



- Adds a definition of “fictive kin” to the general provisions of the Children’s Code, and deletes the definition from the Abuse and Neglect Act.
- Amends the definition of “guardian” by deleting the provision that defines a guardian to include a person authorized by a parental power of attorney.
- Amends the provision regarding notice to Indian tribes by consolidating the statutory sections and adding notice requirements for proceedings under the Delinquency Act.
- Adds provision for voluntary placement to the purposes to the Family Services Act.
- Adds the following definitions to the Family Services Act: (1) “designated tribal agent;” (2) “guardian;” (3) “guardianship assistance agreement;” (4) “guardianship assistance payments;” (5) “guardianship assistance program;” (6) “Indian custodian;” (7) “kinship;” and, (8) “voluntary placement agreement.”
- Deletes the following definitions from the Kinship Guardianship Act: (1) “guardianship assistance agreement;” (2) “guardianship assistance payments;” (3) “guardianship assistance program;” (4) “legal custody;” (5) “subsidized guardianship;” and, (6) “voluntary placement agreement.”
- Removes the ability of a custodian to enter a voluntary placement with CYFD.
- Adds a provision that legal counsel must be provided to a parent, guardian or Indian custodian prior to signing a voluntary placement agreement and through the duration of the agreement to explain the terms and consequences of the agreement, and that the parent, guardian or Indian custodian can withdraw consent at any time.
- Amends the provision regarding the time limit of voluntary placement agreements and adds a provision that the court must hold a hearing and enter a written order on a petition to extend the voluntary placement agreement within 30 days of the filing of the petition.
- Changes the language so that CYFD may file a petition if the parent refuses to accept the child back into the home at any time rather than only after 365 days in a two-year period.
- Adds additional rights of a parent, guardian or Indian custodian who enters a voluntary placement agreement including the right to serve as the child’s educational decision maker, the right to authorize medical and dental care and behavioral health services and the right to make decisions regarding participation and attendance in traditional, cultural and religious events.
- Adds a confidentiality provision to the Family Services Act.
- Adds a new section on the conduct of hearings.
- Adds a new section requiring a voluntary placement of an Indian child to be executed before a court and specifies the determinations the court must make.
- Adds a new section regarding the time limitations of voluntary placement agreement regarding

an Indian child.

- Adds new sections regarding placement of a child and of an Indian child in CYFD's custody through a voluntary placement agreement.
- Adds new sections regarding financial subsidies for a guardianship when a child was removed from the child's home pursuant to a voluntary placement agreement or as a result of a judicial determination that the placement and care of the child should be vested in the department. These provisions were moved to the Family Service Act from the Kinship Guardianship Act.

Finally, the bill adds authorization for CYFD and a caregiver with whom CYFD has placed a child pursuant to the Children's Code and who has the written consent of CYFD to file a guardianship petition under the Kinship Guardianship Act.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

### **FISCAL IMPLICATIONS**

There is no appropriation contained within this bill, but there may be impact on the operating budgets of both CYFD and the Administrative Office of the Courts (AOC). CYFD currently has budgeted \$1.42 million per year to cover a portion of expenses incurred by AOC to provide counsel to parties in abuse and neglect proceedings, based on the state's penetration rate, calculated quarterly, and the federal reimbursement rate of 50 percent. While voluntary placement agreements (VPAs) are currently uncommon, the fiscal impact of 20 VPAs agreements could range from \$6,000 to \$10 thousand in additional expense for CYFD each month and \$42 thousand to \$70 thousand in additional expense for AOC. In addition, if there is an increase in voluntary placements of Indian children, the requirement to file a petition in these cases, will have additional impact on CYFD's operating expenses.

Currently, CYFD has executed five VPAs, and only one out of the 80 most recent requests for guardianship representation involved a VPA. AOC expects these numbers to go up, but even if they triple or quadruple, AOC reports this number is manageable within the court-appointed attorney fund budget, especially if AOC is able to maximize federal Title IV-E foster care funding.

### **SIGNIFICANT ISSUES**

#### **BACKGROUND**

Senate Bill 97 resolves identified concerns and conflicts in the amendments to the Kinship Guardianship Act that allowed for subsidized kinship guardianships in matters involving voluntary custody with the Children, Youth, and Families Department (CYFD).

In 2019 CYFD received a funding mechanism from the federal government to subsidize kinship guardianships, to provide financial support to families caring for relative children outside the foster care system. This process requires that a parent, guardian, or custodian voluntarily place the child in the legal custody of CYFD by entering into a Voluntary Placement Agreement (VPA). CYFD then maintains legal custody of the child, while placing the child in the physical custody of the

relative or intended guardian. The child must remain in the legal custody of CYFD and the physical custody of the relative or intended guardian for six months. After six months, CYFD and the relative or intended guardian can enter into a Guardianship Assistance Agreement in which a regular subsidy is negotiated. The process for establishing a kinship guardianship can then begin in the courts. The subsidy cannot be received by the relative or intended guardian without first completing the VPA process.

In the 2020 Regular Legislative Session, Laws 2020, Chapter 51) was enacted. The law codified the process for subsidized kinship guardianships under the Domestic Affairs statute, where the Kinship Guardianship Act is located. However, as outlined above, the process to receive a subsidized kinship guardianship cannot be initiated until a VPA is in place for six months. The location of the required voluntary placement process in the Domestic Affairs statute was confusing and ill-placed, especially in divisional courts where kinship guardianship matters are heard by family court judges and matters involving the placement of a child in the legal custody of CYFD are heard by children’s court judges.

A stakeholder group of both family law experts, children’s law experts, Indian Child Welfare Act experts, and key CYFD experts was convened to address these concerns. The stakeholder group concluded the Kinship Guardianship Act did not require major changes and should return to its pre-2020 Regular Session form, with some minor modifications. The stakeholder group also concluded the voluntary placement process should be included in the Children’s Code. This bill removes the voluntary placement process from the Domestic Affairs statute and moves it into the Children’s Code.

One of the first issues identified in the amended law relates to who can file a petition for kinship guardianship. Under the 2020 law, CYFD was not named as a party or party type that could petition the court for kinship guardianship. However, as CYFD has legal custody of the child sought to be placed in a guardianship, it was agreed that CYFD should have the authority to petition the court for kinship guardianship. This issue is resolved by the amendments proposed in this bill.

Restoring the kinship guardianship statute to more or less its original form (with minor changes like the one mentioned in the paragraph above) and modifying the Children’s Code with the VPA process resolves much of the confusion encountered by judges hearing subsidized kinship guardianship matters. This bill also clearly and purposefully directs a process in line with the Indian Child Welfare Act by providing heightened protections for Indian families entering into a VPA.

## ISSUES IDENTIFIED

### Definition of Fictive Kin

This bill provides a new definition of “Fictive Kin” under Section 32A-1-4 NMSA 1978 of the Children’s Code and strikes the definition of “Fictive Kin” under the Abuse and Neglect Act (Section 32A-4-2 (E) NMSA 1978). Neither the proposed definitions or current definition of fictive kin aligns with other proposed definitions. Conflicts should be resolved before definitions are placed in the Children’s Code.

### Requirement that Legal Counsel *shall* be provided

CFYD proposes to remove the provision requiring that legal counsel be provided prior to a parent, guardian or Indian custodian entering into a voluntary placement agreement and throughout the term of the agreement. CYFD is concerned this requirement will lead to some parents, guardians, or Indian custodians not being able to take advantage of voluntary placement as an option. While CYFD supports the provision of legal services to parents, guardians, and Indian custodians, CYFD asserts it is unlikely that legal counsel could be secured for a parent, guardian or Indian custodian in sufficient time to avoid CYFD having to filing an abuse and neglect, or family in need petition, with the court. CYFD points out, in cases of voluntary placement into CYFD custody, a parent, guardian or Indian custodian retains more decision-making authority over a child than they would in an involuntary abuse and neglect case, are not subject to court supervision, and have the right to withdraw the voluntary placement at any time, thus making the need for legal counsel less critical.

AOC, in contrast, submits legal representation was very important to the stakeholder group consulted in drafting this bill. The stakeholder group found legal counsel was vital to ensuring a parent fully understand the rights they are giving up and the advantages and disadvantages of placing one's child in the custody of CYFD when signing a VPA. It was also deemed important that a parent not feel undue pressure to comply with a "voluntary" placement agreement, in lieu of the filing of an abuse and neglect petition and the involuntary placement of their child in foster care. CYFD has made it clear a VPA would not be used in this manner, but there are concerns a parent may perceive it as a pressured situation or ultimatum. Therefore, legal counsel is viewed as critical for this process.

However, there is no information, process, or program identified in the bill as to who will recruit, retain, contract with, train, and pay these attorneys, and there is no appropriation sought in this bill.

AOC regularly collaborates with CYFD and other stakeholders and will continue to do so to ensure AOC has a full understanding of the representation envisioned for these parents. AOC currently has approximately 110 contracts across the state for representation of parents and children in abuse and neglect cases. AOC has contracts in every judicial district in the state and has the capacity to craft contracts to meet the needs of the clients, including requiring contact with the client within a very short time frame and on-call legal advice.

#### Withdrawal of VPA begins a seventy-two-hour timeline to return the child

Proposed language in this bill states that a parent, guardian, or Indian custodian may withdraw their consent to VPA at any time, and "the child shall be returned within seventy-two hours of when the written or verbal demand was made." This is 24 hours longer than the state has the right to assume emergency custody of a child without filing a petition when law enforcement has reasonable grounds to believe the child is abused or neglected and/or there is an immediate threat to the child's safety. (NMSA 1978 32A-4-6 (1) and NMRA 1978 10-312 (B)). This disparity may cause concern about the voluntariness of the VPA when a child is not required to be returned home immediately when consent is withdrawn, and in fact can be held by CYFD for a longer period than the law allows when law enforcement intervenes for concerns of abuse and neglect.

This withdrawal of consent language is followed in all instances by language stating, "but before the expiration of the seventy-two hours, the department may prevent the immediate return of the child by filing a petition alleging neglect or abuse and by obtaining a court order granting the

department temporary custody of the child.” This language (1) appears to be unnecessary, as CYFD can file a petition alleging neglect or abuse and obtain a court order granting the department temporary custody of the child at any time, and (2) approaches the same concern about the true voluntariness of a VPA, and potential perception of a parent, guardian, or Indian custodian feeling undue pressure to sign legal custody of their child over to CYFD in agreement in lieu of the filing of an Abuse and Neglect petition and the involuntary placement of their child in foster care.

Eliminates “custodian,” adds “Indian custodian”

This bill eliminates the party type of custodian, defined as an adult with whom the child lives who is not a parent or guardian of the child (NMSA 1978 32A-1-4 (F)). It also introduces the party type of Indian custodian, which the bill defines as an Indian person who has legal custody of an Indian child pursuant to tribal law or custom or pursuant to state law or to whom temporary physical care, custody and control has been transferred by the parent of such child. The party type of custodian is maintained throughout the rest of the children’s code.

**PERFORMANCE IMPLICATIONS**

CYFD has performance measures related to the safety, well-being, and permanence of placement for children in state custody.

**ADMINISTRATIVE IMPLICATIONS**

There is an administrative impact on the courts resulting from the additional hearings required by this bill. A VPA lasts no more than six months and may be extended for an additional six months, upon consent of the parties. In all cases a hearing is required for the extension and the court must produce a written order and specific findings when granting or denying a VPA extension. When an Indian child is the subject of a VPA, the requirements are heightened. CYFD must file a petition for review of the VPA, the court must hold a hearing on the entry of the VPA and inquire as to the ICWA status of the child, the nature of the consent to the agreement, explain the terms and consequences of the agreement, the ability to withdraw consent, the 72-hour period after withdrawal of consent, determine the parties’ fully understand the VPA, ensure the information was provided in the language understood by the parent, guardian, or Indian custodian, witness the signing of the VPA by all parties, and certify the completion of all steps above.

**TECHNICAL ISSUES**

CYFD proposes to amend Section 13, new material, (A)(3) to substitute “reason to know” for “reason to believe” the child is an Indian child.

CYFD proposes to amend Section 16, new material, (D) to read:

“The department shall make reasonable efforts to place siblings in custody by court order or voluntary placement agreement together, unless such joint placement would be contrary to the safety or well-being of any of the siblings in custody. If siblings in custody are not placed together, the department shall make reasonable efforts to provide frequent visitation and other ongoing interaction between the siblings, unless visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings.”

CYFD proposes that the definition the definition of “fictive kin” in 32A-1-4(I) be amended to read:

“fictive kin” means a non-relative who has a significant and family-like relationship with a child or a child’s family that existed prior to the child entering foster care or a non-relative who developed a significant and family-like relationship with a child after the child entered foster care and who has been identified by the department as the child’s permanent connection. For an Indian child, “fictive kin” is also a person defined according to tribal or pueblo law, custom or tradition. “Fictive kin” may also be a person chosen by a child fourteen years of age or older, without regard to when the relationship was established or for how long, when it is in the best interest of the child to identify that person as fictive kin.

**OTHER SUBSTANTIVE ISSUES**

The Child Support Enforcement Division of the Human Services Department is working with CYFD to develop procedures that will allow for more timely and effective court proceedings. This bill may support the development of such procedures by identifying when parents have or do not have the ability to pay support.

CLB/sb