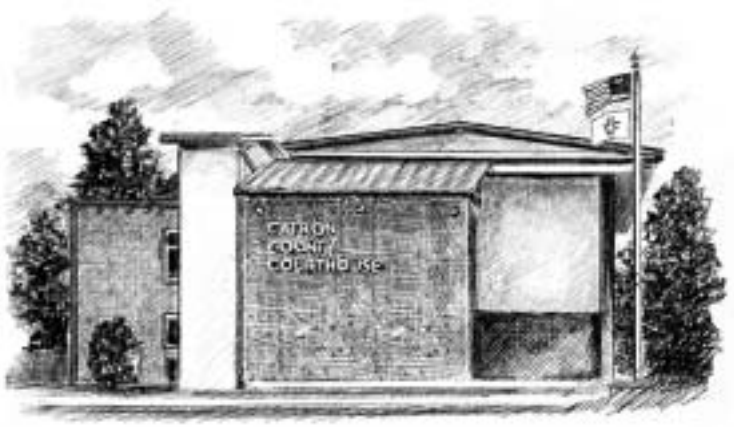
BAR BULLETIN

OFFICIAL PUBLICATION OF THE STATE BAR OF NEW MEXICO

FEBRUARY 19, 2004 • VOLUME 43, NO. 7



Kelley S. Hestir

Catron County Courthouse, Reserve, NM

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It's Not Too Late to Get Involved!

By joining a State Bar committee you will:

- Help Strengthen the Legal Profession
- Work on Legal Causes of Interest
- Improve Public Understanding
- Increase Access to the Legal System

Each year the State Bar president appoints members to committees that accomplish these goals. The following committees are currently accepting new members. Review the descriptions and complete the form below to request an appointment.

Please check the committee(s) you wish to join.

- ❒ **Alternative Methods of Dispute Resolution (ADR) –** Promotes and provides legal education and training in the use of alternative dispute resolution processes.
- ❒ **Bench and Bar Relations –** Plans the statewide Bench and Bar Conference.
- ❒ **Committee for the Delivery of Legal Services to People with Disabilities –** Provides information and assistance to ensure access to counsel for persons who have a disability.
- ❒ **Committee on Diversity in the Legal Profession –** Promotes opportunities for minorities in the legal profession and encourages participation by minorities in bar programs and activities.
- ❒ **Ethics Advisory –** Assists attorneys with interpretation and application of the Code of Professional Conduct.
- ❒ **Historical –** Acquires, maintains and submits for publication historical information relating to the bar.
- ❒ **Law Office Management –** Develops and provides resources for attorneys, especially solo and small firm practitioners and young lawyers, to more effectively manage law practices.
- ❒ **Lawyers' Assistance –** Provides confidential peer assistance to State Bar members in need of help because of substance abuse, mental illness or emotional distress.
- ❒ **Lawyers' Professional Liability –** Advises the State Bar regarding risk management activities.
- ❒ **Legal Services and Programs: Planning Subcommittee –** Recommends to the State Bar and other appropriate legal service organizations systemic approaches to the effective and efficient delivery of legal services to the poor.
- ❒ **Legal Services and Programs: Pro Bono Subcommittee –** Facilitates cooperation and coordination of pro bono opportunities available to the State Bar and the UNM School of Law.
- ❒ **Membership Services Advisory –** Evaluates and makes recommendations regarding in-house programs. Advises the State Bar on alliance partner agreements with vendors of products and services.
- ❒ **Public Legal Education –** Provides information and education about the legal profession, the law and services available through the State Bar and other law-related entities.
- ❒ **Quality of Life –** Examines issues such as depression, dissatisfaction and balance in order to provide recommendations that will help to alleviate the stress of modern law practice.
- ❒ **Technology Utilization –** Assists with the development and promotion of electronic technology applications for the legal profession.

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MAIL TO: State Bar of New Mexico
Membership and Communications Department
PO Box 92860 • Albuquerque, NM 87199-2860
Fax: (505) 828-3765

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In depositions, negotiations and other proceedings, I will conduct myself with dignity, avoiding groundless objections and other actions that are disrupting and disrespectful

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Legal Services & Programs Committee, 10 a.m., State Bar Center

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March

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Lawyers Assistance Committee, 5:30 p.m., First United Methodist Church

3
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Trial Practice Section Board of Directors, 4:30 p.m., State Bar Center

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Indian Law Section Board of Directors, 9 a.m., State Capitol, Room 411

Quality of Life Committee, noon, State Bar Center

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Consumer Debt/Bankruptcy Workshop
6 - 8 p.m., State Bar Center
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Family Law Workshop
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(2nd Fl.-Pearl Higgins Room), Las Cruces, NM

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Consumer Debt/Bankruptcy Workshop
5:30 – 7:30 p.m., Branigan Library
(2nd Fl.-Pearl Higgins Room), Las Cruces, NM

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1:15 p.m. - 4:30 p.m., Meadowlark Senior Center, Rio Rancho, NM

For more information call Marilyn Kelley (505) 797-6048 or (800) 876-6227; or visit www.nmbar.org.

NOTICES

COURT NEWS

N.M. Supreme Court

Notice of Vacancy – Code of Professional Conduct Committee

One attorney vacancy exists on the Code of Professional Conduct Committee due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest and/or resume by Feb. 27 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

Notice of Vacancy – Children's Court Rules Committee

One attorney vacancy exists on the Children's Court Rules Committee due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest and/or resume by Feb. 27 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

Request for Comments on Differentiated Case Management Rules

In 2000 the Supreme Court approved the use of differentiated case management (DCM) rules as a pilot project for the Third and Eighth judicial districts. Both the Third and Eighth judicial districts have requested that the court permanently approve these rules. The rules of Civil Procedure Committee is requesting comments from members of the New Mexico bar on its experience with the DCM programs in these districts and whether these rules should be permanently adopted.

The District Court Civil Rules Committee would like to receive comments from the bench and bar on the Differentiated Case Management Rules of the Third and Fifth judicial districts. These rules are published as LR3-501 to LR3-503, LR3-2.12 to LR3-2.15 NMRA and LR8-401 to LR8-405 and LR8-Forms 1 to 5 NMRA. Send written comments by March 12 to: Rules of Civil Procedure Committee, New Mexico Supreme Court, PO Box 848, Santa Fe NM, 87504-0848.

Judicial Performance Evaluation Commission

Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers.

The commission's next meeting will be from 8 a.m. to 5 p.m., Feb. 27 at the State Bar Center, 5121 Masthead NE, Albuquerque. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

Second Judicial District Court

Children's Court Monthly Judges' and Managers' Meeting

The Second Judicial District Children's Court will hold its monthly judges' and managers' meeting at noon, March 2, in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, in 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, Domestic Cases, 1986-91

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 domestic cases for years 1986 to 1991 (excluding cases on appeal). Counsel for parties are advised that exhibits may be retrieved through April 12. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 841-7596/8767 from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Family Court Open Meetings

The 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 March 1. Contact Mary Lovato, (505) 841-6778, for more information or to have something placed on the agenda.

Thirteenth Judicial District Court

Destruction of Exhibits, 1983 to 2003

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Thirteenth Judicial District Court will destroy exhibits filed with the court in civil cases, criminal cases, domestic cases, probate cases and children's cases for the years 1983 to 2003 (excluding cases on appeal.) Counsel for parties are advised that exhibits may be retrieved through April 19. Attorneys who may have cases with exhibits may verify exhibit information with the Sandoval County District Court (505) 867-2376, ext. 29, Monday through Friday from 8 a.m. to noon and from 1 to 5 p.m. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Bernalillo County Metropolitan Court

Nominees for Vacancy Announced

The Bernalillo County Metropolitan Court Judges Nominating Commission met Feb. 13 in Albuquerque, and completed its evaluation of the 14 applicants for the vacancy in the Bernalillo County

Metropolitan Court. The commission recommends the following three applicants (in alphabetical order) to Gov. Bill Richardson:

Benjamin S. Chavez
Andrew P. Ortiz
Victor E. Valdez

State Bar News

Center for Legal Education

CLE to Present Regular Teleseminars

In an effort to better accommodate the entire State Bar membership, to include those who reside in both rural and urban settings, the Center for Legal Education (CLE) will begin offering teleseminars on a regular basis beginning Feb. 27. This alternative format will provide CLE the opportunity to offer a broader variety of topics from national speakers to its members and also provide an alternative technology to our members who struggle with download problems that are often associated with Internet-based seminars.

The first topic to be broadcast on Feb. 27 will be "Prescription Drug Benefits/ Drug Card Benefits Under Medicare," presented by Joel L. Michaels of the Health Law Department of McDermott, Will & Emery's Washington, D.C., office.

For more information, see the new CLE Teleseminar Calendar on page 4 of this *Bar Bulletin,* or call CLE, (505) 797-6020.

Seminar on NLRA Representation Matters

The State Bar Center for Legal Education and the Employment and Labor Law Section will present "Inside the NLRA-Representation Matters" from 3 to 5 p.m., March 9, at the State Bar Center. This course offers 2.4 general CLE credits.

The featured speaker is George Cherpelis, trial attorney, Seventh Region, National Labor Relations Board, (Detroit, Michigan); labor relations attorney, General Motors legal staff; director, legal staff and senior labor counsel, Burroughs Corp., (since merged with Sperry Rand to form UNISYS). Cherpelis has concentrated in labor relations law for more than 45 years, serving as the management member of the city of Albuquerque Labor Relations Board for 20 years, and as the management member of the Bernalillo County Labor Relations Board for five years.

The costs for the seminar are $69 (standard and non-attorney fee); $49 for members of the Employment and Labor Law Section; and $39 for government attorney and paralegals. To register, visit the State Bar Web site, www.nmbar.org; e-mail, cle@nmbar.org; fax, (505) 797-6071; or call (505) 797-6020, 9 a.m. to 4 p.m.

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 March 3. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Eric Miller, section chair, (505) 995-8287.

Lawyers Assistance Committee

Monthly Meeting

The Lawyers Assistance Committee will meet at 5:30 p.m., March 1, at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

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

Paralegal Division

Paralegal Compensation Survey

The State Bar Paralegal Division is conducting a Paralegal Compensation, Utilization and Benefits Survey during the month of January. The division is urging every paralegal practicing in New Mexico to complete the survey. The complete survey was published as a special insert in the Jan. 15 (Vol. 43, No. 2) *Bar Bulletin*. A link to the online survey can be found on the State Bar Web site, www.nmbar.org, and the survey can also be downloaded, completed and e-mailed to PD@nmbar.org (type "survey" in subject line) or printed and mailed to Paralegal Division Survey, PO Box 1923, Albuquerque, NM 87103. Deadline for submission of the survey is March 1. Confidentiality of all personally identifiable information will be strictly maintained at all times.

Prosecutors' Section

Annual Awards

The State Bar Prosecutor's Section will be presenting awards to five prosecutors at the District Attorney's spring conference. The five categories are as follows:

• Prosecutor of the Year – must have five or more years of full-time prosecution experience. The nomination should address the individual's outstanding characteristics, prosecution history, work with the public and contributions to the quality of prosecution, and the image of prosecutors.

• Law Enforcement Prosecutor - this nomination should address the support and assistance the prosecutor has provided to law enforcement agencies, as well as the prosecutor's commitment of time in assisting law enforcement.

• Community Service Prosecutor – this nomination should address the service this prosecutor has provided to the community and the results of those efforts (for example volunteering at rape crisis centers, nursing homes, youth mentorship organizations, etc.).

• Legal Impact Prosecutor – this nomination should address the significant impact that resulted from the prosecutor's efforts in a criminal prosecution(s) and the significant and positive impact or effect on the law, along with the prosecutor's outstanding character.

• Rookie Prosecutor of the Year – must have been prosecuting for no more than two years. The nomination should address the prosecutor's dedication to criminal prosecution and commitment to making prosecution a career.

Nominations should be submitted by March 19 to Julie Ann Meade, section chair, PO Box 1508, Santa Fe, NM 87504-1508; or jmeade@ago.state.nm.us. The nominees will be presented to a committee for selection.

NOTICES

Public Law Section

Board Meeting

The Public Law Section board meeting will be held at noon, March 11, at the New Mexico Municipal League, 1229 Paseo de Peralta (across from the state capitol), Santa Fe. For a map or driving instructions, contact Randy Van Vleck, (505) 982-5573, or Deborah Moll, (505) 827-2000.

Nominations Sought for Public Lawyer Award

The State Bar Public Law Section is currently accepting nominations for the eighth annual public lawyer of the year award, which will be presented on the day before Law Day, April 30. Prior recipients of the award include Florence Ruth Brown, Frank Katz, Douglas Meiklejohn, Marty Daly, Nick Estes, Mary McInerny, Jerry Richardson and Peter T. White. Send nominations by 5 p.m., March 1 to Douglas Meiklejohn, by e-mail at dmeiklejohn@nmelc.org; or by mail at New Mexico Environmental Law Center, 1405 Luisa St., Ste. #5, Santa Fe, NM 87505. The selection committee (comprised of the three immediate past chairs of the Public Law Section) will consider all nominated candidates and may nominate candidates on its own.

For a complete list of award criteria, see the Jan. 22 (Vol. 43, No. 3) *Bar Bulletin*.

Toastmasters to Form Albuquerque Group for Lawyers

Toastmasters International, a nonprofit organization devoted to helping members learn the arts of speaking, listening and thinking, is inviting interest in forming a club for lawyers in the Albuquerque area.

At Toastmasters, members learn by speaking to groups and working with others in a supportive environment. A typical Toastmasters club is made up of 20 to 30 people who meet regularly for about an hour. Annual dues are minimal and the club leadership is elected from within its own membership. Each meeting gives participants an opportunity to practice:

- conducting meetings;
- giving impromptu speeches;
- presenting prepared speeches; and
- offering constructive evaluation.

Members interested in learning more about a Toastmasters Club for attorneys are invited to attend an informational meeting at 5:30 p.m., March 3 at the State Bar Center, 5121 Masthead NE, Albuquerque. For more information and to reserve a space, contact Bay Stevens, Toastmasters Area 23 governor, (505) 480-1999; or bay.stevens@att.net.

OTHER BARS

Albuquerque Bar Association

Bench and Bar Reception

The Albuquerque Bar Association will host its annual Bench and Bar Reception honoring new judges in New Mexico from 5 to 8 p.m., Feb. 27 at the Sheraton Old Town. Members of the bench and bar are invited to attend. There will be hors d'oeuvres and a no host bar.

Monthly Luncheon Program

The Albuquerque Bar Association will host its monthly luncheon program at noon, March 2 at the Petroleum Club. The topic will be "Kirtland Air Force Base Legal Leadership." Marianne Hill, attorney with Sandia National Laboratory; Becky Kraus, general counsel and corporate secretary for Sandia National Laboratory; Beth Osheim, chief counsel for DOE Nuclear Security Administration Service Center; and Lt. Col. Neil Whiteman, Kirtland AFB JAG commander will be the featured speakers.

American Bar Association

Tax Section Pro Bono Committee

This year, the Pro Bono Committee of the American Bar Association's Tax Section is raising the level of participation in the IRS's Volunteer Income Tax Assistance ("VITA") program.

The VITA Program is available for taxpayers who are in need of assistance in preparing and filing their returns. The complexities of the tax laws can frustrate many low-income, elderly, disabled and limited English proficient taxpayers' effort to complete their own return.

Because commercial tax preparers may not be a viable option for low-income taxpayers, the VITA Program provides a location where these taxpayers can come for assistance. Members of the community – including professionals, students and other volunteers – donate their time to help taxpayers complete their returns. Local legal and tax professionals are asked to check www.abanet.org/tax/vita for VITA location information, including when and how to volunteer at those locations.

For more information on this and other tax pro bono projects, visit www.abanet.org/tax/groups/probono.

OTHER NEWS

National Board of Trial Advocacy

National Trial Certification Exam Scheduled for April 17

The National Board of Trial Advocacy (NBTA), a nonprofit organization accredited by the America Bar Association to certify attorneys as specialists in the areas of civil, criminal and family law trial advocacy, will conduct the spring administration of the national trial certification examination on April 17, in various locations throughout the United States, including Albuquerque, Denver and San Antonio. The day-long written examination, on part of NBTA's certification application, tests an applicant's comprehensive practical knowledge of trial practice, ethics and evidence relevant to their chosen specialty. Applicants will be tested on their knowledge of the substantive law and their ability to evaluate, handle and resolve model controversies prior to the institution of suit and through post judgement proceedings. Attorneys interested in achieving national trial certification in the specialties of civil, criminal or family law trial advocacy should submit an NBTA application prior to March 1 to be eligible to sit for the April 17 examination.

Contact the NBTA staff office for information on how to apply for certification, or visit the NBTA Web site,

www.nbtanet.org.

National Lawyers Guild

N.M. Chapter News

The New Mexico Chapter of the National Lawyers Guild is co-sponsoring several informative and action orientated talks by Jeff Halper, Israeli human rights activist and coordinator of the Israeli Coalition Against Home Demolition, entitled "Between Two Impossibilities: Ending the Occupation and a Democratic State in Israel/Palestine."

The first presentation will be from 7 to 9 p.m., Feb. 23 at the Peace and Justice Center, 202 Harvard SE, Albuquerque. On Feb. 24, Halper will first be at the UNM Law School from 12:30 to 1:30 p.m., and later at the Unitarian Church, 3701 Carlisle NE, Albuquerque (corner of Comanche and Carlisle) from 7 to 9 p.m. All events have a suggested donation of $5.

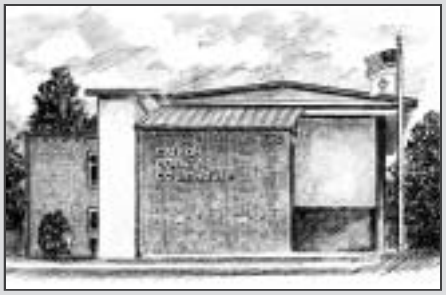
For more information, call (505) 243-4780; or e-mail lorir@unm.edu.

Workers' Compensation Administration

Uninsured Employers' Fund

The newly enacted Uninsured Employers' Fund (UEF), Section 52-9-1.1 (NMSA 2003) became effective June 22, 2003. The purpose of the UEF is for the protection of a worker whose employer was required, but failed, to maintain workers' compensation insurance at the time of the workers' job accident/illness. The UEF will pay workers' compensable disability and medical benefits, and thereafter seek reimbursement from the employer. Only those job accidents/illnesses occurring on or after June 22, 2003, are eligible for UEF benefits.

For more information, call Richard Crollett, UEF fund administrator, (505) 841-6823, or visit the WCA Web site at http://wca.state.nm.us.



***Bar Bulletin*: Call for Cover Images**

The State Bar of New Mexico is seeking additional courthouse images to be featured on the cover of the weekly *Bar Bulletin*. A different image of a New Mexico courthouse — either still in use or historical — will be featured each week. Please send photograph images by mail or e-mail to the attention of Diana Sandoval, editor, PO Box 92860, Albuquerque, NM 87199-2860; or dsandoval@nmbar.org. Images will be used as a reference for original drawings by State Bar artist, Kelley S. Hestir.

U.N.M. School of Law

Third Annual Fundraiser/ Benefit

The University of New Mexico School of Law Association of Public Interest Law and Student Bar Association will host the Third Annual "Monte Carlo on the Rio" fundraiser/benefit from 7 to 11 p.m., March 5 at the Doubletree Hotel, 201 Marquette NW, Albuquerque. For more information call Carmen Rawls, (505) 277-8184.

STATE BAR TASK FORCE TO STUDY THE ADMINISTRATION OF THE DEATH PENALTY IN NEW MEXICO FINAL REPORT

EXECUTIVE SUMMARY

This report is dedicated to the memory of Bill Dixon, a member of the Task Force who performed his work with zeal and unequalled passion until his untimely death before the Task Force completed its work and this report.

The Task Force to Study the Administration of the Death Penalty in New Mexico was created to examine the administration of the death penalty in New Mexico and, if appropriate, to make recommendations for change that would make the process of imposing the death penalty more fair.

Adequacy of Representation

Defendants in capital cases must receive adequate representation by counsel. Excellent lawyers are the best defense against injustice. The Report describes the ways in which capital cases are more legally complex and more demanding than other felony cases. In order to provide adequate representation, defense counsel must oversee two independent investigations, one that focuses on the guilt/innocence phase of the trial and the other in preparation for the penalty phase. The penalty phase is a unique proceeding and its investigation should be conducted by a mitigation expert. In order to assure adequate representation of defendants, the Task Force makes the following recommendations. (1) The defendant should be represented by two attorneys at each stage of capital proceedings and those attorneys should meet certain standards set out in the Report. (2) An appointing authority should be created to recommend appointment of counsel for defendants facing a possible death sentence who are not represented by the public defender and to insure that attorneys representing defendants in capital cases meet the standards set in the Report. (3) Defense attorneys handling capital cases should be compensated in the same manner as attorneys who contract with the Risk Management Division to represent the state. Flat-fee contracts or caps on fees should be prohibited. (4) The New Mexico Supreme Court should consider adapting the standard concerning ineffective assistance of counsel to the unique challenges presented by capital proceedings.

Proportionality

Proportionality is a term of art that encompasses two distinct concerns. In general, it is an effort to see that similar defendants who commit similar crimes receive similar sentences. More specifically, it is an effort to determine whether impermissible factors such as race, ethnicity or socioeconomic status, or arbitrary factors such as the geographic location of the crime affect the imposition of the death penalty.

As part of this effort, the Task Force undertook a survey to determine the factors that district attorneys consider in determining whether to pursue the death penalty. From the responses obtained, it appears that the two most important factors in determining whether the death penalty will be pursued in a particular case are the characteristics of the victim and the attitude of the particular district attorney towards the death penalty. The Task Force recommends that the New Mexico Association of District Attorneys develop internal guidelines stating factors that should and should not be considered in determining whether to seek the death penalty in a particular case.

The Task Force also made an effort to assess whether the imposition of the death penalty is being improperly affected by such issues as race/ethnicity, socioeconomic status and geography and whether similar defendants committing similar crimes receive similar sentences. There is no central repository of information concerning cases in which the prosecution can or does seek the death penalty. The Task Force recommends that the New Mexico Supreme Court take responsibility for acquiring data from this point forward on all first-degree or open murder prosecutions.

Other states that have studied the issue have determined that the imposition of the death penalty is affected by the race or ethnicity of the victim and, to a lesser degree, the race or ethnicity of the offender. A few studies have also shown that geography, meaning the

" ... the two most important factors in determining whether the death penalty will be pursued are the characteristics of the victim and the attitude of the particular district attorney towards the death penalty."

location of the crime, and the socioeconomic status of the defendant also have an effect on the imposition of the death penalty. The Task Force recommends there be an effort to seek funding for a comprehensive proportionality study in order to determine whether similar defendants committing similar crimes receive similar sentences.

The Report also discusses the manner in which the New Mexico Supreme Court examines the proportionality of a death sentence in a particular case.

Trial Practice

The report also recommends changes in some trial procedures. These include: (1) a recommendation that transcripts in capital cases be produced both by audio tapes and by written transcripts; (2) a recommendation that district attorney victim coordinators and advocates provide the survivors of a murder victim with the same level of services without regard to the survivors' views on the death penalty; (3) a recommendation that the jury instruction on mitigating circumstances be amended to include as a mitigating circumstance any concerns about the defendant's guilt, even if those concerns do not rise to the level of a reasonable doubt; and (4) by a narrow majority, a recommendation that jurors who cannot serve on the penalty phase because their religious beliefs preclude them from imposing the death penalty be allowed to serve on the guilt/innocence jury.

Finally, the Report recognizes the critical importance of state habeas corpus proceedings. In line with this, the Report recommends improvements to the statute on DNA testing and also recommends that the Supreme Court Committee on the Rules of Criminal Procedure review the amendments to the Rule 5-802 NMRA 2003 proposed by the New Mexico Attorney General's office.

The full report was presented to and accepted by the Board of Bar Commissioners on Jan. 23. It is available on the State Bar Web site, www.nmbar.org, under "Publications/Media."

Task force co-chairs* **Judge Rudy Apodaca** and **Jerry Todd Wertheim** would like to thank the following task force members who dedicated more than three years to this project:

Jeff Buckels, head of the Capital Litigation Unit of the Public Defender Department of New Mexico

Frankie Clemons, retired professor, New Mexico State University

Carol A. Clifford, shareholder, Jones, Snead, Wertheim & Wentworth, P.A.

Sandy Dietz, victims' advocate, Second Judicial District Attorneys' Office

William Dixon, shareholder, Rodey, Dickason, Sloan, Akin & Robb, P.A.

Mark Donatelli, shareholder, Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Frye, L.L.P.

Michelle Geiger, executive director, Center for Civic Values and representative, New Mexico Chapter of Families and Murder Victims for Reconciliation.

Tony Julian, prosecutor, First Judicial District Attorneys' Office

David Kaufman, attorney in private practice, Santa Fe

The Honorable George Perez, retired district court judge in private practice in Bernalillo

Tom Rutledge, district attorney, Fifth Judicial District

Henry Valdez, district attorney, First Judicial District

Elizabeth Whitefield, Board of Bar Commissioners representative; shareholder, Keleher & McLeod, P.A.

Marcia Wilson, pre-hearing, Court of Appeals, retired

Victoria Wilson, Criminal Appeals Division, New Mexico Attorney General's Office

** Judge Apodaca is retired from the New Mexico Court of Appeals; now in private mediation/arbitration practice, Las Cruces. Wertheim is a shareholder, Jones, Snead, Wertheim & Wentworth, P.A.*

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Writs of Certiorari

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Petitions for Writ of Certiorari Filed and Pending:

NO. 28,499 State v. Kennedy (COA 24,329) 2/12/04
NO. 28,498 Thompson v. NM Probation & Parole Dept. (12-501) 2/12/04
NO. 28,496 Martinez v. Lemaster (12-501) 2/10/04
NO. 28,494 State v. Rodriguez (COA 24,316) 2/9/04
NO. 28,493 State v. Hernandez (COA 24,337) 2/9/04
NO. 28,488 State v. Siegert (COA 23,237) 2/5/04
NO. 28,487 State v. Gomez (COA 23,033) 2/5/04
NO. 28,482 Jouett v. Growney (COA 23,669) 2/5/04
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NO. 28,390 Ballejos v. Ulibarri (12-501) 2/2/04
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NO. 28,458 Parson v. Snedeker (12-501) 1/12/04
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NO. 28,453 State v. Roman (COA 24,151) 1/8/04
NO. 28,452 State v. Vega (COA 24,006) 1/8/04
NO. 28,443 McIntire v. Snedeker (12-501) 1/6/04
NO. 28,444 Armjo v. Williams (12-501) 12/31/03 time to consider petition extended to 2/27/04
NO. 28,424 Cowan v. Velasquez (COA 22,819) 12/31/03
NO. 28,439 Gonzales v. LeMaster (12-501) 12/30/03 time to consider petition extended to 2/27/04
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NO. 28,422 State v. O'Neal (COA 24,292) 12/18/03
NO. 28,421 State v. Reveles (COA 24,260) 12/18/03
NO. 28,420 State v. Martinez (COA 23,751) 12/18/03
NO. 28,419 Henry v. Daniel (COA 23,356) 12/18/03
NO. 28,341 Lucero v. State (12-501) 11/18/03 time to consider petition extended to 2/27/04
NO. 28,384 Casados-Lujan v. Lujan (COA 22,984) 11/17/03
EFFECTIVE 11/1/03, RULE 12-502 AMENDED AND SUBPARA. E (30 DAYS DEEMED DENIED) WAS REMOVED
NO. 28,091 Ramos v. State (12-501) 5/29/03 time to consider petition extended to 2/27/04

Certiorari Granted and Under Advisement:

NO. 26,910 Jaramillo v. UNM Bd of Regents (COA 20,805) 5/9/01
NO. 27,269 Kmart v. Tax & Rev (COA 21,140) 1/9/02
NO. 22,283 State ex rel. Martinez vs. City of Las Vegas (COA 14,647) 1/16/02
NO. 27,409 State v. Rodriguez (COA 22,558) 4/3/02
NO. 27,817 Tomlinson v. George (COA 22,017) 1/8/03
NO. 27,823 Gill v. Public Employees Retirement Board (COA 21,818) 2/4/03
NO. 27,868 State v. Alvarez-Lopez (COA 22,189) 2/4/03
NO. 27,869 State v. Alvarez-Lopez (COA 22,189) 2/4/03
NO. 27,912 State v. Lopez (COA 23,456) 3/11/03
NO. 27,938 State v. Barber (COA 22,706) 3/20/03
NO. 27,950 Breen v. Carlsbad Schools (COA 22,858/22,859) 4/1/03
NO. 27,966 Montano v. Allstate (COA 22,614) 4/7/03
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NO. 27,945 State v. Munoz (COA 23,094) 4/14/03
NO. 27,939 Patscheck v. Snodgrass (12-501) 4/21/03
NO. 28,002 Chase Manhattan v. Candelaria (COA 22,625) 4/28/03
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NO. 28,068 State v. Gallegos (COA 22,888) 6/6/03
NO. 28,077 Slack v. Robinson (COA 23,189) 6/11/03
NO. 28,128 Jicarilla Apache Nation v. Rodarte (COA 22,336) 7/15/03
NO. 28,156 State v. Anita T. (COA 23,652/23,653/23,651) 8/5/03
NO. 28,107 State v. Joanna V. (COA 22,876) 8/8/03
NO. 28,007 State v. Ruiz (on reconsideration) (COA 22,282) 8/11/03
NO. 28,198 Lentz v. Benson (COA 23,762) 9/3/03
NO. 28,178 State v. Daniel G. (COA 22,769/22,772) 9/3/03
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Certiorari Denied, SC28,245, January 21, 2004

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2004-NMCA-015

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
JOSEPH L. HERRERA,
Defendant-Appellant.
No. 22,416 (filed December 4, 2003)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Michael E. Vigil, District Judge

PATRICIA A. MADRID
Attorney General
PATRICIA GANDERT
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

JOHN B. BIGELOW
Chief Public Defender
SHEILA LEWIS
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

OPINION

JAMES J. WECHSLER, CHIEF JUDGE

{1} In this appeal, Defendant Joseph Herrera argues that the district court was constitutionally required to make specific findings justifying its substitution of videotaped testimony for face-to-face confrontation, even though Defendant never objected to the substitution. Because Defendant waived his confrontation clause claim by failing to raise the confrontation issue at trial and because there is no fundamental error, we affirm.

Pertinent Procedural Background

{2} Defendant was indicted on six counts of criminal sexual contact of a minor, in violation of NMSA 1978, § 30-9-13(a)(1) (2001). Four counts arose from contact with Defendant's grandson. The State dropped two of these counts for lack of evidence, and the court declared a mistrial on the other two counts after trial. Defendant was convicted on the remaining two counts involving his granddaughter (Granddaughter).

{3} The evidence before the jury at trial included two separate videotapes, both showing Defendant's two grandchildren describing an incident at Defendant's house. Defendant moved the admission of the earlier videotape (interview tape), which was taken during an interview with the children at a rape crisis center "safe house" shortly after the alleged incident. This appeal involves the admission into evidence of the later videotape of Granddaughter's deposition (deposition tape). The State moved prior to trial to take the videotaped deposition of the children. The State's motion stated that neither child could testify in open court "without suffering unreasonable or unnecessary mental or emotional anguish and/or harm" and that the deposition tape would "eliminate a personal encounter of the alleged victims with . . . [D]efendant" while preserving Defendant's right to confrontation under the Sixth Amendment. The State later moved for admission of the deposition tape at trial. At no time did the district court make a determination of the justification for substituting the deposition tape for a face-to-face encounter in court, and Defendant did not request such a determination.

{4} Defendant now challenges, for the first time on appeal, the district court's admission of the deposition tape without making findings of fact or otherwise weighing his confrontation right against the potential harm that would result from a face-to-face encounter. He argues that the deposition tape deprived him of his constitutional right to confrontation. He asserts that Granddaughter did not appear to suffer unreasonable or unnecessary mental or emotional anguish during the taking of the deposition tape. Granddaughter, upon seeing Defendant who was present behind a one-way mirror during her deposition, said "Hi, [G]randpa." In addition, Granddaughter's mother testified that Granddaughter "still loved her grandfather and felt that he did no wrong."

Standard of Review

{5} As a general rule, when a defendant argues that the admission of evidence violates the right to confront a witness, we review de novo the district court's decision to admit the evidence when the argument has been preserved. See State v. Lopez, 2000-NMSC-003, ¶¶ 10-12, 128 N.M. 410, 993 P.2d 727 (noting that "[w]hen a defendant alerts the trial court to a confrontation issue with a proper objection, he or she raises a question of law"). However, in this case, Defendant did not object to admission of the deposition tape and thereby failed to raise his constitutional argument. Thus, Defendant did not preserve the arguments he makes on appeal. See DeFillippo v. Neil, 2002-NMCA-085, ¶ 12, 132 N.M. 529, 51 P.3d 1183 (discussing the dual purposes of preservation rule as alerting the trial court to error and affording opponents the opportunity to counter objections). We therefore do not apply our constitutional standard of review, "harmless beyond a reasonable doubt," but review only for fundamental error. Lopez, 2000-NMSC-003, ¶ 20 (internal quotation marks and citation omitted).

{6} "Parties alleging fundamental error must demonstrate the existence of circumstances that 'shock the conscience' or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." State v. Cunningham, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176. We apply the doctrine of fundamental error "sparingly, to prevent a miscarriage of justice, and not to excuse the failure to make proper objections in the court below. . . . only if

the defendant's innocence appears indisputable or if the question of his [or her] guilt is so doubtful that it would shock the conscience to permit the conviction to stand." State v. Reyes, 2002-NMSC-024, ¶ 42, 132 N.M. 576, 52 P.3d 948 (internal quotation marks and citation omitted). Neither the procedural circumstances nor the facts support the conclusion that fundamental error occurred in this case.

Waiver of Confrontation Right

{7} By statute and court rule, a district court may allow a videotaped deposition of a child under the age of sixteen who is the alleged victim in the prosecution of criminal sexual penetration or criminal sexual contact of a minor. NMSA 1978, § 30-9-17 (1978); Rule 5-504(A) NMRA 2003. The court may thereafter allow the deposition to be admitted in evidence at trial. Id. As a foundation for allowing the videotaped deposition, the district court must be satisfied that "the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm," Rule 5-504(A), and make findings that justify the videotaped deposition instead of a face-to-face confrontation at trial. State v. Fairweather, 116 N.M. 456, 463, 863 P.2d 1077, 1084 (1993). In addition, the court must follow certain procedural safeguards prescribed by Rule 5-504(B). A judge must preside over the deposition, the defendant must be present and represented by counsel or waive counsel, and the defendant must be given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary. Rule 5-504(B)(2)(3). When a court follows these procedures, a defendant's confrontation right under the Sixth Amendment to the United States Constitution is satisfied. Fairweather, 116 N.M. at 463, 863 P.2d at 1084; State v. Ruiz, 2001-NMCA-097, ¶ 41, 131 N.M. 241, 34 P.3d 630; State v. Benny E., 110 N.M. 237, 242, 794 P.2d 380, 385 (Ct. App. 1990); State v. Tafoya, 108 N.M. 1, 3-4, 765 P.2d 1183, 1185-86 (Ct. App. 1988).

{8} However, a defendant can waive fundamental rights, including constitutional rights. State v. Singleton, 2001-NMCA-054, ¶ 11, 130 N.M. 583, 28 P.3d 1124. In addressing the waiver of a defendant's right to be present during jury selection, our Supreme Court has stated that "'[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege' which must be made in a knowing and voluntary manner." State v. Padilla, 2002-NMSC-016, ¶ 18, 132 N.M. 247, 46 P.3d 1247 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). It has recognized that a voluntary waiver may include an implied waiver by conduct. Padilla, 2002-NMSC-016, ¶ 14; see also State v. Corriz, 86 N.M. 246, 248, 552 P.2d 793, 795 (1974) (affirming waiver by conduct of the right to presence in court by capital defendant).

{9} In this case, Defendant did not file a response to the State's motion for the videotaped deposition. He did not object at the time of the taking of the deposition or at the time that the district court admitted the deposition tape as evidence. To the contrary, Defendant relied on both the deposition tape and the interview tape in his opening and closing arguments. Defendant's actions indicate that he implicitly waived his right to face-to-face confrontation by conduct.

{10} Relying on Padilla, Defendant contends that even if his attorney's conduct constitutes an implied waiver, the waiver was insufficient because it was not explicitly made by Defendant. See State v. Garcia, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942) ("Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive."). In Padilla, the defendant's case was set for joint trial with a co-defendant. Padilla, 2002-NMSC-016, ¶ 2. The defendant did not appear for jury selection, the court severed the defendant's trial, and the defendant's attorney left the proceeding. Id. ¶ 3. After the jury was selected in the co-defendant's case, the defendant and his attorney requested that the court reconsider its severance decision and waived in writing any irregularities in the selection of the jury. Id. ¶¶ 4-5. Our Supreme Court, while discussing that a knowing, intelligent, and voluntary waiver of a defendant's presence may include an implied waiver by conduct, concluded that the written waiver was not voluntary, knowing, and intelligent under the circumstances because the court had not made sufficient inquiry regarding the waiver. Id. ¶¶ 14, 20-21.

{11} In Padilla, the need for the court to make inquiry was based on circumstances that do not apply to this case. The defendant in Padilla was entirely absent during the jury selection process. He did not endeavor to waive his right to be present until after the process had concluded. Our Supreme Court noted that the written waiver did not indicate that the defendant knew his rights or that his attorney had counseled him of his rights and the potential consequences of the waiver. This case is different. The waiver was the result of an ongoing series of occurrences which included Defendant's inaction as well as his active participation. Defendant did not initiate an express waiver after the fact as in Padilla. Defendant was not entirely absent during the proceeding, and all of the procedural safeguards for Defendant's right to confrontation required by Rule 5-504(B) were present: the judge presided over the deposition; Defendant was present behind a one-way mirror and was able to observe the children and communicate with counsel; Defendant was represented by counsel; and counsel had an adequate opportunity to cross-examine the children.

{12} In addition, we have recognized that a defendant's rights related to the conduct of trial may generally be waived through counsel, without the court conducting an inquiry as to the validity of the waiver. Singleton, 2001-NMCA-054, ¶¶ 12-14. The ultimate decision in this case concerned the admission of evidence, a decision generally within the scope of counsel's trial strategy. Id. ¶ 14. Defendant's counsel could reasonably have decided as a matter of trial strategy that it would be damaging to Defendant's case if Granddaughter, who was described in trial testimony as always "very verbal," testified about her molestation by Defendant in front of the jury. See Hawkins v. Hannigan, 185 F.3d 1146, 1154 (10th Cir. 1999) (holding that counsel's decision in the defendant's presence for admission of hearsay statement of frail, elderly rape victim in lieu of live testimony was prudent trial strategy which did not infringe the defendant's confrontation right).

{13} Moreover, the evidence does not indicate that fundamental error occurred. Granddaughter stated in the interview tape that Defendant tickled her "on the cocho," referring to her vaginal area. She said that he removed her pants and panties. In the deposition tape, Granddaughter

said that the last time she saw Defendant, she went to his room and he unbuttoned and unzipped her pants, pulled her panties down and tickled her. She testified that "[i]t made me feel a little bit upset[,]" and "[b]ecause it didn't feel very good." Defendant's son, Granddaughter's father, testified that Granddaughter reported to him upon leaving Defendant's house the day of the alleged incident that Defendant tickled her both that day and the day before and pointed to her "private area." Granddaughter described to him that Defendant unbuttoned her pants, pulled down her panties, and tickled her. He took Granddaughter to the hospital for an examination and alerted the Rape Crisis Center, although he stated that hospital personnel found no evidence of physical trauma. Granddaughter's mother testified that Granddaughter reported similar information to her, physically demonstrating the manner in which Defendant touched her. She also testified about changes in Granddaughter's demeanor after the alleged assault. Although Defendant is correct that he testified he did not touch Granddaughter, that there are inconsistencies between the interview tape and the deposition tape, and that Granddaughter's mother testified Granddaughter still loved Defendant, the evidence does not indicate an unfairness in the jury verdict that would amount to fundamental error. See State v. Trujillo, 2002-NMCA-100, ¶ 31, 132 N.M. 649, 53 P.3d 909 (stating that "our review of the record leads us to conclude that the State presented substantial evidence to support the . . . charges against Defendant, such that those convictions do not undermine judicial integrity") (internal quotation marks and citation omitted).

Conclusion

{14} Defendant waived his right to a face-to-face confrontation by failing to oppose the State's motion for substitution of the deposition tape and by taking part in both the deposition and the trial with no indication to the district court that he had any concern with the admission of the deposition tape. We affirm Defendant's convictions.

{15} IT IS SO ORDERED.

JAMES J. WECHSLER, Chief Judge

WE CONCUR:
LYNN PICKARD, Judge
IRA ROBINSON, Judge

Certiorari Denied, No. 28,419, February 5, 2004

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-016

LINDA RAY HENRY,
Plaintiff-Appellant,
versus
ROBERT L. DANIEL,
Defendant-Appellee.
No. 23,356
(filed: November 12, 2003)

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY
Stephen K. Quinn, District Judge

ERIC D. DIXON
Portales, New Mexico
for Appellant

RANDY KNUDSON
DOERR & KNUDSON, P.A.
Portales, New Mexico
for Appellee

Opinion

Michael E. Vigil, Judge

{1} This case requires us to construe Rule 1-025 NMRA 2003, which prescribes the timing and procedures to follow when a party to a lawsuit dies and a substitute party must be named. The trial court dismissed the complaint with prejudice on the ground that no motion to substitute parties was filed within ninety days after Robert L. Daniel (Defendant) filed a suggestion of Linda Ray Henry's (Plaintiff) death. We reverse, holding that the suggestion of death was not properly served on any successor non-parties to commence running of the ninety days.

FACTS

{2} Plaintiff filed a complaint for dissolution of a partnership, accounting, and declaratory judgment. While the suit was pending, she established the Linda Ray Henry Revocable Living Trust (Trust) on October 4, 2001, to hold and manage assets, to be available as a receptacle to receive assets from her estate and proceeds of life insurance policies, and as part of a plan to dispose of her estate after her death. Plaintiff named herself Trustee, and her sisters Successor Co-Trustees upon her death.

{3} On December 18, 2001, Defendant's attorney filed a suggestion of death that Plaintiff had died and mailed a copy to Plaintiff's attorney. On March 22, 2002, Defendant filed a motion to dismiss, arguing that a suggestion of Plaintiff's death was served on December 18, 2001, and since no motion to substitute her successor or representative as plaintiff was filed within ninety days thereafter, dismissal was required by Rule 1-025. Defendant's motion further argued that Plaintiff's sisters were authorized representatives of Plaintiff's estate because Plaintiff transferred her interests in the lawsuit into the Trust and the sisters were successor co-trustees of the Trust. Defendant added that the sisters had "actively participated in discovery" prior to Plaintiff's death and also participated in hearings "in her stead." Defendant finally argued that service of the suggestion of death was properly made on Plaintiff's attorney as "counsel for the successor" and therefore personal service of the "suggestion of death" upon the sisters was not required. See Jones v. Montgomery Ward & Co., 104 N.M. 636, 638, 725 P.2d 836, 838 (Ct. App. 1985) (suggesting service upon attorney for a decedent's personal representative,

pursuant to Rule 1-005 NMRA 2003 concerning service of pleadings to a "party," may be sufficient for Rule 1-025; however, clarifying such service is not sufficient for a non-party who must be served pursuant to Rule 1-004 NMRA 2003 because of jurisdictional purposes).

{4} Plaintiff's attorney responded as attorney for Plaintiff on March 29, 2002, by filing a motion to substitute the Trust for Plaintiff and arguing that the motion to dismiss should be denied. The response admitted that Plaintiff transferred to the Trust her interest in the property that was the subject matter of Plaintiff's action, that Plaintiff's sisters were the co-trustees of the Trust, and that the sisters had actively participated in discovery prior to Plaintiff's death, and participated in hearings in her stead. He also denied he accepted service of the suggestion of death on behalf of Plaintiff's successor. He asserted that on January 17, 2002, he sent Defendant's attorney a proposed stipulated order substituting Plaintiff's sisters as "Successor Plaintiffs" in their capacity as "Successor Co-Trustees of the Estate of Linda Ray Henry." He further stated that on January 31, 2002, and again on March 20, 2002, he sent Defendant's attorney a copy of the Trust Agreement based on the representation that Defendant's attorney would approve the proposed stipulated order upon receipt of the Trust Agreement. Plaintiff's attorney asserted Defendant's attorney should be required to abide by his agreement and approve the order of substitution or in the alternative that an enlargement of time for substituting parties be granted under Rule 1-006(B) NMRA 2003. Defendant denied that his attorney made an agreement to approve the proposed stipulated order upon receipt of the Trust Agreement.

{5} On June 25, 2002, the day before trial was scheduled to commence, the trial court held a telephonic hearing and issued a letter decision stating Defendant's motion to dismiss for failure to timely file a motion to substitute parties within ninety days after the suggestion of Plaintiff's death was filed would be granted. The court acknowledged the dispute about whether there was an oral agreement to file the proposed order of substitution when Defendant's attorney was provided a copy of the Trust Agreement. However, the court noted, Plaintiff's attorney failed to explain why he took no action to substitute parties when Defendant's attorney failed or refused to approve the proposed stipulated order until March 29, 2002, when he responded to the motion to dismiss.

{6} Plaintiff's attorney filed a motion to reconsider on June 28, 2002, before the formal order granting Defendant's motion was filed, arguing that Plaintiff's estate was not properly served with the suggestion of death. He advised the trial court that the application for informal probate of Plaintiff's estate was not filed until April 3, 2002, and Plaintiff's sisters were appointed personal representatives of the estate on April 17, 2002. Moreover, he stated that he did not represent the estate, and that another attorney did. Since Defendant had "never properly served" the suggestion of death upon the personal representatives of the estate, Plaintiff's attorney argued, the court should reconsider its decision and grant the motion to substitute parties.

{7} The trial court then filed its order dismissing Plaintiff's claims with prejudice. The trial court found that no motion for substitution was filed within ninety days after the suggestion of death was filed by Defendant's attorney. The Court further found that the proposed form of stipulated order of substitution prepared by Plaintiff's attorney showed he was also counsel for the personal representatives of Plaintiff's estate and that the purposes of Rule 1-025 in giving notice to the personal representatives of the estate were fully satisfied. Plaintiff appeals.

ANALYSIS

{8} Rule 1-025(A)(1) provides:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 1-005 and upon persons not parties in the manner provided in Rule 1-004 for the service of a summons. Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

{9} The Rule by its terms requires: (1) the death of a party, (2) survival of the party's claim notwithstanding the death, and (3) a timely motion to substitute the deceased party with a proper successor party within ninety days of the filing and proper service of a suggestion of death. See Jones, 104 N.M. at 638, 725 P.2d at 838. There is no dispute that elements (1) and (2) are satisfied. We analyze the trial court's interpretation of element (3) de novo. See In re Michael L., 2002-NMCA-076, ¶ 9, 132 N.M. 479, 50 P.3d 574 (applying same rules to construction of Supreme Court rules of procedure as to statutes); see also State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (stating interpretation of a statute is a question of law reviewed de novo). In doing so, we apply the teaching of Jones that "[b]efore the ninety day period will commence, however, notice of suggestion of death must be served on all parties (under Rule 5) and interested nonparties (under Rule 4)." Id. at 638, 725 P.2d at 838.

{10} The successor non-party to be served with the suggestion of Plaintiff's death was either the Trust or Plaintiff's estate, a question we do not have to answer in this case because neither was properly served. Rule 1-025(A)(1) specifies that service is to be accomplished in accordance with Rule 1-004. Rule 1-004(F)(9) specifies that a trustee or personal representative must be served in the same way that a person, corporation, or unincorporated association must be served "as may be appropriate." It is undisputed that such service was not made in this case. However, Defendant argues that by preparing the proposed stipulated order in January 2002 substituting Plaintiff's sisters as "Successor Plaintiffs" and sending it to Defendant's attorney, Plaintiff's attorney showed he accepted the suggestion of death not only as Plaintiff's attorney, but also as attorney for Plaintiff's successor. These facts, without more, fail to show that Plaintiff's attorney had authority to accept service and in fact did accept service on behalf of Plaintiff's successor.

{11} We first note that when Plaintiff's attorney sent the proposed stipulated order to Defendant's attorney in January 2002, Plaintiff's estate did not yet exist, so he could not accept service on behalf of the estate. As to the Trust, State Savings & Loan Ass'n v. Anderson, 106 N.M. 607, 608, 747 P.2d 253, 254 (1987), recognizes that the authority of an attorney to accept service of process on behalf of his client may be inferred from the attorney's act of filing an acceptance of service, but an attorney does not, merely by virtue of general employment, actually have authority to accept service of process on behalf of a client, and it must be made to appear that an agent such as an attorney was authorized to bind his principal by the acceptance of process. Here, Plaintiff's attorney never filed an acceptance of service. The earliest time anything was filed by Plaintiff's attorney which might be construed as suggesting he was also representing Plaintiff's successor, is on March 29, 2002, when he filed the counter-motion to substitute parties and response to the motion to dismiss. Even then, he denied he accepted service of the suggestion of death on behalf of Plaintiff's successor when Defendant's attorney mailed it to him on December 18, 2001. We therefore reject Defendant's argument. See Jones, 104 N.M. at 638, 725 P.2d at 838 (stating there was no evidence that plaintiff's attorney who received suggestion of death was also attorney for plaintiff's successor or authorized to receive service for plaintiff's successor at the time service was given).

{12} In construing Rule 1-025(A)(1) we may look to federal law for guidance because it is identical to its federal counterpart. Pope v. Gap, Inc., 1998-NMCA-103, ¶ 10, 125 N.M. 376, 961 P.2d 1283. "The [federal] courts will not dismiss for failure to file the motion for substitution within the deadline unless the suggestion of death meets all the formal requirements of the rule. Actual knowledge of the fact of death is not sufficient to begin the running of the 90-day period." 6 James Wm. Moore et al., Moore's Federal Practice § 25.13[2][b] (3d ed. 2003). The ninety-day period for filing a motion to substitute parties did not commence to run because the suggestion of death was not served on the interested non-parties as required by Rule 1-004. See Int'l Cablevision, Inc. v. Sykes, 172 F.R.D. 63, 66 (W.D. N.Y. 1997) (stating strict formalities must be observed in serving formal suggestion of death to trigger ninety-day limit); Tolliver v. Leach, 126 F.R.D. 529, 530 (W.D. Mich. 1989) (stating ninety-day period begins to run only when formal, written suggestion of death has been filed and properly served).

{13} The effect of the trial court's order was to dismiss with prejudice claims which Plaintiff's successor had against Defendant when the trial court never obtained personal jurisdiction over Plaintiff's successor. Service of the suggestion of death on non-parties pursuant to Rule 1-004 gives the court personal jurisdiction over the non-parties, thereby giving it authority to adjudicate their claims. See Jones, 104 N.M. at 638, 725 P.2d at 838 (stating Rule 1-004 is proper mechanism to give notice to non-parties because it is jurisdictionally rooted); see also Ransom v. Brennan, 437 F.2d 513, 518 (5th Cir. 1971) (stating purpose of serving motion to substitute deceased plaintiff by following procedure set forth in Fed. R. Civ. P. 4 is to acquire personal jurisdiction over non-party). Since the trial court did not acquire personal jurisdiction over Plaintiff's successor, the order of dismissal with prejudice must be set aside. See Chapman v. Farmers Ins. Group, 90 N.M. 18, 19, 558 P.2d 1157, 1158 (Ct. App. 1976) (stating in absence of proper service of summons, trial court lacked jurisdiction to enter judgment).

MOTION TO DISMISS APPEAL

{14} In its answer brief, Defendant moves to dismiss the appeal on grounds that Plaintiff is deceased, and "no longer a corporeal entity that has standing to authorize an attorney to appear on her behalf, and that this fact is admitted on the record." We deny the motion.

{15} Rule 12-301(A) NMRA 2003 addresses the procedure to follow when there is the death of a party to an appeal. Although this rule does not strictly apply to this case inasmuch as Plaintiff died well before the appellate proceedings were pending, we believe it provides substantial guidance to us in determining whether to allow this appeal. In essence, the rule permits the appellate court to allow proceedings to continue on their merits following the death of a party. It provides that, when death is suggested, "proceedings shall then be had as the appellate court directs." In State v. Salazar, 1997-NMSA-044, 123 N.M. 778, 945 P.2d 996, the defendant died in prison while his appeal was pending in the Supreme Court and the Supreme Court allowed the appeal to continue. The Supreme Court held that the language in the rule, "as the appellate court directs" gives the appellate court substantial discretion on how to proceed after death has been noted on the record. Id. ¶ 25. We exercise our discretion and allow the appeal to proceed with counsel for Plaintiff representing Plaintiff. Cf. Castro v. Ogburn, 914 P.2d 1, 3 (Or. Ct. App. 1996) (stating that plaintiff having been denied permission to amend complaint to substitute personal representative as defendant, there would be no procedure for plaintiff to challenge that ruling if appellate court lacked jurisdiction to consider appeal). In Jones, this Court did not question its jurisdiction to consider an appeal filed by the deceased appellant in circumstances identical to those in this case.

CONCLUSION

{16} The order dismissing the complaint with prejudice is set aside, and the case is remanded to the trial court for further proceedings consistent with this opinion.

{17} IT IS SO ORDERED.

MICHAEL E. VIGIL,
Judge

WE CONCUR:
LYNN PICKARD, Judge
JONATHAN B. SUTIN, Judge

Certiorari Granted, SC28,408, January 13, 2004

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-011

FEDERAL EXPRESS CORPORATION a Delaware Corporation,
Plaintiff-Appellee,
versus
ALEX A. ABEYTA, JR., as BERNALILLO COUNTY TREASURER, NEW MEXICO TAXATION & REVENUE DEPARTMENT, and JOHN CHAVEZ, as SECRETARY OF THE NEW MEXICO TAXATION & REVENUE DEPARTMENT,
Defendants-Appellants.
No. 23,519
(filed: November 17, 2003)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ROBERT H. SCOTT,
District Judge

GARY D. EISENBERG
BETZER, ROYBAL & EISENBERG, P.C.
Albuquerque, New Mexico

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RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
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for Appellee

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M. DAVID CHACON, II
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for Appellant Bernalillo County Treasurer

PATRICIA A. MADRID
Attorney General
BRIDGET JACOBER
Special Assistant Attorney General
Legal Services Bureau
New Mexico Taxation & Revenue Department
Santa Fe, New Mexico
for Appellant New Mexico Taxation & Revenue Department

Opinion

James J. Wechsler, Chief Judge

{1} This case involves the distinction between a taxpayer asserting error in the valuation of property and a taxpayer asserting error in the computation of taxes. In the former case, protests must be filed within sixty days, while in the latter case, there is no time limit specified and the general four-year statute of limitations applies. We hold that when a taxpayer makes computational errors in documents submitted to enable the taxing authorities to determine valuation, it is a case of error in valuation, and not computation, and therefore the sixty-day limit applies.

{2} The Bernalillo County Treasurer (County) appeals a summary judgment granted to the Federal Express Corporation (FedEx). The issue in this case is whether FedEx could properly file a claim for refund under NMSA 1978, § 7-38-78 (1981). Because the facts are not in dispute and the issue presented is purely legal, our review is de novo. See Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We reverse the summary judgment entered in favor of FedEx and remand for entry of a judgment in favor of the County.

{3} Section 7-38-78(A) allows a taxpayer to "bring an action in the district court requesting a change in the property tax schedule in connection with any property listed on the schedule for property taxation in which the owner claims an interest." The action is limited, however, because the statute explicitly disallows actions that "directly challenge the value" and requires that the action be founded on one of the grounds listed in the statute. The statute reads:

> Actions brought under this section may not directly challenge the value, classification, allocations of value determined for property taxation purposes or denial of any exemption claimed and must be founded on one or more of the following grounds:
>
> (1) errors in the name or address of the property owner or other person shown on the schedule;
>
> (2) errors in the description of the property for property taxation purposes;
>
> (3) errors in the computation of taxes;
>
> (4) errors in the property tax schedule relating to the payment or nonpayment of taxes;
>
> (5) multiple valuations for property taxation purposes for a single tax year of the same property on the property tax schedule; or
>
> (6) errors in the rate of tax set for any governmental unit in which the owner's property is located.

Section 7-38-78(B). This section does not contain a time limit for filing the request for a change in the property tax schedule, and therefore the general statute of limitations of four years pursuant to NMSA 1978, § 37-1-4 (1880) applies. In contrast, NMSA 1978, §§ 7-38-39 (1983) and -40 (1982) permit a taxpayer to protest property values and classifications, but require the claim for refund to be filed in the district court within sixty days of when the first installment of taxes are due.

{4} FedEx argues that it "is not protesting either the value or the classification of its property." Instead, it argues that "this case involves correction of a simple computational error by FedEx in determining the amount of time its aircraft was present in New Mexico, thereby resulting in an over apportionment of the undisputed value of the aircraft to New Mexico." FedEx relies upon the third ground listed in the statute: "errors in the computation of taxes." Section 7-38-78(B)(3).

{5} Generally, under the Property Tax Code (Code), a county assessor establishes the valuation of property within a county subject to property taxation. NMSA 1978, § 7-36-2 (1995). The Code, however, assigns to the New Mexico Taxation and Revenue Department (Department) the valuation of property used in the conduct of certain businesses, including the airline business. Section 7-36-2(B)(5). FedEx engages in the airline business, transporting packages and cargo throughout the United States.

{6} The Code requires owners of property to annually report information to the Department concerning the property subject to the Department's valuation. NMSA 1978, § 7-38-8(A) (1991). The Department, in turn, mails its notice of valuation to property owners who may protest the Department's valuation. NMSA 1978, §§

7-38-20, -21 (2001). The Department subsequently certifies to the county assessor the values of all property within a county subject to the Department's valuation. NMSA 1978, § 7-38-30 (1973). These values are used by the New Mexico Department of Finance and Administration to set tax rates, NMSA 1978, § 7-38-32 (1977), § 7-38-33 (1989), and by the county to impose property taxes. NMSA 1978, § 7-38-34 (1973). The county assessor bases the county's property tax schedules in part on these determined values. NMSA 1978, § 7-38-35(A)(4) (1981).

{7} The Department determines the property tax valuation of commercial aircraft by allocating a portion of the net book value of the aircraft to New Mexico based on the flight time over, and ground time in, New Mexico as a percentage of total flight and ground time of the aircraft for the preceding year. See NMSA 1978, § 7-36-32(C) (1975); 3 NMAC 6.5.39(C)(1)(a) (2001). Under the formula contained in the Department's regulations, the net book value is multiplied by two separate percentages: flight time over New Mexico divided by total flight time of the aircraft and ground time in New Mexico divided by total ground time of the aircraft. 3 NMAC 6.5.39(C)(1)(a). The two results are averaged to determine the New Mexico property tax valuation. Id.

{8} In 1998, FedEx submitted a report to the Department pursuant to Section 7-36-32, stating a property value of $28,412,389 for its aircraft. Of this amount, $21,681,461 was allocated to the A310 aircraft. Using the property values FedEx submitted, the Department mailed its annual valuation notice to FedEx in May 1998. This notice informed FedEx that it could file an administrative protest of the valuation within thirty days. FedEx did not file an administrative protest. After the tax rate was set and the tax schedule prepared, the County mailed the tax bill to FedEx in November 1998, based on the value FedEx had reported to the Department. Under Section 7-38-40(A)(1), FedEx could have filed a claim for refund within sixty days of the date the first installment of the tax was due. The director of the Department is required to "notify the appropriate county treasurer immediately when a claim for refund is filed." Section 7-38-40(B).

{9} FedEx paid the first installment of property taxes on December 10, 1998. It did not file a claim for refund. On April 19, 1999, FedEx paid the second installment, with the stamp "PAID UNDER PROTEST." On June 9, 1999, FedEx filed its complaint for property tax refund. It later amended its complaint to add the Department as a defendant. With its complaint, FedEx presented documentation that the correct value for the A310 aircraft was $3,104,833, rather than the $21,681,461 it reported. The error occurred because FedEx calculated the percentage of New Mexico ground time by dividing the number of minutes of New Mexico ground time by the total hours of ground time instead of dividing the number of hours of New Mexico ground time by the total hours of ground time.

{10} Our determination in this case depends on whether this computational error was an error in the valuation of the property or an error in the computation of taxes. In asserting that Section 7-38-78 applies to this case, FedEx characterizes the error in its report to the Department as a computational error in completing its property tax schedule. The County and the Department, also a party in the district court, characterize it as FedEx's error in the valuation of the A310 aircraft used in New Mexico. There is no question that FedEx's erroneous statement of New Mexico ground time directly resulted in an excessive valuation of the aircraft. This excessive valuation was then used to calculate the tax rate and schedule. FedEx does not argue that there was any error in computing the tax rate and ultimate tax bill except for using the erroneous value it reported. The Department's mathematical computations applied to FedEx's value were correct.

{11} The error in the process was, therefore, in the valuation of the property for tax purposes, not in the computation of the taxes. Although the aircraft may have had an undisputed book value, this value was not the property value for taxation purposes. The property value for taxation purposes was the allocated value reported by FedEx, using the formula applying the flight and ground time ratio, and adopted by the Department. Fed Ex's computational error in arriving at this allocated value was not an "error[] in the computation of taxes" as contemplated by Section 7-38-78(B)(3). Instead, FedEx's claim was a challenge to the valuation or the allocation of value of its property.

{12} The plain language of Section 7-38-78 prohibits such an action. See generally Sec. Escrow Corp. v. State Taxation & Revenue Dep't, 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct. App. 1988) (stating that in construing the meaning of a particular statute, this Court will "look primarily to the language of the act and the meaning of the words, and when they are free from ambiguity, we will not resort to any other means of interpretation"). See also In re 1971 Assessment of Trinchera Ranch, 85 N.M. 557, 558-60, 514 P.2d 608, 609-11 (1973) (indicating a historical aversion to allowing courts to reassess the value of property under a variety of statutes). Because FedEx's claim was for a refund based on an incorrect allocation of the value of its property for tax purposes, its remedy was pursuant to Section 7-38-40, not Section 7-38-78.

{13} We reverse the summary judgment entered in favor of FedEx and remand for entry of a judgment in favor of the County.

{14} IT IS SO ORDERED.

JAMES J. WECHSLER, Chief Judge

WE CONCUR:

LYNN PICKARD, Judge

JONATHAN B. SUTIN, Judge

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-017

BERNADETTE GUTIERREZ and RICARDO GUTIERREZ,
Petitioners-Appellees,
versus
MELANIE CONNICK and RICHARD MICHAEL GUTIERREZ,
Respondents-Appellants.
No. 23,601
(filed: December 11, 2003)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
DEBORAH DAVIS WALKER,
District Judge

BERNADETTE GUTIERREZ
RICARDO GUTIERREZ
Los Lunas, New Mexico
Pro Se Appellees

DAVID A. STANDRIDGE, JR.
STANDRIDGE LAW FIRM, P.C.
Albuquerque, New Mexico
for Appellant Melanie Connick

Opinion

Jonathan B. Sutin, Judge

{1} Melanie Connick (Mother) is the biological mother of Helena Alicea Connick-Gutierrez, born June 2000 (Child). Richard Michael Gutierrez (Father) is the biological father of Child. Mother and Father have never been married. Bernadette and Ricardo Gutierrez are Child's paternal grandparents (Grandparents). Mother appeals an order granting Grandparents visitation privileges. We reverse.

BACKGROUND

{2} In August 2001, Grandparents filed a pro se petition for grandparent visitation, naming Mother as Respondent. No action involving dissolution of marriage, legal separation, or the existence of a parent and child relationship was pending. See NMSA 1978, § 40-9-2(A) (1999) (permitting a court to grant grandparent visitation "[i]n rendering a judgment of dissolution of marriage, legal separation or the existence of the parent and child relationship"). Mother filed a motion to dismiss, arguing that Grandparents met none of the requirements under Section 40-9-2 for court-ordered grandparent visitation.

{3} The district court took Mother's motion to dismiss under advisement and, although Father was not a party, the court ordered Father to file a petition for paternity. In addition, the court granted a limited amount of supervised visitation to Grandparents, pending further order of the court, simultaneously ordering the parties to work on their long-term relationship for the benefit of Child. When Father did not file a petition for paternity, Mother again moved to dismiss Grandparents' petition for visitation for lack of jurisdiction. The court granted that motion, dismissing Grandparents' petition and suspending visitation between Grandparents and Child.

{4} Grandparents then moved to reinstate the action and for leave to file an amended petition for grandparent visitation and for the issuance of summons to Father. The court granted this motion, and Grandparents, now formally represented by counsel, filed an amended petition adding Father as a party and requesting that Father's paternity be established pursuant to NMSA 1978, § 40-11-7 (1986) of the Uniform Parentage Act, NMSA 1978, §§ 40-11-1 to -23 (1986, as amended through 2001) (Parentage Act). The amended petition asserted that Grandparents were interested parties as contemplated in Section 40-11-7(A).

{5} Mother then filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Her motion to dismiss asserted that Grandparents were not interested parties as contemplated by the Parentage Act and that despite the court's order that he do so, Father did not file a petition for paternity. Grandparents moved for entry of a default judgment against Father. Father filed an answer in which he did not deny paternity. The court denied Mother's motion to dismiss and determined that Father was the natural father of Child.

{6} After a hearing on the merits, the district court entered findings of fact and conclusions of law, and an order and judgment. The court determined that Grandparents had standing to file an action to establish a parent and child relationship between Father and Child because they were interested parties within the meaning of Section 40-11-7(A), that a parent and child relationship between Father and Child existed, and that the court had jurisdiction over the parties and the subject matter.

{7} The court made the following findings of fact, among others, none of which are attacked by any party, and all of which are binding on this Court. Stueber v. Pickard, 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991). We are deferential to the court's findings of fact, but we review conclusions of law de novo and may draw our own conclusions of law. See Strata Prod. Co. v. Mercury Exploration Co., 121 N.M. 622, 627, 916 P.2d 822, 827 (1996). For Grandparents to assert visitation rights, Grandparents were required to file an action to establish the existence of a parent and child relationship between Father and Child. Father was given notice of the hearing and did not appear. Child resided with Mother since birth and Mother provided all the support for Child since birth. Father had been incarcerated for the greater part of Child's life, but resided with Mother and Child prior to his incarceration and after he was released from incarceration in July 2002. Mother and Father have a very unstable relationship and are attempting to work out their differences. No evidence was presented regarding the prior interaction between Grandparents and Father although, presently, Grandparents and Father appear to have a satisfactory relationship. Very little interaction existed between Grandparents and Child, with no significant attachment between them and no time-sharing or visitation arrangements in place prior to Grandparents' petition. The prior interaction and current relationship between Grandparents and Mother was strained and conflicted and, presently, full of animosity. More particularly, Grandparents called Mother derogatory names, intimidated and threatened Mother, threatened to take Child from Mother and leave the country, and have not respected Mother's wishes and opinions regarding the care of Child. Mother's concerns about Child's safety and about attempts by Grandparents to alienate Child from her were therefore reasonable. Grandparents do not appear to be willing or able to promote a close relationship between Mother and Child. Mother's health has suffered as a result of the continued conflict with Grandparents and her concern for Child's safety.

{8} The district court also found that unsupervised visitation was likely to disrupt Child's development and was currently

not in the best interest of Child, but that it would ultimately be in Child's best interest to have a relationship with Grandparents. The court found that supervised visitation would enable Grandparents to have contact with Child, yet ensure the safety of Child, and address Mother's concerns.

{9} Based on a finding that it was in the best interest of Child, the district court awarded supervised grandparent visitation from 1:00 p.m. to 3:00 p.m. on the first Saturday of each month at a specific neutral location not to conflict with prior established visitation or time-sharing privileges or with Child's education. The court stated in its finding of fact that Grandparents were encouraged to develop a positive relationship with Mother and to respect her concerns, and that all parties were encouraged to put their differences behind them and to work together for the benefit of Child. The court also stated that it would modify the visitation schedule upon a showing of a material and substantial change in circumstances.

{10} Mother appeals, contending (1) that the district court lacked subject matter jurisdiction to grant grandparent visitation, in that Grandparents lacked standing, and (2) that Grandparents failed to meet their burden of proof to obtain visitation privileges. Grandparents' two-page, pro se answer brief asserts facts not of record, contains no citation to the record or legal authority, and fails to respond to any of Mother's arguments. It asks this Court to affirm because "[t]he love of a grandparent should never be denied to a child," no visitation "would do psychological and emotional harm to [Child]," and "[Child] and grandparents need each other as part of the special bond already established."

DISCUSSION

I. Standing of Grandparents to Seek Paternity Determination

{11} We review issues of jurisdiction and standing de novo when the facts are undisputed. See Martinez v. Segovia, 2003-NMCA-023, ¶ 9, 133 N.M. 240, 62 P.3d 331 ("The issues of lack of jurisdiction and interpretation and application of law and procedure are legal issues we review de novo."); MPC Ltd. v. N.M. Taxation & Revenue Dep't, 2003-NMCA-021, ¶ 11, 133 N.M. 217, 62 P.3d 308 ("Findings that are not directly attacked are deemed conclusive and are binding on appeal."); see also Williams v. Williams, 2002-NMCA-074, ¶ 8, 132 N.M. 445, 50 P.3d 194 (stating that appeal on constitutional issue as to grandparent visitation privileges raised questions of law to be reviewed de novo).

{12} Mother contends the court lacked jurisdiction, asserting that Grandparents were not interested parties under Section 40-11-7(A) and therefore lacked standing to establish a parent-child relationship between Father and Child. Section 40-11-7(A) states: "Any interested party may bring an action for the purpose of determining the existence or nonexistence of the parent and child relationship." Mother argues that "interested party" does not include grandparents who seek to establish paternity solely to open a door for grandparent visitation under Section 40-9-2.

{13} In Mother's view, allowing Grandparents visitation privileges thwarts the purpose of the Parentage Act. The parent and child relationship, Mother points out, is defined as a "legal relationship . . . incident to which the law confers or imposes rights, privileges, duties and obligations." § 40-11-2. Mother argues that nothing in the Parentage Act indicates a purpose to allow Grandparents to establish a parent-child relationship to gain visitation. See State ex rel. Human Servs. Dep't v. Aguirre, 110 N.M. 528, 530, 797 P.2d 317, 319 (Ct. App. 1990) ("[T]his court has held that the primary purpose of paternity proceedings is to insure that the putative father meets his obligation to help support the child."). In addition to Aguirre, Mother relies on several attenuated New Mexico and out-of-state cases that, according to Mother, require a person to have more of a connection with the outcome of the case than do Grandparents. Mother further contends that it would be contrary to public policy to permit grandparent visitation when the family unit exists and Mother and Father work out their own issues, and when Grandparents have no close bond or financial relationship with Child. Based on her policy argument and the cases cited, Mother requests this Court to narrowly define "interested parties" to bar Grandparents from beginning the process of seeking visitation privileges under Section 40-11-7(A) because Grandparents have neither a financial stake in the establishment of a parent-child relationship, nor a close relationship "necessitating an interest" in the establishment of a parent-child relationship.

{14} We do not accept Mother's lack of standing contention. As the district court determined, for the parent of a putative father to obtain grandparent visitation privileges, a determination of a parent-child relationship must be made linking the putative father as a parent of the child. See § 40-9-2(A). The parent-child relationship established must be one "incident to which the law confers or imposes rights, privileges, duties and obligations." § 40-11-2. Incident to a parent-child relationship, the law confers grandparents certain visitation privileges, see § 40-9-2, assuming the grandparents meet certain requirements. See § 40-9-2(G). We hold that a putative grandparent has standing as an interested party under Section 40-11-7(A) to bring an action to establish a parent-child relationship for the purpose of establishing the grandparent as either the maternal or paternal grandparent of a child in order to obtain visitation privileges under Section 40-9-2.

II. Discretion in Awarding Grandparents Visitation Privileges

{15} We have little doubt that, more often than not, it is in the best interest of a child to have an ongoing beneficial relationship with grandparents. Nor do we doubt that, in certain circumstances, it might be beneficial to experiment with grandparent visitation through court-ordered, limited supervised visitation, even in the face of a parent's objection. However, without statutory permission, a grandparent does not have a right to court-ordered visitation with his or her grandchild. No grandparent visitation right existed at common law. See Lucero v. Hart, 120 N.M. 794, 799, 907 P.2d 198, 203 (Ct. App. 1995).

{16} Furthermore, even if statutorily permitted, grandparent visitation privileges are circumscribed by constitutional limitations, in that parents have a fundamental liberty right to make decisions concerning the care, custody, and control of their children, a right that is protected under the Fourteenth Amendment's Due Process Clause. Troxel v. Granville, 530 U.S. 57, 66 (2000); see also Williams, 2002-NMCA-074, ¶¶ 11-18 (discussing Troxel). "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a `better' decision could be made." Troxel, 530 U.S. at 72-73.

{17} Thus, the starting point in evaluating grandparent visitation privileges is

neither a presumption in favor of grandparent visitation, nor casting the burden on a fit custodial parent to disprove that visitation would be in the best interest of the child. See id. at 68, 71. Rather, the question is whether the grandparents have presented sufficient evidence to relax the concern about infringement on a fit parent's fundamental right to make decisions regarding the care, custody, and control of his or her child, a decision that is to be given material weight by the court. See id. at 71-72.

{18} Section 40-9-2(A) permits a court to grant reasonable visitation privileges to a grandparent. Subsections B, C, D, E, and F of Section 40-9-2 cover the following circumstances for grandparent visitation: instances in which one or both parents are deceased, § 40-9-2(B); a minor child resided with a grandparent for a certain period and the child was removed from the grandparent's home, § 40-9-2(C), (D); and the child has been or is being adopted by certain persons, § 40-9-2(E), (F).[1] Section 40-9-2(G) sets out the evidentiary factors a court must consider in evaluating whether to grant grandparent visitation. This provision requires the court to assess certain factors when considering grandparent visitation, as follows:

> (1) any factors relevant to the best interests of the child;
>
> (2) the prior interaction between the grandparent and the child;
>
> (3) the prior interaction between the grandparent and each parent of the child;
>
> (4) the present relationship between the grandparent and each parent of the child;
>
> (5) time-sharing or visitation arrangements that were in place prior to filing of the petition;
>
> (6) the effect the visitation with the grandparent will have on the child;
>
> (7) if the grandparent has any prior convictions for physical, emotional or sexual abuse or neglect; and
>
> (8) if the grandparent has previously been a full-time caretaker for the child for a significant period.

Id.

{19} The district court has "broad, but not unfettered, discretion in awarding visitation." Lucero, 120 N.M. at 800, 907 P.2d at 204. We review a court's decision granting grandparent visitation for abuse of discretion where a parent asserts the granting of visitation was erroneous because it lacked "an affirmative showing that such visitation is beneficial to the child and would be in furtherance of the child's best interests and welfare." Id. In doing so, we examine "the record in the light most favorable to the decision entered below." Id. Under our often repeated abuse of discretion standard, a court abuses its discretion when its "ruling is clearly against logic and the effect of facts and circumstances." See Ridenour v. Ridenour, 120 N.M. 352, 356, 901 P.2d 770, 774 (Ct. App. 1995) (citing, in connection with the court's application of the grandparent visitation statute, a New Mexico custody-case test as to abuse of discretion when the court modifies a custody arrangement) (internal quotations marks and citation omitted); see also Sims v. Sims, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153 ("An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case.").

> Where the court's discretion is fact-based, we must look at the facts relied on by the trial court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence. If the facts essential to the trial court's judgment are not established by substantial evidence in the record, we will necessarily find an abuse of discretion.

Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 60, 134 N.M. 77, 73 P.3d 215 (internal quotation marks and citations omitted), cert. granted, 133 N.M. 771, 70 P.3d 761 (May 28, 2003).

{20} In the present case, to support the district court's grant of grandparent visitation, Grandparents must at a minimum have presented "evidence specifically showing that [they] satisfied the factors enumerated in Section 40-9-2(G)," Lucero, 120 N.M. at 800, 907 P.2d at 204, to an extent that would permit the district court, exercising reasonable discretion, to ultimately determine the presence of enough factors to allow visitation under the statute.

{21} We agree with Mother that Grandparents failed to meet their burden under Section 40-9-2(G) to show factors that could support grandparent visitation under Section 40-9-2(A). Except for the fact that Grandparents are the paternal grandparents of Child, the evidence is much too thin to support grandparent visitation. The only specific factors remotely supportive of the court's decision are that the parents have a very unstable relationship, Grandparents and Father appear to have a satisfactory relationship, and the court's view that it would be in Child's best interest to have a relationship with Grandparents. Nothing presented at the time of the hearing and entry of the court's findings indicates anything else positive in Grandparents' favor. Grandparents did not show any meaningful, prior relationship existing between them and Child. See Lucero, 120 N.M. at 800, 907 P.2d at 204 (stating that the "statutory factors evidence a legislative intent to permit continued grandparent-child contact despite objections by a child's parents where there is a showing that a meaningful, prior relationship existed"); see also Williams, 2002-NMCA-074, ¶ 24 (noting that specific support for visitation, including "the documented need to nurture the prior relationship between Child and Grandparents," was notably absent in Troxel). The court made no finding indicating that visitation would further Child's best interest. See Lucero, 120 N.M. at 800, 907 P.2d at 204 (stating that Section 40-9-2(G) required "evidence indicating how such visitation will further the child's best interests").

{22} It is noteworthy that in reversing the district court's grant of grandparent visitation in Lucero, this Court described "a case factually similar in part," Rigler v. Treen, 660 A.2d 111 (Pa. Super. Ct. 1995),

[1] No party raises, and we do not address, whether visitation privileges can be granted only under the specific circumstances stated in Subsections (B) to (F). See Williams, 2002-NMCA-074, ¶ 9 (stating that the Visitation Act "allows grandparents to petition the court for visitation under a limited number of specific circumstances, such as divorce, the death of a parent, or termination of parental rights," although no issue was raised in the case regarding whether visitation privileges could be granted solely under such circumstances).

as follows:

> In Rigler the parents of the child were never married and the father's parental rights were terminated. The evidence also indicated that considerable antagonism existed between the mother and the paternal grandmother. The appellate court affirmed the trial court's denial of visitation because there was no showing that grandparent visitation would be in the child's best interests, and the evidence indicated that such visitation, in fact, could interfere with the relationship between the mother and the child.

Lucero, 120 N.M. at 801, 907 P.2d at 205 (citations omitted). Lucero and Rigler are clear pathways to our decision in the present case.

{23} The most that can be gleaned from or read into the court's findings in the present case is that the court appeared to believe that supervised visitation would be of little risk and might, if Grandparents minded themselves and Grandparents and Mother could get along, be in the best interest of Child. Grandparents have not made an affirmative showing that it is in Child's best interest that visitation be imposed, as required under Section 40-9-2(G)(1). The overwhelming evidence is against such visitation.

{24} The court appears to have attempted to come within the statute by permitting only supervised visitation at monthly intervals for short time periods, thus limiting any risk of harm, yet giving Child the chance to know and appreciate Grandparents. While such a conceivably low-risk contact experiment might do little harm and may benefit Child, the law does not permit or require such visitation in the absence of any substantial evidence to support visitation under the factors listed in Section 40-9-2(G). See Williams, 2002-NMCA-074, ¶ 14 ("The visitation order lacked the kind of special circumstances that are constitutionally necessary to justify state interference in a parent's right to determine the best interests of his or her child."). The order allowing visitation in this case is exploratory, causing it to be beyond the pale of the discretion permitted under a Section 40-9-2 grant of visitation. Grandparents did not establish a right under Section 40-9-2 to visitation, and the district court erred in granting visitation.

CONCLUSION

{25} We reverse the district court's grandparent visitation order.

{26} IT IS SO ORDERED.

JONATHAN B. SUTIN,
Judge

WE CONCUR:

LYNN PICKARD, Judge

CYNTHIA A. FRY, Judge

WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

EFFECTIVE FEBRUARY 17, 2004

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NO. 27,816 Warford v. Herrera filed 1/26/04
NO. 27,692 State v. Sanchez-Lara filed 2/5/04

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