effect of the sales transaction. After the transfer, the purchaser replaced many of the sold entity’s officers and directors; but the same officers and directors served in each entity from RHC I down to and including AHS. The controller of the RHC group of affiliates reported directly to the new owner. The new owner supervised the United States hotel operations, including decisions on budgeting, capital spending, investments, sales and purchases, as well as decisions for the hiring and firing of executive officers, and dispute resolutions.

Each side’s accounting expert disputed the starting point for the valuation of AHS’s 10% interest in the Hotel. H-B-S’s expert, Thomas Burrage, relied on an appraisal performed by PKF Consulting, a firm that the seller and new owner agreed would value the underlying assets involved in the transfer. He testified that the exercise price of $5.3 million for the interest should be based on the market value of the Hotel’s real and personal property. AHS’s expert, Carl Alongi, opined that the exercise price should be based on the Hotel’s business value, the real and personal property plus the value of the contract for the management of the hotel, which PKF Consulting appraised at $5.9 million. Alongi made various adjustments to this figure to arrive at a net exercise price of $3,967,977.

The district court entered judgment for H-B-S & NZ against AHS for specific performance. Relying on Alongi’s calculations, it set the exercise price at $3,967,977, less distributions from EDP to AHS since trial, and interest from April 22, 2002. In determining the exercise price, the court denied AHS’s request to credit it for money paid to EDP after the closing in settlement of another lawsuit between the partners. The district court dismissed the breach of good faith duty, breach of fiduciary duty, and punitive damages claims. This appeal followed. We only concern ourselves with the right of first refusal and valuation questions, as the dismissal of the other claims is not appealed by any party.

**DISCUSSION**

1. The Right of First Refusal

The first issue is whether the district court erred in concluding that the sales transaction triggered the ROFR. At the trial’s end, the district court observed that the contract was unambiguous and that the ROFR provision was intended to be broadly applied under the language of Article 9.5 to any direct or indirect transfer. Applying that intent to the corporate structure involved (a “single shareholder really at each level up through the level of the sale”), the court indicated that “a reasonable reading of the contract, keeping in mind the purpose that was sought to be protected by this language, indicates that this type of transaction is covered.” The district court entered the following findings on this issue:

12. Prior to December 17, 1999, Regal International and its affiliates indirectly owned more than a twenty percent interest in AHS. AHS was a wholly owned subsidiary of Regal International and its affiliates.


16. After December 17, 1999, Millennium & Copthorne and its affiliates indirectly owned more than a twenty percent interest in AHS. AHS was a wholly owned subsidiary of Millennium & Copthorne and its affiliates.

18. The Form of Consent indicated that the “indirect owners” of AHS intended to transfer their interest in AHS to CDL.

26. The transaction between Regal International and CDL did not result in a direct transfer of the interest of AHS in EDP; the transfer of the interest in EDP was indirect.

Based on these findings, the district court concluded:

3. All provisions of the EDP Agreement at issue in this case are unambiguous.

4. The EDP Agreement creates a right of first refusal as to the direct or indirect transfer of the partnership interest.

5. The right of first refusal is effectuated when there is an indirect transfer of an equity interest in a Partner which is a direct or indirect transfer of the right of first refusal under the EDP Agreement.

6. The CDL transfer triggered the right of first refusal under the EDP Agreement.

7. The sale of Regal International’s equity interest in AHS was an indirect transfer of the equity interest of AHS in EDP.

11. Plaintiffs are entitled to specific performance of their right of first refusal.

AHS agrees that the ROFR provisions are unambiguous. The focus of their argument is that there was no “transfer” of its stock or its partnership interest in EDP that could trigger the ROFR provisions, as a matter of law. Arguing for a narrow construction of the ROFR provision because it is a restraint on the alienation of stock, AHS gives three reasons for reversal. First, it urges us to apply the rule that the sale of stock in a subsidiary is not a sale of the subsidiary’s assets; when a subsidiary is sold by a parent, the subsidiary retains ownership of its assets. See Capital Parks, Inc. v. S.E. Adver. & Sales Sys., Inc., 30 F.3d 627, 629 (5th Cir. 1994); Engel v.

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2 The 10% interest is based on the 40% equity interest AHS held in EDP which in turn held a 25% interest in Guardian Santa Fe Partnership, the actual owner of the Hotel.
Teleprompter Corp., 703 F.2d 127, 131 (5th Cir. 1983); LaRose Mkt., Inc. v. Sylvan Cir., Inc., 530 N.W.2d 505, 507 (Mich. Ct. App. 1995); Tenneco Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 644-45 (Tex. 1996). AHS argues that, since only stock in its corporate great-great-grandparent was sold, the transfer did not affect any of that corporation’s assets or the assets of its subsidiaries, down to and including its ownership interest in AHS and its interest in EDP. As such, AHS argues, the district court erred in finding that the new owner indirectly owned more than a 20% controlling interest in AHS and that the sale resulted in an indirect sale of any equity interest in AHS or an indirect transfer of its interest in EDP.

{15} Second, although it conceded at oral argument that there was a change of control, AHS contends that since there was no transfer of any equity interest or ownership, a change of control by itself cannot trigger the ROFR. See Capital Parks, Inc., 30 F.3d at 629; Engel, 703 F.2d at 135. (Id. 18) AHS construes Article 9.5 to require a showing that there was a transfer of a Partner’s interest before the issue of control becomes relevant.

{16} Third, AHS argues that the district court disregarded the doctrine of corporate separateness in finding that the ROFR applied to a corporate structure involving a “single shareholder really at each level up through the level of the sale.” It contends that “[m]ere control by the parent corporation is not enough to warrant piercing the corporate veil. Some form of moral culpability attributable to the parent . . . is required.” Scott v. AZL Res., Inc., 107 N.M. 118, 122, 753 P.2d 897, 901 (1988). AHS asserts that no evidence of improper purpose was shown warranting a piercing—or “reverse piercing”—of five levels of corporations in order to hold AHS liable for the sale of the stock of a remote parent.

{17} H-B-S responds that the corporate veil theory is a false issue, since AHS agreed to be bound by the ROFR in the event 20% or more of its stock was indirectly transferred to an upstream corporation. H-B-S argues that since it seeks to impose liability on AHS alone for its contractual and partnership promises and commitments, no veil piercing or reverse piercing is required.

{18} H-B-S focuses on Article 9 of the partnership agreement, which it argues “was drafted broadly to discuss [transfers] that are not permitted and narrowly to discuss the transactions that are permitted.” H-B-S concedes that Article 9.5 required it to prove: (1) the seller’s intent to transfer its equity interest in AHS, (2) that AHS was a corporation or a partnership, and (3) that the transfer resulted in a change of control of AHS. According to H-B-S, a change of control was established in three ways: under the express terms of the partnership agreement; under Generally Accepted Accounting Principles or “GAAP”; and from direct evidence of a change in AHS’s officers and directors, along with a change in the ultimate authority to make financial and employment decisions.


{20} We agree with AHS and the district court that the ROFR provisions are unambiguous; however, we reject AHS’s argument in favor of a narrow construction of its terms. AHS urges us to apply a strict or narrow construction of the ROFR on the theory that all restrictions on the alienation of corporate stock should be strictly construed because they are disfavored. See Kerr v. Porvenir Corp., 119 N.M. 262, 264, 889 P.2d 870, 872 (Ct. App. 1994). We would be more apt to adopt AHS’s position if the ROFR here was similar to that examined in Kerr, but it is not. Rather, the ROFR here is essentially identical to the provision we enforced in Lorentzen v. Smith, 2000-NMCA-067, ¶¶ 17-18, 129 N.M. 278, 5 P.3d 1082. In Lorentzen, we accepted the proposition that a right of first refusal should not be deemed a restraint of alienation as the term is used in the Restatement of Property so long as the provision describes a reasonable price and sets a reasonable time for exercise of the right. See id.; Restatement (Second) of Property: Donative Transfers § 4.4 cmt. a (1983). Here, Article 9 of the partnership agreement does no more than give other partners a chance for thirty days to buy, for the same price, what the selling partner is already willing to sell to a third party. We see no improper restraint in this arrangement. As such, we see no reason to construe this contract any differently than any other agreement.

{21} The bare language of Article 9 in the Partnership Agreement is extremely broad. In fact, we cannot imagine how the language of a ROFR could be broader. The purchase option is triggered under Article 9.1 if “a Partner proposes to sell, assign, or otherwise dispose of all or any part of his interest in the Partnership.” As explained in Article 9.5, the ROFR is triggered by “any direct or indirect transfer including, without limitation: . . . the transfer of any equity interest in a Partner which is a corporation, . . . if the transfer . . . results in a change in control of such corporation.” Use of the phrases “any direct or indirect transfer” and “without limitation” clearly evinces a desire by the parties to maximize the reach of the ROFR. Similarly, reference to “the transfer of any equity interest in a Partner” indicates an intent to include changes in stock ownership in partners by sale. This intent is made all the more clear given that transfers by “merger, consolidation or similar action” are separately covered in Article 9.5(b). We agree with the district court that the language and structure of Article 9.5 evince an intent that the ROFR was to be triggered by all changes in ownership of AHS and AHS’s corporate body.

{22} AHS concedes that a change in control occurred as a result of the sale, but insists that a “transfer” has not—perhaps cannot—be proven in this case because change of control has no effect on ownership of the subject entity. We agree with AHS that Article 9.5 required H-B-S to show both a transfer and a change of control. We disagree that a “transfer” within the meaning of this ROFR does not include a stock sale by a remote parent corporation. “Transfer” is itself broadly defined by Article 9.5 to encompass “any direct or indirect transfer” of an equity interest by or in a partner “without limitation.” “Transfer” must be interpreted within the context of the ROFR. Given the breadth of the ROFR in general, it must comport with the spirit of the provision to interpret “transfer” broadly. This interpretation of the word is consonant with the general legal definition of “transfer.” Interestingly, the concepts of transfer and change of control are inter-related. Black’s Law Dictionary defines the verb “transfer” as, “1. To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of.” Black’s Law
Black’s defines the noun “transfer” as “1. Any mode of disposing of or parting with an asset or an interest in an asset. . . . The term embraces every method — direct or indirect . . . of disposing of or parting with property or with an interest in property.” Id. at 1535. Thus, the general legal definition of “transfer” is quite broad, and there is no reason why it could not be applied to the sale of stock of the remote corporate parent of a series of wholly-owned subsidiaries in the context of this ROFR and this case.

{23} Since AHS is a wholly-owned subsidiary, a transfer of its stock by its parent would constitute a direct transfer of an “equity interest in a Partner” within the meaning of the ROFR. Transfer of the stock of AHS’s corporate parents necessarily constitutes an indirect transfer of an “equity interest in a Partner.” Since the restriction is “without limitation,” the ROFR is triggered regardless of whether the transaction is two or even five tiers removed, so long as it results in a change of that control of AHS. Again, AHS concedes control changed after the sale.

{24} The broad language of the ROFR reflects the common purpose of preferential purchase rights in partnership agreements “to prevent the intrusion of an invited outsider.” Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. P’ship, 840 F. Supp. 770, 775 (D. Or. 1993). Comparing the transfers permitted by the ROFR confirms an intent to bind the vertical corporate structure of AHS. Article 9.5 restricts transfers that are involuntary, by operation of law, by merger, and by direct or indirect sales of stock in a partner that is a corporation or partnership. But Article 9.5 does not restrict a “transfer of a limited partner interest in a Partner which is a limited partnership.” Moreover, transfers to “insiders” are expressly permitted under Article 9.6: with the consent of the other partners, a partner can transfer his interest to a partnership in which he is a partner, or a corporate partner can transfer its interest to an affiliate (a subsidiary or parent corporation as defined in Article 2.3 of the partnership agreement). The intent of these provisions is to prevent a transfer of interest to a non-affiliate, directly or indirectly, without the partners’ consent. That undesired scenario is precisely what occurred in the sale of AHS’s corporate parents. The preliminary and final sales agreements listed AHS’s interest in EDP and the Hotel as assets being sold. The practical effect of this transaction was that H-B-S and NZ had a new controlling partner.

{25} We, of course, recognize the general rule that a sale of a subsidiary by a parent corporation is not a sale of the subsidiary’s assets, unless the assets are actually transferred. Capital Parks, Inc., 30 F.3d at 629; Engel, 703 F.2d at 131; LaRose Mkt., Inc., 530 N.W.2d at 508; Tenneco Inc., 925 S.W.2d at 644-45. Our ruling does no violence to that rule. The dispositive factor in the cases relying on this general rule is the actual terms of the particular ROFR provisions involved. In every instance where the plain terms of the contract limited the ROFR to sales of assets, the courts narrowly interpreted the right and applied the general rule so that the ROFR was not triggered. See Capital Parks, Inc. v. Southeastern Adver. & Sales Sys, Inc., 864 F. Supp. 14, 15-16 (W.D. Tex. 1993) (order), aff’d by Capital Parks, Inc., 30 F.3d at 628 (holding that ROFR for the “purchase of all of the . . . stock or substantially all of the operating assets of [defendant’s] wholly-owned subsidiary” was not triggered under the provision’s plain language where shareholders proposed to sell parent to outside corporation because the right was triggered only by an offer to purchase the subsidiary’s stock or assets (internal quotation marks omitted)); Engel, 703 F.2d at 128, 130, 132, 134-35 (finding that a merger between the surviving parent corporation of defendant subsidiary and an outside corporation was not a transfer of the subsidiary’s stock under the plain words of the contract which limited the ROFR to instances when “stockholders propose to sell or otherwise dispose of all or any part of his shares . . . of the corporation”); Tenneco Inc., 925 S.W.2d at 642, 644, 646 (holding that a sale of stock in a corporation to an outsider did not trigger shareholders’ purchase option since the option was limited to the sale of an “Ownership Interest” which referred to corporate assets; further, the option did not contain a “change-of-control” provision which the court stated would have restricted sales of stock); LaRose Mkt., Inc., 530 N.W.2d at 507-08 (deciding that the sale of a corporate lessor’s stock was not a “sale” of real property triggering lessees’ ROFR to purchase the property where plain language limited the option to a “‘bona fide offer to purchase [the] premises’”).

{26} If the ROFR in this case did not include Article 9.5, these cases would apply with full force and we would hold that the ROFR had not been triggered. Article 9.1 speaks generally of a partner selling its “interest in the Partnership.” By itself this language refers only to assets and does not readily invoke coverage of sales of the seller’s corporate family. Such general language would most appropriately be interpreted in accordance with the general rule AHS relies on. But the ROFR is not limited to Article 9.1, and the addition of Article 9.5 makes other case law more apropos.

{27} In Continental Cablevision v. United Broadcasting Co., the agreement broadly granted the plaintiff a [ROFR] to acquire all or any part of the assets . . . (the “System Assets”), [and] a [ROFR] to acquire the shares of stock of [defendant] constituting its controlling capital stock interest (the “Control Stock”) in each instance before the System Assets or any shares of the Control Stock may, directly or indirectly, be sold or transferred to any third person or persons. 873 F.2d 717, 718 (4th Cir. 1984) (emphasis added). The appellate court agreed with the district court that “it would be ‘illogical’ not to consider a transfer of the parent as an indirect transfer of the wholly-owned subsidiary’s controlling capital stock interest[,]” where the object of the agreement was as much affected by an indirect sale of a parent’s stock in its subsidiary as a direct sale of stock by the subsidiary. Id. at 719.

{28} We find Continental Cablevision persuasive in the context of this case. The contract terms here control our decision. In light of the broad language of Article 9.5, expressly restricting both indirect and direct transfers of equity interests, and the clear intent to restrict corporate sales to outsiders, we conclude that the parties bargained for a broader ROFR than parties to whom the general rule has been applied. The general rule will hold true in most cases, but can be trumped by contract language. “New Mexico . . . has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals.” Berlangieri v. Running Elk Corp., 2003-NMSC-024, ¶ 20, 134 N.M. 341, 76 P.3d 1098 (internal quotation marks,
We hold that this transaction triggered the ROFR under the express terms of Article 9.5. Because we hold that the parties are bound by their agreement, the corporate separateness doctrine is inapplicable.

II. The District Court’s Valuation is Reasonable and is Supported by Substantial Evidence

{29} At the trial’s end, the district court advised the parties that it expected to grant H-B-S specific performance for breach of a contract. The court explained that since AHS failed to abide by the terms of the agreement, it was difficult to determine the purchase price of its interest. The only reasonable approach in the district court’s view was to base the exercise price on the parties’ valuation of the underlying assets, the Hotel. The court agreed with AHS’s expert, Alongi, that the starting point for the valuation was $5.9 million or 10% of the “business value” of the Hotel, rather than with H-B-S’s expert Burrage who opined that the market value of the real and personal Hotel property reflected the actual value assigned by the parties. The court also agreed with Alongi’s adjustments and set the exercise price at $3,967,977.

{30} In its findings, the district court adopted this view and elaborated:

23. AHS did not make an offer to sell its interest in EDP to the other partners of EDP at any time at or near the closing of the transaction involving Regal and CDL.

24. AHS did not provide H-B-S with information regarding the terms and conditions of the CDL transaction prior to closing the transaction.

25. The Securities Purchase Agreement sets forth the terms of the transaction. . . .

26. The transaction . . . did not result in a direct transfer of the interest of AHS in EDP; the transfer of the interest in EDP was indirect.

27. Prior to closing, Millennium & Copthorne commissioned the accounting firm of PKF Consulting to value the hotel properties.

28. Both Regal . . . and CDL used the appraisals performed by PKF Consulting to value the interests sold and to calculate the aggregate purchase price.

29. Through the use of the appraisals and certain adjustments, it is possible to determine the value of the interest of AHS in EDP to the buyer in the CDL transaction. The value of the interest to the buyer represents the best assessment of the actual terms and conditions of the sale for purposes of the EDP Agreement.

30. As of the time of trial, the value of the interest of AHS in EDP to the buyer was $3,967,977.00 less any distributions received by AHS subsequent to trial. The calculation of this value is set forth in Exhibit 101 and in the testimony of [AHS’s expert.] Carl Alongi.

31. The proper exercise price under the EDP Agreement is $3,967,977.00 less any distributions received by AHS since trial plus interest at 8 3/4% from April 22, 2002.

{32} On the contrary, AHS urges that H-B-S has not shown how the district court abused its discretion in weighing the evidence and fashioning an equitable remedy. AHS argues that the record contains no evidence of the actual negotiations or terms of the proposed sale indicating the value of its partnership interest in EDP. According to AHS, the evidence shows that the buyer booked the value of the 10% interest in the Hotel at $5.9 million and accorded the management contract no separate value. As such, it defends the district court’s equitable discretion in determining that this was a fair starting point.

{33} Urging de novo review, H-B-S asserts that the district court committed a legal error in applying a purchase accounting standard rather than a fair market value standard as required by the contract. We disagree. There is no contract question. As all parties agree, the EDP contract dictates that, the “Partner (“Offeror”) shall first make a written offer to sell such Partnership interest to the other Partners on the same terms and conditions on which the Offeror proposes to transfer the Partnership interest.” Because AHS did not comply with the ROFR, there is no direct evidence of the value assigned to the Hotel at the time of the offer. When the district court ruled, it was faced with predictably conflicting evidence. From that evidence the district court had to fashion an equitable remedy. The district court decided that “[t]he value of the interest in the Hotel] to the buyer represents the best assessment of the actual terms and conditions of the sale for purposes of the EDP Agreement.” In this context, valuation methodology is not explicitly controlled by the ROFR. The district court had leeway in reconstructing the “terms and conditions” on which AHS’s interest in EDP was transferred. This does not present a legal question of contract interpretation. Rather, it is an issue of discretion and substantial evidence.

{34} We give broad deference to the district court when interpreting and weighing the evidence. See McCauley v. Tom McCauley & Son, Inc., 104 N.M. 523, 527, 724 P.2d 232, 236 (Ct. App. 1986). We “review the record to determine whether the evidence supports the court’s findings, and apply the substantial evidence test.” Id. In reviewing for substantial evidence, we view the evidence in the light most favorable to the prevailing party and disregard evidence or inferences to the contrary. Weidler v. Big J Enters., Inc., 1998-
The district court’s decision that Alongi’s testimony was the best assessment of the contract terms is supported by substantial evidence. In the final Purchase Agreement, the seller expressly agreed to sell its interests for a purchase price based on a post-closing valuation of the underlying assets, and in accordance with GAAP. Under Section 2.2 of the Purchase Agreement, the parties agreed that the preliminary purchase price was “[640,000,000] plus Adjusted Working Capital plus the Intercompany Note Amount” but they also agreed that the final purchase price was “subject to post-Closing adjustment as set forth in Section 2.6.” Under Section 2.6, the buyer was to prepare and deliver to the seller, subject to its objections and in compliance with GAAP, an audited balance sheet, adjusted working capital computation, an audited income statement for the entities as of September 30, 1999, and a draft income statement through closing. Section 2.11 of the Purchase Agreement provided, “[t]he Purchase Price shall be allocated using a method which shall be reasonably agreed to among the Parties and consistent with the appraisal report of PKF Consulting and all Parties shall file all relevant Tax Returns in a manner which shall be consistent with such allocation.”

In accordance with the Purchase Agreement, the buyer’s parent company retained PKF Consulting to prepare an appraisal of the Hotel. The appraisal set the market value in the real and personal property at $53.1 million and the market value inclusive of business operations at $58.9 million. The seller’s 10% share was $5.3 and $5.9 million, respectively.

Also in accordance with the Agreement, an accounting firm (KPMG) performed a post-closing audit and prepared a “Purchase Accounting Memo.” An accounting partner at KPMG who audited the buyer’s valuation testified that the Purchase Accounting Memo described how the buyer allocated the purchase price. It indicates that

M&C [buyer] began with the purchase price and assigned values to the non-hotel assets purchased (ie [sic] the management company assets, investments accounted for under the equity method of accounting, current assets, liabilities and other identifiable assets & liabilities) with the balance of the purchase price assigned to the hotel assets purchased (land, building, fixtures).

KPMG found that the buyer assigned no value to the management company and contracts since it was a break-even business and the contracts were cancelable with notice and without penalty.

M&C has represented that they did not pay any amounts for these businesses and the purchase price was determined based on the fair value of the real estate. From M&C’s point of view, they have an existing management company infrastructure in place and did not need or want this business when they acquired it from Regal. They had to acquire this business to get the deal done with Regal.

The buyer assigned a value of $3,859,000 to its investment in the Hotel (10% interest). For auditing purposes, KPMG recalculated the seller’s assigned value using PKF Consulting’s $5.9 million appraisal and determined that the buyer’s “assigned values appear reasonable.”

In addition, the buyer’s senior vice-president of finance who participated in the purchase price allocation for the Hotel interest, testified that the estimated fair market value and purchase price of the interest was $5.9 million. The buyer’s documents list $5.9 million as its valuation of EDP’s interest. Significantly, Alongi’s adjusted exercise price through December 17, 2001, which started with the $5.9 million, was $3,854,821, a value that is strikingly close to the buyer’s own “assigned value” as of December 31, 2000.

Although the isolated statement that the buyer bought “only the real estate” lends support to H-B-S’s argument for the $5.3 million exercise price, the Purchase Accounting Memo, when read in its entirety, the supporting documents, and the non-expert and expert testimony support the district court’s conclusion that the best assessment of the actual terms and conditions of the transaction is that the purchase price for the Hotel was based on its business value of $5.9 million. Aside from the H-B-S expert’s use of the $5.3 million exercise price taken from the PKF Consulting appraisal, H-B-S presented no other evidence supporting the $5.3 million exercise price. In fact, the sole witness for the $5.3 million price conceded that starting at $5.9 in the valuation of a 10% interest in the Hotel was not unreasonable.

III. $695,638.27 “Capital Contribution” for Settlement

In determining the exercise price, the district court declined AHS’s request to credit it $695,638.27 paid to EDP and distributed to H-B-S pursuant to a settlement agreement resolving a separate lawsuit between the parties. The district court deemed it inconsistent to factor in these funds and determined that it was impossible to value the funds which, in any event, “would only be available at dissolution.”

AHS argues that it is entitled to be reimbursed for any capital imbalances under Article 6.2 of the EDP Agreement. Since settlement occurred after closing, AHS contends that the buyer was actually liable for the amount and that money was included in the purchase price. According to AHS, fairness dictates that H-B-S should not be paid twice. AHS cites no evidence that the buyer agreed to pay any of the legal obligations between EDP partners as such, or that the purchase price was adjusted specifically to account for the settlement payment.

Both the district court’s valuation and its equitable remedy are reviewed under an abuse of discretion standard for substantial evidence. Collado v. City of Albuquerque, 2002-NMCA-048, ¶ 21, 132 N.M. 133, 45 P.3d 73; Sanchez v. Saylor, 2000-NMCA-099, ¶ 12, 129 N.M. 742, 13 P.3d 960. We agree with the district court.

The district court perceived its task to be enforcement of the ROFR. Article 9.1 of the ROFR generally requires a selling partner to offer to sell “to the other Partners on the same terms and conditions on which the [selling partner] proposes to transfer the Partnership interest.” The district court undertook to reconstruct the value ascribed to the Hotel (and thus EDP’s interest in the Hotel) in the sale by the buyer and seller. The district court relied on the allocated valuations agreed to between the seller and buyer. The aggregate price was to be adjusted for working capital accounts and intercompany notes. No one argues it was not. From the district court’s viewpoint, the number it derived was the best estimate available post-sale for the terms on which the selling partner (AHS) proposed
to “transfer its Partnership Interest.” Further adjustments designed to enforce a settlement achieved post-sale would be inconsistent with enforcement of the ROFR as of the sale date. We cannot disagree with the district court’s logic.

CONCLUSION

{44} We hold that the sale of AHS’s corporate great-great-grandparent was an “indirect transfer” of equity interest in AHS within the meaning of this contract triggering the ROFR. Further, we affirm the exercise price set by the district court.

{45} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
RODERICK T. KENNEDY, Judge
ORGANIZATION IMMEDIATELY AFTER 1999 SALE OF STOCK OF RICHFIELD HOLDINGS CORPORATION I

Millennium & Copthorne Hotels plc (United Kingdom) (publicly traded)

M&C Management Services USA Inc. 100%

CDL Hotels USA, Inc. (Delaware)

Richfield Holdings Corporation II (Delaware) 100% (formerly ACI)

Richfield Holdings, Inc. (Colorado) 100% (formerly ACI)

Richfield Hospitality Services, Inc. (Delaware) 100%

AIROCA Hospitality Services, Inc. (Delaware) 40% M.G.P. (assignment from AEI)

HDS Partnership (New Mexico) 20% L.P.

The El Dorado Partnership (New Mexico) 25%

NZ EDP LLC (New Mexico) 40% (formerly Zeckendorf)

Guardian Life Insurance Co. (Colorado) 75%

Guardian Santa Fe (Colorado) 100%

El Dorado Hotel

Securities sold

DEFENDANT'S EXHIBIT

DEX082001

Appendix 2
OPINION

MICHAEL E. VIGIL, JUDGE

{1} This case requires us to decide whether a school board can discharge a certified school teacher before her current employment contract expires solely because of a reduction in force (RIF). We hold that it cannot because a RIF is not “just cause” to discharge a teacher under the existing statutory scheme. We therefore reverse the arbitrator’s decision and remand for proceedings consistent with this opinion.

{2} The employment of school personnel is governed by the School Personnel Act, (the Act) which is now codified at NMSA 1978, §§ 22-10A-1 to -39 (2003) by virtue of 2003 N.M. Laws ch. 153, which amended, repealed, enacted, and recompiled several provisions of the Act. The Act as it existed prior to the 2003 changes controls the resolution of this dispute. See NMSA 1978, §§ 22-10-1 to -27 (1975, as amended through 2002). Herein we will refer to the 2003 statutory citations where provisions of the 2001 School Personnel Act were not changed, but were simply recodified by the 2003 legislation.

BACKGROUND

{3} Cari Aguilera (Aguilera) was employed by the Board of Education, Hatch Valley Public Schools (School Board) as an art teacher at Hatch High School for the 2000-2001 and 2001-2002 school years. At the end of the 2002 school year in May, the School Board agreed to employ her for a third consecutive year, but at Hatch Middle School rather than Hatch High School. See § 22-10A-22 (directing that “[o]n or before the last day of the school year of the existing employment contract” the school board “shall serve written notice of reemployment or termination on each certified school instructor employed by the school district” and providing that “[a] notice of reemployment shall be an offer of employment for the ensuing school year”). Aguilera delivered a timely written acceptance of the offer, which resulted in a binding employment contract being created for the 2002-2003 school year. Section 22-10A-23(B) (“Delivery of the written acceptance of reemployment by a certified school instructor and the local school board . . . until the parties enter into a formal written employment contract.”). The formal written contract between Aguilera and the School Board was signed on September 5, 2002.

{4} The offer to employ Aguilera, and her acceptance of the offer, occurred when funding for the Hatch Valley Public School System was not in place for the upcoming year. In May 2002, the Hatch Valley Public School System was aware it was about to lose substantial federal funds for a program that had existed for several years and that program had a termination date in July 2002, and it was also made aware in May 2002 that there would be substantial shortfalls or decreased funding from the State Equalization Guarantee Funding Program. On September 16, 2002, the School Board learned that the Hatch Valley Public School System would receive approximately $1,215,000 less for the 2002-2003 school year than it had during the previous school year. Due to this reduction, the School Board approved a RIF of school personnel on September 23, 2002. As part of the RIF, the School Board elected to eliminate the Hatch Middle School art program on September 30, 2002. The following day, the Superintendent of Hatch Valley Public Schools sent Aguilera a letter notifying her that he intended to discharge her because her position would be eliminated on October 30, 2002.

{5} Aguilera exercised her statutory right to a hearing before the School Board, challenging her discharge. A hearing was held on November 14, 2002, and the School Board upheld the decision of the Superintendent. Aguilera then appealed the School Board’s decision to an independent arbitrator.

{6} Despite some initial confusion about the applicable statutes, the parties subsequently agreed that the Superintendent’s letter to Aguilera was sent to her pursuant to Section 22-10A-27(A) (stating that to discharge a certified school employee, the superintendent shall serve written notice of intent to discharge on the employee, stating in the notice the cause for the recommendation, and advising the employee of the right to a discharge hearing before the local school board); that Aguilera properly requested a hearing before the School Board pursuant to Section 22-10A-27(B) (providing that a school employee who receives a notice of intent to recommend discharge may request a hearing before the local school board); that the School Board held a discharge hearing pursuant to Section 22-10A-27(C) through (J) (prescribing the procedures for the local school board to follow in conducting a discharge hearing, and requiring the local superintendent to prove by a preponderance of the evidence that, at the time of the notice of intent to recommend discharge, the superintendent had just cause to discharge the employee); and that the appeal of the School Board’s decision would
be held before an arbitrator pursuant to Section 22-10A-28 (providing for an appeal de novo to an independent arbitrator by a certified school employee who is aggrieved by a decision of a local school board).

On February 20, 2003, the arbitrator heard Aguilera’s appeal. Following the hearing, the arbitrator stated this appeared to be a case of a qualified individual “with an excellent work history with the Hatch Valley Public School System” losing her job “as a result of a failure on management’s part to get its financial house in order.” He recognized that the School Board was required to establish just cause to discharge Aguilera by a preponderance of the evidence and that the applicable statute defines “just cause” as “a reason that is rationally related to an employee’s competence or turpitude or the proper performance of his duties and that is not in violation of the employee’s civil or constitutional rights.” Section 22-10A-2(F). While the arbitrator found that there was “clearly” no just cause to discharge Aguilera as defined in the statute, the arbitrator nevertheless concluded that “there was unfortunately just cause as defined by the authorized RIF policy of the Hatch Valley Public School system due to the loss of funding.” Aguilera appeals the arbitrator’s decision. See § 22-10A-28(M) (providing that an appeal from the arbitrator’s decision is taken by filing notice of appeal as provided by the rules of appellate procedure); see also Bd. of Educ. v. Harrell, 118 N.M. 470, 485, 882 P.2d 511, 526 (1994) (holding that Section 22-10-17.1(M), now codified as Section 22-10A-28(M) is unconstitutional to the extent that it limits the right of appeal to cases “where the decision was procured by corruption, fraud, deception or collusion” (internal quotation marks omitted)).

STANDARD OF REVIEW

We determine whether substantial evidence supports the arbitrator’s factual findings, and we review his conclusions of law de novo. See Harrell, 118 N.M. at 486, 882 P.2d at 527 (holding that under compulsory arbitration statutes due process is satisfied by substantial evidence review of findings of fact and de novo review of questions of law). The construction of a statute is a question of law subject to de novo review. Santa Fe Pub. Schs. v. Romero, 2001-NMCA-103, ¶ 10, 131 N.M. 383, 37 P.3d 100 (“We interpret statutes de novo.”).

DISCUSSION

On appeal, Aguilera contends that the Act prohibits the discharge of an employee unless there is just cause to do so and that the School Board did not have just cause under the Act to discharge her. The School Board responds that (1) proper construction of the Act allows the School Board to discharge Aguilera for reasons other than just cause as defined in the Act, (2) strong policy considerations support the ability of the School Board to discharge employees for financial reasons, and (3) terminating the employment of school employees pursuant to a RIF has been judicially approved.

A. Discharge Under the School Personnel Act

Our principal objective in interpreting a statute “is to determine and give effect to the intent of the legislature.” Regents of the Univ. of N.M. v. N.M. Fed’n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 (internal quotation marks and citation omitted). The “primary indicator” of the legislature’s intent is the plain language of the statute, and we are to give the words used in the statute their ordinary meaning unless the legislature indicates a different intent. Alba v. Peoples Energy Res. Corp., 2004-NMCA-084, ¶ 17, 136 N.M. 79, 94 P.3d 822. Where the legislature defines words used in the statute, we must interpret the statute according to those definitions. Southwest Land Inv., Inc. v. Hubbart, 116 N.M. 742, 743, 867 P.2d 412, 413 (1993); see 2A Norman J. Singer, Statutes & Statutory Construction § 47:07, at 227-28 (6th ed. 2000) (“As a rule a [statutory] definition which declares what a term means is binding upon the court.”).

The Act is very specific and precise in describing when a school board can discharge a certified teacher with whom it has an existing contract. We focus our attention on the statutory definitions of “discharge” and “just cause.”

Under the Act, the “discharge” of a certified school employee is the “act of severing the employment relationship . . . prior to the expiration of the current employment contract.” Section 22-10A-2(A). Since the School Board ended Aguilera’s employment prior to the expiration of her contract, it “discharged” her. See Romero, 2001-NMCA-103, ¶ 11 (determining that since the school board severed employment relationship of certified school employee before current contract expired, discharge provisions of the Act applied).

Moreover, the Act directs that a school board “may discharge a certified school employee only for just cause.” Section 22-10A-27(A). It defines “just cause” as “a reason that is rationally related to an employee’s competence or turpitude or the proper performance of [her] duties and that is not in violation of the employee’s civil or constitutional rights.” Section 22-10A-2(F). Pursuant to the plain terms of the statute, it was incumbent upon the School Board to demonstrate by a preponderance of the evidence to the arbitrator that Aguilera’s “discharge” was based upon her performance, competence, or turpitude. See In re Termination of Kibbe, 2000-NMSC-006, ¶ 14, 128 N.M. 629, 996 P.2d 419 (holding that evidence failed to prove a relationship between competence or ability to teach or coach and the conduct did not involve moral turpitude). The arbitrator found that Aguilera never “had any negative reports in terms of job performance, competence or suggestion of moral turpitude, or ever failed to properly perform [her] duties while employed by the Hatch Valley Public School System.” This finding is undisputed and not challenged by the School Board. Therefore, the statutory basis to “discharge” Aguilera is lacking, notwithstanding the RIF. See Byrd v. Greene County Sch. Dist., 633 So. 2d 1018, 1025 (Miss. 1994) (holding that the “school district’s eleventh hour realization of its financial predicament was not good cause for rescission of teacher’s already renewed contract” in absence of statutory authority to do so).

An examination of the statutory evolution of the applicable statutes reinforces our conclusion. In 1921, the Supreme Court noted that except when a complaint was made that a teacher was afflicted with tuberculosis, there was no statutory provision for dismissal of a teacher. Tadlock v. Sch. Dist. No. 29 of Guadalupe County, 27 N.M. 250, 256, 199 P. 1007, 1009 (1921). Under these circumstances, the general rule was that “there exists in the employing agency an implied power to dismiss the teacher for adequate
cause.” Id. (emphasis added). We assume but do not decide that lost revenues, such as in this case, could constitute “adequate cause.” See Funston v. Dist. Sch. Bd., 278 P. 1075, 1976-77 (Or. 1929) (holding that dismissal of a teacher is permissible when the dismissal is not personal to the teacher, but results from her position being abolished in good faith by reason of a program of economy whereby the position is abolished).

15 In 1941, the legislature for the first time adopted a statute addressing discharge of a certified school teacher, stating, “[n]o teacher having a written contract shall be discharged except upon good cause.” 1941 N.M. Laws ch. 202, § 3 (emphasis added). The statute did not define “discharge” and it did not define “good cause.” We assume that “discharge” meant to dismiss from employment during the term of a contract. We also continue to assume that lost revenues, such as in this case, could constitute “good cause” under this statute. See also Funston, 278 P. at 1077.

16 In 1967, the legislature decreed that a local school board could discharge a certified school teacher during the term of a written employment contract only after “finding cause for discharging the person pursuant to the employment contract with the person or finding any other good and just cause for discharging the person.” 1967 N.M. Laws ch. 16, § 119 (emphasis added). Again, the statute did not define “discharge” and it did not define “cause.” Our assumptions as to the meanings of these words in the statute remain. Changes were made to the statute in 1975, but the foregoing provisions were not affected. The prerequisite of “finding cause for discharging the person pursuant to the employment contract with the person or finding any other good and just cause for discharging the person” before a discharge could occur during the term of the employment contract remained. 1975 N.M. Laws ch. 306, § 12 (emphasis added).

17 In 1990, the legislature revisited the issue. It now simply stated that a board could discharge a certified school teacher “during the term of his written employment contract only for good and just cause.” 1990 N.M. Laws ch. 90, § 4 (emphasis added). The legislature now defined “discharge” to mean “the act of severing the employment relationship with an employee prior to the expiration of the current employment contract.” 1990 N.M. Laws ch. 90, § 1. However, it still did not define “just cause.” We therefore continue to assume that as of 1990, lost revenues, such as in this case, could constitute “just cause.” See Smith v. Bd. of Educ., 334 N.W.2d 150, 152 (Iowa 1983) (stating that a school district’s declining enrollment and budgetary constraints may constitute “just cause” not to renew a teacher’s contract); Laird v. Indep. Sch. Dist. No. 317, 346 N.W.2d 153, 156 (Minn. 1984) (stating substantial reduction in enrollment was sufficient basis for placing teacher on “unrequested leave”); Funston, 278 P. at 1077; Adams v. Clover Park Sch. Dist. No. 400, 629 P.2d 1336, 1340 (Wash. Ct. App. 1981) (holding that a school district can elect not to renew a teacher’s contract because termination of the position is required by budgetary concerns); see also Lee v. Giangreco, 490 N.W.2d 814, 818 (Iowa 1992) (noting that “just cause” for termination of a teacher’s contract may turn on budgetary constraints).

18 This all changed in 1991. The requirement of “just cause” for terminating a certified school teacher’s contract during the term of the employment contract remained, and the definition of “discharge” was not changed. 1991 N.M. Laws ch. 187, §§ 3, 7. However, the legislature for the first time defined “just cause,” stating it “means a reason that is rationally related to an employee’s competence or turpitude or the proper performance of his duties and that is not in violation of the employee’s civil or constitutional rights.” 1991 N.M. Law ch. 187, § 3, now codified as Section 22-10A-2(F). This was the state of the law when Aguilera was discharged by the School Board on October 30, 2002. A RIF was not included in the definition of “just cause.”

19 The School Board argues that a provision of the Act which requires contracts with certified school personnel to be on forms approved by the state board allows for a broader meaning of “cause.” Section 22-10A-21(A) requires all contracts between a school board and certified school personnel to “be in writing on forms approved by the state board.” These forms must “contain and specify” certain items, including “the causes for termination of the contract.” Id. (emphasis added). Since the statute refers to “causes” instead of the statutory definition of “just cause” set forth in Section 22-10A-2(F), the School Board argues that the legislature intended to allow the discharge of an employee for reasons in addition to statutory “just cause.” However, Section 22-10A-21(A) refers to “causes for termination” not “causes for discharge,” and the argument overlooks the difference between a “termination” and a “discharge.” In contrast to a “discharge,” a “termination” is “in the case of a certified school employee, the act of not reemploying an employee for the ensuing school year and, in the case of a non-certified school employee, the act of severing the employment relationship with the employee.” Section 22-10A-2(D). Aguilera was not “terminated”; she was “discharged.”

20 The School Board also argues that Aguilera was properly discharged pursuant to an express provision in the contract she signed. In pertinent part, the contract states, “[t]his contract and the parties hereto are and shall continue to be subject to applicable laws of the State of New Mexico” and that

[i]t may also be cancelled by the Board for cause not personal to the Instructor when a reduction in personnel is required as a result of decreased enrollment or a decrease or revision of educational programs or insufficient legislative appropriation or authorization being made by the State and/or federal government for the performance of this contract, in accordance with the New Mexico Statutes and any applicable rules and regulations of the State and Local Boards of Education.

(Emphasis added.)

21 Aguilera’s contract is a form certified school instructor contract approved and promulgated by the state board pursuant to Section 22-10A-21(A). It is set forth in 6.662.8 NMAC (2000). The form is derived from State Board of Education Regulation No. 72 25, Certified School Instructor Contract, filed January 8, 1973; and State Board of Education Regulation No. 88-1, Certified (Licensed) School Instructor Contract, filed February 2, 1988, as set forth in the history at the end of 6.662.8 NMAC. The statutory evolution we have set forth above in Paragraphs 15-18 establishes that in 1973 and 1988, “just cause” was not statutorily defined and a loss of funds might constitute “just cause.” According to the statutes in existence at that time, a RIF could be a “cause” for discharge.
“pursuant to the employment contract.” However, “just cause” was specifically defined by the legislature in 1991, and a RIF was not included. Amendments made to 6.66.2.8 NMAC in Amendment 1 to State Board of Education Regulation No. 88-1, Certified (Licensed) School Instructor Contract, filed April 3, 1992, apparently did not take into account the requirements made in 1991 that a discharge could occur only for “just cause” with a specific definition of “just cause” that did not include a RIF.

(22) On its face, it appears that there is a direct conflict between the employment contract form and the statute which directs that Aguilera could only be “discharged” for “just cause.” The state board has no authority to promulgate a regulation that conflicts with a statute. See N.M. Pharm. Ass’n v. State, 106 N.M. 73, 75, 738 P.2d 1318, 1320 (1987) (stating a board “has no power to adopt a rule or regulation that is not in harmony with [its] statutory authority”); accord IA Norman J. Singer, Statutes & Statutory Construction § 31:2, at 713-14 (6th ed. 2002) (stating that “the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation”). In fact, 6.66.2.3 NMAC states that the statutory authorities for its adoption are Section 22-10A-21 and NMSA 1978, § 22-2-1 (2003).

Section 22-2-1 expressly states that the state board “is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law.” (Emphasis added.) Therefore, to the extent that the model contract provisions conflict with the Act they are void and unenforceable.

(23) For all the foregoing reasons, we hold that without “just cause” as defined by the Act, the School Board was without authority to discharge Aguilera.

B. Public Policy

(24) The School Board also argues that public policy dictates that it be allowed to cope with changes in student enrollment and funding at the beginning, middle, or end of the school year by allowing it to discharge a certified school employee for reasons other than a teacher’s performance, competence, or turpitude. The School Board argues that this public policy will be violated if Section 22-10A-27(A) is read to require “just cause” as defined in Section 22-10A-2(F).

(25) The state board has plenary authority over the public schools “except as otherwise provided by law.” See § 22-2-1(A) (“The state board is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law.”). The state board adopted 6.67.3.6 NMAC (2000), which allows a local school board to discharge or terminate licensed school personnel pursuant to a RIF, but it must be “in accordance with the Public School Code.” 6.67.3.8 NMAC (2000). The present case involves solely discharge, not termination, and we address only the issue of discharge. The Act, with the limiting definition of “just cause” in relation to discharge is part of the Public School Code. NMSA 1978 § 22-1-1 (2004) (stating NMSA 1978, Chapter 22, may be cited as the Public School Code). We do recognize that a local school board may add or abolish teaching positions in performing its fiscal responsibilities. See NMSA 1978, § 22-5-4(C) (2004) (stating local school board has power to “review and approve the school district budget”); Howard v. W. Baton Rouge Parish Sch. Bd., 843 So. 2d 511, 514 (La. Ct. App. 2003) (“A parish school board has broad responsibilities in administering the public schools. Included is the power, when acting in good faith, to consolidate positions or to abolish them.”); Adams, 629 P.2d at 1340 (“The determination of educational goals, programs and curricula is a matter within the broad discretion of the school board. To establish these goals or to meet the financial conditions of the district, the board may add or eliminate teaching positions.” (citations omitted)). Nothing we say herein prohibits a RIF that complies with the applicable statutes.

(26) However, the legislature has identified which public policies will be favored by defining the conditions under which a discharge may be implemented. Our Supreme Court has recognized that the “purpose of the Certified School Personnel Act [is] to promote a sound public policy of retaining in the public school system teachers who have become increasingly valuable by reason of their experience.” Atencio v. Bd. of Educ., 99 N.M. 168, 170, 655 P.2d 1012, 1014 (1982). The “Certified School Personnel Act” was renamed the “School Personnel Act” in 1991. 1991 N.M. Laws ch. 187, § 2. The statutes here are clear and unambiguous in advancing this public policy of retaining experienced public school teachers. In the face of such a clear statutory expression of public policy, we do not second guess, but enforce, the policy choice made by the legislature.

(27) The premises underlying a contract between a school district and a teacher are indistinguishable from any other employment contract. The district promises to employ the teacher for a given term, subject to the terms of that contract. As consideration, the teacher promises to perform his job for the duration of the contract. . . . Were we to accept the District’s argument [that it could rescind a teacher’s already renewed contract because of its financial predicament], teacher’s contracts would be vulnerable to rescission any time a school district found itself in financial straits. The legislature has not so provided. . . . It is within the province of the legislature to determine what effect, if any, a district’s financial woes may have on teacher contracts and to grant the authority to amend those contracts accordingly.

(Citation omitted.) We perceive no mistake or absurdity that warrants departing from the plain language of the Act. We therefore reject the School Board’s public policy argument. Whether the Board’s public policy argument should be applied to a termination based on a RIF is a question that is not before us, and we express no opinion on it.
C. Judicial Endorsement of Reductions-in-Force

{27} Finally, the School Board argues that precedent prohibits us from reaching the result we do because RIFs have previously been judicially sanctioned and approved. We disagree because the precedent cited did not present the issue which confronts us here and because the School Board fails to consider the statutory framework underlying that precedent.

{28} The School Board cites New Mexico State Board of Education v. Abeyta, 107 N.M. 1, 751 P.2d 685 (1988), Penasco Independent School District No. 4 v. Lucero, 86 N.M. 683, 526 P.2d 825 (Ct. App. 1974), and Swisher v. Darden, 59 N.M. 511, 287 P.2d 73 (1955), superseded by statute on other grounds as stated in Sanchez v. Bd. of Educ., 80 N.M. 286, 454 P.2d 768 (1969). However, all of these cases dealt with the discharge of a tenured teacher when the local board refused to renew the contract of the tenured teacher for a subsequent school year under a RIF policy; none of them dealt with discharging a teacher during an existing contract under a RIF policy, as in this case. Abeyta, 107 N.M. at 2, 751 P.2d at 686; Swisher, 59 N.M. at 513, 287 P.2d at 74; Lucero, 86 N.M. at 683-684, 526 P.2d at 825-26. Furthermore, the issue in Abeyta was whether it was lawful and reasonable for a RIF policy not to require a staff realignment which might have retained a tenured teacher when such a realignment would seriously affect the educational program; and the issue in Swisher and Lucero was whether the evidence established that as a result of the RIF, no position was available for which the tenured teacher was qualified. Abeyta, 107 N.M. at 3, 751 P.2d at 687; Swisher, 59 N.M. at 515, 287 P.2d at 76; Lucero, 86 N.M. at 684, 526 P.2d at 826. These cases are therefore not applicable.

{29} Even more important, as we have already pointed out in our discussion of the statutory evolution of the applicable statutes, the underlying statutory framework was different when Abeyta, Swisher, and Lucero were decided. In 1991, the legislature for the first time defined what constitutes “good cause.” As we have already discussed, we are obligated to apply that statutory definition in this case.

D. Aguilera’s Other Arguments

{30} Aguilera also argues that the arbitrator denied her a de novo hearing and that he erroneously concluded that her discharge was effective on October 31, 2002. However, because we conclude that the School Board exceeded its statutory authority by discharging Aguilera without just cause, we need not reach these arguments.

CONCLUSION

{31} We reverse the arbitrator’s decision and remand for further proceedings consistent with this opinion.

{32} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
LYNN PICKARD, Judge
JONATHAN B. SUTIN, Judge
Sheehan, Sheehan & Stelzner, P.A.

IS PLEASED TO ANNOUNCE THAT

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Bar Bulletin - June 27, 2005 - Volume 44, No. 25 47
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3:15 p.m. Tips for Responding to EEOC Charges; Recent EEOC Litigation and Recent Changes at EEOC - Loretta Medina, Esq.
4:15 p.m. Q & A - Francie Cordova and Loretta Medina, Esq.
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**10.3 General and 1.2 Ethics CLE Credits**

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Congress recently enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). That Act represents the most significant change in bankruptcy law since the passage of the Bankruptcy Code of 1978. All bankruptcy cases filed on or after October 17, 2005, will be subject to the Act. This will have a profound impact on consumer bankruptcies as well as business reorganizations. Join us as we learn how these changes will impact your practice and the rights of your clients.

An outstanding panel of experts will offer practical advice to debtors’ counsel, as well as those attorneys whose clients may be creditors in a bankruptcy proceeding, regarding the requirements, risks, and opportunities presented by the changes in the law. Due to the magnitude of new changes affecting Bankruptcy Law, the course materials for this seminar will include not only a complimentary redlined copy of the Code, but also a complimentary copy of Recent Developments in Chapter 13 by Hon. Keith M. Lundin and Henry E. Hildebrand, Ill, Esq.

**FRIDAY, AUGUST 5**

<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:55 a.m.</td>
<td>Introductions</td>
</tr>
<tr>
<td>9:00 a.m.</td>
<td>Consumer Issues Under BAPCPA</td>
</tr>
<tr>
<td>10:25 a.m.</td>
<td>Break</td>
</tr>
<tr>
<td>10:40 a.m.</td>
<td>Consumer Issues Under BAPCPA (continued)</td>
</tr>
<tr>
<td>Noon</td>
<td>Lunch (provided)</td>
</tr>
<tr>
<td>1:00 p.m.</td>
<td>Creditor Representation under the New Code</td>
</tr>
<tr>
<td>2:00 p.m.</td>
<td>U.S. Trustee Presentation: Debtor Counseling and Education; Enforcement Issues</td>
</tr>
<tr>
<td>2:45 p.m.</td>
<td>Break</td>
</tr>
<tr>
<td>3:00 p.m.</td>
<td>Scheduling Issues, Court Rules, Procedures and Notices</td>
</tr>
<tr>
<td>3:45 p.m.</td>
<td>Ethics: Attorney as Debt Relief Agency; Getting Paid for your Work: Certifying Accuracy and Related Issues</td>
</tr>
</tbody>
</table>

**SATURDAY, AUGUST 6**

<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:00 a.m.</td>
<td>Introductions</td>
</tr>
<tr>
<td>9:10 a.m.</td>
<td>Chapter 13 from A to Z</td>
</tr>
<tr>
<td>Noon</td>
<td>Adjourn</td>
</tr>
</tbody>
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**REGISTRATION – OLD DOGS, NEW TRICKS: THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005**

- ☐ Standard and Non-Attorney - $269  
- ☐ Government & Paralegal - $259  
- ☐ Bankruptcy Law Section Member - $249

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Please Note: This is a CLE Special Event. No auditors permitted.

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