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STATUTES OF LIMITATIONS APPLIED TO MINORS: THE NEW MEXICO COURT OF APPEALS’ BALANCE OF COMPETING STATE INTERESTS TO FAVOR CHILDREN

CHARLOTTE TONETTA RICH

I. INTRODUCTION

The State of New Mexico has a long history of protecting children, as evidenced by the creation of the Children’s Court and the Children’s Code. However, the state also has a history of protecting its financial resources as well as the health of its residents. All of these interests came into conflict when the state legislature developed the Tort Claims Act and the Medical Malpractice Act. Unfortunately for children, when passing both of these acts, legislators favored competing state interests to create shortened limitation periods during which minors could file tort actions. The cost of this action was an encroachment upon a child’s due process right of access to the courts.

In the sister cases Jaramillo v. Board of Regents of the University of New Mexico Health & Sciences Center (Jaramillo I) and Jaramillo v. Heaton (Jaramillo II), the New Mexico Court of Appeals assessed the constitutional validity of the statutes of limitations in each act as applied to the young minor. In 2001, the court ruled in Jaramillo I that, given the circumstances of the case, the statute of limitations found in the Tort Claims Act barred the minor’s access to the courts. The statute was, therefore, an unconstitutional violation of the minor’s due process rights, as guaranteed under the New Mexico Constitution and U.S. Constitution. In 2004,
the court in *Jaramillo II* applied the *Jaramillo I* ruling to a similar statute of limitations provision in the Medical Malpractice Act and found the statute unconstitutionally applied under the circumstances. The court did not find the statutes per se unconstitutional but, rather, created criteria for a case-by-case analysis.

This Note reviews the development of children's rights, the purpose and objectives sought with the creation of the Tort Claims Act and the Medical Malpractice Act, and New Mexico case precedent on the subject. Then, the Note outlines and analyzes the court of appeals' rationale in *Jaramillo I* and *Jaramillo II*. Next, the Note examines the criteria the court used when determining whether minors could comply with the statutory requirements. Lastly, the Note considers whether parents should have a duty to pursue claims on their child's behalf.

### II. BACKGROUND

*Jaramillo I* and *Jaramillo II* sought an appropriate balance between protecting children's legal rights and protecting other state interests. On one hand, the State is concerned about protecting children's and their constitutional right of access to applied to the constitutional challenge of the Tort Claims Act. One can conclude that the court was referring to both state and federal constitutional due process rights because *Tafoya v. Doe*, 100 N.M. 328, 670 P.2d 582 (Ct. App. 1983), a case upon which the court relied, referred to both state and federal constitutional rights. "All of these cases reflect the view that one unable to comply with a notice requirement by reason of minority is protected by the reasonableness requirements of the common law, the Fourteenth Amendment to the United States Constitution, or similar provisions in their state constitutions." *Tafoya*, 100 N.M. at 332, 670 P.2d at 586. In addition, the court in *Jaramillo v. Heaton*, relying heavily on its analysis in *Jaramillo v. Board of Regents of the University of New Mexico Health & Sciences Center*, stated, "We begin with the notion that 'considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate...." 2004-NMCA-123, ¶ 8, 100 P.3d at 207 (quoting *Garcia v. La Farge*, 119 N.M. 532, 541, 893 P.2d 428, 437 (1995)).

The presence of a federal constitutional ruling means the case is reviewable by the U.S. Supreme Court. *Michigan v. Long*, 463 U.S. 1032, 1039–41 (1983). But absent some federal law question, the Supreme Court has no power to review state court judgments based on a state constitutional ruling. *Id.* at 1040–41. If there is ambiguity in a state court opinion as to whether the issue presented was a state or federal question, the Supreme Court will assume a federal constitutional question exists. *Id.* The Court makes this assumption to ensure uniformity in the federal law and to allow state courts to retain autonomy by not having to answer questions from the Supreme Court. *Id.*

15. See *id*.
16. See infra Part II.
17. See infra Part IV.A-B.
18. See infra Part IV.C.
19. See infra Part IV.D.
20. The State's interests include not litigating stale claims or spending unnecessary funds for legal defense. See *Garcia v. La Farge*, 119 N.M. 532, 537, 893 P.2d 428, 433 (1995). The State is also interested in retaining physicians by providing affordable medical malpractice insurance; this will help to ensure the availability of health care workers for New Mexico residents. See *id.* at 539, 893 P.2d at 435; *Jaramillo v. State*, 111 N.M. 722, 725, 809 P.2d 636, 639 (Ct. App. 1991) ("The purpose of a limitations period is to establish repose and, with respect to claims against the state, to protect the state's resources from state claims."); *James L. Isham*, Annotation, *Local Government Tort Liability: Minority as Affecting Notice of Claim Requirement*, 58 A.L.R. 4TH 4TH 402 (2003).
courts. On the other hand, the State has to protect its financial resources and the health of its residents. When making its rulings in both *Jaramillo I* and *Jaramillo II*, the court, when interpreting the constitutionality of the laws, considered the history and the current status of the competing interests. This section looks briefly at the advancement of children’s rights as well as the development and purpose of the Tort Claims Act and the Medical Malpractice Act.

### A. Constitutional Rights of Children

In early common law, children did not have individual, protected constitutional rights. Children were legally recognized as their parents’ property, with parents having absolute authority over children until they reached the age of majority, generally eighteen. Thus, children’s rights were subjugated to those of their parents. During the second half of the nineteenth century and continuing into the twentieth century, “American jurisprudence gradually began to recognize that

is to ensure parties “a fair hearing and [that] their constitutional and other legal rights are recognized and enforced.” NMSA 1978, § 32A-1-3(B) (1999). The Code’s “paramount concern” is “[t]he child's health and safety.” NMSA 1978, § 32A-1-3(A) (1999). The Code provides for the protection of children’s interests in abuse and neglect cases, as well as in delinquency cases.

In abuse and neglect cases, the court is obligated to provide a guardian ad litem to protect the best interests of the child because children are unable to do so themselves. NMSA 1978, § 32A-4-10(C) (2005) (“No officer or employee of an agency that is vested with the legal custody of the child shall be appointed as guardian ad litem of or attorney for the child.”). When children are involved in abuse and neglect cases, the court focuses on the best interests of the children and organizes a treatment plan around the children’s needs. NMSA 1978, § 32A-4-19(B) (1997). The best interest of the child is “a lens through which the entire proceeding should be viewed.” CHILD WELFARE HANDBOOK, supra, at 3-1.

The legislature developed the Children’s Court, which specializes in issues related to children and their specific needs. The development of an entire court system separate from adult courts emphasizes the State’s concern and awareness of children’s special rights, needs, and interests.

In order to further protect children’s interests and rights, the legislature provided for Court Appointed Special Advocates (CASAs) to “assist[] the court in determining the best interests of the child by investigating the case and submitting a report to the court.” NMSA 1978, § 32A-1-4(D) (2005). CASAs are community volunteers who represent the child’s best interest and needs to the Children’s Court Judges. Rule 10-121 NMRA. Additionally, the legislature developed Citizen Review Boards (CRBs) through the Citizen Substitute Care Review Act, NMSA 1978, § 32A-8-1 (1993). The CRBs consist of volunteers who “provide a permanent system for independent and objective monitoring of children placed in the custody of the department.” NMSA 1978, § 32A-8-2 (1993).


22. See NMSA 1978, § 37-1-10 (1975) (allowing for minors to pursue a cause of action once the minor is more capable).
23. See supra note 20.
25. Id. at 14, 20.
26. Id. at 20.
children hold constitutional rights." In 1899, the first juvenile court was developed to focus on and address issues of law specific to children.

In the 1920s, the U.S. Supreme Court began acknowledging that children have constitutional rights separate from their parents' rights. Children now have a bundle of rights, including access to the courts. Common law has established court access as a property right protected by the Due Process Clause.

Given the common-law developments acknowledging children's constitutional rights, specifically access to the court system, state legislatures have chosen to help protect this right by providing children ample opportunity to pursue their own causes of action. When doing so, state legislatures have been confronted with the conflicting interests of a child's right to pursue a cause of action and other legitimate state interests. In New Mexico, legislators have balanced the competing interests differently, depending on the parties involved. For example, the state legislature allows claims against a private tortfeasor for a cause of action arising while the plaintiff is a minor to be brought until the plaintiff's nineteenth birthday. However,

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27. Id. at 20, 26.
28. Id. at 20. The settled national view through much of American judicial history was that "[f]rom time immemorial the status of a minor of tender years has been recognized in law to be different from that of one of more mature years." McDonald v. City of Spring Valley, 120 N.E. 476, 477 (Ill. 1918). This notion was "based upon the well known fact of the incapacity of children of tender years, and [that children] are not held to the same accountability as are adults." Id.
29. Meyer v. Nebraska, 262 U.S. 390 (1923), overruled in part by 912 F. Supp. 580 (1995), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), were the first cases to "provide[] a foundation for ongoing reevaluation of the status, rights and obligations of children." Abrams & Ramsey, supra note 24, at 20-25. Later cases acknowledged and solidified children's constitutional rights. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that children have a right to religion); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that children have a substantive right to equal education); Cooper v. Aaron, 358 U.S. 1 (1958) (holding that children have constitutional rights in public school admission); In re Gault, 387 U.S. 1 (1967) (holding that the Bill of Rights is not just for adults and that children have procedural constitutional rights).
30. See supra note 29. Also, "with the ratification of the Twenty-sixth Amendment in 1971, the Constitution recognized political interests of children." Homer H. Clarke, Jr., Children and the Constitution, 1992 U.I.L.L. Rev. 1, 2. The Twenty-Sixth Amendment gave eighteen year olds the right to vote. U.S. Const. amend. XXVI, § 1.
31. See, e.g., Tafoya v. Doe, 100 N.M. 328, 331, 670 P.2d 582, 585 (Ct. App. 1983) ("It is axiomatic that the constitutional provision of due process extends to protect that 'property' construed to be a vested right and that generally an accrued right of action is a vested property right which may not be arbitrarily impinged."). (quoting Grubaugh v. City of St. Johns, 180 N.W.2d 778, 781 (1970)).
32. See supra note 31 and accompanying text; infra notes 66-68 and accompanying text.
33. See, e.g., Me. Rev. Stat. Ann. tit. 14, § 853 (West 2003) ("If a person entitled to bring any of the actions under sections 752 to 754...is a minor, mentally ill, imprisoned or without the limits of the United States when the cause of action accrues, the action may be brought within the times limited herein after the disability is removed."); Idaho Code § 5-213 (Michie 2004) ("The term during which such disability [being a minor] continues is not deemed any portion of the time in this title limited for the commencement of such action...but such action may be commenced...within the period of five years after such disability shall cease."); Alaska Stat. § 09.10.140(a) (Michie 2004) ("If a person entitled to bring an action mentioned in this chapter is at the time the cause of action accrues...under the age of majority,...the time of a disability...is not a part of the time limit for the commencement of the action.").
34. See supra note 20.
35. Compare NMSA 1978, § 37-1-10 (1975), with NMSA 1978, § 41-4-15(A) (1977). Children under the age of seventeen are afforded more time to file a claim under section 37-1-10 than under the Tort Claims Act, section 41-4-15(A).
36. NMSA 1978, § 37-1-10 (1975) ("The times limited for the bringing of actions by the preceding provisions of this chapter shall, in favor of minors and incapacitated persons, be extended so that they shall have one year from and after the termination of such incapacity within which to commence said actions.").
when a minor is suing the government under the Tort Claims Act\textsuperscript{37} or a doctor under the Medical Malpractice Act,\textsuperscript{38} the legislature restricted the time in which minors have to sue.

In the latter two statutes, the legislature included statutes of limitations that are more restrictive for minors than those found under the statute of limitations for tort claims.\textsuperscript{39} More specifically, the Tort Claims Act provides a two-year statute of limitations “except that a minor under the full age of seven years shall have until his ninth birthday in which to file.”\textsuperscript{40} The Medical Malpractice Act provides a three-year statute of limitations “except that a minor under the full age of six years shall have until his ninth birthday in which to file.”\textsuperscript{41} Although the legislature recognized that young children needed extra time to file claims, overall, the statute of limitations for minors was shortened.\textsuperscript{42} As a result of this legislative act, children’s access to the court system was restricted.

\textbf{B. Brief History of the Tort Claims Act and the Medical Malpractice Act}

The Tort Claims Act and the Medical Malpractice Act were enacted during the same year in an effort to protect state interests.\textsuperscript{43} The legislature enacted the Tort Claims Act in response to the New Mexico Supreme Court’s decision in \textit{Hicks v. State},\textsuperscript{44} which abolished sovereign immunity in New Mexico.\textsuperscript{45} In \textit{Hicks}, the court recognized the unfairness of sovereign immunity: “people who were injured due to the State’s negligence could not seek damages against the State.”\textsuperscript{46} The legislature

\begin{footnotesize}
\begin{enumerate}
\item NMSA 1978, § 41-4-15 (1977).
\item NMSA 1978, § 41-5-13 (1976).
\item \textit{Id.}; NMSA 1978, § 41-4-15(A) (1977); NMSA 1978, § 37-1-10 (1975).
\item NMSA 1978, § 41-4-15(A) (1977). Section 41-4-15(A) of the Tort Claims Act states:
\begin{quote}
Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.
\end{quote}
\item \textit{Id.}
\item Section 41-5-13 states:
\begin{quote}
No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act [41-5-1 NMSA 1978] may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file. This subsection [section] applies to all persons regardless of minority or other legal disability.
\end{quote}
\item NMSA 1978, § 41-5-13 (1976) (alterations in original).
\item See \textit{supra} notes 35–41 and accompanying text.
\item Both statutes were enacted in 1976. NMSA 1978, § 41-4-15 (1977); NMSA 1978, § 41-5-13 (1976).
\item The court stated, “[W]e take this opportunity to rid the State of this legal anachronism. Common law sovereign immunity may no longer be interposed as a defense by the State... in tort actions.” \textit{Hicks}, 88 N.M. at 590, 544 P.2d at 1155. Sovereign immunity protected the state government from lawsuits the State did not consent to, so its abolishment greatly increased potential government liability and taxpayer costs. \textit{Id.} at 589, 544 P.2d at 1154; \textit{see State ex rel. Evans v. Field}, 27 N.M. 384, 387, 201 P. 1059, 1060 (1921), \textit{overruled in part by} \textit{Hicks}, 88 N.M. 588, 544 P.2d 1153.
\item \textit{Id.}
\item \textit{Hicks}, 88 N.M. at 592, 544 P.2d at 1157.
\item The Tort Claims Act attempts to “ameliorate the harshness of the rule of immunity for certain acts of governmental entities when the same acts by private parties would yield liability.” Rivera v. N.M. Highway & Transp. Dep’t, 115 N.M. 562, 564, 855 P.2d 136, 138 (Ct. App. 1993); NMSA 1978, § 41-4-2 (1976).
\end{enumerate}
\end{footnotesize}
recognized the increased liability and financial difficulty the new policy posed for the State.\(^4\) The state legislators attempted to balance the unfair results of sovereign immunity and the need to protect the government from unlimited liability by passing the Tort Claims Act.\(^4\)

At the same time the legislature was creating the Tort Claims Act, nationally there was a perceived crisis in the medical field.\(^5\) The crisis was instigated when Travelers Insurance Companies announced its withdrawal as the State’s medical insurance underwriter.\(^1\) The company withdrew because of an increase in the number of malpractice claims, coupled with an increase in verdict amounts.\(^2\) Ninety percent of the State’s doctors and medical facilities had insurance through Travelers Insurance.\(^3\) The withdrawal of insurance coverage raised issues as to whether doctors could find malpractice insurance and remain in the state and whether patients would have a monetary remedy for malpractice actions.\(^4\)

In an effort to protect the public by addressing these concerns, the legislature enacted the Medical Malpractice Act.\(^5\) The legislature wanted to ensure access to affordable malpractice insurance so doctors could carry liability insurance and remain in New Mexico.\(^6\) With these objectives in mind, the legislature, in the Medical Malpractice Act, shortened the statute of limitations affecting children, enacting a provision similar to that of the Tort Claims Act.\(^7\)

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48. See supra note 45; infra note 49.
49. Ferguson v. N.M. State Highway Comm’n, 99 N.M. 194, 195, 656 P.2d 244, 245 (1982) (“[The legislature] substituted statutory partial immunity for common law total immunity and the court’s denial of any immunity.”). See section 41-4-2(A), which states:

The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. On the other hand, the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done.

NMSA 1978, § 41-4-2(A) (1976); see also Estate of Gutierrez, 104 N.M. at 113, 717 P.2d at 89; Methola v. County of Eddy, 95 N.M. 329, 331, 622 P.2d 234, 236 (1980).
52. Id. at 8–9.
53. Id. at 8 n.11.
54. Id. at 7–8.
56. See Moncor Trust Co. ex rel. Flynn v. Feil, 105 N.M. 444, 446, 733 P.2d 1327, 1329 (1987) (“An obvious goal of the legislature in enacting this legislation was to address certain factors adversely affecting the cost of medical malpractice insurance, to encourage continued availability of professional medical services, and to provide incentives for the furnishing of professional liability insurance.”); see also Otero v. Zouhar, 102 N.M. 493, 499, 697 P.2d 493, 499 (Ct. App. 1984), rev’d in part, 102 N.M. 482, 697 P.2d 482 (1985) (citing Kovnat, supra note 51, at 7).
57. Garcia v. La Farge, 119 N.M. 532, 539, 893 P.2d 428, 435 (1995) (“mak[ing] malpractice insurance more affordable and thereby encourag[ing] more physicians to carry such insurance”). The legislature also attempted to decrease Medical Malpractice claims by making the Act a statute of repose rather than a traditional statute of limitations. NMSA 1978, § 41-5-13 (1976). Under the Medical Malpractice Act, the statute of limitations starts running when the malpractice occurs and not when the injury is discovered. Id.; see, e.g., Kern v. St. Joseph Hosp. Ind., 102 N.M. 452, 455, 697 P.2d 135, 138 (1985) (“The statute clearly starts to run from the time of the occurrence of the act giving rise to the cause of action.”). With the general statute of limitations, the time limitation begins when
By implementing shortened statutes of limitations for children, both the Tort Claims Act and the Medical Malpractice Act limit stale claims and, subsequently, state and medical malpractice liability. Although both statutes allow extra time for young minors, overall the statutes provide for a shorter period of time for a child to file a claim against the state or a private doctor covered by the Medical Malpractice Act than a child would have under the general tort rules. The acts’ requirements raise concerns about the constitutionality of the statutes of limitation as applied to minors. The concern is that the state legislature cannot impose unreasonable restrictions on a child’s constitutional right of access to the courts.

There are two lines of cases addressing the constitutionality of these acts. One line of cases has assessed the constitutionality of the Tort Claims Act notice requirement as applied to minors. The other has assessed both acts’ statutes of limitations requirements as applied to adults. No cases have addressed the Medical Malpractice Act’s notice provision with regard to minors. Jaramillo I and Jaramillo
II are the first cases to address this legislatively imposed statute of limitations with regard to minors.64

C. Litigation Involving the Tort Claims Act Notice Requirement as Applied to Minors

The New Mexico courts have examined in depth the Tort Claims Act's ninety-day notice requirement as applied to minors.65 At the outset of this examination, the court of appeals established a minor's right of access to the courts66 and right to seek redress for a cause of action67 as property rights, protected by the federal and state constitutional due process clauses. Although these property rights cannot be taken without due process,68 the New Mexico Supreme Court acknowledged that there can be time limitations imposed on the rights,69 such as the Tort Claims Act statute of limitations, as long as the time restrictions are reasonable.70

The primary case challenging the reasonableness requirement of the Tort Claims Act's ninety-day notice limitation as applied to a minor in tort litigation against the state government was Tafoya v. Doe.71 Tafoya involved an infant who failed to give notice to the government of an impending lawsuit within ninety days of the injury.72 In Tafoya, the court determined that ninety days was an unreasonably short amount of time for a baby to give notice of a pending lawsuit.73 Subsequently, it found the

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65. See Tafoya, 100 N.M. 328, 670 P.2d 582; Rider, 1996-NMCA-090, 923 P.2d 604; Erwin, 115 N.M. 596, 855 P.2d 1060.
66. Tafoya, 100 N.M. at 331, 670 P.2d at 585 (quoting Grubaugh v. City of St. Johns, 180 N.W.2d 778, 781 (Mich. 1970) ("Generally an accrued right of action is a vested property right which may not be arbitrarily impinged.").
68. Jiron held that a person should have due process before being deprived of access to the courts. Id. at 426, 659 P.2d at 312. Other jurisdictions also have held that access to the courts is a property right that cannot be taken without due process. Tafoya, 100 N.M. at 331, 670 P.2d at 585; see also Grubaugh, 180 N.W.2d at 781 ("Generally an accrued right of action is a vested property right which may not be arbitrarily impinged."). Grubaugh indicated that it would be unfair to bar a minor plaintiff who suffers from an age disability the right to file the cause of action without due process. Grubaugh, 180 N.W.2d at 781; Tafoya, 100 N.M. at 331, 670 P.2d at 585.
69. Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 21, 965 P.2d 305, 311 (“Access to the courts...is not boundless.”).
70. Tafoya, 100 N.M. at 332, 670 P.2d at 585 ("A state may bar a right if a reasonable time is given to enforce that right."). See Terry v. N.M. State Highway Comm'n, 98 N.M. 119, 122, 645 P.2d 1375, 1378 (1982) ("The general rule is that statutes of limitation may be passed where formerly there were none, and existing limitation periods may be reduced while the time is still running, provided that a reasonable time is left for the institution of an action before it is time-barred."). See generally 51 AM. JUR. 2D Limitation of Actions §§ 27–35 (2000). The constitutionality of statutes of limitation has hinged on the reasonableness of the time provided to pursue a remedy. Capitan Grande Band of Mission Indians v. Helix Irrigation Dist., 514 F.2d 465 (9th Cir. 1975); Town of Brookline v. Carey, 245 N.E.2d 446 (Mass. 1969).
71. 100 N.M. at 331–32, 670 P.2d at 585–86. Tafoya v. Doe was filed by Sally Tafoya on behalf of herself and her infant daughter. The suit was brought after the Tort Claims Act ninety-day notice period had expired. The baby was born with a blood immunization problem that was allegedly the result of a transfusion that Sally Tafoya had received several years prior to her pregnancy. The court reviewed the constitutionality of the ninety-day notice requirement as applied to the infant who inherently lacked the ability to file the claim within the requisite time period. Id.
72. Id. at 329, 670 P.2d at 583. Tafoya v. Doe was filed by Sally Tafoya on behalf of herself and her infant daughter. The suit was brought after the Tort Claims Act ninety-day notice period had expired. The baby was born with a blood immunization problem that was allegedly the result of a transfusion that Sally Tafoya had received several years prior to her pregnancy. The court reviewed the constitutionality of the ninety-day notice requirement as applied to the infant who inherently lacked the ability to file the claim within the requisite time period. Id.
73. Id. at 332, 670 P.2d at 586. The court applied the holding while acknowledging the absence of a provision requiring parents to file on the baby's behalf. Id. Rider v. Albuquerque Public Schools also found the ninety-day notice requirement unconstitutional because the injured six-year-old plaintiff was unable to comply with the notice limitation. 1996-NMCA-090, ¶ 8, 923 P.2d 604, 606.
requirement to be an unconstitutional violation of the young plaintiff’s due process rights. The court also noted that a time period reasonable for an adult is not necessarily reasonable for a minor. In *Erwin v. City of Santa Fe*, the court had to determine if the *Tafoya* holding, regarding the Tort Claims Act notice requirement as it pertained to an infant, applied equally to a fourteen-year-old plaintiff. The court narrowly interpreted the *Tafoya* holding to conclude that the statute was facially constitutional. The court then determined whether the statute was constitutionally applied by assessing the reasonableness requirement and the minor’s ability to comply with it. Given the flexibility of the reasonableness requirement of the Due Process Clause and the minor’s circumstances, the court found that the minor might have been able to comply with the notice requirement. If the fourteen-year-old minor was able to comply with the time limitation, then he was not denied access to the courts due to the statutory limitations, and the statute was not a violation of his rights.

The New Mexico Court of Appeals addressed the same issue in *Rider v. Albuquerque Public Schools*, which involved a six-year-old plaintiff who was injured on a school playground. This time, the court found the Tort Claims Act’s ninety-day notice requirement unconstitutionally applied because the minor was unable to comply with the statute of limitations. Through *Tafoya*, *Rider*, and *Erwin*, the court established an ad hoc, case-by-case review for cases involving minors.

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74. *Tafoya*, 100 N.M. at 332, 670 P.2d at 586.
75. *Id.* at 331–32, 670 P.2d at 585–86 (reasoning that young minors are inherently unable to comply with the notice requirement) (citing *McDonald v. City of Spring Valley*, 120 N.E. 476, 478 (Ill. 1918)). Other jurisdictions have found unconstitutional shortened notice requirements for minors when suing the government. *See*, e.g., *McCrary v. City of Odessa*, 482 S.W.2d 151 (Tex. 1972); *Turner v. Staggs*, 510 P.2d 879 (Nev. 1973); *City of Barnesville v. Powell*, 183 S.E.2d 55 (Ga. 1971); *Lazich v. Belanger*, 105 P.2d 738 (Mont. 1940).
76. 115 N.M. 596, 855 P.2d 1060 (Ct. App. 1993). The plaintiff in *Erwin* was a fourteen year old who had been "hit by a car while riding his bicycle." *Id.* at 597, 855 P.2d at 1061. The minor and his father filed suit against the City of Santa Fe under the Tort Claims Act, claiming that the City was negligent in its maintenance and inspection of the street. *Id.*
77. *Id.* ("A statute which is facially constitutional may, then, be unconstitutional as applied.").
78. *Id.* at 599, 855 P.2d at 1063.
79. *Id.* ("Due process...is a malleable principle which must be molded to each situation, considering both the rights of the government and the rights of the individual.").
80. *Id.* The court considered whether the minor had retained counsel and whether the retaining of counsel had occurred within the limitations period. *Id.*
81. *Id.*
82. The case was remanded for a more in-depth determination of the minor’s ability to comply with the notice requirement. *Id.*
83. *Id.*
85. *Id.* ¶ 2, 923 P.2d at 605.
86. *Id.* ¶¶ 8, 15, 923 P.2d at 606, 608 (referring to minors as having a “special disability” that makes them “incapable of satisfying notice provisions”). *Rider* adopted the holding in order to further New Mexico’s “long tradition of interpreting laws carefully to safeguard minors.” *Id.* ¶ 13, 923 P.2d at 607. As stated in *Rider*, if we were to assume our legislature intended the ninety day notice to apply to infants incapable of protecting themselves, this would be the same as the legislature choosing to exclude children altogether from the Act, except for those few fortunate enough to have notice filed for them by adult representatives.
87. 115 N.M. 596, 855 P.2d 1060.
minors and the notice requirement. The court created criteria, such as age and retention of counsel, for determining the minor's ability to comply with the notice requirement. However, the court failed to provide guidance as to how the criteria are to be applied in future cases.90

D. Litigation Involving the Tort Claims Act and the Medical Malpractice Act Statute of Limitations as Applied to Adults

The New Mexico courts have also examined both the Tort Claims Act and Medical Malpractice Act statute of limitations as applied to adults.91 In Jaramillo v. State,92 a guardian sued on behalf of an incompetent adult, claiming that the two-year statute of limitations in the Tort Claims Act was an unreasonably short period of time in which to file a tort claim against the government.93 The court refused to accept this argument.94 The court instead recognized that the limitation protected legitimate state interests, including protection from stale claims.95 In addition, the court refused to equate the disability of being a minor with the disability of being incapacitated due to an accident.96 The court acknowledged that some time restrictions, such as the ninety-day notice period, can be unreasonably short in certain cases.97 However, the Tort Claims Act's two-year limitation period is much longer than ninety days, so the court did not find the statute unconstitutionally applied due to an unfairly short time period.98 Thus, Jaramillo was unable to sue because he missed the two-year deadline.99

Five years later, the New Mexico Supreme Court, in Cummings v. X-Ray Associates,100 examined the application of the Medical Malpractice Act statute of limitations as applied to adults.101 Cummings claimed that it was an unfair violation of her due process rights because the statute acted as a statute of repose,102 rather than as a traditional statute of limitations.103 The court found the statute constitutional for several reasons: (1) only a small percentage of cases are affected by the limitation;104 (2) Cummings could have taken action sooner to file her case;105 and (3) although the statute acted as a statute of repose, it was enacted to protect

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90. Id. at 600, 855 P.2d at 1064 (Apodaca, J., specially concurring).
92. 111 N.M. 722, 809 P.2d 636.
93. Id. at 726, 809 P.2d at 640.
94. Id. at 727, 809 P.2d at 641.
95. Id. at 725–26, 809 P.2d at 639–40.
96. Id. at 727, 809 P.2d at 641.
97. Id.
98. Id.
99. Id.
100. 1996-NMSC-035, 918 P.2d 1321.
101. See id.
102. See supra note 57.
104. Id. ¶ 39, 918 P.2d at 1333 (citing Scott A. DeVries, Medical Malpractice Acts’ Statutes of Limitation as They Apply to Minors: Are They Proper?, 28 IND. L. REV. 413, 415 (1995) (describing a survey revealing that in only “ten percent of the claims the time lapse was three years”)).
105. Id. ¶ 56, 918 P.2d at 1336.
legitimate state interests. Therefore, there was no violation of Cummings’ due process rights.

In summary, the New Mexico courts upheld both Acts’ statutes of limitations as constitutionally applied to adults. However, the court found that the Tort Claims Act notice requirement was unconstitutionally applied to minors in certain circumstances. Jaramillo I and Jaramillo II combined the two lines of cases to address the constitutionality of both acts’ statutes of limitations as applied to minors. The court of appeals weighed the State’s concern for the protection of children against the valid State interests sought to be protected by the Tort Claims Act and the Medical Malpractice Act.

III. STATEMENT OF THE CASE

Jaramillo I and Jaramillo II were filed by Lisa Jaramillo on behalf of her minor son, Anthony Jaramillo. Anthony was born in 1990 and during the following year developed a seizure condition that required treatment. As part of his treatment plan, Anthony took phenobarbital, an anti-seizure medication. Shortly after starting the medication, he developed a blood platelet disorder. On April 27, 1992, Anthony sought help from his private pediatrician, Dr. Heaton, who advised Anthony to stop taking phenobarbital and referred Anthony to the University of New Mexico Hospital (UNMH). Neither Dr. Heaton nor the doctors at UNMH prescribed another anti-seizure medication. In March of 1993, several months after Anthony’s hospital visit, Anthony had a grand mal seizure, which resulted in severe brain damage and physical and mental disability.

On April 23, 1999, six years after the seizure and almost three months after Anthony’s ninth birthday, Lisa Jaramillo, Anthony’s mother, filed suit on Anthony’s behalf. Her first suit was filed against UNMH under the Tort Claims Act.

106. See id. ¶¶ 38–39, 918 P.2d at 1332–33 (stating that medical malpractice insurance providers were withdrawing coverage because of the potential of being sued many years after the act of malpractice).
107. See supra Part II.C.
113. Id.
114. Id.
116. Id. UNMH is a public entity and, therefore, is covered under the Tort Claims Act. NMSA 1978, § 41-4-3(B)–(C) (2003).
asserting that the hospital was negligent in its care of Anthony (Jaramillo I). On August 27, 1999, Lisa Jaramillo filed a different negligence suit against Dr. Heaton, a private doctor covered under the Medical Malpractice Act (Jaramillo II). Lisa claimed that Anthony’s grand mal seizure and subsequent brain damage were a result of Dr. Heaton taking Anthony off phenobarbital and the failure of either Dr. Heaton or UNMH to prescribe another anti-seizure medication.

In Jaramillo I, UNMH filed a motion to dismiss, arguing that the case was barred by the Tort Claims Act statute of limitations requirement, which had expired on Anthony’s ninth birthday, February 2, 1999. In Jaramillo II, Heaton filed a similar motion to dismiss, claiming that the case was barred by the Medical Malpractice Act’s statute of limitations requirement, which also had expired on Anthony’s ninth birthday. The trial court dismissed both cases and Jaramillo appealed, claiming each statute was unconstitutionally applied to Anthony because he was a minor. The court of appeals found that the statutes of limitations in the Tort Claims Act and the Medical Malpractice Act violated Anthony’s due process right to seek redress from the courts.

IV. RATIONALE AND ANALYSIS

The question presented in Jaramillo I and Jaramillo II was whether the State’s interest in protecting children and children’s right of access to the courts outweighed other legitimate state interests. Children have a substantive due process right to pursue a cause of action. However, “[d]ue process...is a malleable principle which must be molded to each situation, considering both the rights of the government and the rights of the individual.” Although protecting the State from stale claims and providing low insurance premiums for doctors are valid concerns, the court of appeals favored the protection of the minor Anthony Jaramillo’s constitutional due

120. See Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 2, 23 P.3d at 931.
127. See Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 1, 23 P.3d at 931; Jaramillo v. Heaton, 2004-NMCA-123, ¶ 1, 100 P.3d at 206.
128. Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 1, 23 P.3d at 931; Jaramillo v. Heaton, 2004-NMCA-123, ¶ 1, 100 P.3d at 206. The New Mexico Supreme Court granted certiorari review of Jaramillo v. Board of Regents of the University of New Mexico Health & Sciences Center. When Jaramillo v. Heaton reached the court of the appeals, the court certified the case (which it had not yet decided) to be considered in conjunction with Jaramillo v. Board of Regents of the University of New Mexico Health & Sciences Center. When the supreme court later quashed certiorari review in Jaramillo v. Board of Regents of the University of New Mexico Health & Sciences Center, thus rendering the court of appeals holding final, it also remanded Jaramillo v. Heaton. At that point, in August 2004, the court of appeals reviewed the merits of Jaramillo v. Heaton. 2004-NMCA-123, ¶ 4-5, 100 P.3d at 206; see Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 1-2, 23 P.3d at 931.
129. For a discussion on weighing these interests, see Mominee v. Scherbarth, 503 N.E.2d 717, 726 (Ohio 1986) (Celebrezze, C.J., concurring).
process right to seek redress in the courts. The court, though, did offer some protection of competing state interests by not finding the Tort Claims Act and Medical Malpractice Act per se unconstitutional as applied to minors. Consequently, the holdings require a “fact-based interpretation” of new cases involving the statutes and minors to determine if a child is able to comply with the requirements. As is common with ad hoc examinations, the court failed to delimit specific criteria, beyond age and retention of counsel, for this decision. In Jaramillo I and Jaramillo II, the court essentially applied the reasoning from the cases involving the Tort Claims Act notice requirement, as applied to minors, to the statute of limitations context.

During the court’s constitutional analysis of the Tort Claims Act in Jaramillo I and the Medical Malpractice Act in Jaramillo II, the court considered Anthony’s age and inherent mental capacity to be the most important factors. Because Anthony was a young child with mental immaturity, he was unable to comply with the requirements. Because he was unable to comply with the statute of limitations, Anthony was barred access to the courts. Denial of court access was a violation of his due process rights. Consequently, the court found the statutes unreasonable


133. Erwin, 115 N.M. at 600, 855 P.2d at 1064 (Apodaca, J., specially concurring).

134. See infra Part IV.C.

135. See Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 9–10, 23 P.3d at 932–33; Jaramillo v. Heaton, 2004-NMCA-123, ¶ 17–19, 100 P.3d at 209; see also Erwin, 115 N.M. at 600, 855 P.2d at 1064 (Apodaca, J., specially concurring). Although Judge Apodaca specially concurred in the denial of summary judgment, he believed the holding was confusing. He stated that the majority had “adopted an unworkable, fact-based interpretation of Tafoya that will lead eventually to confusion for the trial courts and bar, as well as unnecessary appeals.” Id.


Equal protection affords the same treatment for individuals in similar circumstances. The U.S. Supreme Court mandated in Reed v. Reed, 404 U.S. 71, 75–76 (1971), that

[t]he Equal Protection Clause of [the Fourteenth Amendment to the United States Constitution] does...deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
and unconstitutionally applied, but the court did not find them per se unconstitutional.\footnote{Id. (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).}

\textit{A. Jaramillo I—Tort Claims Act Statute of Limitations}

In \textit{Jaramillo I}, the court of appeals began its analysis by equating the Tort Claims Act notice requirement to the statute of limitations requirements for purposes of the due process analysis.\footnote{Under the Tort Claims Act and the New Mexico general tort statute, NMSA 1978, § 37-1-10 (1975), children are afforded different statute of limitations periods. The distinction depends on whether the child is suing the government or a private tortfeasor. In court briefs, Jaramillo argued that the distinction was a violation of equal protection. The court of appeals in \textit{Jaramillo v. State} addressed and dismissed the equal protection issue because the classification in the Tort Claims Act relied on “the character of the defendant, not the mental incapacity of the plaintiff.” 111 N.M. 722, 725, 809 P.2d 636, 639 (1991) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)). The court refused to address the issue in \textit{Jaramillo v. Board of Regents of the University of New Mexico Health & Sciences Center}, stating that the equal protection issue “confuse[d] what [was] otherwise a simple and straightforward issue.” 2001-NMCA-024, ¶ 10, 23 P.3d at 933.}

The court noted that although, practically speaking, the notice and statute of limitations requirements are different, “the notice provision operate[s] as a statute of limitation.”\footnote{144. Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 6, 23 P.3d at 932.} As a result, the court was able to apply the rationale from the notice cases to \textit{Jaramillo I}.\footnote{145. Precedent cases have found that an infant, \textit{Tafoya}, 100 N.M. at 331, 670 P.2d at 585, and a six year old, \textit{Rider}, 1996-NMCA-090, 923 P.2d 604, could not comply with the time limitations, while a fourteen-year-old plaintiff, \textit{Erwin}, 115 N.M. at 600, 855 P.2d at 1064, had the potential to comply with the statutory requirements.}

All of the notice cases discussed age\footnote{146. Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 8, 23 P.3d at 932.} and held that a child’s age inhibits the child from complying with the statute of limitations in the same manner as an adult.\footnote{147. Id.} The court in \textit{Jaramillo I} reiterated that minors face a “special disability”\footnote{148. Anthony’s minor status distinguished the case from \textit{Jaramillo v. State}, 111 N.M. 722, 809 P.2d 636 (Ct. App. 1991), which involved an adult plaintiff who lacked capacity to file his own claim. Because the cases were not analogous, the holding in \textit{Jaramillo v. State}, which upheld the statute of limitations against a due process claim, did not have precedential weight for \textit{Jaramillo v. Board of Regents of the University of New Mexico Health & Sciences Center}. Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 8, 23 P.3d at 932.} due to their age,\footnote{149. Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 10, 23 P.3d at 933; see also \textit{Tafoya}, 100 N.M. at 332, 670 P.2d at 586 (“[O]ne unable to comply with a notice requirement by reason of minority is protected by the reasonableness requirements of the common law, the Fourteenth Amendment to the United States Constitution, or similar provisions in their state constitutions.”).} thus making age a primary consideration for the court. After acknowledging this inherent difference between children and adults, the court in \textit{Jaramillo I} adopted the general rule that “a child who is incapable of meeting a statutory deadline cannot have that deadline applied to bar the child’s right to legal relief.”\footnote{150. Id.} The court in \textit{Jaramillo I} was not focused “on the absolute or relative
length of time of the [statute of limitations] requirement,"150 but rather on the reasonableness of requiring a child to comply with the statutory limit.\textsuperscript{151} The court concluded that it was unreasonable to require Anthony Jaramillo, a young child with inherent mental immaturity, to meet the statute of limitations requirement.\textsuperscript{152}

The court also briefly addressed an alternative to requiring a minor to file a claim, placing the burden on the parents or guardians to file a tort claim on their child’s behalf.\textsuperscript{153} \textit{Jaramillo I} refused to impose this burden on parents and held that a child should be able to meet statutory time requirements “on his own and without anyone specifically appointed, either in fact or in law, to help.”\textsuperscript{154} In making this determination, the court followed the precedent set forth in \textit{Tafoya}\textsuperscript{155} and \textit{Rider}.\textsuperscript{156} \textit{Tafoya} refused to even “consider whether the burden of giving notice [should have been] placed on another.”\textsuperscript{157} \textit{Rider} expanded on that holding and explained the policy concerns of imputing a child’s due process rights on another.\textsuperscript{158} The New Mexico courts have yielded to the state legislature any further decision-making power regarding a parental duty.\textsuperscript{159}

\textit{Jaramillo I} enabled the young minor to protect his own due process right of access to the courts by finding the application of the statute of limitations in that case to be unconstitutional.\textsuperscript{160} However, the court held that, under different circumstances, a defendant may illustrate “factual issues that could cause the limitation period to be constitutional.”\textsuperscript{161} The court found situations similar to those discussed in \textit{Erwin}\textsuperscript{162} to be illustrative of a child’s ability to comply with the requirement.\textsuperscript{163} If the child had been capable “of understanding or appreciating his injuries and the need to file suit” or if “someone on the child’s behalf should have filed suit,” the

\begin{thebibliography}{99}
\bibitem{} Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 7, 23 P.3d at 932.
\bibitem{} \textit{Id.}
\bibitem{} \textit{Id.} ¶ 10–11, 23 P.3d at 933.
\bibitem{} \textit{Id.} ¶ 5, 23 P.3d at 932.
\bibitem{} \textit{Id.} ¶ 4, 10, 23 P.3d at 932–33.
\bibitem{} 100 N.M. at 332, 670 P.2d at 586.
\bibitem{} 1996-NMCA-090, ¶ 5, 10–14, 923 P.2d at 605–08.
\bibitem{} \textit{Tafoya}, 100 N.M. at 332, 670 P.2d at 586. The court in \textit{Tafoya} also stated that “[i]t is noteworthy that minority alone is a disability which tolls the \textit{general} statute of limitations….There is no reason why the minor should not be similarly protected when the alleged wrongdoer is a governmental entity.” \textit{Id.} at 331, 670 P.2d at 585 (quoting Hunter v. N. Mason High Sch., 529 P.2d 898 (Wash. Ct. App. 1974)). The counterargument is that the Tort Claims Act was a reaction to the rejection of state sovereign immunity and that the government should be afforded special considerations. \textit{See supra} Part II.B.
\bibitem{} 1996-NMCA-090, ¶ 11, 14, 923 P.2d at 607–08. \textit{See infra} text accompanying notes 215–227 for further explanation of these policy concerns.
\bibitem{} The legislature is able to examine evidence concerning the number of claims against the government versus private entities, and it can make policy decisions based on this type of evidence. \textit{See Jaramillo v. State, 111 N.M. 722, 726, 809 P.2d 636, 640 (Ct. App. 1991).} As of the 2005 legislative session, the New Mexico state legislature had not enacted legislation requiring parents or guardians to file suits on their child’s behalf. For further discussion on the benefits and disadvantages of imposing this burden on parents, see \textit{infra} Part IV.D.
\bibitem{} \textit{See Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 10–11, 23 P.3d 931, 933.}
\bibitem{} \textit{Id.} ¶ 9, 23 P.3d at 932.
\bibitem{} 115 N.M. 596, 599, 855 P.2d 1060, 1063 (Ct. App. 1993).
\bibitem{} \textit{Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 9, 23 P.3d at 932.}
\end{thebibliography}
statute of limitations may have been constitutional.\textsuperscript{164} UNMH did not prove either fact, so the statutory requirement was found unreasonable and unconstitutionally applied to the minor.\textsuperscript{165}

B. Jaramillo II—Medical Malpractice Act Statute of Limitations

Given the ruling in \textit{Jaramillo I}, the court of appeals in \textit{Jaramillo II} similarly held that the Medical Malpractice Act statute of limitations was applied unreasonably because of the minor’s young age and was, consequently, a violation of his due process right to pursue a cause of action.\textsuperscript{166} The court followed the \textit{Jaramillo I} rationale but expanded briefly on the policy concerns involved with analyzing the reasonableness of the statute.\textsuperscript{167}

The court began its analysis by assessing the reasonableness of the statute “given the circumstances of the [minor].”\textsuperscript{168} \textit{Jaramillo II} reiterated the “unique considerations,” specifically age and mental capability, involved when a child is the plaintiff in a case.\textsuperscript{169} Thus, in \textit{Jaramillo II}, as in \textit{Jaramillo I}, the court determined that the statute was unreasonable because of Anthony’s status as a minor.\textsuperscript{170}

Next, the court examined the opposing policy concerns at issue.\textsuperscript{171} Heaton, the defendant, argued that the statute needed to be upheld because it was enacted to protect legitimate state interests: “to curb the cost of insurance, to encourage physicians to carry insurance, and to provide a benefit to physicians who opt in to the Act’s provisions by purchasing occurrence-based insurance.”\textsuperscript{172} The court did not dispute the importance of the state interests,\textsuperscript{173} but argued that allowing children to file after the stated limitations period would not significantly hinder the State’s

\textsuperscript{164} \textit{Id.} The court suggested that someone “should file” for a child, but there exists no legal requirement for this action. The court failed to illustrate a situation where someone might be required to file on the child’s behalf. \textit{Id.}

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{See Jaramillo v. Heaton, 2004-NMCA-123, 100 P.3d 204. Although the question called for a de novo review of the Medical Malpractice Act requirements, the court analogized the issue involved with the Medical Malpractice Act to the issue in \textit{Jaramillo v. Board of Regents of the University of New Mexico Health \& Sciences Center} concerning the Tort Claims Act. \textit{See id.} ¶ 9, 23 P.3d at 207; Jaramillo v. Bd. of Regents of the Univ. of N.M. Health \& Scis. Ctr., 2001-NMCA-024, 23 P.3d 931; supra Part IV.A.

\textsuperscript{167} \textit{Jaramillo v. Heaton, 2004-NMCA-123, ¶ 13, 100 P.3d at 208.}

\textsuperscript{168} \textit{Id.} ¶ 8, 100 P.3d at 207 (quoting Garcia v. La Farge, 119 N.M. 532, 541, 893 P.2d 428, 437 (1995) (“[C]onsiderations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that when the legislature enacts a limitations period it must allow a reasonable time within which existing or accruing causes of action may be brought.”)).

\textsuperscript{169} \textit{Id.} ¶ 11, 100 P.3d at 207 (“[T]here is no amount of time that is per se reasonable or unreasonable in all situations.”). The court distinguished the case from others involving adults. \textit{Id.} ¶ 11, 100 P.3d at 208; \textit{see, e.g.}, Cummings v. X-Ray Assocs., 1996-NMSC-035, ¶ 39, 918 P.2d 1321, 1333.

\textsuperscript{170} \textit{Jaramillo v. Heaton, 2004-NMCA-123, ¶ 19, 100 P.3d at 209.}

\textsuperscript{171} \textit{Id.} ¶ 12–13, 100 P.3d at 208.

\textsuperscript{172} \textit{Id.} ¶ 12, 100 P.3d at 208.

\textsuperscript{173} The only benefit from the shortened limitation period in the Medical Malpractice Act “is the general reduction of malpractice premiums and lower direct costs of medical care.” Kovnat, \textit{supra} note 51, at 29. However, even that benefit is in question. \textit{See Mominee v. Scherbarth, 503 N.E.2d 717, 721, 723 (Ohio 1986)} (stating that there is no proof that a statutory bar on minors has reduced insurance premiums). Given that that benefit to the State is in doubt, it is difficult to prioritize it over children’s due process rights. \textit{See id.}, 503 N.E.2d at 726 (Celebrezze, C.J., concurring) (“I do not believe that access to health care need come at the cost of a minor’s access to redress in the courts.”).
objectives. The court noted that children have a "finite amount of time" to bring a claim. At best, children have until their nineteenth birthdays to file suit. Thus, allowing minors extra time was fair and did not unduly burden those relying on the Medical Malpractice Act. In fact, the court decided that not allowing Anthony’s claim would unfairly and unreasonably burden the minor, who was inherently unable to comply with the requirements.

Similar to Jaramillo I and in accordance with precedent, the court refused to hold parents accountable for filing on their child’s behalf. The court refuted Heaton’s statutory argument that section 45-5-209, Rule 1-017, and section 24-7A-6.1(A) impose such a duty on parents. Respectively, the statutes impose a duty on guardians to protect the property of their ward, permit parents to file on their child’s behalf, and allow parents or guardians to make health care decisions for a minor. The court found no implied parental duty to pursue claims on a child’s behalf in these statutes.

Instead, the court turned to Anthony Jaramillo’s own ability to file the claim and found that he was too young to comply with the time limitation. Thus, the statute of limitations was unreasonable in the situation. However, the court also stated that there are circumstances in which holding children accountable to the statute of limitations would be fair, thus illustrating that there are times when competing policy objectives support upholding the constitutionality of the statute.

C. Jaramillo I and Jaramillo II—Possibilities for Future Confusion

Jaramillo I and Jaramillo II refused to overturn the holding in Erwin that “some minors may be sufficiently mature to appreciate legal responsibilities and thus
become obligated to comply with the ninety day notice provision.\textsuperscript{189} The court left open the possibility that defendants could show "factual issues" proving that a child could have met the requirements and should not have the benefit of a ruling in the child's favor.\textsuperscript{190} If a child is able to comply with the statutory period, the statute would not be found unconstitutional.\textsuperscript{191} However, the court never explained the application of the specific requirements for proving a child's ability to comply.\textsuperscript{192}

Subsequently, future parties involved with this type of litigation do not have concrete guidelines for challenging or upholding the constitutionality of the Tort Claims Act and Medical Malpractice Act. For example, what if the plaintiff was a mature sixteen-year-old who appeared before a judge to get permission for an abortion without parental consent? Would this demonstrate that the minor should have known to file a civil suit within the two-year statute of limitations? Under \textit{Erwin}, the court might rule that the minor was old enough to comprehend the legal system, as evidenced by the minor's prior experience.\textsuperscript{193}

Or, suppose the plaintiff was twelve years old and had no legal understanding but had parents who contacted an attorney. The court did not explain whether the analysis turns solely on age or age combined with other circumstances.\textsuperscript{194} If age is the primary criterion, at what age is the child mature enough to comply with the requirement? The decisions in \textit{Tafoya}, \textit{Erwin}, \textit{Rider}, and now \textit{Jaramillo I} and \textit{Jaramillo II} make it less than clear whether age, age coupled with other indicia, or another factor altogether would be sufficient to prove that a minor is mature enough to not need an extended statute of limitations.\textsuperscript{195}

Furthermore, the court in \textit{Jaramillo I} and \textit{Jaramillo II} refused to impose a burden on parents or others to file on a child's behalf;\textsuperscript{196} but, without elaboration, the court stated that "specific defendants may be able to prove that such a duty exists in a particular case."\textsuperscript{197} Again, the court provided no criteria and was vague as to how a defendant would prove this. Fortunately for children, the court did protect their due process rights by not decisively transferring children's rights to their parents.

\textbf{D. Reasons For and Against Creating a Legal Obligation for Parents to Pursue a Tort Action on Their Child's Behalf}

There are essentially two ways to create a legal burden on parents to pursue

\begin{itemize}
  \item \textsuperscript{190} Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 9, 23 P.3d 931, 932.
  \item \textsuperscript{191} See supra notes 76–83 and accompanying text.
  \item \textsuperscript{192} See supra notes 76–83 and accompanying text; infra notes 193–195 and accompanying text; Jaramillo v. Heaton, 2004-NMCA-123, ¶ 18, 100 P.3d at 209.
  \item \textsuperscript{193} See \textit{Erwin}, 115 N.M. at 599, 855 P.2d at 1063.
  \item \textsuperscript{194} It appears that if the child is very young and if no one should have filed for the child, fairness concerns will weigh in favor of protecting the child. See \textit{Tafoya} v. Doe, 100 N.M. 328, 670 P.2d 582 (Ct. App. 1983).
  \item \textsuperscript{195} Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 9, 23 P.3d at 932; Jaramillo v. Heaton, 2004-NMCA-123, ¶ 18, 100 P.3d at 209.
  \item \textsuperscript{196} Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, ¶ 7, 23 P.3d at 932; Jaramillo v. Heaton, 2004-NMCA-123, ¶ 17–18, 100 P.3d at 209.
  \item \textsuperscript{197} Jaramillo v. Heaton, 2004-NMCA-123, ¶ 18, 100 P.3d at 209.
\end{itemize}
claims on their child’s behalf.\textsuperscript{198} One way is for the courts to interpret statutory language that parents “may sue”\textsuperscript{199} on behalf of their child as being an obligation sufficient enough to protect their child’s due process right of access to the courts.\textsuperscript{200} With this interpretation, parents may or may not sue, but the child has to deal with the consequences either way.\textsuperscript{201} The court in \textit{Jaramillo I} and \textit{Jaramillo II} focused on the inability of a minor,\textsuperscript{202} not parents, to comply with the statutory limitations,\textsuperscript{203} and thus refused to interpret the statute as implying that a child’s due process rights are protected through the child’s parents’ action or inaction.\textsuperscript{204} This sentiment is in accordance with New Mexico’s “long tradition of interpreting laws carefully to safeguard minors.”\textsuperscript{205}

The other way to impose a legal burden on parents is for the legislature to create a statutory duty requiring parents to file on their child’s behalf.\textsuperscript{206} The New Mexico Court of Appeals has stated that the legislature is free to create such a duty after weighing the policy concerns.\textsuperscript{207} There are reasons for supporting and for opposing the parental burden.

1. Reasons to Impose a Burden on Parents

It can be argued that filing a tort claim for your own child is simply another parental duty in the long list of responsibilities that parents have for their children. Common sense acknowledges that parents are responsible for everything their child

\textsuperscript{198} This Note does not consider whether the decision is for the judiciary or the legislature, but simply whether parents should shoulder their child’s responsibility of filing a tort lawsuit against the State or doctors covered under the Medical Malpractice Act.

\textsuperscript{199} Rule 1-017(c) NMRA. See supra notes 180–185 and accompanying text.

\textsuperscript{200} Rider v. Albuquerque Pub. Sch., 1996-NMCA-090, ¶ 11–12, 923 P.2d 604, 607. Other jurisdictions are split on their interpretations of similar statutory language and the issue of whether a minor should have to rely on someone else to sue on the minor’s behalf. See, e.g., Antonopoulos v. Town of Telluride, 532 P.2d 346, 350 (Colo. 1975) (“[I]t is clear that the next friend’s action or inaction in commencing the suit cannot prejudice the minor’s rights.”); Doe v. Dursch, 716 P.2d 1238, 1248 (Idaho 1986) (holding that a minor should not have to rely upon the actions of others for the protection of that minor’s rights). \textit{But see, e.g.}, Faucher v. City of Auburn, 465 A.2d 1120, 1125 (Me. 1983) (determining that a minor’s rights were sufficiently protected by a statutory provision that a parent, or other agent, may file notice of claim on the child’s behalf); George v. Town of Saugus, 474 N.E.2d 169, 171 (Mass. 1985) (holding that notice requirements should not be tolled for minors because their interests can be protected by their guardians).

\textsuperscript{201} \textit{See infra} Part IV.D.2.

\textsuperscript{202} \textit{Tafoya} relied in part on a case involving a thirteen-year-old plaintiff that held that a 120-day notice requirement “would create ‘an incompatibility with due process and equal protection requirements.’” \textit{Tafoya}, 100 N.M. 328, 331, 670 P.2d 582, 585 (quoting Cook v. State, 521 P.2d 725, 728 (Wash. 1974)).

\textsuperscript{203} \textit{Tafoya}, 100 N.M. 328, 670 P.2d 582; \textit{Rider}, 1996-NMCA-090, 923 P.2d 604; \textit{Erwin}, 115 N.M. 596, 855 P.2d 1060; \textit{Jaramillo} v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr., 2001-NMCA-024, 23 P.3d 931; \textit{Jaramillo} v. Heaton, 2004-NMCA-123, 100 P.3d 204. There appears some contradiction in the holding in \textit{Jaramillo} v. \textit{Heaton} that provides an opportunity for the defense to prove that someone should have filed on the child’s behalf. The court stated, “[W]e will not imply a broad parental or custodial duty to file a medical malpractice suit on behalf of a child, [but] specific defendants may be able to prove that such a duty exists in a particular case.” 2004-NMCA-123, ¶ 18, 100 P.3d at 209. The court did not explain how the defense would prove that someone should have filed on behalf of the child when there is no statutory or common law requirement for a parent to do so. \textit{Id.}

\textsuperscript{204} \textit{Id.}, 1996-NMCA-090, ¶ 11, 923 P.2d at 607.

\textsuperscript{205} \textit{Id.} ¶ 13, 923 P.2d at 607.

\textsuperscript{206} \textit{See, e.g., id.} ¶ 5, 15, 923 P.2d at 605, 608.

\textsuperscript{207} \textit{See id.} ¶ 5, 923 P.2d at 605.
needs, from clothing to food to health care. Statutes and case law have acknowledged parental responsibilities and created legal parental duties. According to these laws, parents must provide adequate medical care, ensure that children attend school, and financially support their children. Moreover, parents should have an interest in protecting their child’s legal well-being. Therefore, it is not unreasonable “to expect that others will protect a minor’s rights.” While it is now up to the legislature to change the law, the court in Jaramillo I and Jaramillo II did not find these reasons persuasive enough to hold that a parent has a duty to file on their child’s behalf.

2. Reasons to Not Impose a Burden on Parents

The primary reason to not impose a burden on parents is to protect the child’s individual legal rights. Making a child suffer because an adult parent or guardian failed to file a claim on the child’s behalf is not fair and is a violation of that child’s due process rights. Children have their own rights, as recognized in statutes and case law. Children should be afforded due process in protecting their own property interests. Parental negligence for failing to bring a claim should not be imputed to children. Children should not have to rely on someone else’s “foresight to file a timely claim” or suffer negative consequences because another person “through inadvertence or ignorance” did not act. Also, not all children have parents; some children are living in institutions, in foster care, with grandparents or other family members, or on their own. Additionally, not all parents act responsibly in the care of their children. Imposing a duty on parents or guardians would put “children unnecessarily...at risk” and would “impute to the child the consequences of parental default.” Moreover, some jurisdictions have found that “it would violate due process to condition the legal rights of the child upon the gratuitous performance of the adult.”

208. As a minor ages, the minor may be able to increase self-sufficiency. See infra notes 211–214 and accompanying text.

209. See supra note 207 and accompanying text; infra notes 212–214 and accompanying text. For example, section 66-7-369(B) provides that parents must have their children in child restraint devices while in a moving car until they are twelve years old. NMSA 1978, § 66-7-369(B) (2005).


214. See supra notes 29–31 and accompanying text.


216. Tafoya, 100 N.M. at 331, 670 P.2d at 585 (quoting Cook v. State, 521 P.2d 725 (Wash. 1974)). Tafoya also stated that a child should “not be left to the whim or mercy of some self-constituted next friend to enforce its rights.” Id.; see also Barrio v. San Manuel Div. Hosp., 692 P.2d 280, 286 (Ariz. 1984); Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983) (“It is neither reasonable nor realistic to rely upon parents, who may…be ignorant, lethargic, or lack concern, to bring…[the] action.”).


220. Id. ¶ 11, 923 P.2d at 607.
In addition to this due process concern, the court in *Rider* expressed uncertainty about the future of such a doctrine.\(^{222}\) The court stated concern about children being left with no remedy\(^ {223}\) or the only remedy being a suit for negligence against their parent or guardian.\(^ {224}\) One court has stated that this limited remedy could be detrimental to the child’s due process rights.\(^ {225}\)

[W]e find it unrealistic to expect that children would seek legal redress against their parents as willingly as against the parties who are alleged to be medically negligent. Placing young adults in a dilemma in which they must choose between suing their parents or abandoning their claims has the practical effect of chilling their due process rights.\(^ {226}\)

Also, if a child were able to later sue his or her parents for negligence in failing to file the tort claim, this would create adversarial relationships between parents and children and between siblings. The suit would inherently cause tension between the two parties involved. Furthermore, if one child won a judgment against the parents for a large sum of money, the obligation to pay could bankrupt the family or, at the very least, deprive other siblings of financial support.

As illustrated above, courts and state legislatures face difficult policy concerns when deciding whether to impose a burden on parents or guardians to file a tort suit on their child’s behalf. However, under the holdings of *Jaramillo I* and *Jaramillo II*, the rule in New Mexico is that parents do not have a duty to pursue a claim on their child’s behalf.\(^ {227}\)

V. CONCLUSION

Children like Anthony Jaramillo are too young to have knowledge of the law and cannot be expected to take legal action in pursuit of their own cause of action while still mentally immature. Fortunately, by finding the New Mexico Tort Claims Act and Medical Malpractice Act statutes of limitations unconstitutionally applied, *Jaramillo I* and *Jaramillo II* offered Anthony, and presumably other minors like him, the opportunity to protect their own legal interests.\(^ {228}\) Unfortunately for minors, the court did not find the statutes per se unconstitutional. The court also failed to provide adequate guidance for determining when the statutes are unconstitutional. Future courts and litigants will struggle to determine the constitutionality of the New Mexico Tort Claims Act and the Medical Malpractice Act as applied to minors.

\(^{222}\) *Id.* ¶ 13–14, 923 P.2d at 607–08.

\(^{223}\) *Id.* ¶ 14, 923 P.2d at 608.

\(^{224}\) *Id.*

\(^{225}\) *Mominee v. Scherbarth*, 503 N.E.2d 717, 722 (Ohio 1986). *Mominee* addressed the issue of children suing their parents. *Id.* Also, if parents and children are involved in a suit many years after the tort action, the stale claims issue would still exist. *Id.*

\(^{226}\) *Id.*


\(^{228}\) See *Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr.*, 2001-NMCA-024, 23 P.3d 931; *Jaramillo v. Heaton*, 2004-NMCA-123, 100 P.3d 204.