New Mexico Family Law Manual

Topics in Family Law for the New Mexico Judiciary

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New Mexico Judicial Education Center
Institute of Public Law, UNM School of Law

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Dedication

This New Mexico Family Law Manual is dedicated to late New Mexico Supreme Court Justice Gene E. Franchini (1935-2009).

Justice Franchini has received many other tributes since his untimely death[1], but dedicating this family law manual to him seems especially appropriate. That is not because his legal career or judicial writings focused especially on family law jurisprudence; but rather, because the qualities and values he exemplified are so vital to judges and attorneys working in family law.

Justice Franchini was committed to fostering a legal system based on principle, tempered by compassion for those least able to protect themselves. He called on judges always to assume the time and responsibility to judge, relying on their sound discretion and informed understanding of the law. He sought collaborative approaches to solving problems, to obtain the fairest and most practical results. And above all, he was committed to attaining justice, recognizing that it can only be attained by understanding the people involved.

The articles in this manual seek to apply these principles to the practice and adjudication of family law problems. In no area of the law are Gene Franchini's principles of justice more applicable or important. Family law clients often come before the court with no legal representation or prior experience with the judicial system. Many are confused, embittered, and afraid. They come seeking justice for some of the deepest personal issues that our courts are asked to resolve, possibly even facing the most important decisions of their lives over issues as wrenching as their future access to their children. Yet, they often understand little of the processes or principles that judges will apply to determine the outcomes.

In every family law case, it may be well for judges and lawyers to recall the words with which Leo Tolstoy began his classic novel, Anna Karenina: "Happy families are all alike; every unhappy family is unhappy in its own way." These words resonate with part of Justice Franchini's judicial legacy to us, of focusing on the people before him rather than on abstractions of the law. We hope that the articles in this manual will promote his sensitive and compassionate approach.

[1] *See* Bosson, 40 New Mexico Law Review 1--16, *Gene E. Franchini: Reflections on a Man of Justice* (2010), an insightful tribute by his colleague, Justice Richard C. Bosson, from which this dedication has heavily drawn.

Preface and Acknowledgments

"Liberty without learning is always in peril
and learning without liberty is always in vain."
- John F. Kennedy

We set out to provide a current reference of family law for New Mexico's bench, also useful to the bar. It had been several years since the last tome by distinguished colleagues. But family law in New Mexico, like all else in The Land of Enchantment, does not follow a plain route. Winding trails of continuous jurisdiction over family disputes can cross into other areas. Still, the guiding road of the law must be clear: weeding out invasive confusion, sparing sage roots, uneroded by flash floods in caseload. We are challenged by prickly pear just off-trail, as more travelers than ever seek the family court's answers without counsel on their journey. There are also trailblazers in emerging models for dispute resolution in the landscape.

So we took some liberty with the landscape of this manual. The State Justice Institute seeded our plan, but its effect was a collection of the writing of individual volunteers – judges, lawyers, mental health and financial professionals. Thanks go first to the respective authors, whose generous sharing of their expertise informs all of ours, in their own voices.

This collection will remain available to the public online at: http://jec.unm.edu/. There, we will post supplemented, updated, or expanded material. We intend to provide a first addition mid-2011 analyzing the Uniform Interstate Family Support Act (UIFSA), the State role, and the Uniform Parentage Act (UPA), after the current legislative session forges New Mexico's choice in their implementation. We also foresee additions on procedure; domestic partnership; and the intersection with domestic violence distinct from IPL's existing dedicated manual. Please contact us with topics you see needed.

May this tool, forged by work of many, clear paths to the summit of effective administration of justice for New Mexico families. There would be no such book without these individuals, deserving of New Mexico's thanks:

The authors, who donated substantial time and expertise, must know our gratitude. So too with others, on top of their day jobs. Above all, we salute Honorable Mike Murphy, Third Judicial District, who has led this mission with wit, wisdom, and discernment. Special thanks must go to attorneys Helen Bennett and Delilah Tenorio Choneska for their commitment to serve on short notice. If your rope ever needs a strong tug up the cliff, they are your women. Honorable Raymond Z. Ortiz, First Judicial District; Honorable Deborah Davis Walker, Second; and Honorable Jim T. Martin, Third, helped generate ideas. Our Institute of Public Law's Paul Biderman and Judicial Education Center's Pam Lambert direct with a fine blend of plan, push and praise.

Behind the scenes, thanks are also rained upon the following professionals for their ideas, counsel, and energy they lent to this project: Attorneys Laura Bassein, Julie Bishop, James E. Bristol III, Merrie Chappell, Maria Montoya Chavez, Dustin K. Hunter, Jeffrey H. Kauffman,

Thomas C. Montoya, N. Lynn Perls, Amber Train, UNM Professor of Law Nathalie Martin, Honorable Kaydee Culbertson, Honorable Anne Kass (Ret.), Honorable James J. Loughren, Honorable James S. Starzynski; and Samuel L. Baca, CPA/ABV/CFF, CVA, Baca & Redwine, P.C., and many others who responded to our survey with ideas.

As a native daughter of the sacred mesas where discoveries are made, I see New Mexico's public interest as my own. For the privilege of working with professionals who have demonstrated such willingness to give of themselves for our State, I am deeply grateful.

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New Challenges Confront Judges

By David P. Levin, Esq. with Honorable Raymond Z. Ortiz, First Judicial District

INTRODUCTION

Judges are entering a legal environment of "first impression." For example, Alternative Methods of Dispute Resolution ("ADR") have emerged as a mainstream legal service. Further, an attorney may offer previously disallowed "unbundled" legal services. However, the largest challenge confronting judges during a period of economic crisis may be the flood of self-represented litigants.

This prologue is intended to provide a framework of understanding for New Mexico Family Court judges regarding these issues. A wealth of knowledge, experience, and literature regarding courts and self-represented litigants exists beyond this publication. The purpose here is to identify how the bench may begin to adjust to a new context of daily operations.

This essay will:

- describe the crisis in the context of the judiciary;
- explore how to approach the challenge, using the example of ADR and Unbundled Legal Services;
- discuss additional approaches to the issue developed by First Judicial District Court Judge Raymond Ortiz.

"Business as usual" may be insufficient for judicial effectiveness and economy during this era, particularly for domestic relations matters. Every district has distinct and individual characteristics. Solutions will have to be home grown to fit each locality. Creative interventions within the framework of each judicial jurisdiction will need to be developed. There is also a need for a statewide pooling of ideas and resources to define and to address these issues. The work will be ongoing. Hopefully, this essay will help launch these efforts.

A hearing or trial is designed for a judicial officer to decide the presenting issues. Therefore, the concerns to address include:

- First, the need to develop best practices for conducting a proceeding with one or more self-represented litigants;
- Second, the need to develop "wrap around" support services to prepare the self-represented litigants for the proceeding and to effectuate the decision after the proceeding;

- Third, the need to provide an opportunity for self-represented litigants to relieve the pipeline of cases before the court by exercising self-determination to settle cases.

The model of conduct to which the public is exposed through the media, particularly television and movies, and which they therefore adopt when representing themselves, is focused only on adversarial confrontations in court. A key to judicial effectiveness and economy is to broaden this conventional wisdom. Self-represented litigants without a broader understanding will only clog and frustrate the courts.

THE CONTEXT OF CRISIS

A convergence of forces is creating a crisis for the legal system. Economic issues comprise only one component. Courts, attorneys, and the public are impacted. As a result, justice may become quagmired. For New Mexico, the challenge is to be innovative, to use the opportunity to creatively advance our system of legal justice.

The stresses upon the legal system, particularly experienced in family court, include:

- a rising caseload for the courts;
- diminishing judicial resources;
- the cost for standard-of-care legal services exceeding the economic means of many litigants;
- a rising tide of self-represented litigants;
- an increasing presence of domestic violence.

How to address these challenges in the context of domestic relations cases will be discussed here.

FAMILY COURT LITIGANTS

Litigants in Family Court have a profound and unique relationship to their case. All parties have a personal investment in any court action. In domestic matters, personal attachments are frequently deeper, more emotionally and psychologically driven, and inherently evoke core self-identity issues. Individual well-being is at risk. When these characteristics are added to potentially complex legal issues, long lasting consequences, personal unfamiliarity with judicial processes, and economic uncertainty, these cases are particularly difficult.

Courts have unique relationships with domestic litigants as well. Continuing jurisdiction regarding issues such as child custody and support, alimony, and enforcement, create a high rate of recidivism. Chronic conflicts breed frequent flyers with insoluble problems. Courts also have special responsibilities, independent of the parties, regarding children. The challenges generally confronting the courts are therefore compounded for domestic matters.

LEGAL LITERACY

Legal literacy is a foundation of our legal system. Courts were constitutionally created to address cases in controversy between adversaries. A rule-based system was established. Conduct, decorum, procedures, and language evolved. These protocols guided a case to a result governed by the evolving substantive law.

To navigate and to preside over the system, people were trained and licensed as attorneys. Completion of law school and passing a bar exam were required. The unauthorized practice of law rules generally prohibited representation by a non-attorney. Legal literacy became an institutionalized expertise.

Members of society hired attorneys to represent them in this system. The attorneys organized facts into legal issues and presented them to the tribunal pursuant to the rules of law. Judges who, with the exception of smaller community courts, were attorneys as well, decided the issues. All of the players were legally literate. The clients were not active players.

The legal system was a "closed system." There was a high threshold of knowledge and skills required to operate within the system, and only those licensed as attorneys navigated the system. The rare occurrence of a self-represented litigant did not disrupt these norms.

Today, there is another set of players – self-represented litigants who lack the legal literacy of attorneys. These are people who are trying to exercise their rights within the system, but who have little to no idea of how to go about it.

From the court's perspective, self-represented litigants are problematic. This population is not trained in the conduct, decorum, procedures, language, and substantive law of the legal system. Because they do not know the norms of practice, procedure and behavior, they are inherently disruptive to the operation of the system. The traditional court system of orderly interactions simply does not work – the institution can not function as usual.

Today, self-represented litigants are no longer an anomaly. The growing majority of family law cases and an increasing percentage of civil cases have one or more self-represented litigants. A new population is displacing the attorneys as the players in the system and is disrupting business as usual.

From the self-represented litigant's perspective, the experience is also problematic. Because they are uneducated about the substance and process of the legal system, their expectations of what will happen and how are not fulfilled. They feel discounted and trapped in an environment which treats them as irritants. To have a self-represented litigant navigate the system does not work for him or her either. As a result, the needs of the self-represented litigants are often unmet.

Courts have dealt with conflict for centuries. The system relied upon intermediaries between the public and the law. Now the intermediaries -- attorneys -- are increasingly gone. The issue is

not one of malice. Both the courts and self-represented litigants are generally well intended. This issue is one of a mismatch.

Issues of first impression are created by this phenomenon. For example:

- **Navigation.** How should a court respond to the difficulties presented when a self-represented litigant attempts to navigate the legal system? Where is the balance between serving as a *de facto* lawyer for the self-represented litigant on the one hand, and passively watching self-represented litigants without legal literacy flounder and clog the system on the other hand?

- **Case Organization and Settlement.** How should a court respond when the self-represented litigant does not recognize what issues need to be decided, what information is needed for decision-making, and the realistic range of attainable outcomes?

- **Legal Issues.** How should a court make decisions (both at the trial and appellate levels) when issues key to decision-making are not brought at all, or not brought appropriately or adequately, to the court's attention? And, is justice served by allowing legally illiterate self-represented litigants to give up rights of which they may not even be aware?

- **Legal Documents and Pleadings.** How should a court respond when the self-represented litigant does not know how to create a legally enforceable, complete set of documents to effectuate either a settlement agreement or a judicial decision?

To preserve the basic tenets and values of American jurisprudence in today's restructured environment requires deliberate thought, planning, and action. A new constituent is coming to court. The traditional approach based upon attorneys as intermediaries is no longer as available – new models are needed.

DOMESTIC RELATIONS LITERACY

Domestic relations cases, such as divorce and partnership dissolutions, paternity, and child custody and support, add the need for extended literacy, including:

- specialized judicial forms and procedures;

- specialized substantive knowledge;

- personal and "family" dynamics expertise;

- understanding of how to manage ongoing relationships, particularly when children are involved.

Judges will find that many self-represented litigants lack both general legal literacy and the specialized literacy associated with domestic relations cases.

DOMESTIC VIOLENCE

Domestic violence additionally impacts how a domestic matter should be approached. Safety is only one concern. Power imbalances may compromise the ability to think. The capacity and competence to participate in court proceedings and ADR processes may be reduced.

The presence and influence of domestic violence is not always obvious. For example, an effort was made to send non-domestic violence cases to a pilot mediation project in the Second Judicial District. However, domestic violence was ultimately discovered in 60% of these pilot cases.

Screening for domestic violence in the pilot cases included: a search for related cases outside of the Second Judicial District; reviewing court files and public information; interviews with the parties; and ongoing screening during the mediation process. As a result, an additional decision was required whether the case was still amenable for mediation and, if so, how the mediation process was be to adjusted to fit the case.

Domestic violence has significant implications for the issues discussed here. Please see the Judicial Education Center's Benchbook and other online resources on domestic violence.

JUDICIAL CASELOADS AND RESOURCES

The economic crisis and its impact upon the courts are well documented elsewhere. Highlights include:

- Insufficient money to increase the number of judges, courtrooms and supporting resources, even as the number of court cases is rising;

- Funding cuts resulting in staff furloughs, unfilled vacancies, cuts to programs, and judges being required to physically file pleadings in court files;

- Hearings and trials being postponed further into the future.

These realities are well known to judges and attorneys. A full study of these circumstances is beyond the scope of this essay.

For this essay, the relevance is that the resources of the legal system are already strained to meet the needs of legally literate attorneys. The additional efforts required to assist self-represented litigants who are not legally literate is highly problematic, unless new approaches are developed.

Innovations need to be as multi-dimensional as the challenges, including how to address:

- What happens in the court room;

- What happens before and after a court proceeding;

- How court services, court connected programs, and private bar activities may be integrated.

One example of a comprehensive approach is how ADR may be deployed.

ADR AND COURT CAPACITY

ADR increases judicial effectiveness and efficiency by lowering the resources required to process a case, thus increasing the capacity of the court to handle larger caseloads. In New Mexico, court-connected ADR generally includes mediation, settlement facilitation, family court clinical services, and arbitration.

A seminal study of the California courts, *Evaluation of Early Mediation Programs,* has demonstrated the efficacy of dispute resolution.

New Mexico has neither the funds nor resources to conduct such a comprehensive study. After considering that the study focused upon California courts, important value from the study remains for us.

The 445-page study report was presented by Heather Anderson at the ABA Dispute Resolution Section Annual Conference during April, 2004, in New York City. It has continued to be discussed, even as recently as the ABA Dispute Resolution Section Annual Conference during April, 2010, in San Francisco. The link to the full study is www.courtinfo.ca.gov/reference/documents/empprept.pdf. In the beginning of the study is an excellent Executive Summary.

For New Mexico, the study findings suggest significant benefits from using ADR, including:

- Lower cost per case : trial and motion practice decreases, disposition time decreases, courts' workload decreases, litigant satisfaction increases, and litigant costs decrease;

- Fewer required resources per case, allowing more cases to be handled;

- Reduced time each case spends in the system pipeline when early intervention with an ADR process is used;

- More available judges time for its highest and best use, i.e., allocating time for cases which require judicial attention and determination.

ADR offers a core resource for accommodating increasing demand upon shrinking court services during an economic crisis. Beyond merely offering ADR, efforts are needed to help self-represented litigants navigate this option as well.

UNBUNDLED LEGAL SERVICES AND ADR

Courts were originally designed to be decision-making facilities, not providers of legal advice or legal documents. Through adjudication in court or self-determination during ADR, decisions are made. However, the legal system continues to assume that the participants have legal literacy, which self-represented litigants do not have. The process also assumes that those in need of the courts' services have resources to hire attorneys for full representation, which is increasingly untrue.

Courts are beginning to offer Self-Help Centers and standardized forms, as well as printed and Internet information about the court to help self-represented litigants navigate the legal system. These are helpful. Nevertheless, the prohibition against the court giving legal advice limits this service to general information, and does not provide the necessary assistance to become even minimally legally literate in a particular case.

To address this need more effectively, attorneys are increasingly providing discrete, "unbundled" legal services to otherwise unrepresented litigants. This is an important development for self-represented litigants, because it allows them to obtain expert assistance at crucial junctures in their progress through the legal system.

Unbundled legal services could be wrapped around the ADR services that courts provide as well as those provided by private ADR services. Unbundled legal services could be offered at the key stages where legal literacy is pivotal to making an informed decision.

The complementary service sets of unbundled legal services and ADR can enhance how smoothly and efficiently a self-represented case travels through the court system to completion. Self-represented litigants would likely experience greater satisfaction with the system and an increased sense of justice. To be clear, court-connected ADR services would have to be ethically partnered with the private bar for this approach to be realized, because a court may not even appear to give legal advice.

AN UNBUNDLED MODEL FOR MEDIATION & SETTLEMENT FACILITATION

Mediation and settlement facilitation are examples of where unbundled services are needed. Neutrals cannot ethically give legal advice and render legal services, even if they are attorneys. The goals of mediators and settlement facilitators are to create an opportunity for decision-making, increase communication and dispute resolution skills, and address underlying concerns and relationships.

When a client engages an attorney for legal representation in a litigated dispute, the attorney becomes the guide, advisor, and active advocate to protect client rights and advance client interests. For the client, litigation is a guided decision-making process, led by the professional expertise and skills of the attorney. The attorney warrants that the legal services meet the standard of care.

The contrast between an attorney performing legal services and a neutral attorney providing a dispute resolution process is plainly illustrated by the example of court-connected ADR.

Self-represented litigants naturally ask a neutral, "What are my rights? How should I protect them? What should I do in court? How will my rights be enforced in the future?" These questions and more ask for legal advice.

For a self-represented litigant the ethical distinction between a neutral and an attorney may be incomprehensible as a practical matter. For the neutral, the boundary between being the process provider and being a legal advice provider is elusive. There is a high risk that the self-represented litigant will perceive the neutral as protecting his or her rights.

What happens if the neutral gives a response? If answers are given, is the neutral responsible for the legal adequacy of the response? Is a court-connected neutral or a court employee serving as a neutral, going to testify before the court that his or her "legal advice" met the standard of care? And, if the standard of care was not met, is the court liable?

A better approach is for attorneys to offer unbundled services to complement the ADR process. Unbundled legal services can mitigate the danger of self-represented litigants asking for and, in some cases receiving, legal advice and legal services from lawyers and non-lawyers acting as neutrals.

Attorneys, without entering an appearance in the case, could provide unbundled legal services to self-represented litigants, including:

- **Pre-ADR Advice Consultation.** Attorneys could help self-represented litigants understand:
    - What legal issues and rights are involved in their case;
    - What substantive law applies and what legal remedies are available;
    - What legal procedures will be required;
    - What decisions need to be made;
    - What information is needed to make those decisions;
    - What are realistic expectations;
    - What unforeseen consequences may exist;
    - What priorities make sense;
    - What is ADR and how does ADR differ from a court appearance;
    - What preparation is helpful for participating in ADR; and
    - What approaches during ADR are best suited to achieve a mutually acceptable resolution of the case?

- **Mid-ADR Consultation.** Attorneys could help self-represented litigants re-visit the above topics as needed**.**

- **Post-ADR Document Consultation.** Attorneys could help self-represented litigants understand:

- What legal documents and provisions are required to make their agreement legally effective and durable;
- What details and issues may have been missed;
- What options are available for self-drafting, such as self-help centers and resources; and
- What options exist for hiring an attorney to prepare the final documents?

Unbundled legal services focused on legal advice and legal documents would complement the focus of ADR and court services on decision-making. The traditional legal system could be updated for contemporary constituents.

UNBUNDLED RULES

The door to unbundled legal services is opened by Rule 16-102 NMRA of the Rules of Professional Conduct, as seen in the following excerpts:

Rule 16-102 NMRA of the Rules of Professional Conduct. Scope of representation and allocation of authority between client and lawyer (emphasis added)

A. Client's decisions. Subject to Paragraphs C and D of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 16-104 NMRA of the Rules of Professional Conduct, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

B. Representation not endorsement of client's views. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

C. Limitation of representation. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

The mechanics of limited representation in court actions are provided in the rule:

Rule 1-089 NMRA. Entry of appearance; withdrawal or substitution of attorneys (Emphasis added.)

A. Entry of appearance. When an attorney represents a party, the attorney shall file an entry of appearance, unless the court filed an order appointing the attorney. Filing a pleading pursuant to Rule 1-007 NMRA signed by an attorney constitutes an entry of appearance under this rule. . . . **If an attorney's appearance is limited pursuant to Paragraph C of Rule 16-102 NMRA, the attorney shall:**

(1) file an entry of appearance entitled "Limited Entry of Appearance" that identifies the nature of the limitation;
(2) note the limitation in the signature block of any paper the attorney files; and
(3) include in the signature block of any paper the attorney files an address where service may be made on the party.

B. Withdrawal by court order required. An attorney shall obtain a court order permitting withdrawal when:

(1) the attorney has appeared without limitation; or
(2) the attorney's appearance is limited pursuant to Paragraph A of this rule and the attorney has not completed the purpose of the representation. A copy of any order permitting an attorney to withdraw shall be filed with the clerk and served on all parties.

The court may place conditions on an order approving withdrawal as justice requires, such as directing the substitution of counsel with an accompanying written notice filed with the clerk and served on the parties or ordering the attorney withdrawing on behalf of a party to file with the clerk and serve on the parties a notice of an address where service may be made upon the party.

When an order permitting withdrawal will result in a party to an action not being represented by an attorney, the order shall reasonably advise that the unrepresented party shall have twenty (20) days to retain an attorney or be deemed to have entered an appearance pro se. The withdrawing attorney shall serve a copy of the order permitting withdrawal on the unrepresented party pursuant to Paragraph B of Rule 1-005 NMRA.

C. **Withdrawal upon completion of limited representation. An attorney whose appearance is limited as set forth in Paragraph A of this rule and who has completed the purpose of the limited representation need not obtain a court order permitting withdrawal. Such an attorney shall file with the clerk and serve on all parties a notice of withdrawal or substitution of counsel. If an attorney ceases to act without complying with the provisions of this rule, upon motion of any party or upon the court's own motion, the court may enter an order requiring any actions that the court deems necessary.**

D. Service upon attorneys of record. Attorneys of record shall continue to be subject to service for ninety (90) days after entry of final judgment. This rule does not preclude the earlier withdrawal of counsel as provided above.

E. Service upon responding party. In the event of further legal proceedings between the parties after the ninety (90) days have elapsed, the moving party shall effect service of process upon the responding party pursuant to Rule 1-004 NMRA.

SUGGESTIONS FROM THE BENCH

Judge Raymond Z. Ortiz, First Judicial District Court, has developed insights and initiatives to address the challenges of a burgeoning number of self-represented litigants who appear before him. These suggestions offer a foundation of useful innovations for adaption to the needs of individual districts.

Pre Trial Suggestions For Pro Se Cases

- *More frequent use of status and settlement conferences*

- *Use of unified Rule 16B Scheduling Orders*
  - *Unified orders include automatic referral to Settlement Conference*
  - *Early use of status and settlement conferences tends to diffuse:*
    - *unrealistic expectations and provide early reality check*
    - *tendency to use children as leverage*

- *Use Hearing Officers early and often by frequent use of minute orders*
  - *At least for child support, interim allocation and domestic violence issues*
  - *Objections to Hearing Officer report and recommendations may be resolved without oral argument where appropriate*
  - *Commentary to Rule 1-053.2 provides that "[w]hen appropriate and sufficient to resolve the objections, the court may rely upon the written presentations of the parties." (Citing National Excess Ins. Co. v Bingham, 106 NM 325, 327, 742 P.2d 537, 539 (Ct. App 1987).*

- *Increase use of attorneys & mediators for settlement facilitation (fee based or pro bono)*
  - *Use of settlement facilitation panel attorneys*
    - *Primarily for cases where pro se on one or both sides*
  - *Use of settlement facilitation panels consisting of mediators*
    - *Primarily where pro se on one side or attorneys on both sides*

- *Selective use (where both parties are pro se) of settlement facilitation for motions or OSCs, involving volunteer attorneys and/or mediators*
  - *Ideal is pair of attorneys for shuttle negotiations where necessary*
  - *Set no more than 4 cases per hour to permit litigants to have issue resolved by judge where necessary (e.g. serious DV cases) or where both parties do not agree to use service*

- *Create or expand courthouse assistance center*
  - *Forms with instructions readily available*

- *Expand information sessions for pro se litigants, making issuance of order for mediation mandatory requirement for case filing*

- *Expand clinics for increasingly common types of litigation (paternity, grandparent visitation)*

- *Expand clinics for enforcement matters (child support, domestic violence, custody/timesharing; MSA and Decree enforcement generally)*

- *Create or expand court website containing basic links to additional information*

- *Encourage members of local bar to offer pro bono services*
    - *Place cases with pro bono attorneys at top of trailing docket*
    - *Make basic family law practice training available for attorneys outside the field through video taped CLE presentations*
    - *Increase focus on retired or semi-retired attorneys*

- *Where overall attorney participation in settlement conferences is inadequate, consider assigning cases to attorneys on pro bono basis*

- *Make pro bono settlement facilitation a cost of doing business*

- *Assigning one to three pro bono cases/year to each attorney who has appeared in family court*

Suggestions For Pro Se Cases For Any Hearing

- *Brief explanation of process and format at outset where necessary*

- *Establish expectations for behavior and procedures*

- *Administer oath at outset to reinforce importance of candor*

- *Use of Evidence Rules 11-614 and 11-611 where necessary*
    - *Court may interrogate witnesses where evidence adduced by litigants is insufficient to fully and fairly resolve all issue(s). 11-614B and 11-611A*
    - *Court may call additional witnesses. 11-614A*
    - *If ultimate resolution not possible, use scheduled hearing for discovery and/or further pre-trial conference*

- *Brief explanation of ruling, including recitation of basic findings and conclusions as may be necessary to support ruling*

- *Extensive findings and conclusions only upon timely request of a party or in the discretion of the court. Rule 1-052*

- *Consider assigning attorneys to prepare orders even where they do not represent the prevailing party*
    - *Efficient use of resources*
    - *Inability of court to prepare orders in a timely fashion if docket is particularly heavy for an extensive period of time*

- *View unbundling as an additional pressure relief valve*
    - *Rather than as loss of ability to hold attorney(s) accountable*
    - *See 16-102 C and 16-303 E for current rules re: unbundling*
    - *Withdrawal orders provide protection to attorneys and notice to litigants*

- *Four fundamental rules to bear in mind for pro bono or unbundled cases*
    - *Limitations in scope must be fully informed and in writing*
    - *Limitations on representation must be reasonable in circumstances*
    - *Changes in scope of representation must be documented*
    - *Attorney must advise client of existence of related issue(s) even if beyond scope of representation and even if no inquiry is made*

TRAPS OF COMPETING PRESSURES

Procedural due process and substantive justice could be undermined by the increasing pressures on the courts. Society needs a fair and effective method for handling conflicts. An erosion of constitutional judicial functioning could weaken the foundation of our society. There is a delicate balance between anarchy and tyranny - courts are the fulcrum.

Unforeseen consequences and innocuous traps lie before us. Risks may not be discovered until afterwards. Major choices may come cloaked as small shifts in conduct. Diligent vigilance may not detect all of the dangers.

Courts will have to be thoughtful with what is known and what is knowable. Some traps are already emerging. Thin, grey boundaries for proper judicial conduct are already murky at best. Examples of emerging traps to avoid are below.

- **Avoid Being a Law School or an Inadvertent Advocate**

  A visit to a self-help center or an explanation from the bench is not a substitute for 3 years of law school or hiring a legal representative. The need for either or both by a self-represented litigant may be desperate. A well-intended desire to help may cause a judicial officer to cross a boundary into an inappropriate role.

- **Avoid Using a Dead Language**

  A natural response to the law school/advocate trap is to retreat into legal language and formalities. However, if a communication goal is to speak so that you will be understood by a self-represented litigant, a modified vocabulary will need to be developed.

- **Avoid Being a Conveyor Belt Justice Provider or a Social Worker**

  Judicial time is a precious commodity. Reducing a case to narrow issues and rendering a decision may lead to a quick disposition. However, given the nature of a domestic relations matter, settling the case may not resolve the conflict between the parties and they may return to court, using more judicial resources. A balance between social work and high volume, quick decision making must be developed.

- **Avoid Being Penny Wise and Pound Foolish**

  These traps reflect natural reactions to being overwhelmed yourself and being confronted by people with overwhelming needs. Cost cutting means reducing immediate expenses and understanding that certain expenditures prevent greater expenses in the future. A strategic, long term plan may be essential for good short term decision-making.

CONCLUSION

Opportunities exist in crisis. The existing legal system does not match the needs of many contemporary constituents. One single approach will not resolve the dilemma. A strategic approach with many components is required. The challenge is to proactively seek methods to use new services for advancing the justice system into a new era.

A survey of innovations tried around New Mexico is beyond the scope of this essay. Nevertheless, creative solutions, such as the LawLaPaloosa legal fair in Albuquerque and the Self-Represented Classes in Santa Fe, exist in many locations. Judges and court administrators, as well as members of the bar and the public, need to develop ways to share ideas and to pool resources.

Judges are in a legal environment of "first impression," as stated in the introduction. The courts, with judicial restraint and creativity, are vested with a unique opportunity to make a difference for the future of New Mexico. Hopefully, this manual will provide a resource for meeting these challenges.

This essay was written with generous and thoughtful commentary by Celia Ludi and Laura Bassein.

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Alternatives, Second Judicial District Court, since 2002, David Levin provides dispute resolution services, develops dispute resolution policy and programs, and serves as a dispute resolution educator, speaker, and trainer. He is Co-Chair of the State Bar Committee on Alternative Methods of Dispute Resolution. He has taught basic, family, magistrate court, and advanced mediation, as well as settlement facilitation, and has presented on workplace, healthcare, and business dispute resolution.

Ethics and Professionalism

By David L. Walther, Esq.

PREFACE

Lawyers and judges are bound by the New Mexico Rules of Professional Responsibility, found in NMRA Chapter 16, and judges are bound by the New Mexico Rules of Judicial Conduct, NMRA Chapter 21. Nevertheless, divorce and family practice is a unique area of law in many respects, and it sometimes calls upon principles that are not well addressed in these rules. The substance of family law practice does not come from statutes and judicial decisions; rather, it comes from the consideration of familial relationships that will continue long after a case is over -- relationships involving many parties who are not before the court. Family law practice is more involved with psychological, and at times, financial issues, than legal issues. The American Academy of Matrimonial Lawyers in its Bounds of Advocacy has stated:

> Family law disputes occur in a volatile and emotional atmosphere. It is difficult for matrimonial lawyers to represent the interests of their clients without addressing the interests of other family members. Unlike most other concluded disputes in which the parties may harbor substantial animosity without practical effect, the parties in matrimonial disputes may interact for years to come. In addition, many matrimonial lawyers believe themselves obligated to consider the best interests of children, regardless of which family member they represent.

The American Academy (AAML) is an association of lawyers which works for the improvement of divorce practice. The Bounds of Advocacy was developed by a committee of the Academy over a period of years. It can be found at www.aaml.org. I believe it is the only collection of ethical principles devoted to family law. It is considered binding on the members of the Academy. The author of this chapter was a member of the group formulating those principles. Some of the thoughts and language expressed there will be used in this chapter.

The Bounds state that a divorce lawyer must discuss with the client the personal and financial choices the client must make. She must be a problem-solving lawyer, and encourage an attitude of problem-solving in the client, to determine what is in the client's best interests, and what is the most effective means to achieve those results. The client's best interests include the well-being of children, family peace, and economic stability post-divorce.

This chapter will follow the Rules of Professional Responsibility as they have been incorporated in the New Mexico rules. Because at least half of divorce cases are *pro se*, the judge is often the only lawyer involved in the case; thus, these rules are important to the domestic branch judiciary as well. We will also refer to the Judicial Code at times.

As we will see, the application of those rules in the context of family law requires considerations which are not required in the practice of other areas of law.

COMPETENCE

NMRA 16-101 provides that a lawyer shall provide competent representation to a client, and that this competence requires the knowledge and skill reasonably necessary for the representation.

Family matters usually involve issues beyond those of the dissolution, alimony, custody and child support. Lawyers and judges have to be familiar with child development and mental and emotional disorders. This requires attending programs and seminars outside the usual areas of a lawyer's expertise. To properly fulfill the role as advisor and counselor, the lawyer must be able to discuss with the client the emotional impact of divorce not only on the client, but also on the client's children, as well as other members of the child's extended family. It is not unusual for divorcing persons to receive psychological treatment or counseling; lawyers must be familiar with the facilities providing such help in the local community and be ready to make such referrals. Fees for mental health professionals tend to be lower than legal fees, and the mental health professionals are better-trained than lawyers to deal with the non-legal issues presented by the client. The referral of a client to a competent mental health professional is often beneficial to the lawyer's psychological well-being, as well.

Lawyers must also be familiar with alternatives to litigation for resolving marital disputes, such as mediation, arbitration, or Collaborative Divorce. Problem-solving models are uniquely suited to family law matters in which, despite a divorce, parties will continue a long-term relationship long after the weddings of their grandchildren. People are usually more comfortable with solutions at which they have arrived through these models than with decisions imposed on them by a court.

SCOPE OF REPRESENTATION

NMRA 16-102 discusses both the various responsibilities between the lawyer and the client and provides for unbundled representation. Unbundled representation means that a lawyer may limit the scope of the representation if the limitation is reasonable and the client understands the limitation. Any limited engagement should be confirmed in writing. The rule also provides generally that the client determines the objectives to be achieved, and the lawyer determines the means to achieve these objectives, all-the-while consulting with the client. There are exceptions: the authority of a client over the determination of objectives is not absolute. Divorce provides wonderful opportunities for vindictiveness and revenge, all of which are usually counterproductive. A divorce lawyer should make every effort to lower the emotional level of the interaction between the parties and counsel, and should discourage the client from such vengeful aims and motives. Life is too short to be part of that kind of war, and the hotter tempers become, the more likely it is that the lawyers will be caught in the crossfire. A good mental health referral for such clients is usually helpful.

DILIGENCE AND PROMPTNESS

NMRA 16-103. The commentary to this provision discusses "zealous advocacy." This concept is particularly problematic in a domestic relations context. The commentary also discusses procrastination and delay. Procrastination and delay is fairly self-explanatory. One usually puts

on the back burner those things one doesn't like, or doesn't understand, or which tend to frustrate. My experience is that this is less of a problem within the bar than it is within the judiciary. It is very difficult for a lawyer to blow the whistle on a judge who has delayed making a decision. There should be a mechanism for making timely action self-executing. Some cases do take four or five months to decide. A year or more is less easy to defend.

Some lawyers believe the obligation of the "zealous advocate" is to "win." However, "wins" in family law cases are not as clear as criminal or other civil wins. A creative, counseling, problem-solving approach for people resolving issues and conflicts within the family will bring clients better to a broader life-long success than could be obtained by a momentary favorable decision by a court. Effective advocacy, therefore, works hard to determine the most effective means to achieve the client's best interests, the well-being of children, family peace, and economic stability.

ATTORNEY FEES

NMRA 16-105. This rule sets criteria for the determination of the reasonableness of attorneys' fees. In addition, in divorce cases, we have rules and statutes that determine the allocation of attorneys' fees. NMSA Section 40-4-7(A) and NMRA 1-127. Those rules and statutes provide for allocation of fees in divorce cases to ensure either party an efficient preparation and presentation of their case, and the standards for the allocation include disparity of the parties' resources, prior settlement offers, the total amount expended by each party, and success on the merits. There are many cases which have interpreted these rules. See *Grant v. Cumford*, 2005, 137 N.M. 485, 112 P.3d 1142; *Bursum v. Bursum*, 2004, 136 N.M. 584, 102 P.3d 651.

In a broader sense, however, the ethics rules, adopted not only from the American Bar Association Rules of Professional Responsibility, but coming from a long line of cases that preceded those rules, set the following criteria for determining the reasonableness of a fee: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service; the extent to which the lawyer's acceptance of the employment will preclude him from other employment; customary fees in the locality; the amount involved and the results obtained; time limits imposed by the client or circumstances; the length of the professional relationship with the client; and, lastly, the experience, reputation and ability of the lawyer performing the service.

In setting fees, however, courts invariably have trouble getting beyond the first of those criteria: the time involved. To some extent the courts will recognize the other criteria in determining the hourly rate to be awarded for the time involved. However, the courts are inclined to slavishly count the hours invested by the lawyer and make the award accordingly. Using time as the predominant factor in making a fee award has the unfortunate effect of putting a premium on the longevity of the case, which in family matters usually is inverse to the true value of the service to the client. A long, lengthy, highly-disputed divorce is certainly less advantageous to a client than a case that is resolved amenably, within a reasonable period of time. A fee award should be based on the extent the service has minimized the damage to the client and his family.

Contingent fees, as a general rule, are not allowed in domestic relations matters. See 4 *American Journal of Family Law. Fam. L.* 199, 1990. Rule 16-105(D) forbids "any fee in a

domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof." The concern is that to allow contingent fees would be to encourage divorce. Although divorce is certainly a problem-laden solution to a conflict-filled marriage, it is now generally accepted that some marriages should indeed be dissolved. Thus there is less rationale for discouraging divorce. Furthermore, some courts have found that a fee based in part on results obtained by a divorce, a criterion expressly countenanced by the rules themselves, will violate the prohibition against contingent fees. See *American Journal of Family Law*, Vol. 13, issue 1, 1999. Nonetheless, the principle remains in the black letter of the ethics rules. In practice many divorce fees are contingent in that the impecunious party may have no source of payment for representation, other than from the proceeds of the divorce award. The lawyer who can see no source of payment for his work is less inclined to take a case (unless it is on a pro bono basis). The comments to this rule provide that this prohibition does not preclude a contingent fee in connection with the recovery of post-judgment balances of support, alimony, or other financial provisions.

The payment of fees in a domestic relations case may be protected by a consensual lien in the fee agreement. However, since the creation of the lien is per se conflictive between a lawyer and a client, it is better for the lien-creating agreement to provide the client the opportunity to discuss the propriety of the lien with separate counsel. Under some circumstances, divorce lawyers put a charging lien on the proceeds awarded in a divorce case if the award has not yet been paid and has been achieved through the work of the lawyer. See Sowder v. Sowder, 127 N.M. 114 (1999).

CONFIDENTIALITY

NMRA 16-106 prohibits a lawyer from revealing information relating to the representation of a client without the client's consent. It is important to note this rule differs from the evidentiary rule on attorney-client privilege, which protects communications between the two. This rule of ethics prohibits revealing any information, no matter how acquired, even in the public domain, without consent of the client.

The interesting legal issues here arise when discussing the exceptions to the confidentiality rule. For example, NMRA 16-106(B) allows disclosure to the extent the lawyer believes it is reasonably necessary to prevent certain death or substantial bodily harm, or to prevent the client from committing a crime or fraud that will result in substantial financial injury to another in furtherance of which the client has used the lawyer's services, or to rectify that harm. For example, the lawyer has received information from a client that the client, or an associate of the client, has engaged in conduct abusive to a child, or that the client has a disease that threatens infection to others. Should these situations arise, it is better to carefully examine the rules and the cases.

Another exception is that the lawyer may reveal confidential information to secure legal advice about compliance with these rules. A lawyer may also reveal that information to establish a claim or defense in a controversy between the lawyer and the client. These controversies most commonly arise in malpractice cases or fee disputes.

CONFLICT OF INTEREST

NMRAs 16-107, 108, 109, 110, and 111 deal with conflicts of interest. We shall deal here with three categories.

1. Conventional conflicts. A lawyer may not take a case against a present or past client in a substantially related matter. Obviously, a lawyer may not take a domestic case against a present or former client, representing the spouse who is or had been adverse in the earlier matter. Thus if the lawyer has represented John against Mary in a domestic matter, the lawyer may not take a case representing Mary against John in a domestic matter. It is theoretically possible for a lawyer to represent a new spouse against John if that representation will not require violation of the confidentiality the lawyer still owes to John. But that is risky business, and probably not a good idea. However the lawyer could represent Mary against a new spouse, or for that matter, represent Mary's new spouse in a domestic matter involving her.

If the lawyer has prepared an estate plan for Mary, it is likely that the lawyer has come into confidential information with respect to her estate that would bar the lawyer from pursuing a domestic case against Mary that would involve financial issues. That would constitute a "substantially related matter." And if the lawyer has prepared an estate plan for both John and Mary, she is likely barred from representing either in a domestic case.

Interesting conflicts can develop in smaller communities. John may have a romantic relationship with Sally. The lawyer is probably barred from representing Sally's husband in a domestic matter involving her. The lawyer probably does not have a conflict in representing Sally in her divorce from her spouse, but even then conflicts can develop that would prevent the lawyer from representing either Sally or John properly. In that event, the lawyer would have to obtain written consent from both John and Sally waiving the conflict, or if the conflict is the type that cannot be waived, the lawyer would have to withdraw from representing either.

Supposing the lawyer does not know that John is involved with Sally, and the lawyer has agreed to represent Sally's husband. If that conflict is discovered subsequently, the lawyer may not continue with both representations unless she gets a written waiver from both clients. That is known as a "Thrust Upon" conflict. See Thrust Upon: Conflicts *American Journal of Family Law*, Vol 21 No 1 p 271. Spring 2007. Even then, the opportunity for conflict could arise, in which case, with the consent of both, the lawyer should continue with the client who would be most prejudiced by the withdrawal. If the consent of both cannot be obtained, the lawyer should withdraw from both representations.

A common situation arises where a lawyer has represented a family business and both husband and wife in their business affairs, and then seeks to represent one of the principals of the business against the other. There is authority that this would be conflictive, based on the principle that a lawyer for a business may not represent one of the owners against the other in a suit over ownership of the business. See Representation of Business and One Business Owner Against Another in Divorce, *American Journal of Family Law*, Vol. 21, No. 2, p.4-6, Summer 2007. It is very daunting for a lawyer representing the "out of business" spouse to be faced with an

adversary who has complete control over the history and financials of the business entity. It is common sense that such representation is unfair, and that the business lawyer should be equally accessible to both parties to the divorce. However, corporate counsel is often reluctant to let a good client out of the office. It is for that reason that boutique specialty domestic relations firms have developed. A firm that does nothing but family law is not in a position to hijack a business client, and corporate counsel can be comfortable in referring the domestic matter out of the office.

2. Common representation. It is commonly believed that a lawyer may never represent both a husband and wife in a divorce. See Bounds of Advocacy, Section 3.1. That practice certainly is subject to many risks. But it is believed that the revisions to the NMRAs of Professional Responsibility by the American Bar Association Ethics 2000 Commission, adopted for the most part in New Mexico have liberalized that practice. See Ethics 2000 Commission Update for Family Lawyers, *American Journal of Family Law*, Vol. 16, no.2, p.84, 2002.

Comments 26, 27, 28 and 29 to NMRA 16-107 are in point. A lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. In doing such, the lawyer must first determine the likelihood that disagreements will arise, and consider that if the common representation fails, the result can be prejudicial to one or both clients. If such failure occurs, the lawyer must withdraw from representing both clients. And in representing both clients, confidentiality does not attach with respect to either client.

3. Children. An often overlooked conflict is the conflict between parents and the children. See Conflict of Interest Between Child and Parent, 5 *American Journal Of Family Law* 51, 1991. Generally speaking, children are better served by an intact family, and the divorce itself may result in prejudice to them. In addition, if there is a dispute as to any child issue, the dispute itself is regarded as harmful to the child. There are many websites helpful on these issues. Some of them are Helpguide.org, or a **guide to divorce written for children** from KidsHealth.org.

Comment 12 to NMRA 16-102 provides: "Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary." It is well established that the lawyer for a fiduciary has an ethical obligation to the beneficiaries of the fiduciary. See, Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996) and Disciplinary Proceedings Against Noble, 100 Wash.2d 88, 101, 667 P.2d 608, 615 (1983). Furthermore, NMRA 16-114(B) provides that when a client of diminished capacity is at risk of harm, the lawyer may take protective action, including consulting with individuals with the ability to protect the client.

In family law, the welfare of each family member is interrelated. Parents owe a fiduciary duty to each other, as well as to their children, to serve their children's best interests. The lawyer for either party has an obligation to see that these duties of their clients are complied with.

RELATIONSHIPS BETWEEN COUNSEL

NMRA 16-401 provides that a lawyer may not make a false statement of material fact or law to a third person, or fail to disclose a material fact to a third person, unless such disclosure is prohibited by the confidentiality rule, NMRA 16-106.

That rule can be interpreted to require a high degree of candor and courtesy between counsel in family matters, where a high emotional level can engulf the lawyers. Combative conduct by divorce lawyers is inconsistent with the ability to be a problem solver.

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Judicial Ethics

By David L. Walther, Esq.

This chapter will deal primarily with several issues of judicial conduct particular to divorce and family law.

Demeanor

NMRA 21-300 (B)(4) requires a judge to be patient, dignified and courteous to litigants and lawyers. Most family law cases are resolved reasonably between the parties, either with mediation, or with or without counsel. Only 3% of divorce cases go to litigation. However, the divorce cases that do go to litigation are the most intractable cases. Further, as to those cases that go to litigation, it is said that half involve no lawyer, and half of the remaining cases have a lawyer on only one side. This combination of a high conflict divorce, together with no or only one lawyer to act as a buffer, can be very trying to the patience of the judge, especially a judge with little or no domestic relations experience in practice. Yet, these cases are also the ones that most need a patient judge, who can work with the litigants and the lawyers.

It is important for a divorce judge to avoid burnout. Burnout leads to rotation, the bane of divorce lawyers. Often no sooner does a judge learn the ropes of family court, than a new judge is rotated in to the position. Divorce lawyers have been told several principles to avoid burnout that may also benefit family court judges. First, realize that in some cases the situation of the parties can not be improved. Second, it is not your case; it is the clients' case. Then too, the professionals in the case are not miracle workers. They can only do what they can do. Finally, you can't enjoy what you do if you are constantly on the defense.

Ex Parte Communications

It is axiomatic that counsel may not engage in ex parte communications with the judge, and NMRA 21-300 (B)(7) so states. There are some exceptions contained in the rule that are self explanatory. Some are not so clear. A letter to the judge that has been copied to opposing counsel is not ex parte. However, anything transmitted to the court should be copied to opposing counsel in such fashion as to arrive simultaneously with delivery to the judge. If a letter is hand delivered to the judge, a copy should not be sent to opposing counsel by ordinary mail. The judge should exercise superintending control of this practice if there appear to be abuses.

A judge may obtain the advice of an expert on a question of law, or any other subject requiring an expert opinion. See NMRA 21-300 (B)(7)(b). However, the judge should notify the parties beforehand that such will be done, and give the parties a copy of the expert's report, so they have the opportunity to question the expert before the judge. A judge shouldn't get a side opinion from her personal accountant, or let a former law partner write an opinion, without prior notice to the parties, and an opportunity for contrary input from them. This rule does not prevent consultation with court personnel, or other judges, or prevent the judge from having such personnel ghost-draft opinions. Sometimes that is a very good idea.

Ex parte communications, with consent of the parties in a mediation setting, will be discussed in the section on mediation.

Prompt Decisions

NMRA 21-300 (B)(8) provides that a judge shall dispose of all judicial matters promptly, efficiently and fairly. Because of the interpersonal complexity of a divorce case, it can be difficult to come to a fair decision in a timely and efficient manner. But unlike wine, or cheese, or in fact, good judges, age does not improve a divorce case. It usually makes things much worse. There is no perfect decision in a divorce case, and a case that has gone into contested litigation is by definition problematic. Very few divorce cases go to an appellate court, so the decision of the trial judge usually brings finality. By and large, the parties, including their children, need a decision, to help provide direction as they go on to rebuild their often shattered lives. They can't do this in the shadow of an undecided case.

Collegial Decisions

NMRA 21 -300(B) (9) provides that all cases decided by an opinion of an appellate court shall be by a collegial opinion. (Emphasis supplied). There are no United States Supreme Court rulings on this issue, but the practice of that court of issuing fractured opinions is very frustrating. This is particularly problematic in domestic relations cases, where the parties, and the practicing bar, need hands-on direction in resolving their cases.

Mediation

NMRA 21-300(B)(7)(d) provides that a judge may, with the consent of the parties, confer with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Some judges have been reluctant to mediate cases that are pending before them, concerned that they will be influenced by the discovery of facts that would otherwise not be admissible in evidence. However, a divorce judge must bear in mind that the practice in divorce cases is generally one of disclosure, not discovery. Any facts stumbled upon in mediation that would be relevant to any of the issues in the case should have been disclosed.

A judge is uniquely able to settle divorce cases, because the judge can give that which has been called "a preview of coming attractions." That is, the judge can let the parties know what her view of the law may be as it would be applied to the facts as stated by counsel. This preliminary opinion is, of course, not binding on the judge if the case goes to full litigation. Judges often decide cases on that which they receive as offers of proof. Sometimes a thorough pretrial of the case can result in the same type of settlement. Such settlement methods are not only highly valuable and beneficial to the parties in a domestic relations matter, but they are also a remarkably effective way of reducing a case load.

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Contempt

By Honorable Mike Murphy, Third Judicial District, Division III

I. Contempt - An Introduction

1. Introduction:

The contempt power is the court's ultimate weapon. People v. Mckenzie, 194 Cal. Rptr. 462 (1983).

It is critical that the exercise of this contempt power never be used by a judge in a fit of anger, in an arbitrary manner, or for the judge's own sense of justice. In re Perry, 641 So. 2d 366 (1994).

But the contempt power's exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge....The judge must banish the slightest personal impulse to reprisal, but he should not bend backward, and injure the authority of the court by too great leniency. Cooke v. United States, 267 U.S. 517 (1925).

[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be persons of fortitude, able to thrive in a hardy climate. Craig v. Harney, 331 U.S. 367, 376, 67 S.Ct. 1249, 1225, 91L.Ed. 1546 (1947).

Trial courts...must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice. Brown v. United States, 356 U.S. 148, 153, 78 S.Ct. 622, 626, 2 L.Ed.2d 589 (1958).

A. CRIMINAL CONTEMPT

1. The purpose is to vindicate the authority and dignity of the court.

2. Generally, criminal contempt has no remedial purpose. (However, a reduction in sentence may be used to coerce certain behavior.)

B. CIVIL CONTEMPT

1. Is an equitable remedy.

2. Is intended to benefit a party and to coerce compliance with a court order.

C. DEFINITIONS

While the legislature cannot take away or abridge a constitutional court's inherent contempt power, contempt is generally defined by statute. While each state may vary in the precise definition of contempt, the concepts are generally the same. Oftentimes, the distinction between civil and criminal contempt is unclear. The same facts may give rise to both a criminal and civil contempt and justify the resorting to coercive **and** to punitive measures.
See, United States v. United Mine Workers, 330 U.S. 258, 302 (1947).

II CLASSIFICATION

A. Is of primary importance.

B. Determines the type of procedures to be followed by the Court.

C. The types of cases in which the contempt arises **does not** control the classification of the contempt. Gompers v. Bucks Stove & Range Co., 221 U.S. 448, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

D. Conduct can be the same for a civil or a criminal contempt, and both can be prosecuted together and the Court may use both remedies. Lindsay v. Martinez, 90 N.M. 737, 568 P.2d. 263 (Ct. App. 1977); State v. Our Chapel of Memories of New Mexico, Inc., 74 N.M. 201., 392 P.2d. 347 (1964).

E. DIRECT or INDIRECT

1. Determined by the place the contumacious conduct occurs.

2. Direct contempt occurs in the "presence" of the Court while the Court is in session and while Court is administering justice.

3. Indirect contempt is caused by disobedience of a Court Order; or by a publication tending to embarrass the Court; or by intimidation of a witness; jury tampering; or conduct in discovery proceedings.

4. Both criminal and civil contempt may be direct or indirect.

5. The main importance of the distinction between direct contempt and indirect contempt is to determine whether the Court may punish the contempt in a **summary** proceeding.

6. Hybrid contempts are acts that occur both in and out of the presence of the Court.

7. "Presence" of the Court defined.

   a. In some jurisdictions this means strictly within the ocular view of the judge;

   b. A majority of jurisdictions, including New Mexico, give a liberal interpretation of "presence," including ocular view, in courtroom, jury room, in the presence of the jury, or clerk's office. These jurisdictions look to the character and circumstances of the act, but all hold that the judge must have personal knowledge.

   c. Most cases have excluded outside corridors from definition of "presence."

   d. The touchstone is that the conduct tends to interrupt order and interfere with the conduct of business.

   e. Conduct can occur at an intermission or recess, such as abuse of the judge at recess because of the judge's official conduct with respect to the case on trial.

   f. Failure to appear is hybrid, but should always be treated as indirect unless there is no excuse articulated.

   g. Refusal to testify is direct, unless the judge does not have personal knowledge of the facts.

   h. Publications, radio, television and telegrams are indirect and require a jury trial. NMSA Sec. 34-1-4.

   i. Negative acts (failure to produce documents or children) are usually considered to be direct.

   j. Other direct contempt:

      1. Attempt to have *ex parte* communication with the judge on a substantive matter, or attempt to improperly influence a judge.

      2. Fighting in court.

      3. Threatening, assaulting, intimidating a judge, witness, court personnel or jurors, or members of the public in attendance.

      4. Stating that the court is ignorant or unfair.

5. Acting as a lawyer without a license, or not complying with *pro hac vice* rules.

6. Frauds on the court which induce actions.

k. Disobeying or resisting process is indirect contempt.

III DEFINING CONTEMPT

A. It is an act, or failure to act.

B. Actual loss or damage to a party does not have to be proved to establish contempt.

C. Willfulness or intent is necessary for criminal contempt in most jurisdictions, but not in New Mexico. Seven Rivers Farms, Inc. v. Reynolds 84 N.M. 789, 508 P.2d. 1276 (1973) [contrary to most other jurisdictions.]

D. Contempt existed at common law, but it can also be established by statute or rule.

E. The Court has inherent authority to punish criminal contempt but "inherent" does not mean absolute.

F. The legislature may regulate contempt proceedings, but may not abolish them.

G. Perjury may simultaneously be a crime and a criminal contempt.

H. A series of acts may constitute only one contempt (refusal to answer multiple questions regarding identical subject matter). Case v. State, 103 N.M. 501, 709 P.2d. 670 (1985).

I. Legislation adds nothing to the contempt powers of courts of ***general jurisdiction***.

J. Acts before hearing officers and referees can be direct contempt of the court to which the officer is attached.

K. Contempt can be committed in chambers while the case has been recessed.

L. Officers of a corporation can be punished for a corporation's contempt.

M. Non-parties can commit contempt only while acting in concert with a party, or as a privy of a party, or as part of a conspiracy.

N. ACTS

1. Assaults. Remember, a mentally incompetent person cannot commit criminal contempt.

2. Foul or threatening language: Witness to attorney to witness, attorney to attorney, attorney or witness to judge; all are contempt, including calling someone a liar.

3. Mere nasty talk during testimony is not contempt if not directed at anyone, and if not loud or boisterous as an attempt to disrupt the Court.

4. Vulgar and insulting writings may be contempt.

5. Failure to stand for the Court is not a contempt *per se* since rising is not fundamental to order (spectators), *contra* lawyers, who are officers of the court.

6. Violation of the dress code requires adequate warning. Hairstyle, make-up, tattoos, piercing, etc., can never be the basis for contempt.

7. Intoxication alone is not a basis for contempt, except for attorneys who are officers of the court.

8. Obstruction of process by tricking a process server, hiding the object of a search (with warrant) or substituting a third party for a prisoner or litigant is contempt.

9. Improper interference with property that is in the custody of the law may be contempt.

10. Interference with a receiver's rights may be contempt.

11. Conduct by or involving prisoners outside of the courtroom is usually not contempt because the judge is not in control.

12. Conduct that is not direct speech, e.g., laughter, tone of voice – requires substantial warning before it can be considered contempt.

O. ATTORNEY'S CONDUCT

1. Incompetence is not contempt.

2. Knowingly filing false documents is contempt.

3. Scandalous language included in documents is contempt if intended to embarrass or intimidate, or harass.

4. Refusal to serve or seeking to withdraw by counsel may be contempt.

5. Sarcastic comments to the court, not intended to impede the court, are not contempt.

6. Out-of-court comments about a judge who recused from the case accusing him of conducting a show proceeding, violation of judicial code of conduct, political corruption, while uncivil and discourteous are not contempt if the statements had no effect on the pending trial.

7. Charging a judge with bias in a case may be contempt unless done carefully.

8. Making a record regarding the judge's facial expressions is not contempt unless attorney intimates that the judge did it purposefully.

9. Absence from court is contempt unless attorney had actual lack of knowledge or has a valid excuse (reasonable man standard).

10. Making repeated objections may be contemptuous, but the judge must balance the chilling effect on zealous advocacy.

11. When compelling an expert to testify to his expert opinion without pay. The jurisdictions are split over whether refusal to testify is contempt. There are no direct New Mexico cases.

12. Refusal to testify in a criminal proceeding to avoid self-incrimination is not contempt, but a witness must give judge enough facts to show the likelihood of self-incrimination.

13. Refusal to testify will be contempt if witness has been given actual immunity [See Apodaca vs. Viramontes, 53 N.M. 514 (1949) dealing with grant of immunity by District Attorney with no authority].

14. Fear of reprisal alone is not a defense to contempt for failure to testify.

P. CONDUCT INVOLVING JURIES

1. Eavesdropping on the jury is contempt.

2. Attempt to influence jurors is contempt.

3. Violation of judge's admonition by a juror is contempt.

4. Breaking sequestration by jurors is contempt.

5. Misconduct as a juror is contempt.

Q. PUBLICATIONS. Publications may be contemptuous even if there is not a pending case to which the publications relate.

1. Shield Law (since 1973) NM Stat. Ann. §38-6-7, no disclosure is necessary unless judge explains necessity in writing. Finding of contempt is immediately appealable to Supreme Court and is handled as an extraordinary writ.

2. Taking photographs contrary to Order is contempt.

IV EXAMPLES

A. LATE ATTORNEY. Absence is in the presence of the Court, but the explanation or excuse is not before the Court so these cases should not be handled summarily.

B. REFUSAL TO TESTIFY. Refusal to testify is usually hybrid. It may be civil or criminal, but refusal after immunity has been granted is criminal.

C. INSULTING JUDGE OR COURT PERSONNEL. Insulting a judge or court personnel can be criminal if in open court, and if it goes beyond mere affront and obstructs proceedings. But, if the words are so offensive and unnecessary that their very utterance creates delay, it may be obstructive *per se*. But, see RE Little 30 L. Ed.2d 708, where no contempt was found where lawyer in summation said the Court was biased and prejudicial but there was no boisterous tone or disruption.

D. VIOLATION OF INJUNCTION. Violation of injunction can be either criminal or civil – the Court must balance the parties' interest in determining the character.

V PROCEDURE

A. DIRECT - STEPS

1. Act or omission to act

2. Presence

3. Warning

4. Repeated Acts

5. Cite

6. Recusal (not always), but watch for a rule change

7. Explanation to contemnor

8. Judgment - Sentence

9. Stay (sometimes)

B. INDIRECT AND HYBRID - STEPS

1. Act or failure to act

2. Order to Show Cause

3. Recusal (sometimes)

4. Hearing

5. Judgment - Sentence

6. Stay (sometimes)

7. Appeal

C. CIVIL - STEPS

1. Act or failure to act

2. Application for contempt citation or Order to Show Cause

3. Hearing

4. Judgment

5. Purge (sometimes)

6. Stay (rare)

7. Appeal

D. TRIAL DISRUPTION - SUMMARY SANCTIONS AVAILABLE CHECKLIST

1. Do nothing

2. Suspension of proceedings

3. Censure or reprimand or incarceration or fine

   a) On record or not
   b) With notice
   c) In chambers

4. Proceedings against attorney

   a) Bar association/professional misconduct complaint
   b) Contempt
   c) Incarceration or fine

5. Removal from courtroom

6. Bind and gag disruptive defendant

7. Physical restraint

E. SOURCE OF CONTEMPT POWER

1. Inherent in a court of general jurisdiction. Split of jurisdictions as to whether it is inherent in courts of limited jurisdiction. (N.M.: the source is statutory)

2. Rule of the Supreme Court

   a) SCRA 6-111

   b) SCRA 7-111

   c) SCRA 8-110

   d) SCRA 1-037

   e) SCRA 1-045

3. Legislature

a) NM Stat. Ann. §34-1-2

b) NM Stat. Ann. §34-1-4

c) NM Stat. Ann. §34-1-5

d) NM Stat. Ann. §35-3-9

e) NM Stat. Ann. §44-3-10

4. Constitutional

a) NM Const., Art. VI, §21

5. Advisory Material

ABA Standards of Criminal Justice
6-3.1 *Special rules for order in the courtroom*.

The trial judge, either before a criminal trial or at its beginning, should prescribe and make known the ground rules relating to conduct which the parties, the prosecutor, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the code of criminal procedure or in the published rules of court.

6-3.1 *Judge's use of powers to maintain order*.

The trial judge has the obligation to use his or her judicial power to prevent distractions from and disruptions of the trial. If the judge determines to impose sanctions for misconduct affecting the trial, the judge should ordinarily impose the least severe sanction appropriate to correct the abuse and to deter repetition. In weighing the severity of the possible sanction for disruptive courtroom conduct to be applied during the trial, the judge should consider the risk of further disruption, delay or prejudice that might result from the character of the sanction or the time of its imposition.

6-3.4 *Judge's responsibility for self-restraint.*

The trial judge should be exemplar of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should suppress personal predilections and control his or her temper and emotions. The judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or undermine judicial authority in the courtroom. When it becomes necessary during the trial for

the judge to comment upon the conduct of witnesses, spectators, counsel, or other, or upon the testimony, the judge should do so in a firm, dignified, and restrained manner, avoiding repartee, limiting his or her comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

F. SUMMARY PROCEEDINGS

1. Purpose and Basis

    a. The court must take **immediate** action to maintain the dignity and authority of the Court. See *Ex Parte* Terry, 32 L. Ed. 405 (1888).

2. There are two independent justifications for imposition of summary punishment, and both must be present together.

    a. Immediate punishment **without delay** is necessary to prevent and punish serious disruptions of the Court business and to vindicate the Court's dignity and authority. The judge cannot wait until a later time (even until a recess) to punish.

    b. Because the contemptuous acts occur in the judge's sight and hearing, a hearing or trial may not be necessary to adjudicate the facts, unless the contemplated punishment requires it.

3. The biggest problem in dealing with contempt is defining the procedural and substantive limits of the contempt power.

4. A Judge's difficulty is distinguishing a personal affront from an obstruction of the integrity or continuity of a trial, or the authority of the Court in the heart of the moment is often problematic.

5. Conduct which tends to bring the authority and administration of the law into disrespect or disregard, interferes with or prejudices parties during litigation, or otherwise tends to impede, embarrass or obstruct the Court in the discharge of its duties, is direct criminal contempt.

6. Unlike ordinary criminal proceedings where prosecution is initiated by the executive branch and crimes are delineated by the legislative branch, the normal checks and balances are not in place in summary contempt proceedings. Thus, the potential for abuse is increased. The judiciary is hesitant to limit its own prerogatives. The legislature may attempt to control contempt, and has in some cases, but separation of power considerations come into play, and also, since the legislature has its own contempt power it is not anxious to see such control

reflected back, and perhaps magnified, when courts look to the constitutional limits of legislative contempt.

G. SUMMARY PROCEEDINGS, PROBLEMS AND CONSIDERATIONS

1. No independent fact finder.

2. No right to counsel.

3. No notice or sufficient time to prepare a defense, talk to witnesses, research the law, or to call the office or home.

4. The only rights are the presumption of innocence, right to proof beyond a reasonable doubt, and the right of some sort of allocution.

5. Actual necessity.

a. Required to overcome due process rights. Unless there is great necessity to summarily punish, contemnor's right to notice and to be heard should be honored. U.S. vs. Harris, 15 L. Ed. 2d 240 (1965).

1) Failure to appear by lawyer cannot be handled summarily because the lawyer was not before the court, therefore the court cannot know if the action was contumacious. Notice and hearing is required to see if there is a valid excuse. State vs. Diamond, 94 N.M. 118 (1980).

2) Failure of a witness to answer can be punished summarily. State vs. Sanchez, 89 N.M. 673 (1976). But if the court proceeds summarily it must sentence right then; if it does not, it may violate contemnor's due process rights. Delay diminishes the necessity which is an independent element necessary for imposition of summary punishment State vs. Wollen, 85 N.M. 764 (1973).

3) Summary proceedings are **never** appropriate for indirect contempt.

b. The legislature cannot abridge the summary contempt power of the court. State *ex rel.* Bliss vs. Greenwood, 63 N.M. 156 (1957). Due process is not violated *per se* in a summary proceeding. Groppi vs. Leslie, 404 U.S. 496, 92 S.Ct.582, 30 L.Ed. 2d 632 (1972).

VI NON-SUMMARY PROCEEDINGS

A. Criminal Contempt

1. Notice and opportunity to be heard.

2. Must be charged by sworn affidavit, information or verified application. State vs. Clark, 56 N.M. 123 (1952). Court or District Attorney may institute contempt resulting from not filing pleadings may be by unsworn Order to Show Cause. Matter of Avallone, 91 N.M. 777 (1978).

3. Personal service on the contemnor is required. Momsen vs. Placer, 41 N.M. 525 (1937).

4. Right against self-incrimination applies.

5. Right to jury trial exists.

   a. Unless not in jeopardy of fine exceeding $1,000.00 or more than six (6) months incarceration. Seven Rivers v. Reynolds, *supra.*

6. Right to counsel (even if indigent). Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d. 383 (1979) [Fine only - no attorney], [Civil contempt - ought to have a lawyer if practical]

7. Right to proof beyond a reasonable doubt.

8. Generally, no right to appointed counsel.

B. CIVIL

1. Notice and opportunity to be heard. In re Fullen, 17 N.M. 394 (1913), also see Fullen vs. Fullen, 21 N.M. 212 (1915).

2. Notice to contemnor's attorney is sufficient.

3. No summary proceeding.

4. No right to jury trial (except under N.M. Stat. Ann. §34-1-4).

5. Can not be used to coerce payment of debts that are subject to discharge in bankruptcy.

6. The aggrieved party must initiate proceedings.

7. A sworn affidavit or pleading required.

C. HEARINGS

1. Contemnor has right to call witnesses.

2. Jury trial sometimes.

3. Rules of evidence apply, except in summary contempt proceedings. See NMRA 11-1101B.

4. Court may take judicial notice of other proceedings.

5. Burden of proof.

a. Criminal - beyond reasonable doubt.

b. Civil - preponderance of evidence.

6. Written contempt order is required as well as written commitment. Both must include sufficient facts.

7 All criminal contempts are appealable, including summary contempts. State v. Watson, 82 N.M. 769, 487 P.2d. 197 (Ct. App. 1971).

VII. INDEPENDENT FACT FINDER

A. DIFFERENT JUDGE - Mayberry vs. Pennsylvania, 400 U.S. 455 (1971). If judge is so personally embroiled in the controversy that she can no longer fairly rule in the contempt charge, she must recuse herself.

B. This was New Mexico rule until Wollen vs. State, 86 N.M. 1 (1974), which held *contra.* Judge Riordan was the trial judge. The idea was to remove the need to analyze personal "embroilment" (the California position). But in 1983, Judge Riordan is Justice Riordan, writes for the majority, with Justice Sosa in dissent (State vs. Stout, 100 N.M. 472 (1983), and Wollen is reversed). These cases nicely illustrate the prevailing difference of opinion. *Watch for rule change*.

C. Query: Why take the chance of abusing rights? If necessity does not require summary punishment, and you're aggravated, recuse yourself and let someone else conduct the hearing. You may be happier as a witness. (Life is too short, unless you're a one-judge-district).

VIII PROCEDURE

A. Give **many** warnings.

B. Failure to obey an erroneous order is still contempt.

C. Failure to obey a void order is not contempt.

D. The order must be sufficiently detailed to put one on notice.

E. Inability to comply with order is a defense (burden of proof on contemnor).

F. Reliance on advice of counsel is not a defense.

G. Witness intimidation, perjury and jury tampering are punishable as contempt.

H. Trying to defeat venue is punishable as contempt.

I. With publications, there must be a balancing of interests – clear and present danger. State vs. Morris, 75 N.M. 475 (1965).

J. Money judgments generally are not enforceable by contempt (*contra* divorce support matters, but there must be an ability to pay). Sosaya v. Sosaya, 89 N.M. 769, 558 P.2d. 38 (1977). The district court does not have the power to hold a person in contempt for failure to pay debts incurred during marriage as ordered in the marital settlement agreement/final decree, if the debt is still subject to discharge in a bankruptcy proceeding.

K. Mandamus - Judges and clerks can be held in contempt.

L. Order need not be written, but

1. Actual knowledge is required.

2. Must have actual notice.

M. Warnings are required, but experience is enough in some circumstances (substitution for criminal defendant at counsel table is example). Warning must be adequate (reasonable man standard).

N. In summary proceedings, it is acceptable to cite and convict and then delay **execution** of the sentence until the end of the proceeding.

O. Excessive and cruel punishment concerns.

P. Court may award aggrieved party damages, costs and attorney fees in civil contempt only.

Q. Rules of evidence apply to all contempt proceedings except summary proceedings (SCRA 11-1101B).

IX MISCELLANEOUS

A. Securing a TRO in another court or district to block the implementation of an existing order is an indirect criminal contempt. Norton v. Reese, 76 N.M. 602, 417 P.2d. 205 (1966).

B. Removal of a child from the state or locale to frustrate a custody order is an indirect criminal contempt. State *ex rel* Neumann v. Keller, 36 N.M. 81, 8 P.2d. 786 (1932).

THIRD JUDICIAL DISTRICT COURT
COUNTY OF DONA ANA
STATE OF NEW MEXICO

IN RE THE MATTER OF **NO. CR-2010-1000**

THE CONTEMPT OF **Judge Snoozer**

MICHAEL T. MURPHY,
Contemnor.

ORDER AND JUDGMENT OF CONTEMPT

1. On July 25, 2010 at the Third Judicial District Courtroom Division III, in the immediate view and presence of the court, Contemnor said the following:

"We'll do it your way because you're the Judge, not because you're right. Law school for you was like a vaccination that didn't take."

2. The Court heard and considered Contemnor's explanation and/or excuse for the said conduct or offered the Contemnor an opportunity to present explanation or excuse.

3. After due consideration the Court finds, beyond reasonable doubt, that Contemnor is guilty of direct criminal contempt of Court.

IT IS HEREBY THE ORDER OF THE COURT THAT:

A. Contemnor is sentenced to:

1. 〔 〕 Pay a fine of $_____ (not to exceed $1,000.00) and/or

2. 〔 〕 Serve _____ days (not to exceed six (6) months) in the Dona Ana County Detention Center. Commencing on the _____ day of _____, 2010.

3. 〔 〕 Perform _____ hours of community service as follows: _____

_____

_____

_____.

B. Execution of the sentence of the Court:

1. 〔 〕 Is stayed until _____, 20__ at_____ o'clock __.m.

2. 〔 〕 Is not stayed and Contemnor is ordered to pay the fine and/or is remanded to custody forthwith and/or shall provide the Court with a community service plan and schedule within _____ days.

C. That the clerk of the Court is directed to file this Order and enter the contempt upon the docket of the Court, and to deliver to Contemnor a copy of this Order.

_____
DISTRICT JUDGE

THIRD JUDICIAL DISTRICT COURT
COUNTY OF DONA ANA
STATE OF NEW MEXICO

IN RE THE MATTER OF

No. CR-2010-1000

THE CONTEMPT OF

Judge Snoozer

MICHAEL T. MURPHY,
Contemnor.

ORDER TO SHOW CAUSE IN RE CONTEMPT

TO: MICHAEL T. MURPHY

YOU ARE HEREBY ORDERED to appear before the above-named Court, in Division ___ thereof at the Dona Ana County Judicial Complex, Las Cruces, New Mexico, before the Hon. Ima Snoozer on the _____ day of _____, 2010 at _____ o'clock ___.m., then and there to show cause, if any you have, why you should not be adjudged guilty of indirect civil contempt of Court and punished accordingly, for the acts of willful disobedience of the

Order of this Court dated _____ (or Subpoena, etc.), as provided by law and as more fully described in the (Affidavit) or (Application) or (Motion) of (person). Said (Application) is attached hereto, and by this reference incorporated herein as though fully set forth at length, and a copy of said (Application) shall be served upon you with a copy of this Order.

_____
DISTRICT JUDGE

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Marriage

By Honorable Christina P. Argyres, Metropolitan Court, Bernalillo County

Under current New Mexico law, what is a marriage? In New Mexico, marriage is the creation of the status of husband and wife. It is a civil contract which requires consent of the parties. NMSA Sec. 40-1-1. Husband and wife contract to each other the obligations of mutual respect, fidelity and support. NMSA Sec. 40-2-1. All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state. NMSA Sec. 40-1-4.

WHO CAN MARRY

A. LIMITATIONS ON WHO MAY MARRY

1. Age

Most states require a minimum age before individuals can consent to be married. In New Mexico, the law states that persons under eighteen (18) years can not marry unless they obtain parental consent. Persons under sixteen (16) can not marry with or without parental consent, unless authorized by the children's or family court division of the district court. Marriage under the age of sixteen (16) is only authorized in settlement of proceedings to compel support and establish parentage, or where the female is under the age of consent and is pregnant, if the marriage would not be incestuous. NMSA Sec. 40-1-6.

2. Consanguinity

Marriages between people who are closely related are prohibited. This includes all marriages between relations and children including grandfathers and grandchildren of all degrees, between half brothers and sisters, as also of full blood; between uncles and nieces, aunts and nephews. All such purported marriages are defined as incestuous and void. NMSA Sec. 40-1-7.

3. Sex of Parties

New Mexico does not recognize same sex marriages. The word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Under the Defense of Marriage Act (DOMA), no State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a

relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. 28 USC Sec. 1738 (C).

4. Mental Capacity

Because marriage is a contract, each party must possess the ability to contract and voluntarily agree to do so.

5. Unmarried Status

A person must be single or legally divorced from a former spouse in order to validly marry in New Mexico.

B. PROCEDURAL REQUIREMENTS

1. Marriage License. NMSA Sec. 40-1-10

The County Clerk's Office is the only agency permitted to issue marriage licenses. All marriage license applications and licenses are kept by county clerks. The cost of a marriage license is $25, which must be paid in cash. Although applicants need not be New Mexico residents, the following limitations apply:

- Applicants for a marriage license must be one female and one male.
- Both applicants need to be present at signing of the license.
- Both must be eligible to apply.
- Both must present photo identification or birth certificate.
- Both must present proof of social security number.
- A fee of $25 cash only must be paid.
- For any applicant 16 or 17 years of age, parental consent is required.
- Any applicant under 16 years of age must present a court order authorizing marriage.
- Marriage licenses are issued and valid immediately upon all required parties' signature at solemnization.
- Marriage licenses do not expire.
- Blood tests are not required.
- The marriage license must be returned within ninety (90) days from the day of solemnization.

2. Solemnization. NMSA Sec. 40-1-14

Marriages originating in New Mexico must be solemnized: a ceremonial or civic witnessing of the expression of the contract made.

To legally solemnize their marriage, a couple must present their marriage license for signature by the person performing the ceremony. Matrimony can be solemnized by an ordained clergy, ordained minister, or any priest of any church or religious denomination or authorized representative of a federally recognized Indian tribe, without regard to the sect to which s/he may belong or the rites and customs s/he may practice. NMSA Sec. 40-1-2(A).

Judges, justices and magistrates of any of the courts established by the constitution of New Mexico, United States constitution, laws of the state or laws of the United States are civil magistrates having authority to solemnize contracts of matrimony. NMSA Sec. 40-1-2(B Civil magistrates solemnizing contracts of matrimony shall require no fee. NMSA Sec. 40-1-2(C).

In New Mexico, the sole requirement of the ceremony sufficient to solemnize is a declaration of intent. The declaration of intent is a verbal acknowledgement of the couple's intent to wed. This is the, "Do you take…? I do!" portion of a typical ceremony.

After the solemnization is performed, the license and marriage certificate must be returned to the County Clerk's office where the license was issued within 90 days to be recorded. NMSA Sec. 40-1-10.

It is lawful for any religious society or federally recognized Indian tribe to celebrate marriage conforming with its rites and customs, and the secretary of the society or the person presiding over the society or federally recognized Indian tribe shall make and transmit a transcript to the county clerk certifying the marriages solemnized. NMSA Sec. 40-1-3.

Community Property Law

By The Honorable Jim T. Martin, Third Judicial District

SUMMARY OF NEW MEXICO COMMUNITY PROPERTY LAW

In 1907 the legislative assembly of the Territory of New Mexico established New Mexico as a community property jurisdiction. The concept of community property has its origins in Spain as a protection for rich women losing everything to profligate husbands. The territorial legislature adopted the principle that property acquired during the marriage presumably belongs to the community. This presumption is based upon the theory that during the marriage each spouse is a member of the community, equally contributing his or her industry to its prosperity and possessing an equal right to the successes or failures of the community until dissolution.[1]

A. HOW PROPERTY IS HELD

In 1972, New Mexico's Constitution was amended to adopt the Equal Rights Amendment. In order to implement this amendment, the legislature changed and clarified how spouses obtain and own property.[2] Spouses may now hold property as joint tenants, tenants in common, or as community property.[3] Property acquired by either or both spouses during the marriage is presumed to be held as community property and this includes the rents, issues and profits thereof.[4]

1. Community Property

At the time a couple gets married, each owns his or her separate property. After marriage, any property that either spouse acquires from community income is presumptively community property. Some couples have the mistaken belief that if they buy an asset, such as a car, title the asset in their name and then make the payments using their salary, that the asset somehow does not belong to the community. Counsel should be quick to disillusion their clients about the effect of title on the presumed community nature of an asset.

a) Co-mingling

A difficult problem faced by counsel and the courts is explaining the concept of co-mingling to the lay person. Co-mingling occurs when the parties' separate assets are mixed together in such a fashion as to lose their separate character and thereby become transmuted into community property. Co-mingling may be symbolized this way: each party brings to the marriage several eggs, representing separate property. Those eggs are then broken into a mixing bowl and vigorously whipped together. After whipping, the comingled eggs are no longer easily

[1] *Strong v. Eakin*, 11 N.M. 107, 115 (NM S. Ct. 1901)
[2] Community Property Act of 1973, see also *Swink v. Fingado*, 115 N.M. 275 (1993) (Discussing legislative history of community property law in New Mexico).
[3] NMSA §40-3-2
[4] NMSA §40-3-8

identifiable as individual assets, and the division results in each party's getting an equal amount of the otherwise indistinguishable assets.

b) Tracing

In an effort to rebut co-mingling, counsel often engage in the practice of "tracing" to identify the specific separate assets. Tracing can be applied to unique assets such as works of art or fungible assets such as money, so long as the challenging party has maintained accurate records. An often used example is where one party deposits $1000 of separate money into a savings account and the other party deposits $5000 into the same joint account. No other deposits or withdrawals occur during the course of the marriage. Even though the money appears co-mingled, tracing illustrates that the first party is entitled to the $1000 deposition plus 1/6 of the earned interest and the second party is entitled to the $5000 plus 5/6 of the earned interest.[5]

Co-mingling and tracing become more difficult when the original asset is disposed of and another asset is acquired in its place. For example, one spouse owns a separate vehicle at the time of the marriage which is soon thereafter sold and the proceeds are used as a down payment for another vehicle. The down payment is easily traceable. Once community funds are used to make the ongoing debt payment and repairs for the new vehicle, however, the ability to trace becomes more difficult because of the mathematical challenge in depreciating the down payment over the life of the vehicle. At some point, the down payment is no longer distinguishable from the community payments and it becomes transmuted into community property.

Going back to the savings account illustration, if, after the initial deposits were made, the parties continued to make deposits and withdrawals from the account, at some point the initial deposits will no longer be traceable to their separate origin. This is true unless the challenging party can demonstrate that the deposits are attributable to separate income or made from other separate assets. Furthermore, the challenging party must demonstrate that the withdrawals were used for the benefit of the community and not to acquire additional separate assets.

A different, useful food analogy would be to identify one party bringing a cup of vinegar and the other party a cup of oil. The oil and vinegar can be poured together and mixed vigorously. However, given enough time, the oil and vinegar will separate into two easily identifiable solutions for division.

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[5] *Dorbin v. Dorbin*, 105 N.M. 263 (N.M. Ct. App. 1986) In *Dorbin* the court articulated the following four-step formula:

1. The value of the separate asset or the separate portion of an asset at the date of marriage is determined.
2. The pre-marriage value is treated as though it had been a well secured, long-term investment, and earned such interest as a well-secured long term investment would have earned if added to the separate pre-marriage value. This amount represents the value of the separate property.
3. The fair market value of the asset is determined as of the date of divorce.
4. The fair market value of the asset as of the date of divorce is apportioned, with the separate property owner taking an amount equal to the value of the separate property calculated at step 2 (above), while the community receives the balance of the fair market value.

2. Quasi Community Property

If both spouses are domiciliaries of New Mexico at the time of dissolution of marriage or legal separation and they acquired property in another jurisdiction that does not recognize New Mexico's community property rules, New Mexico law treats such property as quasi-community property and divides it in the same manner as if it were community property.[6] Quasi-community property is all real or personal property, wherever situated, if it is acquired in either of the following ways:

(1) by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition; or

(2) in exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.[7]

3. Separate Property

Separate property can be acquired by either spouse in one of four ways: 1) the property is acquired by either spouse before marriage or after the entry of decree of dissolution of marriage or legal separation; 2) a judgment or decree of any court having jurisdiction designates the property as separate; 3) the property is acquired by either spouse by gift, bequest, device or descent; or 4) property is designated as separate by written agreement between the spouses.[8] If either spouse claims that property subject to division is not community property, the burden falls upon that spouse to persuade the court and rebut the presumption of community property by a preponderance of the evidence.[9]

4. Date of Separation vs. Date of Divorce

Another common misconception among lay people and attorneys is that property or debts accumulated after the date of separation do not belong to the community. For example, a couple gets married and sometime thereafter become separated, but through oversight or lack of money, they never file for divorce. Many years later one spouse wishes to remarry, files a Petition for divorce, and is rudely awakened to discover that all of the property he or she accumulated after separation still belongs to the community. This shocking discovery comes with the sobering news that the other spouse is entitled to a one-half interest in these assets and that both spouses are still responsible for one-half of the other spouse's debts. The only exception to this rule is where the parties have received a decree of legal separation or an interim order dividing income and debts, but such orders may not be entered *nunc pro tunc*. Consequently, it is a good practice to advise both spouses that everything that they have accumulated from the day they said "I do" until the date of the final divorce must be disclosed, identified, and separated.

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[6] NMSA §40-3-8 C
[7] Id.
[8] Id.
[9] *Zemke v. Zemke*, 116 N.M. 114 (N.M. Ct. App. 1993)

5. Title to Property Does Not Control Ownership

As stated earlier, title to property does not control the character of the property.[10] However, title can be useful as a factor in determining the intent of the parties at the time the asset is acquired.[11] For example, spouse A owns a separate piece of real property acquired before the marriage. After marriage, spouse A signs a deed transferring the property to both parties. This transfer is compelling evidence that spouse A intended to make a gift of the separate property to the community and grant a 1/2 interest in the property to spouse B. In reverse, if spouse A and B own community property and both sign a deed transferring it to spouse A as sole and separate property, the transfer is compelling evidence of the parties' intent to create a separate property ownership interest for spouse A only. Proof of transmutation is by clear and convincing evidence.[12]

Sometimes spouses unintentionally change title to property without the intent to change its separate or community property character. This often occurs when the parties take out a loan using real property as collateral. For example, spouse A owns a separate piece of real property acquired before the marriage and during the marriage the parties take out a loan. During the preparation of the loan documents, the bank or the title company will often require the separate property owner to sign a deed transferring the property to both parties to use it as collateral for the loan. In this situation, there is insufficient evidence to show that spouse A intended to gift a half community property interest to spouse B. All that was intended was to obtain a loan using both parties' income to establish sufficient credit.[13]

Sometimes this transaction happens in reverse: the community owns a piece of real property but only one spouse is creditworthy enough to obtain a loan. In this situation, often times the bank or title company will require both parties to sign a deed transferring the community property to spouse A only, and thereafter, the mortgage is filed against the property for the loan. Absent additional evidence, this transfer does not meet the burden of proof to establish spouse B intended to gift a half community property interest to spouse A as that spouse's sole and separate property. Again, the only evidence is the intent of the parties to obtain a loan.

Another area of confusion to lay persons is the notion that community funds and labor to improve a separate asset transmutes the property into a community asset. In fact, all that is truly created is a community lien against the separate asset. For example, spouse A owns a piece of real property acquired prior to marriage. During the marriage both spouse A and B contribute funds and labor to make improvements to the real property. In this instance, the real property is still the separate property of spouse A, however, spouse B has acquired a half community interest in the value of the improvements.[14]

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[10] *Macias v. Macias*, 126 N.M. 303 (N.M. Ct. App. 1998)
[11] *Id*.
[12] *Id.*
[13] *See Macias v. Macias*, supra
[14] *Jurdado v. Jurdado*, 119 N.M. 522 (N.M. Ct. App. 1995)

6. Closely Held Businesses

The division of a closely held business can be a tricky affair. In arriving at an equitable division, the court must consider many facts and factors, including the total value of the business; and both real assets, such as equipment and supplies, and intangible assets, such as good will. The court must consider whether the business began before or after marriage and what assets, either separate or community, were used to start the business. Finally, the court must recognize that professional degrees which contribute to a practice, such as those attained by doctors, attorneys or accountants, cannot be treated as property subject to division. The value of the practice as a business at the time of dissolution is subject to division under community property laws.[15]

In these cases it is the best practice for the court to appoint a Rule 11-706 business evaluation expert. As the court's expert, the court should require the parties to disclose tax accounting information, bank record information, and any other financial appraisal information in the possession of the parties. As a matter of best practice, the court should also enter a protective order limiting the distribution of this confidential information against re-release to third parties. The cost of this expert is subject to allocation at the court's discretion.

In the end, it is up to the court to recognize the separate property of each party and then divide the community assets in a fair and equitable manner.[16] Obviously, this does not mean partitioning the house in half, so to speak, but rather, awarding each spouse assets of equal value as part of the final distribution.

While these examples have focused on automobiles and real property, it is important to remember that the property of the community includes all significant assets. These assets may include such things as retirement benefits and pension plans; stocks, stock options, and bonds; insurance policies; income and bonuses; cash; leases and options to purchase real estate; accrued vacation and sick time; and anything else of value. Rule of Civil Procedure 1-123 NMRA requires the parties to disclose and exchange information concerning property and debts within 45 days after service of the petition. Counsel and the court should keep this disclosure requirement in mind in an effort to keep matters progressing efficiently.

B. DEBTS

In addition to dividing the assets of the community, the court will be required to identify and divide the debts of the community. Just like property, debts can be characterized as separate obligations or community obligations. Also, like property, the date that the obligation is incurred typically controls the nature of the obligation. For example, debts acquired before the date of the marriage are the separate obligations of the incurring spouse, while debts incurred after the date of marriage are the obligation of the community.

[15] *Mitchell v. Mitchell*, 104 N.M. 205 (Ct. App. 1986)
[16] *Bustos v. Bustos*, 100 N.M. 556 (N.M. S. Ct. 1983)

1) Secured Debts

Typically, after the court has divided the assets of the spouses, if a debt is associated with a particular asset, that debt becomes the obligation of the spouse receiving the asset. For example, because the court cannot partition a vehicle, if spouse A takes the community vehicle as a sole and separate asset, the obligation to pay the lien on the vehicle becomes the responsibility of spouse A as well.

An additional way to identify the character of a debt is to trace it to the asset acquired. Under normal circumstances, a debt incurred to purchase a community asset is a community debt. Similarly, a debt incurred to acquire or improve a separate asset becomes a separate obligation.

2) Unsecured Debts

The more difficult division of debts arises in the context of unsecured debts, such as credit cards. Often times it is difficult to explain to a spouse that a credit card debt in the name of one spouse, if used during the course of the marriage, becomes an obligation of the community. In this situation, it is best to go back and re-explain the concept of co-mingling and make clear to the party that the name on the credit card, just like the name on the title to the car, does not control ownership or responsibility for the debt.

There are limited circumstances under which a debt incurred during the course of the marriage could be the sole responsibility of one party. For example, spouse A, in anticipation of divorce, maxes out the credit card in his or her possession without acquiring assets (i.e. charges services, such as trips, or consumables, such as meals). Spouse B might successfully argue that this debt obligation did not benefit the community, and that therefore the community should not suffer from the one-sided benefit to the other party.[17] However, this will be a difficult challenge: just like proving transmutation, proving that a debt did not benefit the community requires clear and convincing evidence.

C. EQUALIZATION

After the court has fairly and equitably divided the assets and the debts of the community, the court must decide if an equalization payment is due from one party to the other. This is a simple matter of totaling the community assets assigned to each spouse, deducting the obligations assigned to each spouse, and determining the net equity retained by each spouse. The difference is divided by two and the spouse with the larger net equity owes that amount to the other spouse as an equalization payment. The New Mexico Supreme Court has developed very useful forms to help with these mathematical calculations in Form 4A-131 (Community Property and Liabilities Schedule) and Form 4A-132 (Separate Property and Liabilities Schedule). The equalization is reduced to a form of judgment which is collectable in the same manner as judgments in other civil matters.[18]

[17] *Fernandez v. Fernandez*, 111 N.M. 106 (Ct. App. 1991)
[18] NMSA §39-4-1

Divorce Taxation and Other Related Topics

By Baca & Redwine, P.C.
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I. The Marital Residence -- § 121 Exclusion

a. Appreciated Assets

If during the five year period ending on the date of the sale of a property, the taxpayer has owned and used the property as a principal residence for an aggregate of two years, gain up to $250,000 ($500,000 if filing jointly) can be excluded from tax. If filing jointly, at least one spouse must meet the ownership test but both spouses must meet the use test.

If a spouse acquires the family home incident to divorce, then he / she can count the other spouse's ownership for purposes of the ownership test. An exception to the use test comes when there is a delayed sale of home order. In this circumstance the non-occupant spouse is deemed to have used the home as his / her principle residence while the other spouse uses it under the divorce instruction.

If the ownership and use tests are not met on account of an unforeseen circumstance, then the maximum excludable amount can be prorated. Divorce qualifies as an unforeseen circumstance. Please note that if a joint return is not filed the maximum excludable amount is $250,000.

b. Refinance Issues

Most banks are unwilling to simply drop one spouse from a home's mortgage. As such, if one spouse will keep the family home, the divorce decree should require the home to be refinanced by the spouse maintaining ownership.

c. Equity Allocation

An inherent issue in community property states is dealing with assets that were owned prior to marriage, where there is now a community lien or where a sole and separate asset was used to purchase a community asset. The underlying issue is one of allocation. In New Mexico, *Dorbin v. Dorbin,* 105 N.M. 263, 731 P.2d 959 (Ct.App. 1986) is the defining case. Below, the facts and court's conclusion in the case is laid out. However, please note that the methodology presented in *Dorbin* is not presented as the sole method of allocation equity. The court's interest is in "substantial justice."

a. *Dorbin v. Dorbin* Facts

- Husband and Wife were married on July 3, 1976

- In October 1978 Wife purchased a townhouse for $69,000
- Wife made a down payment of $10,000 from sole and separate funds
- $59,000 was financed
- In November, 1978, the couple moved into the newly purchased townhouse where they lived until October, 1981, when the divorce was filed.
- Between the date of separation and the date of trial, Wife alone lived in the townhouse and Wife made the monthly payments for those 27 months.
- The value of the townhouse was $100,000 at the date of trial and the mortgage was $56,000 (total equity of $44,000)
- Community principal reduction totaled $3,000

b. *Dorbin v. Dorbin* – Calculation Per Case (see next page)

Analysis				
	Debt / No Basis	**Debt / Basis**	**Cash / Equity**	**Total**
Equity Analysis				
FMV				100,000
Purchase Price/Basis - Residence		59,000	10,000	69,000
Appreciation Equity				31,000
Debt Analysis				
Original Mo	-	59,000		59,000
Refinance	-	-		-
Total Debt I	-	59,000		59,000
Total Debt I	-	(3,000)		(3,000)
Principle De	-	56,000		56,000

Summary			
	Community	**Separate**	**Total**
Total Appreciation Equity			31,000
Paydown Equity			
06/14/05 thru 11/27/09	3,000	-	
Total Paydown Equity	3,000	-	
Total Down Payment	-	10,000	
Total Paydown Equity Plus Down Payme	3,000	10,000	13,000
Total Equity			44,000

Separate Property % Share of Appreciation Equity

Separe Down Payment			10,000
Original Loan	59,000		
Less: Community Reduction of Principal Ba	(3,000)		
	56,000		56,000
			66,000
Total Purchase Price			69,000
Separate Property % Share of Appreciation Equity			**95.65%**

Community Property % Share of Appreciation Equity				
Community Reduction of Principal Balance		3,000		
Total Purchase Price		69,000		
Community Property % Share of Appreciation Equity		**4.35%**		
Separate Property Share of Total Equity		**Total**	**Husband**	**Wife**
Separate Property % Share of Appreciation Equity		95.65%	0.00%	95.65%
Multiplied by Appreciation Equity	31,000	29,652	-	29,652
Plus Separate Down Pymt & Separate Pay I	10,000	10,000	-	10,000
Separate Property $ Share of Total Equity		**39,652**	**-**	**39,652**
Community Property Share of Total Equity				
Community Property % Share of Appreciation Equity		4.35%	2.17%	2.17%
Multiplied by Appreciation Equity	31,000	1,348	674	674
Plus Principal Paydown		3,000	1,500	1,500
Community Property $ Share of Total Equity		**4,348**	**2,174**	**2,174**
Total Equity Split		**44,000**	**2,174**	**41,826**

c. Issues with *Dorbin*
    a. The equity allocation in *Dorbin v. Dorbin* treats debt assumed the same as cash paid.
    b. One solution to this is to allocate equity based on cash expended for principal pay-down. The benefit of this approach is you are using cash equity to allocate cash equity.

d. Items to Watch Out For
    a. Refinance
        i. Were all funds from the refinance invested back into the home?
        ii. Were some or all of the funds used to pay off other debts?
        iii. Were some or all of the funds used to purchase a depreciating asset like a boat or a car?
    b. Value of Home
        i. If the value of the home as of the date of marriage is know, should the appreciation be viewed as occurring in two pieces (i.e.: pre and post marriage) or should it be averaged over the entire life of ownership?

ii. One issue with treating it in pieces is you are essentially locking in equity at the date of marriage that could potentially be absorbed due to a downturn in the housing market.
    i. Ex: At the date of marriage Wife owns a home as sole and separate property subject to a mortgage of $125,000. The home was purchased for $150,000 and as of the date of marriage was valued at $170,000. At the date of divorc,e the home is appraised for $155,000. If the appreciation equity of $20,000 ($170,000 less $150,000) is locked in at the date of marriage, should the soon to be ex-spouse be allocated his share of the $15,000 of depreciation, or should the appreciation of $5,000 be allocated?

II. Filing Status

a. Legal Separation vs. Divorced

Filing status is determined as of the taxpayer's year end (December 31st). If a taxpayer is either legally separated or divorced, they are no longer considered married for income tax purposes. In order for a couple to be legally separated, the separation agreement must include an order instructing the couple to live apart.

b. Filing in the year of divorce

In general, in a community property state, in the year of divorce community income, withholding, and deductions are allocated equally between the parties up to the date of divorce and each party reports their share of the income, withholding, and deductions on their individual income tax return.

Subsequent to the date of divorce income, withholding, and deductions are sole and separate and reported by the individual to whom they relate.

Please note that special attention must be given to tax attributes that carry forward (i.e.: net operating losses, capital losses, depreciation, charitable contributions, etc.).

The schedule below is an example of how a couple might allocate and report income, withholding, estimated payments, and deductions in the year of divorce. A schedule similar to the one below should be attached to both returns in the year of divorce so it is clear to the IRS how income has been allocated.

The parties (Husband XXX-XX-XXXX and Wife XXX-XX-XXXX), were divorced September 26, 2007. Community income and expenses are being allocated pursuant to IRC section 66. The allocation is detailed below. For self employment tax purposes 100% of the schedule C

01/01/07 - 09/30 Community 75%
10/01/07 - 12/31/ Separate 25%

					Community		Separate		Total	
		Total	Total Community	Total Separate	Wife	Husband	Wife	Husband	Wife	Husband
W-2 [1]										
	Wages	50,000.00	37,397.26	12,602.74	18,698.63	18,698.63	12,602.74	-	31,301.37	18,698.63
	Federal Income	9,000.00	6,731.51	2,268.49	3,365.75	3,365.75	2,268.49	-	5,634.25	3,365.75
	Social Security	55,000.00	41,136.99	13,863.01	20,568.49	20,568.49	13,863.01	-	34,431.51	20,568.49
	Social Security	3,410.00	2,550.49	859.51	1,275.25	1,275.25	859.51	-	2,134.75	1,275.25
	Medicare Tax W	798.00	596.86	201.14	298.43	298.43	201.14	-	499.57	298.43
	State Income T	2,000.00	1,495.89	504.11	747.95	747.95	504.11	-	1,252.05	747.95
		-	-	-	-	-	-	-	-	-
Investment Accoun		-	-	-	-	-	-	-	-	-
	Ordinary Divide	1,500.00	1,500.00	-	750.00	750.00	-	-	750.00	750.00
	Qualified Divide	1,500.00	1,500.00	-	750.00	750.00	-	-	750.00	750.00
	Interest Income	150.00	150.00	-	75.00	75.00	-	-	75.00	75.00
	Margin Interest	2,000.00	2,000.00	-	1,000.00	1,000.00	-	-	1,000.00	1,000.00
Estimated Payment		-	-	-	-	-	-	-	-	-
	4/16/2007	12,000.00	12,000.00	-	6,000.00	6,000.00	-	-	6,000.00	6,000.00
	6/15/2007	12,000.00	12,000.00	-	6,000.00	6,000.00	-	-	6,000.00	6,000.00
	9/17/2007	12,000.00	12,000.00	-	6,000.00	6,000.00	-	-	6,000.00	6,000.00
	1/15/2008	12,000.00	-	12,000.00	-	-	-	12,000.00	-	12,000.00
		-	-	-	-	-	-	-	-	-
Estimated Payment		-	-	-	-	-	-	-	-	-
	4/15/2007	2,000.00	2,000.00	-	1,000.00	1,000.00	-	-	1,000.00	1,000.00
	6/10/2007	2,000.00	2,000.00	-	1,000.00	1,000.00	-	-	1,000.00	1,000.00
	9/15/2007	2,000.00	2,000.00	-	1,000.00	1,000.00	-	-	1,000.00	1,000.00
	1/19/2008	2,000.00	-	2,000.00	-	-	-	2,000.00	-	2,000.00
		-	-	-	-	-	-	-	-	-
Wells Fargo 1098 - 2		1,850.00	1,850.00	-	925.00	925.00	-	-	925.00	925.00
		-	-	-	-	-	-	-	-	-
Wells Fargo Primar		10,000.00	10,000.00	-	5,000.00	5,000.00	-	-	5,000.00	5,000.00
		-	-	-	-	-	-	-	-	-
Property Taxes Pai		1,500.00	1,500.00	-	750.00	750.00	-	-	750.00	750.00
		-	-	-	-	-	-	-	-	-
Mortgage on Secon		3,000.00	3,000.00	-	1,500.00	1,500.00	-	-	1,500.00	1,500.00

1 Wages and withholding are being allocated based on days.
2 Dividends and Interest are being allocated on the date received.
3 Estimated payments are allocated equally during the time the parties were married and to the spouse making the payment after the
4 Mortgages and Property Taxes are allocated based on days.

c. Head of Household

Generally, in order for a taxpayer to qualify as head of household he or she must be either single or legally separated. However, a married person can file as head of household if he pays over half the cost of maintaining

their household, if the household is the primary place of abode for a child for which the taxpayer is entitled to the dependency exemption, and if the other spouse is not a member of the household during the previous six months (temporary presence is disregarded).

d. Joint vs. Separate

Prior to 1998, general practice was to file separate returns to avoid the joint and several liabilities associated with jointly filed returns. The 1998 IRS Restructuring and Reform Act lowered the standard necessary to qualify as an innocent spouse and made it possible for a taxpayer to have a joint liability only on his/her income and deductions.

e. Innocent Spouse & Relief From Joint and Several Liability

Under IRC section 6015(b), a taxpayer can qualify as an innocent spouse if the following requirements are met:

1. A joint return has been made for the current year;
2. There is an understatement of tax attributable to erroneous items of one individual filing the joint return;
3. The other individual establishes that by signing the return they did not know and had no reason to know of the understatement;
4. It is inequitable to hold the other individual liable for the deficiency in tax associated with the understatement;
5. The individual elects the benefits of IRC section 6015 within two years of the IRS beginning collection activities.
   By qualifying as an innocent spouse and filing form 8857, the electing individual is relieved of liability for tax (plus interest and penalties) relating to the understatement.

f. Separate Liability Election

Under IRC section 6015(c), the liability of a taxpayer who files a joint return and makes a timely election will not be greater than the taxpayer's liability had they filed a separate return. To qualify under IRC section 6015(c), at the time of the election the taxpayers must be divorced or legally separated and the taxpayers filing the joint return can not have been members of the same household for a twelve month period ending on the date of the election.

g. Equitable Relief

The IRS may relieve an individual of all or part of a tax liability if:

1. It is inequitable to hold an individual liable for any unpaid tax or deficiency assessed on a jointly filed return;

2. Relief is unavailable from either the innocent spouse rule or the separate liability election;
3. The taxpayer did not know and had no reason to know that funds intended to pay the tax due on the return were taken and used by the other spouse: the IRS may relieve the individual of all or part of the liability.
4. The individual must not have filed the return with fraudulent intent ;
5. Assets must not have been transferred between the individuals filing the joint return as part of a fraudulent scheme.
   Please note that equitable relief is also available to an individual filing a separate return in a community property state.

h. Dependency Exemption

General Rule: A child will generally be the "qualifying child" or "qualifying relative" of the parent with whom he/she lives with for the greatest portion of the year. However, the non-custodial parent can treat the child as qualifying if both parents combined provide over half of the child's support, the child is in custody of one of the parents for over half of the year, and the custodial parent waives the exemption.

1. Waiving the Exemption

   For a non-custodial parent to claim the child's exemption the custodial parent must sign a written declaration (IRS form 8332) and the decree or agreement applicable to the current year must provide that the non-custodial parent is entitled to the child's exemption.

2. What is the exemption worth?

   A child's personal exemption is worth the marginal benefit of the exemption less any applicable phase out. In figuring the value of a child's exemption it is important to evaluate the additional benefit provided by those credits and deductions attached to the child's personal exemption (child tax credit, education credits, and student loan interest deduction). The 2010 exemption amount prior to any phase out is $3,650.

3. Who can claim the related medical expenses? Child tax credits? Child care credits?

   For medical expense deduction purposes, children are deemed to be the dependent of both parents and thus medical expenses

incurred on behalf of a child are deductible by the parent paying the expense regardless of whether they are the custodial or non-custodial parent. For purposes of the dependent care and earned income credits the child is deemed to be the dependent of the custodial parent. Child tax credits, education credits, and student loan interest deductions are tied to the child's personal exemption. Thus, only the parent claiming the child's exemption, whether by custody or written declaration, is eligible for these additional benefits.

III. Spousal Support

General Rule -- In order to be taxable and deductible spousal support payments must meet several qualifications. The payments must be –

1. made pursuant to a verdict, decree, or written separation agreement,
2. paid in cash to or on behalf of the ex-spouse,
3. the payments must terminate on death of the payee, and
4. The verdict, decree or written separation agreement cannot deem the payments as non-taxable or non-deductible.

Also, the payor and payee cannot be members of the same household and, if separated under a temporary order or separation agreement, the couple cannot file a joint income tax return.

a. Alimony Recapture

Alimony payments that decline substantially in the three years after separation may be recaptured in year three as ordinary income to the payor and a deduction to AGI for the payee. If, between years two and three, there has been a reduction in payments greater than $15,000, this will be recaptured first. Then, if payments in the first year exceed the average of unrecaptured payments in the second year and amounts paid in the third year by $15,000, the excess is recaptured.

Example –

Taxable and deductible alimony payments made from husband to wife are as follows:

Year 1 -	$200,000
Year 2 -	$100,000
Year 3 -	$ 50,000

Recapture Calculation:

Year 2 Pymts		100,000
Year 3 Pymts		(50,000)

Decrease in Pymts		50,000
Less: $15,000 Floor		(15,000)
Year 2 Recapture		35,000
Year 1 Pymts		200,000
Unrecaptured Year 2	65,000	
Year 3 Pymts	50,000	
	115,000	
Average	57,500	57,500
Excess		142,500
Less: $15,000 Floor		(15,000)
Year 1 Recapture		127,500
Total Recapture		162,500

Please note that alimony recapture rules do not apply to payments under a temporary decree or order, to any reduction on account of the death of either spouse, or to any reduction when payments are based on a formula applied to the payor's income.

b. Planning Opportunities

In scenarios where one spouse is in a substantially different tax bracket than the other spouse, special attention must be given to the taxability and deductibility of alimony payments.

IV. Tips on Making a Tax Effective Divorce Settlement

a. All assets aren't equal

Example 1 – Cash vs. Capital Gain Property

	Property Type	FMV	Basis	Tax on Distribution**	Net Distribution
Spouse 1	Cash	50000	50000	0	50000
Spouse 2	Stock	50000	10000	6000	44000

**Assume 15% capital gains rate

Example 2 – Cash vs. IRA

	Property Type	FMV	Tax on Distribution**	Net Distribution
Spouse 1	Cash	50000	0	50000
Spouse 2	IRA	50000	12500	37500

**Assume 25% tax rate

In addition to the increased tax burden, there is an issue of liquidity.

V. Retirement Plans (IRA'S, SEP'S, etc.)

General Rule: Participants in a qualified retirement plan generally cannot assign or alienate their benefit under the plan. In order to get around this obstacle and have the ability to assign plan assets to a spouse / ex-spouse, an individual must file a qualified domestic relations order (QDRO).

a. Qualified Domestic Relations Order (IRC Section 414p):
    i. In order to be a "qualified" domestic relations order the order must meet the following requirements:
        i. Be a court judgment, decree, order, or court approved property settlement agreement;
        ii. Relate to the provision for child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a plan participant;
        iii. Be made pursuant to State domestic relations law (including community property laws);
        iv. Include the name and last known mailing address of the participant;
        v. Include the name and last known mailing address of each alternate payee covered by the order;
        vi. Include the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee, or the manner in which the amount or percentage is to be determined;
        vii. Include the number of payments or period to which the order applies;
        viii. Identify the plan to which the order applies.

b. The order must not:
    i. require a plan to provide any type or form of benefit not otherwise provided under the plan;
    ii. require the plan to provide increased benefits;
    iii. Require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

VI. Tax Carryover Items

a. Net Operating Losses
    a. Are generally community property and allocated accordingly.
b. Passive Activity Losses
    a. Follow the property generating the loss.
        i. Ex: Husband and Wife own a rental property which has generated passive activity losses. As part of the MSA, the wife is awarded ownership of the rental property. The wife now also owns the passive activity losses related to that rental property.
c. IRC §179 Carry forward
    a. §179 carry forwards are attached to the property which originally generated the carry forward.

VII. Estimated Tax Payments and Refunds

a. General Rule: Estimated payments made from community assets during the period of marriage are considered community property and split equally between spouses.
b. Refunds or tax due from jointly filed returns are split equally unless other arrangements have been made.
c. Refunds or tax due from separately filed returns are the benefit or responsibility of the party filing the return.

VIII. Double Dipping

a. Introduction – The basic concept of double dipping

Should the earnings of a closely-held business be used as the basis of the value of the closely-held business, or the basis for alimony and child support, or both?

One way to conceptualize the theory of double-dipping is to view a closely-held business as two parts, (1) the total value of the business and, (2) the income stream of the business. The problem arises in the fact that the value of the business is in most cases based on the income stream it produces.

b. Example –

Think of the closely-held business as a cow. A cow can provide its owner with either milk or steak. The milk would be equivalent to the income stream of the business and the steak would represent the value of the business. The milk (cash flow) will be provided to the owner's family to help support the family. The problem arises the very moment the cow becomes a steak. That is, although the family now has a steak, they can no longer depend on the milk for support.

c. Thus, the question becomes, is it equitable to place the value of a small business in the spouse A's column and give the spouse B an equal share of the other assets,

and then obligate the spouse A to pay alimony on the total income steam he or she derives from the business?

It depends!

d. History of Double Dipping

The notion of awarding an interest in income generating property (being considered both an asset and income) has evolved from the equitable distribution of a pension's assets. If one spouse provides a distribution of his or her pension at divorce, should the other spouse be entitled to support based on income derived from the pension after retirement? There have been many court cases across the country that have dealt with this concept, and the rulings have been inconsistent.

Many states have dealt with this issue and their treatment is likely to depend on whether or not statutory framework exists for the reliance upon non-marital or post-equitable distribution assets for the purposes of support. If a retirement investment can be equitably distributed and then later used to establish a spouse's ability to pay support, it follows that income used to assign a value to an asset such as a business interest, can be similarly relied upon as a resource for the payment of support.

Relevant Court Cases:

Diffenderfer v. Differnderfer, 491 So.2d 265 (Fla. 1986).
Batson v. Batson, 821 So.2d 1141 (Fla. 5th DCA 2002)
Acker v. Acker, 821 So.2d 1088 (Fla. 3rd DCA 2002)
Carver v. Carver, 844 So.2d 803 (Fla. 4th DCA 2003)
Cook v. Cook, 208 Wis.2d 166, 179-80 (1977)

e. IMPACT OF THE APPROACH TO VALUATION

The method used for purposes of a business valuation can determine whether double-dipping will occur. Generally three methods are used for purpose of valuing a closely held business.

a. Income Approach - Value is comprised of the present value of future benefit expectations.

b. Excess Earnings Approach - Hybrid approach – contains elements of both the asset and income approaches.

c. Asset Approach - Value is comprised of the market value of business assets less market value of business liabilities.

d. Market Approach - Value is derived based on prices paid in the marketplace for an asset similar to the business under consideration.

f. INCOME APPROACH/EXCESS EARNINGS APPROACH

a. Normalization of owner compensation is taken into account for purpose of business value, but actual compensation is used for support calculations.
b. Double dipping results from using actual compensation for support calculations and normalized compensation for business valuation calculations.
c. To avoid double dipping, both support valuations and business valuation calculation should be based on the same compensation amounts.
d.

Example:

John Smith and Mary Smith have decided to divorce. John Smith owns a business from which he draws compensation of $350,000. Through an analysis of compensation data, the valuation expert determines that a person with similar skills and experience, with similar responsibilities, would command a salary of $100,000 in the marketplace. If this "normalized" salary is used in the calculation of the net cash flow of the business, the estimated business value is $3,500,000. If the actual salary of $350,000 is used, the estimated value of the business is $2,750,000.

	Using Normalized Compensation	Using Actual Compensation
Revenues	$3,000,000	$3,000,000
Owner's Compensation	**100,000**	**350,000**
Other Expenses	900,000	900,000
Earnings before Taxes	2,000,000	1,750,000
Provision for Income Taxes	(800,000)	(700,000)
Net Income	1,200,000	1,050,000
Capital Expenditures/Working Capital	(500,000)	(500,000)
Net Cash Flow From Business	700,000	550,000
Divided By: Capitalization Rate	20%	20%
Equity Value of Business	$3,500,000	$2,750,000

Relevant Court Cases:

Steneken v. Steneken, 183 N.J. 290, 873 A.2d 501 (N.J., 2005)
Rattee v. Rattee, 145 N.H. 44, 767 A.2d 415 (H.H. 2001)
Keane v. Keane, 2006 WL 223830 (N.Y.A.D. 2 Dept., 2006)
Wadsworth v. Wadsworth, 219 A.D.2d 410, 641 N.Y.S.2d 779 (N.Y.A.D. 4 Dept., 1996)
Weaver v. Weaver, 2005 WL 1562798 (N.J. Super A.D. 2005)
In re Marriage of Huff, 834 P.2d 244 (Colo. 1992)

g. S Corporations

The key question with regard to income from an S Corporation is whether this outside source of funds constitutes available income for the purposes of paying support.

a. Is pass through income for an S corporation income to the owning spouse if it is being retained within the corporation for legitimate corporate purposes?
b. Burden is on the shareholder spouse to demonstrate that this income is legitimately held for corporate purposes other than avoiding support.

h. Other Areas of Possible "Double Dip" Consequences

a. Pensions
b. Stock Options
c. Contingency Fee Cases
d. Accounts Receivable

i. Conclusion

The widespread debate regarding double dipping or double counting of an asset as both an equitable distributed value and a source of income appears to be taking a turn towards a more flexible approach which allows for double dipping where equity requires. This debate is not new, and has its roots in the division of retirement investments, which by their very nature are both an asset and a future source of income. Courts across the country have steadily bridged the gap between their treatment of retirement investments and their treatment of business interest, using varying business valuation approaches which may legitimately include income as a valuation factor.

IX. Accountant's Conflict of Interest

In 2006 the New Mexico Board of Public Accountancy adopted conflict of interest provisions. These provisions are summarized below.

a. A New Mexico CPA cannot perform services for a client if the performance of the services will be directly or substantially adverse to another client.
b. Where a New Mexico CPA has provided services to a business entity or both spouses of a marriage, the CPA's services to one client are deemed to be directly and/or substantially adverse to another client after the initiation of divorce proceedings, business dissolutions, or other similar transactions. An exception to this may be applicable if the following are met:
    a. The CPA reasonably believes the performance of services for one client will not adversely affect the relationship with the other client; and
    b. After consultation, each client consents in writing to allow the CPA to provide services to the other party.

c. A CPA may not perform services for a client if the CPA's ability to perform the services may be materially limited by his responsibilities to another client, a third person, or his own interests unless:
    a. The CPA reasonably believes the performance of services will not adversely affect the relationship with the client;
    b. The relationship is disclosed to the client; and
    c. The client consents in writing after the consultation.
d. A CPA will not enter into a business transaction with a client for services other than public accountancy or knowingly acquire an ownership, security or other pecuniary interest adverse to a client unless:
    a. The transaction and terms on which the CPA acquires the interest are fair and reasonable to the client.
    b. The terms are fully disclosed and transmitted in writing to the client in a manner that can be reasonable understood by the client;
    c. The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
    d. The client consents in writing.
e. A CPA cannot use information relating to the performance of services for a client to the disadvantage of the client.
f. A CPA who performs services for two or more clients involved in a dispute will not participate in making an aggregate settlement of the claims of or against the clients unless each client consents in writing after consultation.

Intersection with Bankruptcy

By Don F. Harris, Esq.

Community Property and the Bankruptcy Code

When a married couple or a married individual files for bankruptcy, the entire community estate is brought into the bankruptcy estate. 11 U.S.C. § 541(a)(2). Therefore, even if only one spouse has filed bankruptcy, all of the marital estate becomes part of the bankruptcy estate. *See, Swink v. Fingado*, 115 N.M. 275, 850 P.2d 978 (N.M. 1993).

The "Community Discharge"

Generally speaking, the status of New Mexico as a "community property" state benefits people filing bankruptcy (called "debtors" under the Bankruptcy Code), because all dischargeable community debts (but not separate debts) are discharged as to all after-acquired community property even if only one spouse files for bankruptcy. 11 U.S.C. § 524(a)(3). In effect, both spouses get a discharge even if only one spouse files for bankruptcy. However, if the parties subsequently divorce, the non-filing spouse is essentially denied the benefits of the discharge upon the divorce being entered. *In re Costanza*, 151 B.R. 588 (Bankr. D.N.M. 1993).

A divorce after a bankruptcy discharge has the effect of retroactively denying the non-filing spouse the discharge. As a practical matter, after the creditors have coded their file for both individuals as discharged, it is unlikely that most creditors will follow the individuals that closely or renew their collection efforts after a non-filing spouse gets divorced. If there is a particular creditor who was particularly upset with a particular individual, then the divorce causing the revocation of the non-filing spouse's discharge could have a practical effect.

A Joint Bankruptcy Case Prior to Divorce Decree?

The Bankruptcy Code allows, and perhaps encourages, a husband and wife to file a joint bankruptcy case. 11 U.S.C. § 302. This reduces costs and permits a single filing fee and attorney fee, because most bankruptcy attorneys do not charge more for a joint case than for an individual case. Because all of the community estate is part of the bankruptcy estate (see above), the bankruptcy petition is not generally significantly different whether or not both spouses file bankruptcy, unless there is significant separate property.

Ideally, if the parties are insolvent and will be needing bankruptcy, it makes the most sense for them to file jointly prior to the divorce being entered. This does two rather important things: (1) it makes one aspect of the divorce less complicated by eliminating, or certainly reducing, a debt division problem, and (2) it saves costs.

There is a third, less obvious, but very important concern that suggests getting bankruptcy out of the way prior to the divorce decree. Under the 2005 amendments Congress made to the Bankruptcy Code, the Bankruptcy Abuse Prevention and Consumer Protection Act (the "2005

Amendments"), any debt division or debt assumption in a divorce decree will be non-dischargeable after bankruptcy as between the divorced spouses. 11 U.S.C. § 523(a)(5) and (a)(15).

However, spouses on the verge of filing for divorce present ethical concerns for the bankruptcy attorney representing both spouses, and, at a minimum, a conflict waiver agreement should be provided.

2005 Bankruptcy Amendments: More Autonomy and Authority for Family Courts

A. Most Family Court Litigation Can Proceed, and is Not Stayed (suspended or prohibited) Because Either or Both Spouses File for Bankruptcy

Congress expanded the exception to the Bankruptcy Stay in 11 U.S.C. § 362(b)(2) to allow nearly all litigation relating to divorce proceedings to proceed, including establishing and enforcing child support orders and alimony orders from wages. However, the bankruptcy court still has exclusive jurisdiction over other aspects of "property of the bankruptcy estate," and certain issues such as property division will require bankruptcy court approval while the bankruptcy case is pending.

Example: Divorce or separation proceedings can proceed to hearing on interim division of income, to a hearing on a Domestic Violence Protection Order, or to a hearing or trial on timesharing, custody, child support, and spousal support—including wage withholding orders. If there is an active bankruptcy case proceeding, such as a Chapter 11 or Chapter 13 or assets under the control of a Chapter 7 Trustee, bankruptcy court permission will be required before a family court can divide community property such as real estate and pension plans.

Practical Effect: Because most bankruptcies in New Mexico are "no-asset, Chapter 7s," meaning that the community property (such as the family homestead or retirement plans) are "exempt" and not subject to distribution, the bankruptcy case will ultimately have little effect on the property division in the divorce case. A Chapter 7 bankruptcy in New Mexico only lasts about 100 days, so the family court could normally either delay the matter involving dividing community assets or enter a bifurcated decree reserving property division until after the Chapter 7 case is closed.

B. Almost any Order arising from a divorce or family law case will not be discharged in a Chapter 7 bankruptcy

Although there are some exceptions too nuanced for treatment here, the Bankruptcy Code, as amended by Congress in the 2005 Amendments, make any debt "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, [or] divorce decree . . . ." automatically non-dischargeable in a Chapter 7 case (although debt assumption orders may be discharged in a Chapter 13). New Mexico has one of the lowest Chapter 13 filing rates in the country (less than eight percent of cases filed) at the time this section was written, so what happens in Chapter 7 is generally what should be considered when lawyers draft or courts approve Marital Settlement Agreements.

Clarifying Point: Child support and spousal support orders remain non-dischargeable in all chapters of the Bankruptcy Code. After the 2005 Amendments, debt assumption and property division orders, arising from a divorce or separation, are also automatically non-dischargeable in Chapter 7 cases -- over 90 percent of bankruptcy cases filed in New Mexico. It used to be important to distinguish between a support order or property or debt division order for bankruptcy purposes. That distinction is of no consequence anymore in the vast majority of bankruptcy cases filed.

Example: Mr. Smith agrees to pay the Chase Visa as part of the divorce settlement incorporated into a divorce decree. He subsequently loses his job, and can not pay. He files for Chapter 7 bankruptcy. His former wife sues him in bankruptcy court (or in state court) and argues that the debt to Chase that he assumed in the divorce action is in reality a debt to his ex-wife or for her benefit, and that he still has to pay the credit card debt subsequent to the bankruptcy discharge. The ex-wife wins. *In re Wodark*, 425 B.R. 834 (Bankr. 10th Cir. 2010).

Practical Effect: Family courts and family lawyers must be careful about debt division orders in divorce decrees. If the parties may be needing bankruptcy later, it may be a good idea not to divide debts in the Marital Settlement Agreement or decree. This issue is addressed at greater length below.

The New "Means Test": People are More Likely to Qualify for Chapter 7 Subsequent to Divorce

In the 2005 Amendments, Congress sought to weed out, to the extent possible, Chapter 7 bankruptcies that were filed out of convenience rather than out of necessity. Congress created the "means test," which sets in motion a detailed analysis of someone's qualification for filing for bankruptcy based on the "median income" in the state for the particular size of family.

For instance, as of this writing, the median income for New Mexico in the spring of 2010 for a family of one is approximately $37,000. Someone making this amount of money or less automatically qualifies for Chapter 7 bankruptcy. If someone makes more, a Chapter 7 can be filed and discharge obtained based on the second phase of the "means test" depending on the person's other expenses, such as secured debt, medical bills or tax liability. In summary, if a family is below the median income for the size of the family in New Mexico, or is close if they exceed the median income, the better situated that family is if they need to file and qualify for Chapter 7.

With that background consider the following. The median income for a family of four in New Mexico is approximately $55,000 (as of the spring of 2010), which size would be a typical intact family with two children. If both parents make approximately $40,000 per year, it would be hard for a bankruptcy lawyer to make the Chapter 7 work, assuming the other expenses were within average ranges. The median income for a family of two in New Mexico is approximately $50,000. After the intact family of four divorces (or separates and forms two different households), and each parent claims one child on his or her tax return, for instance, each parent easily qualifies for bankruptcy now. Each family unit of two makes well under the median of

$50,000, although their combined income had been well over the median income for a family of four, prior to separation or divorce.

For a childless couple, the bankruptcy "marriage penalty" is also significant. The median income for a family of one is $37,000, but $50,000 for a family of two. Unmarried couples each making less than $37,000 can easily qualify for bankruptcy, but if the same people were married, qualifying them as a couple may be more difficult.

Practical Effect. According to Harvard Law Professor Elizabeth Warren, divorce is the primary factor causing about twenty percent of consumer bankruptcies. The total number of bankruptcy cases number over 1 million filed in the United States every year and over 6000 filed in New Mexico every year (as of the spring of 2010). It is easy to understand why divorce can cause bankruptcy, because two households are more expensive than one. The "means test" in the Bankruptcy Code may actually make it easier for people to qualify for bankruptcy subsequent to divorce or separation than prior. Because many people who complete their divorce proceeding may foreseeably head into a bankruptcy lawyer's office some time in the future, and because of the expanded exception to discharge for nearly any order entered in family court, family courts and family lawyers should look at debt division differently. Family courts and family lawyers should be cognizant of the fact that debt assumption provisions in a divorce decree will likely be non-dischargeable in a subsequent Chapter 7 case and draft accordingly.

Alternatively, the parties might want to get their bankruptcy out of the way either prior to divorce (perhaps even post-separation but pre-divorce decree), so that aspect of the Marital Settlement Agreement is out of the way. The family courts and family lawyers should encourage debt-ridden families going through divorce or legal separation to consult with bankruptcy counsel prior to drafting their Marital Settlement Agreements.

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Introduction to Business Valuation

By Baca & Redwine, P.C.
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I. Introduction to Business Valuation
   a. Regulatory Bodies – Business valuation theory and practice are constantly evolving. Because a strong theoretical foundation is essential to the completion of meaningful business valuations, and because it has become increasingly important to have comparability between analyst's reports, professional organizations and governing bodies issue guidance on both technical and reporting standards. The following professional and regulatory bodies issue guidance regarding the development of estimates of value and the reporting of results.
      i. Internal Revenue Service
         1. The IRS has issued numerous rulings and pronouncements on the subject of business valuation. Some of the most important of these are:
            a. Revenue Ruling 59-60 – Valuing Closely Held Stock
            b. Revenue Ruling 68-609 – Formula Method
            c. Revenue Ruling 83-120 – Valuation of Preferred Stock
            d. Revenue Ruling 93-12 – Allowance of Minority Interest Discounts in Family Owned Businesses
      ii. American Institute of Certified Public Accountants (AICPA)
         1. Statements on Standards for Valuation Services No. 1 (SSVS No.1)

            In recent years, the AICPA, as well as other professional organization (see below), recognized the increasing number of members who were performing business valuation engagements. In an effort to improve the consistency of reports and the overall quality of practice, SSVS No. 1 was issued. All AICPA members are required to follow this standard when performing engagements to estimate culminating in the expression of a conclusion of value or a calculated value. The full text of SSVS No. 1 can be downloaded from www.aicpa.org.
         2. Credentials – The AICPA issued credential related to business valuation services is "Accredited in Business Valuation" (ABV).
      iii. Other Organizations
         1. National Association of Certified Valuation Analysts (NACVA), American Society of Appraisers, Institute of Business Appraisers,

(IBA), Canadian Institute of Chartered Business Valuators (CICBV)

2. Professional Standards

   Similar to the AICPA and many of the professional bodies listed above have issued standards which are meant to govern the services provided by its members.

3. Credentials:
   a. NACVA -- Certified Valuation Analyst (CVA)
   b. American Society of Appraisers – Accredited Senior Appraiser (ASA)
   c. IBA – Certified Business Appraiser (CBA)
   d. CICBV – Chartered Business Valuator (CBV)
   e. Other – The professional societies listed above offer a multitude of additional credentials. However, the credentials listed are the most widely used for business valuation purposes.

b. Purposes for Valuing a Business

Prior to beginning work on a business valuation, it is important to understand the valuations purpose. The four basic purposes for valuing a business are tax, litigation, transaction, and regulatory. However, there are many reasons to value a business including:

i. Gifting
ii. Sale
iii. Establish a charitable trust
iv. Issue Options
v. Divorce
vi. Litigation
vii. Estate Taxes

c. Basis of Value
   i. Standard of Value
      1. Fair Market Value: The price at which the property would change hands between a willing buyer and a willing seller, when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.
      2. Fair Value: the price that would be received for an asset or paid to transfer a liability in a transaction between marketplace participants at the measurement date. Fair value does not utilize discounts for lack of marketability or lack of control.

3. Investment Value: the value of an asset or business to a specific owner or prospective owner. Accordingly, this type of value considers the owner's or prospective owner's knowledge, abilities, expectations of risks and earning potential, and other factors. An example of investment value is when a transaction provides unique motivators or synergies to a particular buyer that is unavailable to the typical buyer. In this situation, the transactions usually include a synergistic or acquisition premium that reflects additional value to a particular buyer.

ii. Premise of Value
    1. Going Concern Value – The value of a business enterprise that is expected to continue to operate into the future.
    2. Liquidation Value – The net amount that would be realized if the business was terminated and the assets are sold piecemeal. Liquidation can be either "orderly" or "forced".
    3. Replacement Value – Refers to the current cost of a similar new property having the nearest equivalent utility to the property being valued.

II. Financial Statement Analysis

Financial statement analysis is one of the most important steps in gaining an understanding of the historical, current, and potential profitability of a company. It is also critical in evaluating the relative stability of earnings as well as the levels of operating and financial risk. There are multiple methods a valuator can utilize to aid in the financial statement analysis.

a. Ratio Analysis – Financial ratios are measures of the relative health, or sometimes the relative sickness of a business. Ratios analysis is an effective tool to assist in answering some basic questions such as:
    i. How well is the company performing compared to others in the same industry?
    ii. What are the company's relative strengths and weaknesses?
    iii. What are the relative business and operating risks to the company?

b. Comparative Analysis -- To make the most effective use of financial ratios, the ratios should be calculated and compared over a period of several years. This allows for the identification of trends in measurements over time. These ratios can also be compared to specific other companies or to industry averages or norms in order to see how the subject company is performing relative to other businesses in its industry during the same industry period of time.

c. Common Size Analysis – The conversion of balance sheet and income statement line items to percentages is referred to as preparing the statements on a "common size" basis. For purposes of common size statements, balance sheet line items are

presented as a percentage of total assets and income statement line items are presented as a percentage of total net sales or gross revenue. Converting the financial statements to a common size basis can assist the valuator in identifying trends within the company, as well as comparing the company with others in the same industry.

III. Generating Normalized Financial Statements -- When performing a valuation of a company, the valuator's objective is to determine a fair and reasonable return on investment to an investor, in view of the facts available at the date of valuation. It is often assumed that a reasonable estimate of value can be ascertained simply by looking at a company's most recent financial statements. In nearly all cases, this is not accurate. Even if a company is preparing its financial statements based on Generally Accepted Accounting Standards (GAAP), there is a distinct possibility the financial statements present a picture which is different from reality.

This issue tends to be exacerbated in situations where the subject of the valuation is a small, closely held company. In the end, the ultimate goal of the analyst is to present the financial statements in a way that accurately reflects the entity's financial position as of the valuation date as well as its "normal" results of operations for the periods being analyzed. The goal is not to correct the financial statements, but rather to present them as an outside investor would look at the entity. Normalizations are typically related to financial transactions of a non-recurring, non-operating, or non-market nature.

***Side Note:**

Double Dipping: If the purpose of the valuation is related to divorce, and alimony will be calculated, it is important for all interested parties to understand normalizations related to salary and the effect they may have on alimony. This issue is referred to as "double-dipping."

The fundamental double-dip issue related to business valuation is that, if a normalization is made to the wages of the person running the business, and those same wages are used in the calculation of alimony, it is entirely possible the spouse who is not involved in the business has gotten the benefit of the wages twice.

Ex: Husband runs a successful service business and wife has been a stay-at-home mother during the entire 20 years of the marriage. The wages paid to husband are $250,000 per year, which amounts to $50,000 more than what most CEO's of similar businesses would be paid. The business valuation analyst chooses the income method and adds the $50,000 of wages to the benefit stream of the company. The analyst then capitalizes the benefit stream to come up with

the final estimate of value. Husband agrees to a property settlement of ½ the value of the business.

As the two parties negotiate the monthly alimony amount wife will receive, wife wants to include the full $250,000 of salary husband earns. This is potentially a double dip because a portion (in this case $50,000) was added back to the benefit stream of the business, which made the business more valuable. The double dip argument is that Wife has already received benefit of the $50,000, and for alimony purposes $200,000 should be used as husband wages.

IV. Defining the Benefit Stream – If utilizing the income method, the benefit stream chosen will have a material impact on the value of the business.
    a. Historical vs. Future – Whether the historical or future benefit stream is utilized will depend largely on whether the analyst believes historical results are a reasonable predictor of future results, and whether the analyst believes management has the ability to reliably prepare income projections.
    b. EBIT – Earnings Before Interest and Taxes
    c. EBITDA – Earnings Before Interest, Taxes, Depreciation, and Amortization
    d. Free Cash Flow – free cash flows provide a measure of the cash available to the company for discretionary uses after deducting the funds needed to continue operating at a planned level. The issue that can arise from using free cash flows is the lack of guidance regarding what is a required cash flow and what is truly a discretionary cash flow.

V. Developing Capitalization / Discount Rates
    a. The development of appropriate capitalization and discount rates is one of the most difficult and critical steps in valuing a business. This is often the area of a valuation that is hotly debated and criticized because there is no single method or formula to arrive at a capitalization or discount rate. In the context of closely held businesses, the capitalization or discount rate must include the following two criteria:
        i. The capitalization or discount rate should be essentially the same as the rate of return that is currently being offered to attract capital or investment similar to the type, size, and financial condition of the business being valued.
        ii. The capitalization or discount rate must be consistent with the type of benefit streams being capitalized or discounted.
    b. Yield Rate: Within business valuation, the capitalization or discount rate is the rate of return an investor expects on their money. The rate is comprised of two basic parts:
        i. Safe (or reasonable) rate of return on secure investments. Analysts often use the applicable treasury bill rate as the safe rate.

ii. Additional return that compensates the investor for the relative degree of risk in excess of the safe rate.

c. Risk Factors
    i. External
        1. Expectations of the general economy
        2. Existing conditions of the general economy
        3. Expectations of a particular industry
        4. Competitive environment of a particular industry
    ii. Internal
        1. General expectations of the particular business being valued
        2. Financial condition of the business being valued
        3. Competitive position of the business being valued
        4. Size of the business being valued
        5. Nature of the business being valued
        6. Quality and depth of the organization's employees and management group
        7. Reliability or stability of the earnings of the business being valued

d. Capitalization vs. Discounting
    i. Capitalization Rate = Discount Rate – Long term sustainable growth
    ii. A capitalization and discount rate will only be equal if there is no projected long term sustainable growth.
    iii. Capitalization rates are applied to a historical benefit stream and discount rates are applied to a projected benefit stream.

e. Common Methods for determining capitalization or discount rates
    i. Ibbotson Build-Up Method – Ibbotson Associates provides a model which uses both historical data and current inputs to estimate the cost of equity capital for a company.
        1. The formula starts with the risk free rate and then adds expected risk premiums designed to reflect the additional risk of an equity investment.
        2. Formula: $K_e = R_f + ERP + IRP_i + SP + SCR$
            a. K_e = cost of equity
            b. R_f = Risk free rate of return
            c. ERP = Expected equity risk premium, or the amount by which investors expect the future return on equity securities to exceed the risk free rate
            d. IRP_i = Expected industry risk premium for industry I reflecting the relative risk of companies in the industry
            e. SP = Size Premium
            f. SCR = Specific Company Risk

3. Capitalization Rate Buildup Example:

	Risk free rate	4.50%
+	Equity risk premium	7.10%
+	Small capitalization premium (10b decile)	12.41%
+	Specific entity premium	9.26%
-	Growth rate	(2.0)%
=	Capitalization rate	31.27%

ii. Capital Asset Pricing Model (CAPM)
    1. By definition, the CAPM is, "an equilibrium asset pricing theory that shows that equilibrium rates of expected return on all risky assets are a function of their co-variance with the market portfolio."
    2. Formula: Expected Return = Risk Free Rate + Beta x (Expected Return on a market portfolio – Risk Free Rate)

iii. Weighted Average Cost of Capital (WACC) – WACC blends a company's cost of equity with its cost of debt to arrive at the company's overall cost of capital. WACC is often used in situations where the analyst wants to value the entire capital structure of a company, such as in an acquisition.

VI. Commonly Used Methods

a. Asset: A general way of determining a value indication of a business' assets and / or equity using one or more methods based directly on the value of the assets of the business less liabilities.
    i. Book Value Method: Based on the financial accounting concept that owners' equity is determined by subtracting the book value of a company's liabilities from the book value of its assets. Because assets are recorded at historical cost less depreciation, it is not possible to use this method to determine current values of assets.
    ii. Adjusted Net Assets Method: This method is used to value a business based on the difference between the fair market value of the business assets and its liabilities. Under this method, the assets are adjusted from book value to fair market value.

b. Income: A general way of determining a value indication of a business' assets and / or equity using one or more methods wherein a value is determined by converting a stream of anticipated benefits to present value.
    i. Capitalization of Earnings Method: This method is used to value a business based on a benefit stream. This benefit stream is capitalized using an appropriate capitalization rate.

ii. Discounted Earnings Method: This method is used to value a business based on the present value of its projected futures earnings plus the present value of the terminal value.

c. Market: A general way of determining a value indication of a business' assets and / or equity using one or more methods that compares the subject to similar investments that have been sold.
   i. Guideline Public Data
   ii. Guideline Transactions

d. Other:
   i. Excess Earnings Method

      This method was developed by the Treasury Department and is outlined in Revenue Ruling 68-609. Under this method, the analyst first determines a fair rate of return on the company's tangible assets. Then, the consultant computes the company's excess earnings, which is the difference between the company's net earnings and a fair return on its tangible assets. To compute the value of intangibles, the excess earnings are capitalized using a cap rate suitable for the intangible assets. To determine the value of the company, the value of the intangibles is added to the value of the company's tangible net assets.

VII. Discounts and Premiums

Once a value has been determined, the next step is to apply any required premiums or discounts. The types of premiums and discounts are usually determined based on the characteristics of the value estimate previously determined, the standard of value used, and ownership characteristics of the subject interest that differ from the characteristics inherent in the valuation approaches and methods used. The most common discounts utilized are discounts related to minority interests and discounts for lack of marketability. The most common premium utilized is a control premium.

a. Minority Discounts

   A minority interest discount is a reduction in the initial indicated value due to a lack of control prerogatives such as declaring dividends, liquidating the company, going public, issuing or buying stock, directing management, setting management's salaries, etc. In effect, a minority or non-controlling position in a privately held company is generally held at the great risk of being subject to the judgment, ethics, and management skills of the controlling shareholder or shareholders.

b. Discount for lack of Marketability

   Publicly traded shares can be sold on the open market and converted into cash in three trading days. However, the shares of privately held companies have no ready market.

   Investors strongly prefer liquidity to lack of liquidity. According to IRS Revenue Ruling 77-287, Sec.04, "Securities traded on a public market are

generally worth more to investors than those that are not traded on a public market." Thus, it follows that a lack of a ready marketplace to liquidate stock justifies a discount for lack of marketability.
A willing buyer might be found for the shares of a privately held company, but the buyer would only buy the shares if he were able to purchase them at a discount to compensate for the fact that he would have a very hard time turning around and selling the shares himself.

c. Control Premium

Closely related to the discount for lack of control, the control premium is an amount by which the pro rata value of a controlling interest exceeds the value of a non-controlling interest.

VIII. Reports

As discussed previously, valuation analysts may hold a variety of credentials issued by different professional organizations. It is the professional organizations which issue reporting standards so each analyst must be certain they meet the requirements of all organizations of which they are members.

In general, there are two main types of reports:

a. Conclusion of Value
   i. Full – These reports cover all relevant points supporting the value conclusion, including detailed analyses and financial data.
   ii. Summary – Also known as letter reports, these reports cover most of the same material as a detailed, written report, except much of the material is summarized instead of explained.

b. Calculation of Value

These reports present the results of a calculation engagement, as defined in SSVS No. 1. It is important to understand that, under a calculation of value, the analyst is conducting a valuation based on an agreement between himself and the client regarding specific valuation approaches and methodologies which will be utilized. Because these agreed upon procedures are more limited than those of a valuation engagement, the valuation consultant calculates the value in agreement with the client. The final estimate of value in this type of report is simply a calculation. No opinion is being given by the analyst.

A common misconception is that a calculation report is a "quick and dirty" method of valuing a company. While less extensive than a conclusion of value report, a significant amount of work and professional judgment is still required.

Relevant Cases
- Blake vs. Blake, 695 P.2d 838 (1985)
- Hertz vs. Hertz, 657 P.2d 1169 (1983)
- Hurley vs. Hurley, 615 P.2d 256 (1980)
- Jurado vs. Jurado, 892 P.2d 969 (1995)
- Leeder vs. Leeder, 884 P.2d 494 (1994)
- Roberts vs. Wright, 871 P.2d 390 (1994)
- Cox vs. Cox
- Mitchell vs. Mitchell

International Glossary of Business Valuation Terms

Adjusted Book Value Method – a method within the asset approach whereby all assets and liabilities (including off-balance sheet, intangible, and contingent) are adjusted to their fair market values. (Note: In Canada on a going concern basis)

Adjusted Net Asset Method – see Adjusted Book Value Method.

Appraisal – see Valuation.

Appraisal Approach – see Valuation Approach.

Appraisal Date – see Valuation Method.

Appraisal Method – see Valuation Method.

Appraisal Procedure – see Valuation Procedure.

Arbitrage Pricing Theory – a multivariate model for estimating the cost of equity capital, which incorporates several systematic risk factors.

Asset (Asset –Based) Approach – a general way of determining a value indication of business ownership interest, or security using one or more methods based on the value of the assets net of liabilities.

Beta – a measure of systematic risk of a stock; the tendency of a stock's price to correlate with changes in a specific index.

Blockage Discount – an amount or percentage deducted from the current market price of a publicly traded stock to reflect the decrease in the per share value of a block of stock that is of a size that could not be sold in reasonable period of time given normal trading volume.

Book Value – see Net Book Value.

Business – see Business Enterprise.

Business Enterprise – a commercial, industrial, service, or investment entity (or combination thereof) pursuing an economic activity.

Business Risk – the degree of uncertainty if realizing expected future returns of the business resulting from factors other than financial leverage. See **Financial Risk.**

Business Valuation – the act or process of determining the value of a business enterprise or ownership interest therein.

Capital Asset Pricing Model (CAPM) – a model in which the cost of capital for any stock or portfolio of stocks equals a risk – free rate plus a risk premium that is proportionate to the systematic risk of the stock or portfolio.

Capitalization – conversation of a single period of economic benefits into value.

Capitalization Factor – any multiple or divisor used to convert anticipated economic benefits of a single period into value.

Capitalization of Earnings Method – a method within the income approach whereby economic benefits for a representative single period are converted to value through division by a capitalization rate.

Capitalization Rate – any divisor (usually expressed as a percentage) used to convert anticipated economic benefits of a single period into value.

Capital Structure – the composition of the invested capital of a business enterprise; the mix of debt and equity financing.

Cash Flow – cash that is generated over a period of time by an asset, group of assets, or business enterprise. It may be used in a general sense to encompass various levels of specifically defined cash flows. When the term is used, it should be supplemented by a qualifier (for example, "discretionary" or "operating") and a specific definition in the given valuation context.

Common Size Statements – financial statements in which each line is expressed as a percentage of the total. On the balance sheet, each line item is shown as a percentage of total assets, and on the income statement, each item is expressed as a percentage of sales.

Control – the power to direct the management and policies of a business enterprise.

Control Premium – an amount or a percentage by which the pro rata value of a controlling interest exceeds the pro rata value of a non controlling interest in a business enterprise to reflect the power of control.

Cost Approach – a general way of determining a value indication of an individual asset by quantifying the amount of money require d to replace the future service capability of that asset.

Cost of Capital – the expected rate of return that the market requires in order to attract funds to a particular investment.

Debt – Free – we discourage the use of this term. See Invested Capital.

Discount for Lack of Control – an amount or percentage deducted from the pro rata share of value of 100% of an equity interest in a business to reflect the absence of some or all of the powers of control.

Discount for Lack of Marketability – an amount or percentage deducted from the value of an ownership interest to reflect the relative absence of marketability.

Discount for Lack of Voting Rights – an amount or percentage deducted from the per share value of a minority interest voting share to reflect the absence of voting rights.

Discount Rate – a rate of return used to convert a future monetary sum into present value.

Discounted Cash Flow Method – a method within the income approach whereby the present value of future expected economic benefits is calculated using a discount rate.

Discounted Future Earnings Method – a method within the income approach whereby the present value of future expected economic benefits is calculated using a discount rate.

Economic Benefits – inflows such as revenues, net income, net cash flows etc.

Economic Life – the period of time over which property may generate economic benefits.

Effective Date – see Valuation Date.

Enterprise – see Business Enterprise.

Equity – the owner's interest in property after deduction of all liabilities.

Equity Net Cash Flows – those cash flows available to pay out to equity holders (in the form of dividends) after funding operations of the business enterprise, making necessary capital investments, and increasing or decreasing debt financing.

Equity Risk Premium – a rate of return added to a risk–free rate to reflect the additional risk of equity instruments over risk free instruments (a component of the cost of equity capital or equity discount rate).

Excess Earnings – that amount of anticipated economic benefits that exceeds an appropriate rate of return on the value of a selected asset base (often net tangible assets) used to generate those anticipated economic benefits.

Excess Earnings Method - a specific way of determining a value indication of a business, business ownership interest, or security determined as the sum of a) the value

of the assets derived by capitalizing excess earnings and b) the value of the selected asset base. Also frequently used to value intangible assets. See **Excess Earnings.**

Fair Market Value - the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. {NOTE: In Canada, the term *"price"* should he replaced with the term *`highest price".}*

Fairness Opinion - an opinion as to whether or not the consideration in a transaction is fair from a financial point of view.

Financial Risk - the degree of uncertainty of realizing expected future returns of the business resulting from financial leverage. See **Business Risk.**

Forced Liquidation Value - liquidation value, at which the asset or assets are sold as quickly as possible, such as at an auction.

Free Cash Flow **-** ***we discourage the use of this term.*** See **Net Cash Flow.**

Going Concern - an ongoing operating business enterprise.

Going Concern Value - the value of a business enterprise that is j expected to continue to operate into the future. The intangible elements of Going Concern Value result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems, and procedures in place.

Goodwill - that intangible asset arising as a result of name, reputation, customer loyalty, location, products, and similar factors not separately identified.

Goodwill Value - the value attributable to goodwill.

Guideline Public Company Method - a method within the market approach whereby market multiples are derived from market prices of stocks of companies that are engaged in the same or similar lines of business and that are actively traded on a free and open market.

Income (Income-Based) Approach - a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more methods that convert anticipated economic benefits into a present single amount.

Intangible Assets - nonphysical assets such as franchises, trademarks, patents, copyrights, goodwill, equities, mineral rights, securities, and contracts (as distinguished from physical assets) that grant rights and privileges and have value for the owner.

Internal Rate of Return - a discount rate at which the present value of the future cash flows of the investment equals the cost of the investment.

Intrinsic Value - the value that an investor considers, on the basis of an evaluation or available facts, to be the "true" or "real" value that will become the market value when other investors reach the same conclusion. When the term applies to options, it is the difference between the exercise price and strike price of an option and the market value of the underlying security.

Invested Capital - the sum of equity and debt in a business enterprise. Debt is typically (a) all interest-bearing debt or (b) long term, interest-bearing debt. When the term is used, it should be supplemented by a specific definition in the given valuation context.

Invested Capital Net Cash Flows - those cash flows available to pay out to equity holders (in. the form of dividends) and debt investors (in the form of principal and interest) after funding operations of the business enterprise and making necessary capital investments.

Investment Risk - the degree of uncertainty as to the realization of expected returns.

Investment Value - the value to a particular investor based on individual investment requirements and expectations. {NOTE: in Canada, the term used is *`Value to the Owner".}*

Key Person Discount - an amount or percentage deducted from the value of an ownership interest to reflect the reduction in value resulting from the actual or potential loss of a key person in a business enterprise.

Levered Beta - the beta reflecting a capital structure that includes debt.

Limited Appraisal - the act or process of determining the value of a business, business ownership interest, security, or intangible asset with limitations in analyses, procedures, or scope.

Liquidity - the ability to quickly convert property to cash or pay a liability.

Liquidation Value - the net amount that would be realized if the business is terminated and the assets are sold piecemeal. Liquidation can be either "orderly" or "forced."

Majority Control - the degree of control provided by a majority position.

Majority Interest - an ownership interest greater than 50% of the voting interest in a business enterprise.

Market (Market-Based) Approach - a general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more

methods that compare the subject to similar businesses, business ownership interests, securities, or intangible assets that have been sold.

Market Capitalization of Equity - the share price of a publicly traded stock multiplied by the number of shares outstanding.

Market Capitalization of Invested Capital - the market capitalization of equity plus the market value of the debt component of invested capital.

Market Multiple - the market value of a company's stock or invested capital divided by a company measure (such as economic benefits, number of customers).

Marketability - the ability to quickly convert property to cash at minimal cost.

Marketability Discount - see **Discount for Lack of Marketability.**

Merger and Acquisition Method - a method within the market approach whereby pricing multiples are derived from transactions of significant interests in companies engaged in the same or similar lines of business.

Mid-Year Discounting - a convention used in. the Discounted Future Earnings Method that reflects economic benefits being generated at midyear, approximating the effect of economic benefits being generated evenly throughout the year.

Minority Discount - a discount for lack of control applicable to a minority interest.

Minority Interest - an ownership interest less than 50% of the voting interest in a business enterprise.

Multiple - the inverse of the capitalization rate.

Net Book Value - with respect to a business enterprise, the difference between total assets (net of accumulated depreciation, depletion, and amortization) and total liabilities as they appear on the balance sheet (synonymous with Shareholder's Equity). With respect to a specific asset, the capitalized cost less accumulated amortization or depreciation as it appears on the books of account of the business enterprise.

Net Cash Flows - when the term is used, it should be supplemented by a qualifier. See **Equity Net Cash Flows** and **Invested Capital Net Cash Flows.**

Net Present Value - the value, as of a specified date, of future cash inflows less all cash outflows (including the cost of investment) calculated using an appropriate discount rate.

Net Tangible Asset Value - the value of the business enterprise's tangible assets (excluding excess assets and nonoperating assets) minus the value of its liabilities.

Nonoperating Assets - assets not necessary to ongoing operations of the business enterprise. {NOTE: in Canada, the term used is *"Redundant Assets".}*

Normalized Earnings - economic benefits adjusted for nonrecurring, noneconomic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

Normalized Financial Statements - financial statements adjusted for nonoperating assets and liabilities and/or for nonrecurring, noneconomic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

Orderly Liquidation Value - liquidation value at which the asset or assets are sold over a reasonable period of time to maximize proceeds received.

Premise of Value - an assumption regarding the most likely set of transactional circumstances that may be applicable to the subject valuation; for example, going concern, liquidation.

Present Value - the value, as of a specified date, of future economic benefits and/or proceeds from sale, calculated using an appropriate discount rate.

Portfolio Discount - an amount or percentage deducted from the value of a business enterprise to reflect the fact that it owns dissimilar operations or assets that do not fit well together.

Price/Earnings Multiple - the price of a share of stock divided by its earnings per share

Rate of Return - an amount of income (loss) and/or change in value realized or anticipated on an investment, expressed as a percentage of that investment.

Redundant Assets - see **Nonoperating Assets.**

Report Date - the date conclusions are transmitted to the client.

Replacement Cost New - the current cost of a similar new property having the nearest equivalent utility to the property being valued.

Reproduction Cost New - the current cost of an identical new property.

Required Rate of Return - the minimum rate of return acceptable by investors before they will commit money to an investment at a given level of risk.

Residual Value - the value as of the end of the discrete projection period in a discounted future earnings model.

Return on Equity - the amount, expressed as a percentage, earned on a company's common equity for a given period.

Return on Investment - See **Return on Invested Capital** and **Return on Equity.**

Return on Invested Capital - the amount, expressed as a percentage, earned on a company's total capital for a given period.

Risk-Free Rate - the rate of return available in the market on an investment free of default risk.

Risk Premium - a rate of return added to a risk-free rate to reflect risk.

Rule of Thumb - a mathematical formula developed from the relationship between price and certain variables based on experience, observation, hearsay, or a combination of these; usually industry specific.

Special InterestPurchasers - acquirers who believe they can enjoy post-acquisition economies of scale, synergies, or strategic advantages by combining the acquired business interest with their own.

Standard of Value - the identification of the type of value being utilized in a specific engagement; for example, fair market value, fair value, investment value.

Sustaining Capital Reinvestment - the periodic capital outlay required to maintain operations at existing levels, net of tax shield available from such outlays.
Systematic Risk-the risk that is common to all risky securities and cannot be eliminated through diversification. The measure of systematic risk in stocks is the beta coefficient.

Tangible Assets - physical assets (such as cash, accounts receivable, inventory, property, plant and equipment, etc.).

Terminal Value - See **Residual Value.**

Transaction Method - See **Merger and Acquisition Method.**

Unlevered Beta - the beta reflecting a capital structure without debt.

Unsystematic Risk - the risk specific to an individual security that can be avoided through diversification.

Valuation - the act or process of determining the value of a business, business ownership interest, security, or intangible asset.

Valuation Approach - a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more valuation methods.

Valuation Date - the specific point in time as of which the valuator's opinion of value applies (also referred to as "Effective Date" or "Appraisal Date").

Valuation Method - within approaches, a specific way to determine value.

Valuation Procedure - the act, manner, and technique of performing the steps of an appraisal method.

Valuation Ratio - a fraction in which a value or price serves as the numerator and financial, operating, or physical data serve as the denominator.

Value to the Owner - see **Investment Value.**

Voting Control - *de jure* control of a business enterprise.

Weighted Average Cost of Capital (WACC) - the cost of capital (discount rate) determined by the weighted average, at market value, of the cost of all financing sources in the business enterprise's capital structure.

Resources:

IRS Revenue Ruling 59-60
IRS Revenue Ruling 68-609
IRS Revenue Ruling 83-120
IRS Revenue Ruling 93-12
PPC's Guide to Business Valuations, Volumes 1-3
NACVA Business Valuations: Fundamental, Techniques, and Theory
IRS Business Valuation Guidelines – 2006

Dividing Military Retired Pay

By Honorable Mike Murphy, Third Judicial District, Division III

I. HISTORY.

The Uniformed Services Former Spouses' Protection Act ("USFSPA") was passed by Congress in 1982. The USFSPA gives a State court the authority to treat military retired pay as marital property and divide it between the spouses. Congress' passage of the USFSPA was prompted by the United States Supreme Court's decision in *McCarty v. McCarty*, 453 US 210 (1981).

The *McCarty* decision effectively precluded State courts from dividing military retired pay as an asset of the marriage. Justice Blackmun, writing for the majority, stated that allowing a State to divide retired pay would threaten "grave harm to 'clear and substantial' federal interest." Accordingly, the Supremacy Clause of Article VI preempted the State's attempt to divide military retired pay. Congress, by enacting the USFSPA, clarified its intent that State courts have the power to divide what can be the largest asset of a marriage.

With the passage of the USFSPA, Congress took the opportunity to set forth various requirements to govern the division of military retired pay. Therefore, if a member is divorced while on active duty, the requirements of the Servicemembers Civil Relief Act ("SCRA") must be met before an award dividing military retired pay can be enforced under the USFSPA. The USFSPA contains its own jurisdictional requirement for the division of retired pay as property. It limits the amount of the member's retired pay which can be paid to a former spouse to 50% of the member's disposable retired pay (gross retired pay less authorized deductions). It requires that the parties must have been married 10 years or more while the member performed at least 10 years of service creditable towards retirement eligibility before a division of retired pay is enforceable under the USFSPA. It specifies how an award of military retired pay must be expressed. It also provides a former spouse with a means of enforcing an alimony and/or child support award.

II. DOCUMENTS NEEDED TO DIVIDE MILITARY RETIRED PAY.

The USFSPA defines a "court order" dividing military retired pay enforceable under the Act as a "final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree." This also includes an order modifying a previously issued "court order."

Since military retired pay is a Federal entitlement, and not a qualified pension plan, there is no requirement that a Qualified Domestic Relations Order ("QDRO") be used. As long as the award is set forth in the divorce decree or other pertinent court order in an acceptable manner, that is sufficient. It is also not necessary to judicially join the "member's plan" as a part of the divorce proceeding. There is no Federal statutory authority for this. The award may also be set

forth in a court ratified or approved separation agreement, or other court order issued incident to the divorce.

In order to submit an application for payments under the USFSPA, a former spouse needs to submit a copy of the applicable court order, certified by the clerk of court, along with a completed application form ("DD Form 2293"). Instructions, including designated agent names and addresses, are on the back of the DD Form 2293. The Defense Finance and Accounting Service ("DFAS") is the designated agent for all uniformed military services. The Forms and instructions can be downloaded from the DFAS website at www.dfas.mil/garnishment/retiredmilitary.html.

III. REQUIREMENTS FOR ENFORCEABILITY UNDER USFSPA.

A. Servicemembers Civil Relief Act.

The provision of the SCRA that has primary application to the USFSPA and the division of military retired pay is the section concerning default judgments against active duty service members. This section requires that if an active duty defendant fails to make an appearance in a legal proceeding, the plaintiff must file an affidavit with the Court informing the Court of the member's military status. The Court shall appoint an attorney to represent the interests of the absent defendant. A member has 90 days after separation from active duty service to apply to a Court rendering a judgment to re-open a case on SCRA grounds. Thus, this provision of the SCRA does not apply to a member with an active duty divorce where the member has been retired for more than 90 days.

B. Requirements that Apply to Retired Pay as Property Awards Only

(1) The 10/10 requirement.

This is a "killer" requirement. For a division of retired pay as property award to be enforceable to direct payments under the USFSPA, the former spouse must have been married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable towards retirement eligibility. **This requirement does not apply to the Court's authority to divide military retired pay,** but only to the ability of the former spouse to **enforce** the award by direct payments from DFAS. This is a statutory requirement for direct payments, and not a personal right of the member that can be waived.

This causes a problem, as the member will be taxed on the entire retirement, because DFAS will issue a 1099-R only to him. Thus, the member will have to do a "pass thru allocation schedule" on his federal tax return each year, and the spouse will have to add her/his share of the income on her/his return, but the spouse will not have a share of the withholdings which were taken from the member's share. If DFAS were to pay the former spouse directly, the former spouse's USFSPA payments would be reported on her or his own Form 1099-R, instead of all taxable retired pay being reported on the member's Form 1099-R.

If we can not determine from the Court order whether the 10/10 requirement has been met, we may ask the former spouse to provide a copy of the parties' marriage certificate. A recitation in the Court order such as, "The parties were married for 10 years or more while the member performed 10 years or more of military service creditable for retirement purposes" will satisfy the 10/10 requirement, unless the marriage certificate shows otherwise.

(2) USFSPA Jurisdiction

The USFSPA's jurisdictional requirement is found in 10 U.S.C. § 1408(C)(4). If it is not met, the former spouse's application for retired pay as property payments under the USFSPA will be rejected. For a Court to have the authority to divide military retired pay, the USFSPA requires that the Court have "(c)(4)" jurisdiction over the military member in one of three ways. One way is for the member to **consent** to the jurisdiction of the Court. The member indicates his or her consent to the Court's jurisdiction by taking some affirmative action with regard to the legal proceeding, such as filing any responsive pleading in the case. Simply receiving notice of filing of the divorce complaint or petition is not sufficient. Consent is the most common way for a Court to have (c)(4) jurisdiction over a member.

The other ways for the Court to have (c)(4) jurisdiction are for the member to be a **resident** of the State at the time of divorce other than because of his or her military assignment, or for the Court to find that the member was **domiciled** in the particular State at the time of the divorce. Now, the key with regard to domicile is that the Court makes this determination, and it should be noted in the divorce decree.

IV. LANGUAGE DIVIDING MILITARY RETIRED PAY.

A. Fixed Dollar Amount or Percentage Awards.

The amount of a former spouse's award is entirely a matter of State law. However, in order for the award to be enforceable under the USFSPA, it must be expressed in a manner consistent with the USFSPA, and the Court order must provide DFAS with all the information necessary to compute the award.

The major reason why DFAS rejects applications for payments under the USFSPA is that the language dividing retired pay is faulty. The USFSPA states that for a retired pay as property award to be enforceable, it must be expressed either as a **fixed dollar amount** or as a **percentage of disposable retired pay**. For a fixed dollar amount award, a monthly amount needs to be provided in the Court order. If a fixed dollar amount award is used, the former spouse will not be entitled to any of the member's retired pay cost of living adjustments ("COLAs"). Because of the significant effect of COLAs over time, it is infrequent that an award is stated as a fixed dollar amount. The more common method of expressing the former spouse's award is as a percentage of the member's disposable retired pay. This has the benefit to the former spouse of increasing the amount of the former spouse's award over time due to periodic retired pay COLAs.

All percentage awards are figured based on a member's **disposable retired pay** which is a member's gross retired pay less authorized deductions. The authorized deductions vary based

on the date of the parties' divorce. The principal deductions now include retired pay waived to receive VA disability compensation, disability retired pay, and Survivor Benefit Plan ("SBP") premiums where the former spouse is elected as the former spouse beneficiary. Since the United States Supreme Court has ruled that Congress authorized the division of only **disposable retired pay**, **not gross retired pay**, the regulation provides that all percentage awards are to be construed as a percentage of disposable retired pay.

Set-offs against the former spouse's award are not permitted. If the amount of the former spouse's award is expressed as a percentage of disposable retired pay less some set-off amount (e.g., the Survivor Benefit Plan premium or the former spouse's child support obligation or some other debt), the entire award is **unenforceable**. This type of award language does not meet the statutory requirement of a fixed dollar amount or percentage. Moreover, the amount of the former spouse's award is indeterminate, and there is no way for DFAS to set it up in the retired pay system.

If the award language is otherwise acceptable, but another provision of the Court order requires that a set-off amount be deducted from the former spouse's share (such as an SBP premium or the former spouse's child support obligation), only the set-off is unenforceable. This is because there is no provision of the USFSPA that authorizes enforcement of a set-off against the former spouse's retired pay as property award. State Courts have authority to divide military retired pay only as set forth by the USFSPA. Thus, State Court provisions not in accordance with the USFSPA are unenforceable.

There is no magic language required to express a percentage or fixed dollar award. All the divorce decree needs to say is the following:

Example 1: "The former spouse is awarded _____ percent [or dollar amount per month] of the member's disposable military retired pay."

B. Introduction to Formula and Hypothetical Retired Pay Awards.

Most of the problems with award language have arisen in cases where the parties were divorced while the member was still performing military service. In these cases, the former spouse's award was indeterminate at time of divorce since the member had not yet retired. Since the parties did not know how much longer the member would remain in military service after the divorce, a straight percentage award may not have been suitable. DFAS has dealt with this situation as discussed below.

C. Formula Awards.

A formula award is an award expressed in terms of a marital fraction, where the numerator covers the period of the parties' marriage while the member was performing creditable military service, and the denominator covers the member's total period of creditable military service. The former spouse's award is usually calculated by multiplying the marital fraction by ½ or 50%. Since a formula award works out to a percentage of disposable retired pay, it would

be a type of percentage award, and as such would automatically include a proportionate share of the member's COLAs.

For members retiring from **active** duty: The numerator is usually the total period of time from marriage to divorce or separation while the member was performing creditable military service. The numerator, expressed in terms of whole months, **must** be provided in the Court order. If the numerator is expressed in terms of years or days, DFAS will convert it to months. DFAS will then drop any odd days or partial months. DFAS will supply the denominator in terms of whole months of service creditable for retirement eligibility, and then work out the formula to calculate the former spouse's award as a percentage of disposable retired pay. All fractions will be carried out to six decimal places.

For example, assume you have a marriage that lasted exactly 12 years or 144 months. The member serves for 25 years and then retires. Using the formula given above, the former spouse would be entitled to ½ × (144/300) = 24.0000% of the members disposable retired pay.

Example 2. The following language is an example of an acceptable way to express an active duty formula award:

> **"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____ months of marriage during the member's creditable military service, divided by the member's total number of months of credible military service."**

In the case of members retiring from **reserve** duty, a marital fraction award must be expressed in terms of **reserved retirement points** rather than in terms of whole months. The numerator, which for reservists is the total number of reserve retirement points earned during the marriage, must be provided in the Court order. **Failure to list the reserve points earned during the marriage in the Court order will cause the Court order to be rejected. DFAS Garnishment Operations does not have access to a reserve member's points**. DFAS will supply the member's total reserve retirement points for the denominator. All fractions will be carried out to six decimal places.

Example 3. The following language is an example of an acceptable way to express a reserve duty formula award:

> **"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____ reserve retirement points earned during the period of the marriage, divided by the member's total number of reserve retirement points earned."**

D. Hypothetical Retired Pay Awards.

(1) Introduction

A **hypothetical retired pay** award (or hypothetical award) is an award expressed as a percentage of a hypothetical retired pay amount different from the member's **actual retired pay**. It is usually figured as if the member had retired on the date of separation or divorce. In some instances, New Mexico Courts may use hypothetical awards to divide military retired pay. Unlike a formula award, a hypothetical award does not give the former spouse the benefit of any of the member's pay increases due to promotions or increased service time after the divorce. Since a hypothetical award also works out to a percentage of disposable retired pay, it too would be a type of percentage award, and as such would automatically include a proportionate share of the member's COLAs.

The basic method for computing military retired pay is to multiply the member's retired pay base times the retired pay multiplier. For members entering military service before September 8, 1980, the retired pay base is the member's final basic pay. For members entering military service after September 7, 1980, the retired pay base is the average of the member's highest 36 months of basic pay. This will usually be the last 36 months prior to retirement. The retired pay computation is rounded down to the next lower multiple of $1.00.

The standard retired pay multiplier is the product of two and one-half percent times the member's years of creditable service. For members who entered military service on or after August 1, 1986, who are under the age of 62, and who elect to participate in the Career Status Bonus ("CSB")/REDUX retirement system, their retired pay multiplier is reduced one percentage point for each full year of service less than 30, and 1/12th of one percent for each full month. Their retired pay is computed using the standard multiplier when the member attains age 62. The years of creditable service for a reservist are computed by dividing the reserve retirement points on which the award is to be based by 360.

A hypothetical retired pay amount is computed the same way as a member's actual military retired pay, but based on variables that apply to the member's hypothetical retirement. The necessary variables are shown as blanks in the following examples of acceptable award language. The principal problem we find with hypothetical awards is that one or more of the necessary variables for the hypothetical retired pay computation is often left out of the Court order. **These variables must be provided in the applicable Court order. Failure to do so will cause the Court order to be rejected.**

For members entering military service **before September 8, 1980**, the hypothetical retired pay base is the member's pay at the hypothetical retirement date. **Basic pay tables, for all years, are available at the DFAS website: www.dfas.mil/militarypay/militarypaytables.html**. Attorneys should be able to obtain the basic pay figure either from the member or from the applicable pay table.

For members entering military service **after September 7, 1980**, the hypothetical retired pay base would normally be the average of the member's highest 36 months of basic pay prior to the hypothetical retirement date. This information is specific to each member. The pay information can be obtained from either the member during the discovery or from his pay center

by subpoena. **DFAS Garnishment Directorate does not have access to this pay information.** It must be included in the Court order dividing military retired pay.

For members who elect to retire under the CSB/REDUX retirement system, DFAS will compute the member's hypothetical retired pay amount using the standard retired pay multiplier, and not the reduced CSB/REDUX multiplier. Thus, the former spouse's award will not be reduced as a result of the member's electing to receive a Career Status Bonus and a reduced retired pay amount.

The hypothetical retired pay amount is a fictional computation, since the member often does not have the required 20 years of creditable service necessary to be eligible to receive retired pay on the date his or her retired pay is divided. DFAS' goal in computing a hypothetical retired pay award is to make the computation in a way that is reasonable and equitable to both the member and former spouse. In order to do so, DFAS will compute the hypothetical award as if the member had enough creditable service to qualify for military retired pay, 240 months, hypothetical retirement date, even if he or she did not.

Also, a member who retires with less than 20 years of creditable service may have a reduction factor applied to his or her retired pay computation. The only time DFAS would apply a reduction factor to the hypothetical retired pay calculation is if a reduction factor was actually used to compute the member's military retired pay. In that case, DFAS would apply the same reduction factor to both computations to achieve equity.

(2) Example of a Hypothetical Retired Pay Calculation.

DFAS will convert all awards of a percentage of a hypothetical retired pay amount into a percentage of the member's actual disposable retired pay according to the following method.

(a) First, calculate the hypothetical retired pay amount. Assume that the Court order awarded the former spouse 25% of the retired pay of an E-6 with a retired pay base of $2,040 and with 18 years of service retiring on June 1, 1999. *The member's hypothetical retired pay multiplier would be .025 $\times$ 18 = .45. His hypothetical retired pay would be .45 $\times$ $2,040 = $918.00.*

(b) Next, we apply retired pay COLAs to the hypothetical retired pay amount up to the member's actual retirement date to find a "present value" of the hypothetical retired pay as of the member's actual retirement date. *This adjustment does not result in the former spouse benefitting from the member's additional service time or promotions after the hypothetical retirement date. It simply provides the former spouse with the amount he or she would have received had the member actually become eligible to receive retired pay on the hypothetical retirement date.*

In our example, the member would have been eligible for the following COLAs had he retired on June 1, 1999:

December 1, 1999	1.7%	$918.00 × 1.017 = $933.00
December 1, 2000	3.5%	$933.00 × 1.035 = $965.00
December 1, 2001	2.6%	$965.00 × 1.026 = $990.00

(c) *We then convert the former spouse's award to a percentage of the member's actual disposable retired pay by multiplying the percentage awarded the former spouse times a fraction. The member's hypothetical retired pay is the numerator of the fractions, and the member's actual retired pay is the denominator.*

In our example, assume that the member later retired on June 1, 2002, as an E-7 with a retired pay base of $3,200.40 and 23 years of creditable service. The member's actual retired pay multiplier would be .025 × 23 = .575. His gross retired pay would be .575 × $3,200.40 = $1,840.00. The former spouse's actual award percentage would be: 25% × $990/$1,840 = 13.4510%. We would set up 13.4510% in the retired pay system.

While the percentage has been reduced from 25% to 13.4510%, the amount the former spouse would receive is the amount intended by the Court. This is because the lower percentage would be multiplied times the higher dollar amount of the member's actual disposable retired pay. For example, in this case, assume that the member's disposable retired pay is equal to his gross retired pay. Twenty-five percent of $990 is $247, which equals 13.4510% of $1,840. The retired pay system would apply 13.4510% to the member's actual disposable retired pay each month to determine the amount the former spouse receives. The former spouse would automatically receive a proportionate share of the member's cost of living adjustments (COLAs).

For CSB/REDUX members, we compute the former spouse's initial percentage using the member's reduced retired pay amount as the denominator of the fraction. We implement this percentage in the retired pay system effective through the month the member attains age 62. We also calculate the former spouse's percentage using the retired pay amount the member would have received had the member not elected CSB/REDUX. We sent this lower percentage up in the retired pay system effective on the first day of the month after the member attains age 62, which is also the effective date of the recomputation of the member's retired pay to the amount the member would have received had the member not elected CSB/REDUX. This prevents the former spouse from receiving more than the amount intended in the Court order.

(3) Examples of Active Duty Hypothetical Awards.

The following are examples of acceptable active duty hypothetical awards:

Example 4. The following language is acceptable for all active duty members, regardless of service entry date.

"The former spouse is awarded ___% of the disposable military retired pay the member would have received had the member retired with a retired pay base of _____ and with _____ years of creditable service on _____."

Example 5. If a member entered military service **before September 8, 1980**, the following language is also acceptable because we can determine the member's retired pay base by simply looking at the pertinent military pay table.

"The former spouse is awarded ___% of the disposable military retired pay the member would have received had the member retired with the rank of ____ and with _____ years of creditable service on _____."

The Court order may direct DFAS to calculate a hypothetical retired pay amount using the pay tables in effect at the time the member becomes eligible to receive military retired pay instead of the pay table in effect at the time the Court divides military retired pay. If this is the case, then the Court order dividing an active duty member's military retired pay must provide DFAS with:

1) the percentage awarded the former spouse,
2) the member's rank to be used in the calculation, and
3) the years of creditable service to be used in the calculation.

DFAS will make the hypothetical retired pay calculation using the basic pay figure from the pay tables in effect at the member's retirement for the rank and years of service given in the Court order, for both members who entered military service before September 8, 1980, and for members who entered military service on or after September 8, 1980.

Example 6. The following language is an example of an acceptable active duty hypothetical award based on the pay tables in effect at the member's retirement:

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of ____ and with ____ years of creditable service."

(4) Examples of Reserve Hypothetical Awards.

The following are examples of acceptable reserve hypothetical awards.

Example 7. The following language is acceptable for all reserve members, regardless of service entry date:

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of ____ and with reserve retirement points on _____."

Example 8. The following language is also acceptable for reservists who entered military service before September 8, 1980:

> **"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on _____, with the rank of ____ with ____ reserve retirement points, and with ____ years of service for basic pay purposes.**

If the Court order directs DFAS to calculate a hypothetical retired pay amount using pay tables in effect at the time the member becomes eligible to receive retired pay, the Court order must provide DFAS with:

1) the percentage awarded the former spouse,
2) the member's rank to be used,
3) the reserve retirement points to be used, and
4) years of service for basic pay purposes.

DFAS will make the hypothetical retired pay calculation using the basic pay figure from the pay tables in effect at the member's retirement for the rank and years of service given in the Court order, for both members who entered military service before September 8, 1980, and for members who entered military service on or after September 8, 1980.

Example 9. The following language is an example of an acceptable reserve hypothetical award based on the pay table in effect at the member's becoming eligible to receive military retired pay.

> **"The former spouse is awarded ___% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on the date he [or she] attained age 60, with the rank of _____, with _____ reserve retirement points, and with ____ years of service for basic pay purposes."**

E. Examples of Unacceptable Former Spouse Award Language.

Problems with award language usually occur when the parties are divorced prior to the member's becoming eligible to receive military retired pay. The examples given below represent common mistakes we see in Court orders attempting to divide military retired pay.

(1) "The former spouse is awarded one-half of the community interest in the member's military retired pay."

Here DFAS is not told how to calculate the community interest. Nor is DFAS provided with any of the variables necessary to make such a calculation using either a formula or hypothetical retired pay award.

(2) "The former spouse is awarded one-half of the member's military retirement that vested during the time of the marriage."

Military retired pay is a federal entitlement, which a member either qualifies for or does not. It does not vest in any way prior to the member's retirement. As with the above example, DFAS is not provided with any information as to how to calculate the amount of the former spouse's award.

(3) "The former spouse is awarded one-half of the accrued value of the member's military retirement benefits as of the date of the divorce."

This example is similar to example (2) above. As with example (2), since military retired pay is a statutory entitlement, it has no accrued value prior to the member's retiring. Again, DFAS is not provided with any information as to how to calculate the amount of the former spouse's award.

(4) "The former spouse shall be entitled to 42% of the member's military retirement based on the amount he would have received had he retired as of the date of the divorce."

This appears to be intended as a hypothetical award, but it does not provide DFAS with any of the variables needed to calculate a hypothetical retired pay amount. Since DFAS does not have access to the member's military service information, there is no practical way for us to obtain the needed information ourselves.

(5) "The former spouse is awarded a portion of the member's military retired pay calculated according to the Murphy formula."

Here, the Court order presumes that DFAS is familiar with the State's law and knows what the Murphy formula is. DFAS is not able to research individual cases to resolve ambiguities in Court orders. Also, the Court order does not provide DFAS with any of the necessary variables.

(6) "The former spouse is awarded an amount equal to 50% of the member's disposable retired pay less the amount of the Survivor Benefit Plan Premium."

The amount of the former spouse's award must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay, or as an acceptable formula or hypothetical award. This award does not meet this requirement. If the Court order awarded the former spouse 50% of the member's disposable retired pay, but then later in the order it stated that the amount of the Survivor Benefit Plan (SBP) premium would be deducted from the former spouse's share, DFAS could honor the case at 50%. The provision concerning the SBP premium would be unenforceable since Federal law provides that SBP premium must be deducted from the **member's** retired pay.

F. Correcting Deficient Awards.

If DFAS is not able to determine the amount of the former spouse's award from the information provided in the Court order, the former spouse has two alternatives. One alternative

is for the former spouse to obtain a new Court order **clarifying** the former spouse's retired pay as property award by expressing it in an acceptable manner. The other alternative is for the former spouse to provide DFAS with any missing information by submitting a notarized agreement with the information signed by both the former spouse and member. If the parties wish, they may provide DFAS with the fixed dollar amount or percentage of disposable retired pay the former spouse is to receive.

V. SURVIVOR BENEFIT PLAN (SBP)

A. SBP is a unitary benefit and it cannot be divided between a current spouse and a former spouse.

B. Active Duty Election. A member, or active duty, is automatically covered at retirement. An election must be made and spouse concurrence is necessary if member chooses no SBP, child coverage, or coverage at a base amount less that the full retired pay.

C. Guard/Reserve election. There is **one** opportunity to make election at the 20 year mark (receipt of 20 year letter) at time of application for retired pay (about 1 year before a member turns 60) the member is given another opportunity. Spouse concurrence is required.

D. SBP benefit payments equal 55% of the **selected** base amount.

E. SBP premium is 6.5% of the selected base amount, payable out of retired pay, and is taken "off the top" and deducted **before** division of disposable retired pay, to the effect that both parties pay in the same proportion as their shares of the retired pay.

F. The Court should require the former spouse to send a copy of the divorce decree order for SBP coverage on a "deemed election letter" within one year of the Court order granting SBP to: DFAS P.O. Box 7130, London, KY 40741-7130.

G. For all other correspondence with DFAS: DFAS-CL P.O. Box 998002 Cleveland, OH 44199-8002.

H. Mailing document to DFAS does not require certified mail, but it is recommended.

I. All Court orders **must** be certified by the Court clerk **within 90 days** of service on
DFAS.

J. Form DD 2293 may be filled out by anyone, but must be signed by the member and may be served by anyone, and may be served by anyone on DFAS. The form **must** accompany the Court order. A current form may be downloaded from the DFAS website from time to time. http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2293.pdf

In brief, “CRSC” –– Combat-Related Special Compensation –– is the Defense Dept. paying AGAIN (for combat injuries or conditions) a retiree who is already getting disability payments for service-connected illness or conditions. A military retiree can only get CRSC by applying for it, submitting all of his military and medical records to prove that the medical condition/illness was“combat-related” and then receiving a board’s decision from his branch of service which finds that it is, in fact, combat-related. In other words, it’s not automatic or forced upon you –– you have to ask for it and get approved. Once you get approved, then all of the Concurrent Retirement and Disability Pay (“CRDP”) which you may have been receiving from DFAS [Defense Finance and Acctg Svc] for the “return of your waived pension” if you’ve got a VA rating of 50% or higher, GOES AWAY. In other words, getting CRSC means that you’ve probably reduced substantially the pot of money which can be shared with your ex-spouse in military pension division; and YOU are in line to receive non-divisible CRSC and also VA disability pay.

Non-Abatement

By Elizabeth D. Hartwell, Esq.

In general, dissolution actions **do not abate upon the death of a party,** so long as the petition for dissolution has been properly filed and served. Upon the filing and service of a petition for dissolution of marriage...if a party to the action dies during the pendency of the action, but prior to the entry of a decree granting dissolution of marriage..., the proceedings for the determination, division and distribution of marital property rights and debts, distribution of spousal or child support or determination of paternity shall not abate. The court shall conclude the proceedings as if both parties had survived. NMSA § 40-4-20(B). In order for this to occur, the estate of the decedent spouse must be substituted as a party to the action pursuant to Rule 1-025(A)(1) NMRA.

Is the survivor a spouse in a related probate? Once a dissolution action has been filed and served, the remaining party cannot be treated as a surviving spouse for purposes of distribution of the decedent's estate. The Probate Code specifically excludes from the definition of "surviving spouse" an individual "who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights, including a property division judgment entered pursuant to the provisions of Section 40-4-20." *Karpien v. Karpien,* 146 N.M. 188, 192, 207 P.3d 1165, 1169 (N.M.App., 2009).

As this publication goes to press, the Supreme Court has not issued its opinion on the related issue of whether estate documents naming a spouse as the personal representative of one's estate are effectively revoked by the filing and service of a petition for dissolution of marriage. The Court of Appeals held that, consistent with its opinion in *Karpien*, such estate documents are effectively revoked when a petition for dissolution is filed and served, such that the remaining party cannot be considered a surviving spouse for purposes of distributing the decedent's estate. *Oldham v. Oldham*, 147 N.M. 464, 225 P.3d 794 (N.M. App. 2009), *cert. granted* (N.M. Nov. 4, 2009).

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Attorney Fees in Domestic Relations Cases

By Jennifer M. deGraauw, Esq.

I. ATTORNEY FEES GENERALLY

Attorney fees in domestic relations cases are governed by rule, statute and case law. The determination of whether or not to grant an award of attorney fees or the amount of the award rests within the sound discretion of the trial court. *Hertz v. Hertz*, 99 N.M. 320, 657 P.2d 1169 (1983). The trial court's ruling concerning the grant or denial of attorney fees will be reviewed only as to whether there has been an abuse of discretion. *Fitzgerald v. Fitzgerald*, 70 N.M. 11, 369 P.2d 398 (1962).

New Mexico follows the "American Rule" regarding the award of attorney fees. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, 127 N.M. 654, 986 P.2d 450. Under the "American Rule" a party may not recover attorney fees unless authorized by a statute, a court rule, or an agreement expressly permitting recovery. See *Central Adjustment Bureau, Inc. v. Thevenet*, 101 N.M. 612, 614, 686 P.2d 954, 956 (1984); Baca, 116 N.M. at 753, 867 P.2d at 423. Of course, the "American Rule," does not restrict the court's inherent powers to impose sanctions upon a party, including attorney fees, under Rule 1-011 NMRA. *See N.M. Right to Choose/NARAL* at ¶ 9. For example, the court may consider if one spouse's acts, such as an abuse of discovery rules, resulted in the other party incurring additional fees. *Hakkila v. Hakkila*, 112 N.M. 172, 180, 812 P.2d 1320.

Rule 1-127 NMRA requires "[a] motion for attorney fees pursuant to Rule 1-054 NMRA shall include an itemization of time expended and an affirmation that the fees claimed are correctly stated and necessary." Rule 1-054(E) NMRA instructs parties to make a motion for attorney fees. If a party submits an attorney's fee affidavit, this is sufficient to alert the court's attention to that party's request for attorneys fees and preserves the issue for appeal. *See Grant v. Cumiford*, 137 N.M. 485, 112 P.3d 1142 (2005-NMCA-058).

II. STATUTORY PROVISIONS RELATED TO DOMESTIC RELATIONS CASES

New Mexico statutory law specifically authorizes an award of attorneys fees in domestic relations cases. Under § 40-4-7(A) NMSA,

> "[i]n any proceeding for the dissolution of marriage, division of property, disposition of children or spousal support, the court may make and enforce by attachment or otherwise an order to restrain the use or disposition of the property of either party, or for the control of the children, or to provide for the support of either party during the pendency of the proceeding, as in its discretion may seem just and proper. The court may make an order, relative to the expenses of the proceeding, as will ensure either party an efficient preparation and presentation of his case."

§ 40-4-7(A) NMSA 1978. This statute "ensure[s] either party an efficient preparation and presentation of his case." *Bustos v. Gilroy*, 106 N.M. 808, 812, 751 P.2d 188, 192 (Ct.App.1988).

This statute only applies to the parties in the underlying domestic relations proceeding and does not extend to third-party litigants in domestic relations cases, because, § 40-4-1 NMSA provides a district court may decree dissolution of marriage upon petition of "either party to a marriage." § 40-4-1 NMSA 1978, *Garcia v. Jeantette*, 2004-NMCA-004, ¶ 20 134 N.M. 776, 82 P.3d 947. Therefore, § 40-4-7(A) NMSA only applies to parties in dissolution of marriage actions, that is, husband and wife. *Garcia* at ¶ 18.

III. SUPPORT CASES

Additionally, an award of attorney fees is authorized by statute in support cases. Under the Uniform Interstate Family Support Act,

> "[i]f an obligee prevails, a responding tribunal may assess against an obligor filing fees, reasonable attorney's fees, other costs and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs or expenses against the obligee or the support enforcement agency of either the initiating or the responding state, except as provided by other law. Attorney's fees may be taxed as costs and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs and expenses."

§ 40-6A-313(b) NMSA 1978.

With respect to the registration of a foreign support order under § 40-6A-601 NMSA, if the party responding to a proceeding to register a foreign order and that party objects to the registration of the foreign order under § 40-6A-606, attorneys fees are governed by NMSA § 40-6A-313(c). § 40-6A-613(c) NMSA 1978. Under that provision,

> "[t]he tribunal shall order the payment of costs and reasonable attorney's fees if it determines that a hearing was requested primarily for delay. In a proceeding under Sections 40-6A-601 through 40-6A-615 NMSA 1978, a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change."

§ 40-6A-313(c) NMSA 1978.

IV. CUSTODY CASES

Under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"), §40-10A-101 NMSA, "[t]he court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses and child care

expenses during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate." §40-10A-312 NMSA 1978.

Additionally, the UCCJEA provides "if a court dismisses a petition or stays a proceeding because it declines to exercise jurisdiction pursuant to [§40-10A-208(a)], it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses and child care expenses during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate." §40-10A-208 NMSA 1978. Even if the court does not find New Mexico a "clearly inappropriate forum" the court may award attorneys fees under this section where a trial court declines jurisdiction on grounds of inconvenient forum. *Hester v. Hester,* 100 N.M. 773, 676 P.2d 1338 (Ct. App. 1984).

V. TEMPORARY DOMESTIC ORDERS

In original domestic relations cases where a temporary domestic order is issued under Rule 1-122 NMRA, the court can assess attorney fees and costs against either party for committing acts contrary to the terms of the temporary domestic order. Rule 1-122(D) NMRA.

VI. FACTORS FOR THE COURT TO CONSIDER

The factors the court is required to take into consideration are listed in Rule 1-127 NMRA. This rule requires that the court consider:

> "A. disparity of the parties' resources, including assets and incomes;
> B. prior settlement offers;
> C. the total amount of fees and costs expended by each party, the amount paid from community property funds, any balances due and any interim advance of funds ordered by the court; and
> D. success on the merits."

Rule 1-127 NMRA.

A. ECONOMIC DISPARITY

If there is economic disparity between the parties, such that one party may be inhibited from preparing or presenting a claim, the trial court should liberally exercise its discretion so as to remove that inhibition and assist the needy party. See *Allen v. Allen,* 98 N.M. 652, 655, 651 P.2d 1296, 1299 (1982); *Schuermann v. Schuermann,* 94 N.M. 81, 84, 607 P.2d 619, 622 (1980). "It is important for trial judges to be liberal in awarding attorney's fees in custody cases where the economic disparity between the parties and the costs involved in pursuing the action are so great that participation becomes economically oppressive to one party. To do otherwise would have a chilling effect upon the less affluent parent's ability to present his or her case and upon the trial judge's ability to determine which parent can provide best for a child's welfare." *Schuermann* at 84.

In considering the economic disparity between the parties, the court should consider not only the parties' relative incomes but the parties' relative access to financial resources. *See Mattox v. Mattox*, 105 N.M. 479, 487, 734 P.2d 259, 267 (Ct.App. 1987); *Blake v. Blake*, 102 N.M. 354, 365, 695 P.2d 838, 849 (Ct.App. 1985). If neither Wife nor Husband is economically oppressed, the trial court may in its discretion require each side to pay his and her own attorney fees. *Allen v. Allen*, 98 N.M. 652, 651 P.2d 1296 (1982); *Corliss v. Corliss*, 89 N.M. 235, 549 P.2d 1070 (1976).

B. OTHER FACTORS

In addition to the factors contained in Rule 1-127, New Mexico caselaw establishes additional factors for the court to take into consideration in analyzing a party's request for attorney fees. Other relevant factors include: the nature and character of the litigation, the amount involved, the importance of the litigation and the benefits derived therefrom, the experience and ability of counsel, and the fee customarily charged in the community for similar services. *Michelson v. Michelson*, 89 N.M. 282, 551 P.2d 638 (1976). *See also Fryar v. Johnsen*, 93 N.M. 485, 488, 601 P.2d 718, 720 (1979). The amount billed for the time spent and the effort expended by an attorney, while relevant, is not solely determinative of a reasonable award of attorney fees. *See Fryar* at 487.

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Spousal Support

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Statutory Definitions and Standards

The dissolution statute, NMSA §40-4-7, provides a general description of spousal support, lists the types of spousal support available and the factors that a Court must consider in determining whether or not to award it. Pursuant to this statute, courts are given broad authority to set and modify support during the pendency of the proceeding, in final decrees, and subsequent to the case.

Pending litigation:

- Temporary support during the pendency of the proceeding may be ordered by the court pursuant to NMSA §40-4-7(A).

In final decrees:

- General Description of Spousal Support: upon final hearing, a court may allow a reasonable portion of the other spouse's property or a reasonable sum of money in a single sum or in installments, NMSA §40-4-7(B)(1);
- Measurement: as under the circumstances of the case may seem just and proper;
- Types of Spousal Support authorized include: *rehabilitative*, NMSA §40-4-7(B)(1)(a); *transitional*, NMSA §40-4-7(B)(1)(b); *indefinite duration*, NMSA §40-4-7(B)(1)(c); *single sum*, paid in installments, in definite amounts and ending upon death of receiving spouse, NMSA §40-4-7(B)(1)(d); *single sum*, paid in installments, in definite amounts, but not subject to any contingencies, including death of receiving spouse, NMSA §40-4-7(B)(1)(e).
- Rehabilitative Spousal Support: to provide the receiving spouse with education, training, work experience, or other forms of rehabilitation to increase receiving spouse's ability to earn income and become self-supporting. May include a rehabilitation plan and may condition continuing support upon compliance with the plan. NMSA §40-4-7(B)(1)(a).
- Transitional Spousal Support: to supplement the income of receiving spouse for a limited period of time; period must be clearly stated in the court's final order. NMSA §40-4-7(B)(1)(b).
- Indefinite Duration Spousal Support: usually expressed in monthly installments, has no ending period; sometimes referred to as permanent modifiable spousal support. NMSA §40-4-7(B)(1)(c).

- Single Sum ending upon Death of Recipient: also referred to as lump sum non-modifiable spousal support; usually paid in monthly installments, but ending upon the death of the recipient. NMSA §40-4-7(B)(1)(d).
- Single Sum, no contingencies to end support: also referred to as lump sum non-modifiable spousal support; usually paid in monthly installments, but could be awarded as property from the other spouse, and must be paid until single sum completely paid, even after death of receiving spouse. NMSA §40-4-7(B)(1)(e).

Subsequent to final decrees:

- Modifiable or Nonmodifiable: As described in greater detail below, the court may modify spousal support awarded pursuant to (B)(1)(a), (b) and (c) or may designate spousal support pursuant to subparagraphs (a) and (b) as nonmodifiable as to amount or duration. NMSA §40-4-7(B)(2)(a) and (b).
- Retention of Jurisdiction: The Court must retain jurisdiction over a case if the final decree is either silent as to spousal support or awards periodic spousal support in a marriage of twenty years or longer, unless the decree states that no spousal support is awarded. NMSA §40-4-7(F). Rhoades v. Rhoades, 2004-NMCA-020, 135 N.M. 122, ¶17.

Judicial Authority to Award Spousal Support

Discretion of the Court: Awarding of spousal support rests within the sound discretion of the trial court and that decision will only be overturned on appeal upon a showing of an abuse of that discretion. This standard is also sometimes referred to as "contrary to all reason." Ellsworth v. Ellsworth, 97 N.M. 133, 637 P.2d 564 (1981), Psomas v. Psomas, 99 N.M. 606, 661 P.2d 883 (1982), Chrane v. Chrane, 98 N.M. 471, 649 P.2d 1384 (1982).

Factors to Consider in Ordering Spousal Support: Although the following factors must all be considered and were developed from case law, *need* is the first criterion in determining spousal support. Weaver v. Weaver, 100 N.M. 165, 667 P.2d 970 (1983). Some of the leading cases that helped develop the following factors are: Michelson v. Michelson, 86 N.M. 107, 520 P.2d 263 (1974), Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979), Hurley v. Hurley, 94 N.M. 641, 615 P.2d 256 (1980) and Ellsworth v. Ellsworth, 97 N.M. 133, 637 P.2d 564 (1981). These cases collectively hold that each case must be decided on its individual facts, in light of what is fair and reasonable. The circumstances of both spouses must be considered and weighed by the court in deciding whether to grant spousal support, to avoid hardship on the supporting spouse, but to not permit the recipient spouse to abdicate the responsibility for his or her own support. Mitchell v. Mitchell, 104 N.M. 205, 719 P.2d 432 (Ct. App.), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986).

When making an award of spousal support, the court shall consider the following factors:

(1) The age and health of and the means of support for the respective spouses;

(2) The current and future earnings and the earning capacity of the respective spouses;

(3) The good-faith efforts of the respective spouses to maintain employment or to become self-supporting;

(4) The reasonable needs of the respective spouses, including:

a. The standard of living of the respective spouses during the term of the marriage;

b. The maintenance of medical insurance for the respective spouses; and

c. The appropriateness of life insurance, including its availability and cost, insuring the life of the person who is to pay support to secure the payments with any life insurance proceeds paid on the death of the paying spouse in lieu of further support;

(5) The duration of the marriage;

(6) The amount of the property awarded or confirmed to the respective spouses;

(7) The type and nature of the respective spouses' assets; provided that potential proceeds from the sale of property by either spouse shall not be considered by the court, unless required by exceptional circumstances and the need to be fair to the parties;

(8) The type and nature of the respective spouses' liabilities;

(9) Income produced by property owned by the respective spouses; and

(10) Agreements entered into by the spouses in contemplation of the dissolution of marriage or legal separation.

Factors Excluded from Consideration in Ordering Spousal Support: Even before New Mexico was a no-fault divorce state, courts were allowed to award spousal support independent of guilt. Thus fault was not a factor that a Court was required to consider, nor *could* the Court consider it because it was not a factor set out in the statute. Redman v. Redman, 64 N.M. 339, 328 P.2d 595 (1958), Cassan v. Cassan, 27 N.M. 256, 199 P. 1010 (1921). Factors that a court is *not* allowed to consider include: the level of spousal support needed for a wife to afford herself the opportunity to achieve an earning capacity reasonably comparable to that of her husband, or to support herself in a style reasonably comparable to that enjoyed by the parties during the marriage. Hertz v. Hertz, 99 N.M. 320, 657 P.2d 1169 (1983). Eligibility for federal benefits is not in and of itself a change in circumstances warranting a modification in spousal support if there is no change in other factors to be considered. Sheets v. Sheets, 106 N.M. 451, 744 P.2d 924 (Ct. App. 1987).

Spousal Support in Conjunction with Property and Child Support: The Court must decide the division of community property first, because the Court must consider factors 6, 7, 8 and 9 above

regarding property and debts before deciding whether or not spousal support should be awarded. Ellsworth v. Ellsworth, 97 N.M. 133, 637 P.2d 564 (1981). A recipient of spousal support is not required to spend down her share of the community assets in order to support herself. Income such as rental, interest, or lease payments may be considered in setting spousal support, but proceeds from selling the property itself should not be considered except in exceptional circumstances. Ellsworth, *supra*. Spousal support may be justified even though the recipient eventually receives a large amount of property. Mitchell v. Mitchell, 104 N.M. 205, 719 P.2d 432 (Ct. App.), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986).

Because spousal support is part of gross income that would be used to calculate child support, spousal support should be determined first. The amount of spousal support then is either added to the recipient's gross income or deducted from the payor's gross income in the calculation of child support.

Amount and Duration of Spousal Support: The statute provides that the Court may allow a reasonable portion of the other spouse's property or a reasonable sum of money to be paid by one spouse to the other in either a single sum or in installments. NMSA §40-4-7(B)(1). Case law states that there is no fixed rule, but that the court must evaluate each case based upon its own particular relevant facts in light of what is fair and reasonable. Sloan v. Sloan, 77 N.M. 632, 426 P.2d 780 (1967), Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

Property can be awarded in lieu of spousal support payments. A court may also order that the marital residence be sold, rather than allowing the wife to keep the equity in exchange for the husband keeping his retirement benefits, where the wife needs immediate, regular income for necessities. Psomas v. Psomas, 99 N.M. 606, 661 P.2d 884 (1982). A husband can also be ordered to provide a new residence for the ex-wife and children as spousal support. The court may enforce such a requirement by ordering the ex-husband to sign a note, or by ordering that a special master have the authority to sign on behalf of ex-husband. Wolcott v. Wolcott, 101 N.M. 665, 687 P.2d 100 (Ct. App. 1984).

The Court has the power to award from husband's one-half community interest a lump sum to wife as spousal support. Should the wife die before receipt of that lump sum, her estate is entitled to it. Harper v. Harper, 54 N.M. 194, 217 P.2d 857 (1950), and Michaluk v. Burke, 105 N.M. 670, 735 P.2d 1176 (Ct. App. 1987).

Several older cases awarded actual amounts of spousal support that may have some reference value, but they should be cited with caution because of their age:

- In Redman v. Redman, 64 N.M. 339, 328 P.2d 595 (1958), the court-approved $2500 total in spousal support, payable at $125 per month, where husband owned separate property that generated income due to wife's labor and where, at the time of divorce, she was making $30 per week as a waitress.

- In Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937), the court approved a lump sum award of $4,000 out of an estate of $8,000, part of which was community, out of which the wife would have to pay her attorney's fees, costs and support herself.

- In Jones v. Jones, 67 N.M. 415, 356 P.2d 231 (1960), the court approved an award of $75 per month for 12 months to a 31-year-old wife capable of working.

Evidence for a Spousal Support Claim in Trial: In practical terms, lawyers should present evidence at trial to support or deny spousal support claims. That evidence might include reasonable budgets for each party, employment information (job availability, salary information, efforts to obtain employment), past actual earnings (social security statements, tax returns), history and lifestyle of the parties, any relevant health/medical information, and testimony regarding these issues and the other factors listed in the statute.

Spousal Support Guidelines/Settlement Purposes: For settlement purposes, practitioners reference the spousal support guidelines approved by the New Mexico Supreme Court on April 16, 2007. The Supreme Court authorized and encouraged practitioners to use these guidelines for settlement negotiation purposes in its order approving the Statewide Alimony Guidelines and Commentaries.

The spousal support guidelines are useful for initial calculations, to give the lawyer and client a first look at potential spousal support awards, so that they may analyze and discuss whether the client has a spousal support claim or exposure. If the alimony guideline calculation results in a positive number, then the lawyer and client need to discuss further the statutory factors and analyze whether the factors support or disprove a spousal support claim or exposure. The guidelines have two different formulae, one with and one without child support taken into consideration.

If the payor will be paying child support as well as spousal support, then the alimony guideline calculation is: (payor's gross income X 0.28) less (recipient's gross income X 0.58).

If the payor will not be paying child support, then the alimony guideline calculation is (payor's gross income X 0.30) less (recipient's gross income X 0.50).

Practitioners and clients may still make arguments to the court regarding imputation of income for both figures of gross income.

Practitioners and clients may not present the alimony guideline calculation or worksheet at trial: these calculations are only intended for settlement negotiations. However, if a party presents the calculations/worksheet in settlement negotiations but the case does not settle, and the trial court orders or denies alimony consistent with that settlement offer, then presumably that prior offer can be used in proving up a request for attorney's fees pursuant to NMRA 1-027. It was the intention of the committees that developed the alimony guidelines to provide a calculation that would facilitate settlements.

Rationales for Awarding Spousal Support: Spousal support is a continuation of, or a substitute for, the right to support that each spouse enjoys during the marriage. Chavez v. Chavez, 82 N.M. 624, 485 P.2d 735 (1971). It is a personal, not a property, right, and thus is modifiable due to a change in circumstances. McClure v. McClure, 90 N.M. 23, 559 P.2d 400 (1976), Hazelwood v.

Hazelwood, 89 N.M. 659, 556 P.2d 345 (1976). An award of alimony is not intended to be a penalty against the payor. Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

Continuing Jurisdiction: Generally, spousal support should be a consideration in a marriage of twenty years or more. This is because the statute and case law both provide that the court retains jurisdiction involving periodic spousal support payments when the parties have been married for twenty years or longer. NMSA §40-4-7(F). Subsection F specifically states:

> the Court shall retain jurisdiction over proceedings involving periodic spousal support payments when the parties have been married for twenty years or more prior to the dissolution of the marriage, unless the court order or decree specifically provides that no spousal support shall be awarded.

This has been interpreted to mean that the Court shall retain jurisdiction to consider spousal support when the final decree was silent as to the granting of spousal support in a marriage of longer than twenty years and that Subsection F authorizes the Court to award spousal support. Rhoades v. Rhoades, 2004-NMCA-020, ¶17.

To Whom Spousal Support Payments are Made: Spousal support payments can be made to either the wife or the husband. Neither the statute nor case law contains any gender preclusions . Spousal support payments can also be subject to wage withholding and sent directly to the recipient for direct-deposit in the recipient's bank account.

Escalation Clauses: Escalation clauses or automatic increases in spousal support awards, generally tied to the payor's ability to pay, have been overturned because the recipient is receiving automatic increases (modified alimony) without having to prove increased need or substantial change in circumstances. Dunning v. Dunning, 104 N.M. 295, 720 P.2d 1236 (1986).

Modification of Spousal Support Order

Substantial Change of Circumstances: The statutory language of subsection (B) (2)(a) provides that a spousal support award may be modified whenever the circumstances render such change proper. Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979) (recipient of spousal support was able to support herself, thus change in circumstances from original award were proven and spousal support was terminated). "Modifiable" forms of spousal support include those spousal support awards under (B)(1)(c) [indefinite duration] or (B)(1)(a) [rehabilitative] or (b) [transitional] stating no ending date. Either party seeking to modify a spousal support award must show evidence of changed circumstances regarding the recipient's need and the supporting spouse's ability to pay. Dunning v. Dunning, 104 N.M. 295, 720 P.2d 1236 (1986). Thus, if a modifiable award of spousal support is made, then the Court retains jurisdiction over its decree to modify its award and to enforce all portions of its decree. Zarges v. Zarges, 79 N.M. 494, 445 P.2d 97 (1968).

Assumption/Discharge of Debts: A voluntary assumption of debts is not a proper basis for modifying and reducing a spousal support award. Russell v. Russell, 101 N.M. 648, 687 P.2d 83 (1984). However, where the amount of debt to be paid was an important factor in deciding the

initial amount of spousal support, and those debts are later discharged in bankruptcy, then this constitutes a change in circumstances that may justify a modification to the alimony award. In re Danley, 14 Bankr. 493 (Bankr. D.N.M. 1981).

Non-modifiable Spousal Support: The statutory language of subsection (B) (2)(b) provides that a court may designate spousal support awards as nonmodifiable as to duration or amount made under (B)(1)(a) [rehabilitative] or (B)(1)(b) [transitional]. Galassi v. Galassi, 2009-NMCA-026, 145 N.M. 630 ("In 1993 the Legislature rewrote subsections (B)(1) and (B)(2) of the statute." ¶8. "The new provisions describe five categories or types of spousal support that a district court may order. Of the five, only Subsection (B) (1)(c) allowing 'support for an indefinite duration' can be analogized to the support allowed under earlier versions of the statute. The other four are entirely new." ¶10. In addition to creating four new categories of spousal support, the Legislature revised the statute with regard to modifications of spousal support. The prior statute generally allowed the district court to 'modify and change any order in respect to alimony allowed either spouse, whenever circumstances render such change proper." Citing Section 22-7-6(B) (2) (1975 Pocket Supp.). The new statute includes a similar modification provision covering rehabilitative, transitional, and indefinite spousal support. Section 40-4-7(B) (2)(a). However, and most pertinent to this case, the new provision also allows the district court to designate an award of rehabilitative or transitional support 'as nonmodifiable with respect to the amount or duration of the support payments[.]' Section 40-4-7(B)(2)(B)." ¶11.) What is left unanswered by Galassi is whether parties can contract for different categories of spousal support not listed in the statute, or preserve nonmodifiability, but include contingencies, such as remarriage. The only contingency mentioned in the statute is death of the recipient, and that provision preserves the deductibility of spousal support, in case the parties did not so specify in their agreement or court order. See §40-4-7(D) and I.R.C §§71 and 215.

Words are Important: However, if a recipient of rehabilitative spousal support with a specified ending date files a motion to modify before that ending date, the court has jurisdiction to modify the award. Deeds v. Deeds, 115 N.M. 192, 848 P.2d 1119 (Ct. App. 1993). In Deeds, the trial court awarded rehabilitative spousal support at $400 per month through May 1991, to terminate June 1, 1991. Although a "lump sum" could be calculated from the face of the order, the appellate court rejected this reasoning, holding that a lump sum is an award of a definite sum of money, payable in installments and that there must be some intent by the court that the full amount be paid regardless of future events. Deeds, N.M. at 194. The court had not ordered in its wording a "lump sum" or "definite amount," nor had it used the word "*nonmodifiable*," nor did it seem to have any intent that those amounts be paid regardless of future events (such as the wife dying, etc.) Thus, the words are important for expressing exactly what type of spousal support the parties are either agreeing upon, or what the Court has ordered.

Single sums of spousal support, also referred to as lump sums, are nonmodifiable, and a court may order that the single sum terminate upon the death of the recipient spouse [(B)(1)(d)]; or the court does not have to order any contingencies for termination [(B)(1)(e)]. The single or lump sum may be paid in installments, stating definite amounts and the payment frequency, e.g. "$6,000, payable at $500 per month for 12 months." However, as the Deeds case, *supra*, teaches, this same award, expressed as "$500 per month for 12 months" without the mention of

the "$6,000" would likely mean that award would be subject to modification because a lump sum is not stated.

Thus, in the Pruyn case, the court held that the spousal support was nonmodifiable, where the order stated that husband would pay wife monthly support in the amount of $1/12^{th}$ of $31,375 per year for years 2005-2009, $39,000 per year for years 2010-2014, and $23,000 per year for years 2015-2019. Pruyn v Lam, 2009-NMCA-103, cert. denied, 2009-NMCERT-008. Note that the agreement in Pruyn actually stated definite lump sum amounts.

Subsection F reserving jurisdiction for modification over periodic spousal support awards in marriage of twenty years' or more duration does not apply to spousal support awards of single or lump sums made under (B)(1)(d) or (e). Edens v. Edens, 2005-NMCA-033, cert. denied, 2005-NMCERT-003. The Edens Marital Settlement Agreement ("MSA") provided $220,500 to be paid to Wife until paid in full or until Wife's death, whichever occurred first. The MSA further provided that Husband would pay Wife $2000 per month for six months and then $1500 per month until obligation was paid in full or until Wife's death. The MSA also stated that other than Wife's death, the spousal support provision was nonmodifiable. Husband moved to modify under Rule 60(b) arguments. The trial court declined to modify/terminate and the Court of Appeals affirmed.

Spousal support payments made pursuant to an order become vested as they become due and payable and cannot be modified. They become a fixed property right, and the judgment as to accrued alimony is nonmodifiable, enforceable and entitled to full faith and credit. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976), Cain v. Cain, 91 N.M. 423, 575 P.2d 607 (1978). Thus, a court has no authority to modify retroactively those vested alimony payments. Mask v. Mask, 95 N.M. 229, 620P.2d 883 (1980); Chrane v. Chrane, 98 N.M. 471, 649 P.2d 1384 (1982).

Statute of Limitations: To collect on accrued, past due spousal support payments, the judgment statute of limitations in effect at the time of filing of the motion to enforce will apply. Thus, in New Mexico, the current statute of limitations, NMSA §37-1-2 (2010), stating a term of fourteen (14) years will apply to any current motions filed. Each payment is vested and accrues on the due date, so the statute of limitations time period runs on each individual payment. Britton v. Britton, 100 N.M. 424, 671 P.2d 1135 (1983).

Remarriage Cases: Although accrued alimony payments are vested and normally not modifiable, New Mexico case law supports modification retroactive to the date of the wife's remarriage. Proof of the remarriage establishes a prima facie case for modification of alimony payments absent extraordinary conditions justifying continuance of former husband's duty to support wife who now is the wife of another man obligated to support her. Kuert v. Kuert, 60 N.M. 432, 292 P.2d 115 (1956), Chavez v. Chavez, 82 N.M. 624, 485 P.2d 735 (1971). Note that these "remarriage" modification cases predate the 1993 revisions to the spousal support statute. As the Galassi Court explains, if an MSA designates rehabilitative or transitional spousal support as nonmodifiable pursuant to Section 40-4-7(B)(2)(b), then that spousal support is nonmodifiable and overrides the presumption represented by Kuert. Galassi v. Galassi, 2009-NMCA-026, 145 N.M. 630, ¶12.

Remarriage and Nonmodifiability: Thus, the current status of the law seems to indicate that orders promulgated pursuant to subsections (B) (1)(a) and (b) may be designated as nonmodifiable, and those issued pursuant to (d) and (e) are nonmodifiable based on the clear wording of the statute subsections. If (a) and (b) orders are so designated, or the parties agree and the court orders spousal support under (d) or (e), then upon a motion for modification or termination, a court should uphold these provisions as nonmodifiable. As discussed above, the Galassi court left unanswered the question as to whether parties can contract for different categories of spousal support, not listed in the statute, or include other contingencies, such as remarriage.

Insurance to Guarantee Payment of Spousal Support: The provision of life insurance to secure the payments of spousal support to the recipient, if the payor dies, so that the payor's estate does not have to continue paying spousal support is but another factor for the court to consider under the reasonable needs of each spouse. See NMSA §40-4-7(E)(4)(c) which authorizes consideration of "the reasonable needs of the respective spouses, including . . . the appropriateness of life insurance, including the availability and cost, insuring the life of the person who is to pay support to secure the payments, with any life insurance proceeds paid on the death of the paying spouse to be in lieu of further support"

Tax Consequences/Termination: NMSA §40-4-7(D) provides that an award of spousal support pursuant to (B)(1)(a), (b), (c) and (d) will terminate upon the death of the recipient, unless the court order for spousal support states otherwise. Because this provision is included in the statute, if the court order is silent, then the spousal support award is protected and given tax protection. To qualify for tax deduction status pursuant to IRS regulations, spousal support must terminate upon the death of the recipient. Then, generally, the payor should be able to deduct the spousal support from gross income and the recipient must include the spousal support as taxable income. Payments made on behalf of the recipient to other direct providers such as mortgage payments, health insurance carriers, or other services can also be ordered and qualify as tax deductible/taxable spousal support payments.

Enforcement of Spousal Support Order: If the Court had original jurisdiction to enter the decree, then the court always maintains jurisdiction to enforce its decrees. Zarges v. Zarges, 79 N.M. 494, 445 P.2d 97 (1968). Parties seeking to enforce a decree may either file a motion to enforce or a motion for the court to issue an order to show cause and asking that the court hold the obligor in contempt for failure to pay spousal support.

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Parentage

By Geoffrey R. Nims, Esq.

The New Mexico Uniform Parentage Act applies to parentage determinations. Section 40-11A-103(A), NMSA. It is found at Sections 40-11A-101 through 40-11A-903, NMSA.

The New Mexico Uniform Parentage Act is referred to herein as the NMUPA.

The NMUPA took effect January 1, 2010, replacing its much shorter predecessor, the Uniform Parentage Act, Sections 40-11-1 through 40-11-23, NMSA.[1]

The NMUPA reflects the Uniform Parentage Act as approved and recommended by the National Conference of Commissioners of State Laws. New Mexico amended this Act.

The NMUPA is organized into the following nine articles:

Article 1. GENERAL PROVISIONS AND DEFINITIONS
Article 2. PARENT-CHILD RELATIONSHIP
Article 3. VOLUNTARY ACKNOWLEDGMENT OF PATERNITY
Article 4. REGISTRY OF PATERNITY
Article 5. GENETIC TESTING
Article 6. PROCEEDING TO ADJUDICATE PARENTAGE
Article 7. CHILD OF ASSISTED REPRODUCTION
Article 8. GESTATIONAL AGREEMENTS
Article 9. MISCELLANEOUS PROVISIONS

This treatment of the NMUPA tracks this organization, and is presented as a series of topical outlines.

My goal is give practitioners, and any pro se litigants who happen to consult this, a concise overview of parentage law.

Readers are advised to consult the various forms comprising the "Parentage Packet" currently in use in the 13th Judicial District, and which are included elsewhere in this family law guidebook.

The Child Support Enforcement Division, New Mexico Human Services Department, is referred to herein as "CSED."

Statutory references to the New Mexico Statutes Annotated, or NMSA, are given without the "NMSA" tag.

[1] A proceeding to adjudicate parentage that was commenced before January 1, 2010, is governed by the law in effect at the time the proceeding was commenced. Section 40-11A-903.

Definitions
(Article 1, NMUPA)

The definitions section of the NMUPA appears at Section 40-11A-102.

The NMUPA defines four kinds of father:

1. "Acknowledged father" means a man who has established a father-child relationship by filling out and filing an acknowledgment of paternity. Section 40-11A-102(A); *see also* Article 3, NMUPA.

2. "Adjudicated father" means a man who has been adjudicated by a court of competent jurisdiction to be the father of a child. Section 40-11A-102(B); *see also* Article 6, NMUPA.

3. "Alleged father" means a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined. "Alleged father" does *not* include (1) a presumed father; (2) a man whose parental rights have been terminated or declared not to exist; or (3) a male donor. Section 40-11A-102(C).

4. "Presumed father" means a man who, by operation of law pursuant to Section 40-11A-204, is recognized as the father of a child until that status is rebutted or confirmed in a judicial proceeding. Section 40-11A-102(P); *see also* Article 2, NMUPA.

Parent-Child Relationship
(Article 2, NMUPA)

1. *Mother-child relationships are established in any of three ways*. Section 40-11A-201(A).
    a. The woman gives birth to the child
    b. The woman's maternity is adjudicated[2]
    c. The woman adopts the child

2. *Father-child relationships are established in any of five ways.* Section 40-11A-201(B).

    a. *The man has an unrebutted presumption of paternity* pursuant to Section 40-11A-204; these presumptions are explained in detail in paragraph 3

    b. *The man has signed an effective acknowledgment of paternity* pursuant to Section 40-11A-301, unless the acknowledgment has been rescinded or successfully challenged; this is covered in the discussion of Article 3, Voluntary Acknowledgment of Paternity

[2] Insofar as possible, provisions relating to paternity determination in the NMUPA apply as well to determinations of maternity. Section 40-11A-106.

c. *The man's paternity is adjudicated*

d. *The man adopts the child*

e. *The man consents to assisted reproduction* by a woman pursuant to Section 40-11A-701, and the assisted reproduction resulted in the birth of the child; assisted reproduction is covered in the discussion of Article 7, Child of Assisted Reproduction

3. *A man is presumed to be the father of a child under any of the following five situations.*[3] Section 40-11A-204(A).

   a. *The man and the mother of the child are married to each other* and the child is born during the marriage.

   b. *The man and the mother of the child were married to each other* and the child is born within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity or divorce or after a decree of separation.

   c. *Before the birth of the child, the man and the mother of the child married each other* in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within three hundred days after its termination by death, annulment, declaration of invalidity or divorce or after a decree of separation.

   d. *After the birth of the child, the man and the mother of the child married each other* in apparent compliance with law, whether or not the marriage is or could be declared invalid, and the man voluntarily asserted his paternity of the child, and:
      i. The man's assertion of fatherhood is in an acknowledgement of paternity on a form provided by the Bureau of Vital Records and Health Statistics, and filed with the same;
      ii. The man agreed to be and is named as the child's father on the child's birth certificate; or
      iii. The man promised in a record to support the child as his own.

   e. *For the first two years of the child's life, the man resided in the same household* with the child and openly held out the child as his own.

4. *The paternity presumption described above may be rebutted only by court adjudication.* Section 40-11A-204(B).

[3] Marriage plays a key role in these presumptions. However, a child born to parents who are not married to each other has the same rights as a child born to parents who are married to each other. Section 40-11A-202.

Voluntary Acknowledgment of Paternity
(Article 3, NMUPA)

1. *A valid acknowledgment of paternity is equivalent to a judicial adjudication of paternity.* Similarly, a valid denial of paternity by a presumed father in conjunction with another's valid acknowledgment of paternity is equivalent to an adjudication of the nonpaternity of the presumed father. Section 40-11A-305.

2. *A parentage determination is binding on the signatories* to an acknowledgment of paternity or a denial of paternity. Section 40-11A-637(A)(1).

3. *A valid acknowledgment of paternity involves:*

    a. *The mother of a child and a man claiming to be the genetic father signing* an acknowledgment of paternity with the intent to establish the man's paternity. Section 40-11A-301.

    b. *The acknowledgment of paternity must be on a form* provided by the Bureau of Vital Records and Health Statistics. *See* Section 40-11A-302 for details, and, in particular, *see* the form itself, which is included in this family law guide.

    c. *An acknowledgment of paternity is void under any of the following circumstances*:
        i. It states that another man is a presumed father, unless the presumed father has filed a denial of paternity with the Bureau of Vital Records.
        ii. It states that another man is an acknowledged or adjudicated father.
        iii. It falsely denies the existence of a presumed, acknowledged or adjudicated father.

4. *A presumed father may also sign a denial of his paternity*. Section 40-11A-303. This denial is valid only if the following three circumstances exist:

    a. The denial is on a form provided by the Bureau of Vital Statistics. A copy of this form is included in this family law guide.

    b. The presumed father has not previously acknowledged his paternity or the previous acknowledgment has been formally rescinded or challenged, or has not previously been adjudicated to be the child's father.

    c. Another man has filed an acknowledgment of paternity.

5. *There is no filing fee to file* an acknowledgment of paternity or denial of paternity with the Bureau of Vital Records. Section 40-11A-306.

6. *The Bureau of Vital Records is a good resource* for basic information and forms: http://www.vitalrecordsnm.org/adoption.shtml

7. *Some additional basic rules for an acknowledgment of paternity or denial of paternity*. Section 40-11A-304.

    a. *An acknowledgment of paternity and denial of paternity may be a single document* or may be signed in counterparts, and may be filed separately or simultaneously. If the acknowledgment and denial are both necessary, neither is valid until both are filed.

    b. *An acknowledgment of paternity or denial of paternity may be signed* before or after the birth of the child.

    c. *An acknowledgment of paternity or denial of paternity takes effect* on the birth of the child or the filing of the document with the Bureau of Vital Statistics, whichever occurs later.

    d. *Generally, a minor's acknowledgment of paternity or denial of paternity is valid.*

8. *Rescinding or challenging an acknowledgment of paternity or denial of paternity*. Section 40-11A-307 and Section 40-11A-308.

    a. *Rescission: time limit:* Section 40-11A-307. This is a judicial proceeding, and there is a small window within which to bring such a proceeding, namely, for adults, the earlier of: (i) 60 days after the effective date of the acknowledgment of paternity or the denial of paternity, or (ii) the date of the first hearing, in a proceeding to which the signatory is a party, before the district court to adjudicate any issue relating to the child, including a child support proceeding.
        i. If the signatory was a minor, the time limit is the later of 60 days after the 18th birthday of signatory, or 60 days after the effective date of the acknowledgment or denial.

    b. *Challenge:* Section 40-11A-308. This is the judicial proceeding if the time for rescission has run.
        i. There is a new time limit: within two years after filing the acknowledgment or denial with the Bureau of Vital Records, or within two years of the challenger's 18th birthday, whichever is later.
        ii. In addition, the challenge can be based only on fraud, duress, or material mistake of fact, and the challenger has the burden of proof.

c. *Estoppel*. Proceedings to rescind or challenge an acknowledgment of paternity or denial of paternity are also subject to the application of the principles of estoppel established in Section 40-11A-608.[4] Section 40-11A-609(C).

9. *Procedure for rescission or challenge*. Section 40-11A-309.

   a. *Parties and jurisdiction.* Every signatory to an acknowledgment of paternity and any related denial of paternity shall be made a party to a proceeding to rescind or challenge the acknowledgment or denial, and the district court has personal jurisdiction over each signatory.

   b. *No suspension of legal responsibilities during proceedings.* Except for good cause shown, during a proceeding to rescind or challenge, the district court shall not suspend the legal responsibilities of a signatory arising from an acknowledgment of paternity, including the duty to pay child support.

   c. *Proceedings same as proceedings to adjudicate parentage*. A proceeding to rescind or to challenge an acknowledgment of paternity or denial of paternity shall be conducted in the same manner as a proceeding to adjudicate parentage. This is covered in the discussion of Article 6, Proceeding to Adjudicate Parentage.

   d. *Birth certificate*. At the conclusion of the proceeding, the district court shall order the Bureau of Vital Records to amend the birth record of the child, if appropriate.

10. *Full faith and credit given to acknowledgments and denials from other states.* New Mexico courts give full faith and credit to an acknowledgment of paternity or denial of paternity effective in another state if the acknowledgment or denial has been signed and is otherwise in compliance with the law of the other state. Section 40-11A-311.

11. *Bureau of Vital Records is expected to adopt rules* regarding the acknowledgment of paternity and denial of paternity. *See* Section 40-11A-314. Within the New Mexico Administrative Code, the Bureau of Vital Records regulations appear at Section 7.2.2.1. Through late December 2010, these regulations had not been updated to reflect the NMUPA, but the Bureau is expected to issue such regulations soon.

[4] These are the same principles which would allow the district court to deny a motion for genetic testing. *See* the discussion below, paragraph 5 within the discussion of Genetic Testing, Article 5, NMUPA.

Paternity Registry
(Article 4, NMUPA)

1. *The registry of paternity* established pursuant to the NMUPA is also the Putative Father Registry established in the Adoption Act, Section 32A-5-20. Section 40-11A-401.

    a. *The Putative Father Registry is part of the Bureau of Vital Records*.

    b. *The Bureau of Vital Records web site for the Putative Father Registry* is: http://www.vitalrecordsnm.org/PutFathReg.shtml

Genetic Testing[5]
(Article 5, NMUPA)

1. *Genetic testing defined.* "Genetic testing" means an analysis of genetic markers to exclude or identify a man as the father or a woman as the mother of a child. "Genetic testing" includes an analysis of one or a combination of the following: (1) deoxyribonucleic acid; and (2) blood-group antigens, red-cell antigens, human-leukocyte antigens, serum enzymes, serum proteins or red-cell enzymes. Section 40-11A-102(K).

2. *The NMUPA governs genetic testing of a person to determine parentage*, whether the person voluntarily does a test, or is tested pursuant to district court order or a CSED order. Section 40-11A-501.

3. *Genetic testing: getting an order*. Section 40-11A-502.

    a. *Sworn statement by party to proceeding*: the district court shall order the child and other designated persons to submit to genetic testing if the request is supported by a sworn statement (i) alleging paternity and facts establishing a reasonable probability of sexual contact, or (ii) denying paternity and stating facts establishing that sexual contact (if any) between the relevant persons did not result in conception of the child.

    b. *CSED may order genetic testing* only if there is no presumed, acknowledged or adjudicated father.

    c. *NOTE: there is no provision for in-utero* genetic testing.

    d. *The district court may order two or more men* to do genetic testing concurrently or sequentially.

[5] This discussion of genetic testing also incorporates those parts of Article 6, Proceeding to Adjudicate Parentage, which involve genetic testing. *§608, 621, 622,626, 631 & 637 (B).*

4. *Genetic testing: consequences of declining court-ordered genetic testing.* Section 40-11A-622.

    a. *An order for genetic testing is enforceable by contempt*.

    b. *If a person whose paternity is being determined declines to submit to genetic testing* ordered by the district court, the district court for that reason may adjudicate parentage contrary to the position of the person who declines.

    c. *Genetic testing of the mother of a child is not a condition precedent* to testing the child and a man whose paternity is being determined. If the mother is unavailable or declines to submit to genetic testing, the district court may order the testing of the child and every man whose paternity is being adjudicated.

5. *Genetic testing: district court may deny motion for testing.* In part to deal with the problem of the father who is dad at home, or is called dad by the child, or has simply been dad for some time, but who then balks at child support or otherwise resents being identified as dad by the district court, the district court may deny a motion for genetic testing. Section 40-11A-608.

    a. *Grounds for denial*. In a proceeding adjudicating the parentage of a presumed father, or challenging an acknowledged father, the district court may deny a motion seeking an order for genetic testing if the district court determines that: (i) the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and (ii) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.

    b. *Factors to weigh*. In determining whether to deny a motion for genetic testing, the NMUPA instructs the district court to consider the best interest of the child and a list of nine equitable factors:
        i. the length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged father was placed on notice that he might not be the genetic father;
        ii. the length of time during which the presumed or acknowledged father has assumed the role of father of the child;
        iii. the facts surrounding the presumed or acknowledged father's discovery of his possible nonpaternity;
        iv. the nature of the relationship between the child and the presumed or acknowledged father;
        v. the age of the child;

vi. the harm that may result to the child if presumed or acknowledged paternity is successfully disproved;
vii. the nature of the relationship between the child and any alleged father;
viii. the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and
ix. other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or acknowledged father or the chance of other harm to the child.

c. *Guardian ad litem*. In a court proceeding involving a possible denial of a motion for genetic testing, a minor or incapacitated child shall be represented by a guardian ad litem. [6]

d. *Clear and convincing evidence*. If the district court denies a motion for genetic testing, the denial must be based on clear and convincing evidence.

e. *If genetic testing not ordered, Court should adjudicate paternity.* Also, if the district court denies a motion for genetic testing, the district court must also issue an order adjudicating the presumed or acknowledged father as in fact the father of the child.

6. *Genetic testing: the test and the lab.* Section 40-11A-503. The standards for testing and for the testing laboratory are set forth in this statute. As of the time of this writing (December 2010), appropriate testing laboratories include:

a. *DNA Diagnostics Center, or DDC*: as of December 2010, this was the testing laboratory under contract with CSED. It serves private individuals as well. Genetic specimens are harvested locally, but the testing occurs at DDC's lab in Ohio. The expense for genetic testing for an individual is roughly $500. DDC web site: http://www.dnacenter.com/

b. *Albuquerque DNA Testing Southwest*, phone # 505.342.8064 or 505.261.9051

7. *Genetic testing results: admissibility in court.*

a. *Genetic testing results are self-authenticating and admissible without testimony*. Section 40-11A-504. If compliant with the relevant statute, a report of the testing laboratory should be admissible in court without anyone having to lay a foundation

[6] In general, the District Court can appoint a guardian ad litem at any time it finds that the interests of a minor or incapacitated child are not adequately represented. Section 40-11A-612(B).

for its admission. Among other things, an appropriate report includes photographs of the persons tested, information about the genetic specimens, and accreditation of the testing laboratory.

b. *A record of a genetic-testing expert is admissible as evidence of the truth* of the facts asserted in the report unless a party objects, in a writing delivered to the adverse party, to the record's admission within fourteen days after its receipt by the objecting party. The objecting party shall cite specific grounds for exclusion. *§40-11A-62(A).*

c. *The admissibility of the report is not affected by whether the testing was performed:* (1) voluntarily or pursuant to an order of the district court or a support-enforcement agency; or (2) before or after the commencement of the proceeding. *§40-11A-62(A).*

d. *A party objecting to the results of genetic testing may call one or more experts* to testify in person or by telephone, videoconference, deposition or another method approved by the district court. Unless otherwise ordered by the district court, the party offering the testimony bears the expense for the expert testifying. *§40-11A-621 (B).*

e. *NOTE: Genetic testing results are <u>inadmissible</u> to adjudicate parentage* if a child has a presumed, acknowledged or adjudicated father, unless the genetic testing was performed: (1) with the consent of both the mother and the presumed, acknowledged or adjudicated father, <u>or</u> (2) pursuant to an order of the district court. *§40-11A-621(C).*

8. *Genetic testing results: rebuttable identification of fatherhood.* Section 40-11A-505.

a. *The presumption*: If the genetic testing results indicate that "the man has at least a ninety-nine percent probability of paternity, using a prior probability of zero point five zero, as calculated by using the combined paternity index obtained in the testing" *and* "a combined paternity index of at least one hundred to one," the man is rebuttably identified as the father.

b. *Rebutting the presumption*: If genetic testing identifies a man as the father of the child, the man may rebut the genetic testing only by *other* genetic testing either excluding the man as a genetic father or identifying another man as the possible father.

9. *Genetic testing: assessing its cost.* Section 40-11A-506.

a. *The initial cost of genetic testing* is covered by CSED if CSED is providing services; by the person seeking genetic testing; by stipulation of the parties; or as otherwise ordered by the district court.

b. *If CSED advances the cost for genetic testing*, CSED may subsequently seek reimbursement from a man later rebuttably identified as the father.

c. *As part of district court parentage proceeding, genetic testing costs may be assessed* along with other costs. Section 40-11A-636(C).

d. *Copies of bills for genetic testing* that are furnished to the adverse party not less than ten days before the date of a hearing are admissible to establish: (1) the amount of the charges billed; and (2) that the charges were reasonable, necessary and customary. Section 40-11A-621(D).

10. *Additional genetic testing and unusual situations*. Section 40-11A-505; Sections 40-11A-507 to 40-11A-510.

a. *More genetic testing may be necessary to break ties*. If genetic testing identifies more than one man as the possible father, the district court shall order them to submit to further testing. Section 40-11A-505(C).

b. *If a party contests the result of the original testing* and wants additional genetic testing, the district court or CSED shall order it. *However*, if the previous testing rebuttably identified a man as a father, the district court or CSED shall not order additional testing unless the party provides advance payment for the testing. Section 40-11A-507.

c. *If a specimen isn't available from a man who may be the father*, genetic testing still can occur. Such testing would possibly involve the man's parents; his brothers and sisters; his other children and their mothers; and other relatives necessary to complete genetic testing.
    i. Before such genetic testing, due process requires notice, an opportunity for a hearing, a showing of good cause, and circumstances the district court considers to be just. The district court must find that the need for testing outweighs the legitimate interests of the person sought to be tested. Section 40-11A-508.

d. *For good cause, the district court may order genetic testing of a deceased person.* Section 40-11A-509.

e. *Identical brothers* – who by definition have identical genetic material – pose problems addressed by the NMUPA. The district court may order genetic testing of a brother of a man identified as the father if the man is commonly believed to have an identical brother and evidence suggests that the brother may be the genetic father of the child. If each brother is rebuttably identified as the father, the district court may rely on nongenetic evidence to adjudicate which brother is the father. Section 40-11A-510.

11. *Genetic testing: confidentiality.* Section 40-11A-511.

a. *A genetic testing report may be released only* to the persons tested; their representatives; CSED; and the district court.

b. *It is a 4th degree felony for a person to intentionally release an identifiable specimen* of another person's genetic material for any purpose other than a purpose relevant to the parentage proceeding, unless there is a court order or the person who furnished the specimen gave written permission for its release.

Proceeding to Adjudicate Parentage
(Article 6, NMUPA)

Practitioners and parties most commonly encounter the NMUPA through legal proceedings to adjudicate parentage. The most common scenarios are:

- The child's mother files a petition to determine parentage
- A man claiming paternity files a petition to determine parentage
- In cases brought by the mother or the alleged father, the related issues of child support, child custody, and visitation are often part of the case
- CSED files a petition regarding parentage as part of its effort to establish child support for a child

> Practice Tip:
> An individual party usually will start his or her case by filing a petition to determine parentage with the district court, and serve that petition on the other party.

Getting Started: Parties, Jurisdiction, Venue

1. *Civil proceeding.* Parentage proceedings are civil proceedings in district court to determine the parentage of a child. The Rules of Civil Procedure for District Courts apply. Section 40-11A-601. Judges, not juries, adjudicate paternity. Section 40-11A-632.

2. *A parentage proceeding may be filed by the following, pursuant to Section 40-11A-602:*

    a. *The child*: including a minor child, who is a permissible but not necessary party in parentage proceedings, Section 40-11A-612(A); if a minor or incapacitated child *is* a party, the district court is to appoint a guardian ad litem to represent the child, Section 40-11A-612(B)[7]

    b. *The child's mother*

    c. *A man claiming paternity*

    d. *CSED*[8]

    e. *An adoption agency or licensed child-placing agency*

    f. *A representative authorized by law for a person who could otherwise bring a parentage proceeding*, but can't because of death, incapacity, or age

3. *The necessary parties that have to be joined* in a parentage proceeding are the child's mother and the man whose paternity is to be adjudicated. Section 40-11A-603.

4. *A party may file before the birth of the child, but case can not conclude until child is born*. Section 40-11A-611.

5. *Personal jurisdiction.* The District Court can not adjudicate anyone to be a parent unless it has personal jurisdiction over the parent. Section 40-11A-604; *see also* Section 40-6A-201.

    a. *Personal jurisdiction exists over residents of New Mexico*.

    b. *Regarding nonresidents, personal jurisdiction exists in these situations*:[9]
        i. the individual is personally served with notice within this state;
        ii. the individual submits to the jurisdiction of this state by consent, by entering a general appearance or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
        iii. the individual resided with the child in this state;

[7] In general, the District Court can appoint a guardian ad litem at any time it finds that the interests of a minor or incapacitated child are not adequately represented. Section 40-11A-612(B).

[8] Sections 8.50.107.1 to 8.50.107.13, New Mexico Administrative Code, took effect January 1, 2010, and apply to parentage determinations involving CSED.

[9] These are the grounds for personal jurisdiction over nonresidents in the Uniform Interstate Family Support Act. Section 40-6A-201.

iv. the individual resided in this state and provided prenatal expenses or support for the child;
v. the child resides in this state as a result of the acts or directives of the individual;
vi. the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
vii. the individual asserted parentage in the putative father registry;
viii. or there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

6. *Venue is in the following counties.* Section 40-11A-605.

a. *Venue is in the county where the child resides or is found*;

b. *If the child does not reside in New Mexico*, venue is in the county where the respondent resides or is found; *or*

c. *Venue is in the county in which a proceeding for probate or administration* of the presumed, acknowledged or alleged father's estate is pending.

7. *Time limits on bringing court proceeding*.

a. *21 years*: except as specifically noted elsewhere in the NMUPA, any proceeding to adjudicate the parentage of a child or adjudicate child support shall be commenced before the child has reached the age of 21.[10] Section 40-11A-607(A).

b. *Two years*: If a child has an acknowledged father or an adjudicated father, a person, other than the child, who is neither a signatory to the acknowledgment of paternity nor a party to the adjudication and who seeks an adjudication of paternity of the child shall commence a proceeding not later than two years after the effective date of the acknowledgment or adjudication. Section 40-11A-609(B). Such a proceeding is also subject to the application of the principles of estoppel established in Section 40-11A-608.[11] Section 40-11A-609(C).

c. *No time limit*: A proceeding to adjudicate the parentage of a child having no presumed, acknowledged or adjudicated father may be commenced by the child at

[10] The statute reads, "not later than three years after the child has reached the age of majority." In New Mexico, the age of majority is 18; *see* Section 28-6-1.

[11] These are the same principles which would allow the district court to deny a motion for genetic testing. *See* the discussion above, paragraph 5 within the discussion of Genetic Testing, Article 5, NMUPA.

any time, even after: (1) the child becomes an adult; or (2) an earlier proceeding to adjudicate paternity has been dismissed based on the application of a statute of limitation then in effect. Section 40-11A-606(A).

d. <u>*See also*</u> *time limits on rescinding and challenging, and on retroactive child support*:
   i. Time limits on rescinding and challenging an acknowledgment of paternity or denial of paternity were covered in paragraph 8 of the discussion on Acknowledgment of Paternity, Article 4, NMUPA.
   ii. General 12-year time limit on getting retroactive child support if there is a failure to meet the enhanced burden of proof. This is covered in paragraph 8 below, within the discussion "Process once parentage case is underway."

8. *A parentage proceeding is flexible enough to be joined* to various other family or even probate proceedings, *except that* a respondent cannot join a parentage proceeding to a proceeding to adjudicate parentage brought pursuant to the Uniform Interstate Family Support Act. Section 40-11A-610.[12]

   a. *A parentage adjudication may include child custody or visitation, child support* (except as noted above), divorce, adoption, or probate issues.

9. *An unrepresented party has the option of seeking appointed counsel.* Section 40-11A-641(A). The party must be unable to obtain counsel because of financial reasons, but appointed counsel is *not* mandatory. Rather, the district court has discretion to appoint counsel only if appointment is required in the interest of justice.

<u>*Process once the parentage case is underway*</u>

1. *At any time, a respondent may admit to paternity.* If so, and if the district court is satisfied with the admission, the district court shall issue an order adjudicating parentage. Section 40-11A-623.

2. *The district court may issue a default order adjudicating paternity.* The district court must make a finding that the man is indeed the father. Section 40-11A-634.

3. *The district court may dismiss the parentage case for lack of prosecution*, but can do so only *without prejudice*. Section 40-11A-635.

4. *The district court may issue temporary orders for support, custody, and visitation.* Section 40-11A-624.

[12] The Uniform Interstate Family Support Act, or UIFSA, is found at Sections 40-6A-100 through 40-6A-903, NMSA. It governs determination, modification, and enforcement of child support when two states are involved.

a. *In regards to a possible father ordered to pay child support under a temporary order*, the district court must be satisfied that there is good reason to think the person is the father. This satisfaction can occur in various ways (the person is the petitioner, has been identified as the father through genetic testing, etc.). Section 40-11A-624(A).

5. *Pretrial proceedings*. These proceedings screen parentage cases, and see which cases might settle under the court's supervision. As a practical matter, their actual implementation around the state varies.

    a. *As soon as practicable, the district court is to hold an informal hearing.* The public is barred from this hearing. The rules of evidence don't apply in this hearing. Section 40-11A-625.

    b. *Court makes recommendations.* At the pretrial hearing, the judge, hearing officer, or master conducting the hearing evaluates the probability of determining paternity in a trial, and makes an appropriate recommendation for settlement to the parties. Based upon the evaluation, the judge, hearing officer, or master may enter an order for temporary child support consistent with the statutory child support guidelines. Section 40-11A-626(A); *see* Section 40-4-11.1 for the child support guidelines.
        i. The parties may accept the recommendation. If they do, judgment is entered accordingly. Section 40-11A-626(B).
        ii. A party may reject the recommendation, but then genetic testing may be ordered. Thereafter, the judge, hearing officer or master would make a final recommendation. Section 40-11A-626(C).
        iii. A child's guardian can accept or reject the recommendation. Section 40-11A-626(D).
        iv. If the judge, hearing officer, or master finds it unlikely that all parties will accept the recommendation, then the informal hearing may be terminated and the matter set for trial. Section 40-11A-626(E).

6. *District court's rules in paternity hearings; genetic testing carries a lot of weight*.[13] Section 40-11A-631.

    a. *The paternity of a presumed, acknowledged or adjudicated father may be disproved* only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child.

    b. *A man identified as the father pursuant to genetic testing will be adjudicated* the father unless there are rebuttal genetic testing results.

[13] *See also*, of course, the genetic testing section within this discussion of the NMUPA.

c. *If genetic testing neither identifies nor excludes a man as the father of a child*, the genetic testing results are still relevant, along with any other evidence relevant on the issue of paternity.

d. *If genetic testing excludes a man as the father, those results are conclusive* unless there are rebuttal genetic testing results.

7. *Hearings may be closed to the public; the case file is mostly closed*. Section 40-11A-633; *see also* Section 40-11A-642 and 40-11A-643.

a. *The informal pretrial hearing is closed to the public.*

b. *To close a proceeding to the public or seal the file*, a party must request this for "good cause."

c. *Only the final order in a parentage proceeding is a public record*. Section 40-11A-(B). *But see* Section 40-11A-642, under which broader public access to the case file is possible.

d. *If a new birth certificate is ordered*, the evidence relevant to a new birth certificate, and the original birth certificate, are to be kept sealed and confidential, and subject to inspection only upon court order and consent of all interested parties, or in exceptional cases only upon court order for good cause shown. Section 40-11A-643(C).

8. *Order adjudicating parentage: contents*. The contents of an order adjudicating parentage are described in Section 40-11A-636:

a. *Identification of child; change to birth certificate and of name*. The order identifies the child by name and date of birth, and, upon request and for good cause shown, may change the child's name. If the court order varies from the birth certificate, then the district court may order the Bureau of Vital Records to issue an amended birth certificate. Regarding birth records, *see also* Section 40-11A-643.

b. *Assessment of fees, costs, and expenses*. The court may assess fees and costs (for example, filing fees, attorney fees, expert fees, guardian ad litem fees, genetic testing fees, and travel costs). However, fees, costs and expenses may not be assessed against CSED or against the child support enforcement division of another state.[14]

[14] To facilitate the assessment of costs, copies of bills for genetic testing, for child birth and for prenatal and postnatal health care for the mother and child that are furnished to the adverse party not less than ten days before the

c. *Addressing related issues*. The district court may also address past and future child support, guardianship, custody, visitation, grandparent visitation, and other related issues.[15] In making child support determinations, the district court is to follow the guidelines in Section 40-4-11.1, NMSA.

d. *Payment for pregnancy and birth.* The district court *may* direct the father to pay the reasonable expenses of the mother's pregnancy, birth and confinement.

e. *Retroactive child support.* The district court *shall* order child support retroactive to the date of the child's birth, but not to exceed 12 years unless there is a substantial showing that paternity could not have been established and an action for child support brought within 12 years of the child's birth. Also, in dealing with the retroactive child support issue, the district court also shall consider whether the *alleged or presumed* father has absconded or can't be located, and whether any equitable defenses are applicable.

9. *Divorce decree counts as parentage determination.* Divorce decrees are deemed to be parentage adjudications as long as there is personal jurisdiction and the final order indicates that the husband is the father or that the husband provides child support, or the final order contains a stipulation or admission that the parties are the parents of the child. Section 40-11A-637(C).

10. *Binding effect of parentage determination*. Generally, the parentage determination is binding upon all parties to the case if the district court had personal jurisdiction over the parties. Section 40-11A-637(A).

11. *A child is not bound by a parentage determination <u>unless</u>*:

a. *the determination was based on an unrescinded acknowledgment of paternity <u>and</u>* the acknowledgment is consistent with the results of genetic testing;

b. *the adjudication of parentage was based on a finding consistent with the results of* genetic testing and the consistency is declared in the determination or is otherwise shown;

c. *the child was a party or was represented in the proceeding* determining parentage by a guardian ad litem; *<u>or</u>*

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date of a hearing are admissible to establish: (1) the amount of the charges billed; and (2) that the charges were reasonable, necessary and customary. Section 40-11A-621(D).

[15] Regarding grandparent visitation, *see Lucero v. Hart*, 120 N.M. 794, 907 P.2d 198 (Ct.App. 1995).

d. *there was a final order in a divorce that satisfied Section 40-11A-637(C). See also* paragraph nine above.

12. *Continuing jurisdiction after the parentage determination.* The district court continues to have jurisdiction, in particular regarding:

    a. *Enforcement of any judgment or order through a contempt proceeding*, or any other remedies available to enforce a judgment. Section 40-11A-639(C).

    b. *Modification or revocation of a judgment or order for future child support*, except as otherwise provided in UIFSA. Section 40-11A-640.

    c. *Modification of custody and visitation*, if such issues were already addressed as part of the parentage determination.

13. *Party may challenge parentage determination via appeal, vacation of judgments* or other forms of judicial review. Section 40-11A-637(E).

    a. *A transcript is free if a party appeals*. Section 40-11A-641(B).

14. *Parentage determinations made in courts in other states are given full faith and credit*. Section 40-11A-638.

Child of Assisted Reproduction
(Article 7, NMUPA)

1. *Assisted reproduction defined.* "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse. Section 40-11A-102(D). It includes:
    a. Intrauterine insemination;
    b. Donation of eggs;
    c. Donation of embryos;
    d. In-vitro fertilization and transfer of embryos; and
    e. Intracytoplasmic sperm injection.

2. *Intent to parent is crucial.* A person who provides eggs, sperm or embryos for, or consents to, assisted reproduction pursuant to the NMUPA with the intent to be the parent of a child is a parent of the resulting child. Section 40-11A-703. Otherwise, donors of eggs, sperm or embryos are not the parents of a child conceived by assisted reproduction. Section 40-11A-702.

3. *Signed consent should precede assisted reproduction*. The intended parent or parents must consent to assisted reproduction in a record signed by them before the placement of the eggs, sperm or embryos. In addition, donors must also consent to an assisted reproduction before retrieval of the donors' eggs or sperm. Section 40-11A-704(A).

    a. *Even if a parent fails to sign consent, there still may be a parentage finding* if the parent, during the first two years of the child's life, resided in the same household with the child and openly held out the child as the parent's own. Section 40-11A-704(B).

4. *Inspection of papers. All* papers (whether legal, medical, or otherwise) relating to the assisted reproduction are subject to inspection only (i) upon a district court order *or* (ii) with the signed consent of those involved in the assisted reproduction (the donor or donors; the parent or parents; or, instead of the parent or parents, the child, if the child is 18 or older). Section 40-11A-704(C).

5. *Husbands challenging paternity of child by assisted reproduction.* Section 40-11A-705. The husband of a wife who gives birth to a child via assisted reproduction can challenge the paternity under the following circumstances:

    a. *The husband may maintain a proceeding to adjudicate paternity at any time if* the district court determines three things:
        i. The husband did not provide sperm for, or ever consent to, assisted reproduction by his wife.
        ii. The husband and the mother of the child have not cohabited since the probable time of assisted reproduction.
        iii. The husband never openly held out the child as his own.

    b. *Otherwise, the husband shall not challenge paternity unless* (i) within two years of learning of the birth of the child, he commences a paternity proceeding, and (ii) the district court finds that he did not consent at any time to the assisted reproduction. This limitation applies when a marriage is dissolved or declared invalid after assisted reproduction.

6. *Changes: effect of divorce, withdrawal of consent, or death.*

    a. *Divorce*: if a divorce occurs before placement of eggs, sperm or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a signed record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child. Section 40-11A-706(A).

b. *Withdrawal of consent*: Unless otherwise agreed in a signed record, the consent of a woman or a man to assisted reproduction may be withdrawn by that person in a signed record delivered to the other person at any time before placement of eggs, sperm or embryos *if* the placement has not occurred within one year after the consent. A person who withdraws consent in this manner is not a parent of the resulting child. Section 40-11A-706(B).

c. *Death*: If a person who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm or embryos, the deceased person is not a parent of the resulting child unless the deceased spouse consented in a signed record that if assisted reproduction were to occur after death, the deceased person would be a parent of the child. Section 40-11A-707.

Gestational Agreements
(Article 8, NMUPA)

1. *The NMUPA does not authorize or prohibit a gestational agreement* in which a woman relinquishes all rights as the parent of a child to be conceived by means of assisted reproduction, and that provides that the intended parents become the parents of the child. Section 40-11A-801(A).

2. *If a birth results pursuant to a gestational agreement* and the agreement is unenforceable under other New Mexico law, the parent-child relationship shall be determined under the parent-child relationship provisions of the NMUPA. Section 40-11A-801(B); Article 2, Section 40-11A-201 to Section 40-11A-204.

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Acknowledgments by the Author

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Lastly, at the time of writing,, my wife Tanya and I are in the process of adopting our son Xavier. Xavier has taught us more about parentage, in the fullest sense of the term, than anyone or anything else ever could, and it is to him that my efforts are dedicated.

Voluntary Acknowledgment of Paternity and the NM UPA

By M. Elizabeth Price, Esq.

Effective January 1, 2010, §301-314.

DEFINITION: §102 A. An "acknowledged father" means a man who has established a father-child relationship pursuant to Article 3 [40-11A-301 NMSA 1978] of the New Mexico Uniform Parentage Act.

What is the purpose of an acknowledgment of paternity?

§301. The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity.

What is the legal consequence of a valid Acknowledgment of paternity?

§305 A. A valid *effective* acknowledgment of paternity filed with the bureau is equivalent to an adjudication of paternity of a child. (*Do not file a Petition to Adjudicate paternity*)

§310. Ratification barred.

A court or administrative agency conducting a judicial or administrative proceeding ***shall not ratify*** an unchallenged acknowledgment of paternity. *(Do not file a Petition to Adjudicate paternity)*

What is required in a valid acknowledgment of paternity?

§302. Execution of acknowledgment

- Specific Form -- Acknowledgment of Paternity form -- Dept. of Health in NM
- Signed or authenticated under penalty of perjury by MOTHER & MAN seeking to establish paternity,
- The Acknowledgment form ***shall*** state that the child:
    - Does NOT have a *presumed* father, OR
    - Does have a *presumed* father,
    - Does NOT have another *acknowledged or adjudicated* father, AND
- The Acknowledgment form ***shall*** also state:

- Whether there has been genetic testing, and, that the acknowledging man's claim of paternity is ***consistent with the genetic testing,*** if genetic testing was performed, AND
- That the SIGNATORIES understand that the acknowledgment is equivalent to a *judicial adjudication* of paternity, AND
- That a *challenge* to the acknowledgment is permitted in LIMITED circumstances *(legal proceeding for RESCISSION or CHALLENGE after time expired for rescission)* AND
- A challenge is *BARRED after 2 years* from the LATER of the birth of the child or the filing of the Acknowledgment.

- EXCEPTIONS:
  - §311. Full faith and credit; acknowledgment or denial of paternity.
    - A court of this state shall give full faith and credit to an acknowledgment of paternity or denial of paternity effective in another state if the acknowledgment or denial has been signed and is otherwise in compliance with the law of the other state.
  - §312. Forms for acknowledgment and denial of paternity.
    - B. A valid acknowledgment of paternity or denial of paternity is not affected by a *later modification* of the prescribed form.

What, if anything, can affect the validity or enforceability of an acknowledgment?

3. A SIGNATORY (*mother or man who signed*) can file an action to rescind, deny paternity or to challenge an acknowledgment:

§307. Proceeding for *RESCISSION* of the acknowledgment
A signatory may rescind an acknowledgment of paternity or denial of paternity only by means of a *judicial proceeding* to rescind the acknowledgment or denial of paternity. A proceeding to rescind an acknowledgment of paternity or a denial of paternity shall be brought no later than the earlier of:
A. sixty days after the effective date of the acknowledgment or denial, as provided in Section 3-304 [40-11A-304 NMSA 1978] of the New Mexico Uniform Parentage Act;
B. in the case of a signatory who was a minor at the time of acknowledgment, the later of:
(1) sixty days after the eighteenth birthday of the signatory; or
(2) sixty days after the effective date of the acknowledgment or denial, as provided in Section 3-304 of the New Mexico Uniform Parentage Act; or
C. the date of the first hearing, in a proceeding to which the signatory is a party, before a court to adjudicate an issue relating to the child, including a proceeding that establishes support.

§308. *CHALLENGE* after expiration of period for RESCISSION

A. After the period for rescission pursuant to Section 3-307 [40-11A-307 NMSA 1978] of the New Mexico Uniform Parentage Act has expired, a signatory to an acknowledgment of

paternity or denial of paternity may commence a proceeding to challenge the acknowledgment or denial **only**:
(1) on the basis of ***fraud, duress or material mistake of fact***; and
(2) within ***two years*** after the acknowledgment or denial is filed with the bureau or two years after the eighteenth birthday of the signatory, whichever is later.

§303. *DENIAL OF PATERNITY* of a PRESUMED Father in conjunction with signing/authenticating and filing of a VALID ACKNOWLEDGMENT by another man

A presumed father may sign a denial of his paternity. The denial is valid only if:
A. an acknowledgment of paternity signed or otherwise authenticated by another man is filed pursuant to Section 3-305 [40-11A-305 NMSA 1978] of the New Mexico Uniform Parentage Act;
B. the denial is on a form provided by the bureau and is signed or otherwise authenticated under penalty of perjury; and
C. the presumed father has not previously:
(1) acknowledged his paternity, unless the previous acknowledgment has been rescinded pursuant to Section 3-307 [40-11A-307 NMSA 1978] of the New Mexico Uniform Parentage Act or successfully challenged pursuant to Section 3-308 [40-11A-308 NMSA 1978] of the New Mexico Uniform Parentage Act; or
(2) been adjudicated to be the father of the child.

§305 B. A valid denial of paternity by a presumed father filed with the bureau in conjunction with a valid acknowledgment of paternity is equivalent to an adjudication of the non-paternity of the presumed father.

4. A CHILD is not bound by an acknowledgment if it is *inconsistent with paternity testing*.

§637 B. A child is *not bound* by a determination of parentage pursuant to the New Mexico Uniform Parentage Act [40-11A-101 NMSA 1978] unless:
(1) the determination was based on an unrescinded acknowledgment of paternity ***and*** the acknowledgment is consistent with the results of genetic testing;

5. ANOTHER PERSON seeking to adjudicate paternity who is not a signatory to the acknowledgement or a party to the adjudication may file an action.

§609 B. If a child has an acknowledged father or an adjudicated father, a person, other than the child, who is neither a signatory to the acknowledgment of paternity nor a party to the adjudication and who seeks an adjudication of paternity of the child shall commence a proceeding *not later than two years* after the effective date of the acknowledgment or adjudication. (Subject to estoppel §608 & to §637 D)

6. THE ACKNOWLEDGMENT IS VOID:

§302 B. An acknowledgment of paternity is void if it:

- states that another man is a presumed father, unless a denial of paternity signed or otherwise authenticated by the presumed father is filed with the bureau;
- states that another man is an acknowledged or adjudicated father; or
- falsely denies the existence of a presumed, acknowledged or adjudicated father of the child.

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Charts comparing new and old UPA, prepared by Cathryn Wallace, Former Special Assistant AG for HSD/CSED, and M. Elizabeth Price, Esq., Regional Managing Attorney, HSD/CSED, Las Cruces.

"Old" New Mexico Uniform Parentage Act	***See***	**"New" New Mexico Uniform Parentage Act**
Section 40-11-1. Short title.		Section 101. Short Title
Section 40-11-2. Definition.		Section 102. Definitions
No Analogue		Section 103. Scope of Act; Choice of Law
No Analogue		Section 105. Protection of Participants
Section 40-11-3. Relationship not dependent on marriage.		Section 202. No Discrimination based on Marital Status
Section 40-11-4. How parent and child relationship established.		Section 201. Establishment of a Parent-Child Relationship Section 203. Consequences of Establishment of Parentage; *and See, generally,* Part 3: Voluntary Acknowledgment of Paternity Section 301. Acknowledgment of Paternity Section 302. Execution of Acknowledgment of Paternity Section 303. Denial of Paternity Section 304. Rules for Acknowledgment of and Denial of Paternity Section 305. Effect of Acknowledgment or Denial of Paternity Section 306. No Filing Fee Section 307. Proceeding for Rescission Section 308. Challenge after Expiration period for Rescission Section 309. Procedure for Rescission or Challenge Section 310. Ratification Barred Section 311. Full Faith and Credit Section 312. Forms for Acknowledgment of Paternity Section 313. Release of Information Section 314. Adoption of Rules; see also Section 638. Full Faith and Credit; Determination of Parentage
Section 40-11-5. Presumption of paternity.		Section 204. Presumption of Paternity
Section 40-11-6. Artificial insemination.		Part 7: Child of Assisted Reproduction Section 701. Scope of Part Section 702. Parental Status of Donor Section 703. Paternity of Child of Assisted Reproduction Section 704. Consent to Assisted Reproduction Section 705. Limitation on Husband's Dispute of Paternity Section 706. Effect of Dissolution of Marriage or Withdrawal of Consent Section 707. Parental Status of Deceased Individual
Section 40-11-7. Determination of father and child relationship; who may bring action; when action may be brought.		Part 6: Proceeding to Adjudicate Parentage, Subpart 1 Section 601. Proceeding Authorized Section 602. Standing to Maintain Proceeding

		Section 603. Parties to Proceeding Section 611. Proceedings Before Birth, Section 612. Child as Party; Representation; *see also* Section 502. Order for Testing.
Section 40-11-8. Jurisdiction; venue.		Section 104. Jurisdiction; *and* Section 604. Personal Jurisdiction Section 605. Venue, *see also* Section 309. Procedure for Rescission or Challenge
Section 40-11-9. Parties.		Section 603. Parties to Proceeding Section 606. No limitation; child having no presumed, acknowledged or adjudicated father Section 609. Limitation; child having acknowledged or adjudicated father Section 610. Joinder of Proceedings Section 612. Child as Party; Representation; *see also* Section 309. Procedure for Rescission or Challenge
Section 40-11-10. Pre-trial proceedings.		Section 624. Temporary Order Section 625. Pretrial Proceedings
Section 40-11-11. Pre-trial recommendations.		Section 626. Pretrial Recommendations
Section 40-11-12. Blood and genetic tests.		<u>Part 5: Genetic Testing</u> Section 501. Scope of Part Section 502. Order for Testing Section 503. Requirements for Genetic Testing Section 504. Report of Genetic Testing Section 505. Genetic Testing Results; Rebuttal Section 506. Costs of Genetic Testing Section 507. Additional Genetic Testing Section 508. Genetic Testing when Specimens not Available Section 509. Deceased Person Section 510. Identical Brothers Section 511. Confidentiality of Genetic Testing; *see also* Section 608. Authority to Deny Motion for Genetic Testing
Section 40-11-13. Evidence relating to paternity.		<u>Part 6: Special Rules for Proceeding to Adjudicate Parentage, Subpart 2</u> Section 621. Admissibility of Results of Genetic Testing; Expenses Section 622. Consequences of Declining Genetic Testing Section 623. Admission of Paternity Authorized
Section 40-11-14. Civil action.		<u>Part 6: Hearings and Adjudication, Subpart 3</u> Section 631. Rules for Adjudicating Parentage Section 632. Jury Prohibited
Section 40-11-15. Judgment or order.		Section 634. Order on Default Section 635. Dismissal for Want of Prosecution Section 636. Order Adjudicating Parentage Section 637. Bending Effect of Determination of Parentage

Section 40-11-16. Costs.		*See*, Section 641. Right to counsel; free transcript on appeal, and Section 306. No Filing Fee
Section 40-11-17. Enforcement of judgment or order.		Section 639. Enforcement of judgment or order.
Section 40-11-18. Modification of judgment or order.		Section 640. Modification of judgment or order.
Section 40-11-19. Right to counsel; free transcript on appeal.		Section 641. Right to counsel; free transcript on appeal.
Section 40-11-20. Hearings and records; confidentiality.		Section 633. Hearings, Inspection of Records Section 642. Hearings and Records; Confidentiality; *see also* Section 105. Protection of Participants
See NMSA Title VII, Chapter II, Part 3, et seq.		Part 4: Registry of Paternity Section 401. Establishment of Registry
Section 40-11-21. Action to declare mother and child relationship.		Section 106. Determination of Maternity
Section 40-11-22. Birth records.		Section 643. Birth Records, *see also* Section 636. Order Adjudicating Parentage; *see also* Section 309. Procedure for Rescission or Challenge
Section 40-11-23. Limitation.		Section 607. Limitation; general
No Analogue		Part 8: Gestational Agreement Section 801. Gestational Agreement not Authorized or Prohibited
No Analogue		Part 9: Miscellaneous Provisions Section 901. Uniformity of Application and Construction Section 902. Severability Clause Section 903. Transitional Provision

National Model Uniform Parentage Act		"New" New Mexico Uniform Parentage Act
Article 1: General Provisions		Part 1: General Provisions *and Definitions*
Section 101. Short title. *Identical*		Section 101. Short Title
Section 102. Definitions. • Includes definition of "gestational mother", which does not appear in the Definitions section of the New Mexico Act		Section 102. Definitions • Adds definition of "bureau" • New Mexico's Act substitutes "person" for "individual", as used in the National Model • New Mexico's Act uses the term "district court" in lieu of the National Model's "court" • Identifies the New Mexico Human Services Department as the Title IV D "support-enforcement agency" for purposes of the Act • Note: This Act uses "Part" in lieu of "Article"
Section 103. Scope of Act; Choice of Law • Adds, "[(d) This [Act] does not authorize or prohibit an agreement between a woman and a man and another woman in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction, and which provides that the man and other woman become the parents of the child. If a birth results under such an agreement and the agreement is unenforceable under [the law of this State], the parent-child relationship is determined as provided in [Article] 2.]		Section 103. Scope of Act; Choice of Law • Under Section C, adds, "The definition or use of terms in the New Mexico Uniform Parentage Act shall not be used to interpret, by analogy or otherwise, the same or other terms in the Adoption Act or other law of New Mexico." • Omits subsection(d)
Section 104. *Court of this State*.		Section 104. *Jurisdiction* • Adds, "The provisions of the New Mexico Uniform Parentage Act shall not be used to expand personal jurisdiction of the district court over nonresident persons in cases subject to the Uniform Interstate Family Support Act."
Section 105. Protection of Participants *Identical*		Section 105. Protection of Participants
Section 106. Determination of Maternity		Section 106. Determination of Maternity • Adds clause "insofar as possible" at end of the first paragraph.
Article 2: Parent-Child Relationship		Part 2: Parent-Child Relationship
Section 201. Establishment of a Parent-Child Relationship • A (4), adds "an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under Article 8 or is enforceable under other law." • B (6), adds, "an adjudication confirming the man as a parent of a child born to a gestational mother		Section 201. Establishment of a Parent-Child Relationship • Omits text concerning gestational mothers as referenced in A (4) and B (6)

if the agreement was validated under Article 8 or is enforceable under other law.		
Section 202. No Discrimination based on Marital Status *Identical*		Section 202. No Discrimination based on Marital Status
Section 203. Consequences of Establishment of Parentage		Section 203. Consequences of Establishment of Parentage • Inserts phrase "or extinguished by relinquishment and decree of adoption pursuant to the Children's Code."
Section 204. Presumption of Paternity		Section 204. Presumption of Paternity • Under subsection B, ads the phrase "Rebuttal of a presumption of paternity pursuant to the New Mexico Uniform Parentage Act does not apply to a presumption of paternity established pursuant to the Adoption Act."
Article 3: Acknowledgment of Paternity		Part 3: *Voluntary* Acknowledgment of Paternity
Section 301. Acknowledgment of Paternity *Identical*		Section 301. Acknowledgment of Paternity
Section 302. Execution of Acknowledgment of Paternity		Section 302. Execution of Acknowledgment of Paternity • Adds subsection "A (1) be on a form provided by the bureau"
Section 303. Denial of Paternity *Identical*		Section 303. Denial of Paternity
Section 304. Rules for Acknowledgment of and Denial of Paternity *Identical*		Section 304. Rules for Acknowledgment of and Denial of Paternity
Section 305. Effect of Acknowledgment or Denial of Paternity • Subsection A includes "and confers upon the acknowledged father all the rights and duties of a parent." • Subsection B includes "and discharges the presumed father from all the rights and duties of a parent."		Section 305. Effect of Acknowledgment or Denial of Paternity • Phrase omitted from New Mexico Act • Phrase omitted from New Mexico Act
Section 306. No Filing Fee *Identical*		Section 306. No Filing Fee
Section 307. Proceeding for Rescission National Model Reads: A signatory may rescind an acknowledgment of paternity or denial of paternity by commencing a proceeding to rescind before the earlier of: (1) 60 days after the effective date of the acknowledgment or denial, as provided in Section 304; or (2) the date of the first hearing, in a proceeding to which the signatory is a party, before a court to		Section 307. Proceeding for Rescission New Mexico Act Reads: A signatory may rescind an acknowledgment of paternity or denial of paternity only by means of a judicial proceeding to rescind the acknowledgement or denial of paternity. A proceeding to rescind an acknowledgment or denial of paternity shall be brought no later than the earlier of: (A) sixty days after the effective date of the acknowledgment or denial, as provided in

adjudicate an issue relating to the child, including a proceeding that establishes support.		Section 3-304 of the Uniform Parentage Act; (B) in the case of a signatory who was a minor at the time of acknowledgement, the later of: (1) sixty days after the eighteenth birthday of the signatory; or (2) sixty days after the effective date of the acknowledgement or denial, as provided in Section 3-304 of the New Mexico Uniform Parentage Act; or (C) the date of the first hearing, in a proceeding to which the signatory is a party, before a court to adjudicate an issue relating to the child, including a proceeding that establishes support.
Section 308. Challenge after Expiration period for Rescission		Section 308. Challenge after Expiration period for Rescission Under subsection A (2), adds, "or two years after the eighteenth birthday of the signatory,"
Section 309. Procedure for Rescission or Challenge *Identical*		Section 309. Procedure for Rescission or Challenge
Section 310. Ratification Barred • A court or administrative agency conducting a judicial or administrative proceeding *is not required or permitted to* ratify an unchallenged acknowledgment of paternity.		Section 310. Ratification Barred • A court or administrative agency conducting a judicial or administrative proceeding *shall not* ratify an unchallenged acknowledgment of paternity.
Section 311. Full Faith and Credit *Identical*		Section 311. Full Faith and Credit
Section 312. Forms for Acknowledgment of Paternity • Adds clause, "to facilitate compliance with this article" preceding subsection A		Section 312. Forms for Acknowledgment of Paternity • Omits this clause
Section 313. Release of Information *Identical*		Section 313. Release of Information
Section 314. Adoption of Rules • The agency maintaining birth records may adopt rules to implement this article.		Section 314. Adoption of Rules • The bureau may adopt *and promulgate* rules *and forms* to implement *the provisions of* this article.
<u>Article 4: Registry of Paternity</u>		<u>Part 4: Registry of Paternity</u>
Part 1: General Provisions Section 401. Establishment of Registry Section 402. Registration for Notification Section 403. Notice of Proceeding Section 404. Termination of Parental Rights: Child Under one Year of Age Section 405. Termination of Parental Rights: Child at least One Year of Age Part 2: Operation of Registry Section 411. Required Form Section 412. Furnishing of Information; Confidentiality		Section 401. Establishment of Registry • Adopts only Section 401 • Refers readers to NMSA Title VII, Chapter II, Part 3, *et seq.*, the existing New Mexico Registry of Paternity statute

Section 413. Penalty for Releasing Information Section 414. Rescission of Registration Section 415. Untimely Registration Section 416. Fees for Registry Part 3: Search of Registries Section 421. Search of Appropriate Registry Section 422. Certificate of Search of Registry Section 423. Admissibility of Registered Information		
Article 5: Genetic Testing		Part 5: Genetic Testing
Section 501. Scope of Article *Identical*		Section 501. Scope of Article
Section 502. Order for Testing *Identical*		Section 502. Order for Testing
Section 503. Requirements for Genetic Testing *Identical*		Section 503. Requirements for Genetic Testing
Section 504. Report of Genetic Testing		Section 504. Report of Genetic Testing • Adds, "(6) the accreditation of the testing facility showing that it meets the requirements of Section 5-503 of the New Mexico Uniform Parentage Act."
Section 505. Genetic Testing Results; Rebuttal *Identical*		Section 505. Genetic Testing Results; Rebuttal
Section 506. Costs of Genetic Testing *Identical*		Section 506. Costs of Genetic Testing
Section 507. Additional Genetic Testing *Identical*		Section 507. Additional Genetic Testing
Section 508. Genetic Testing when Specimens not Available		Section 508. Genetic Testing when Specimens not Available • In subsection A, adds the phrase "upon notice and after an opportunity for a hearing" after "the father of a child" and preceding "and for good cause shown"
Section 509. Deceased Person *Identical*		Section 509. Deceased Person
Section 510. Identical Brothers *Identical*		Section 510. Identical Brothers
Section 511. Confidentiality of Genetic Testing *National Model text reads*: A. Release of the report of genetic testing for parentage is controlled by [applicable state law]. B. An individual who intentionally releases an identifiable specimen of another individual for any purpose other than that relevant to the proceeding regarding parentage without a court order or the written permission of the individual who furnished the specimen commits a *[appropriate level misdemeanor]*.		Section 511. Confidentiality of Genetic Testing *New Mexico Act text reads*: A. Release of the report of genetic testing for parentage may be released only to the parties tested or their representatives, the support enforcement agency and the court. B. An individual who intentionally releases an identifiable specimen of another individual for any purpose other than that relevant to the proceeding regarding parentage without a court order or the written permission of the individual who furnished the specimen *is guilty of a fourth degree felony and shall be*

		sentenced pursuant to Section 31-18-15 NMSA 1978.
Article 6: Proceeding to Adjudicate Parentage, Part 1		Part 6: Proceeding to Adjudicate Parentage, Subpart 1 • Though New Mexico adopted the section of the National Model in its entirety, the Act expands significantly on local procedures
Section 601. Proceeding Authorized		Section 601. Proceeding Authorized • Adds at the end of the section, "The mother of the child and an alleged father or presumed father are competent to testify. Any witness may be compelled to testify".
Section 602. Standing to Maintain Proceeding • Adds subsection G: "an intended parent under this Act."		Section 602. Standing to Maintain Proceeding • Omits this phrase
Section 603. Parties to Proceeding *Identical*		Section 603. Parties to Proceeding
Section 604. Personal Jurisdiction *Identical*		Section 604. Personal Jurisdiction • (See long-arm statute in New Mexico UIFSA)
Section 605. Venue *Identical*		Section 605. Venue
Section 606. No limitation; child having no presumed, acknowledged or adjudicated father *National Model reads*: A proceeding to adjudicate the parentage of a child having no presumed, acknowledged, or adjudicated father may be commenced at any time, even after: (1) the child becomes an adult, *but only if the child initiates the proceeding*; or (2) an earlier proceeding to adjudicate paternity has been dismissed based on the application of a statute of limitation then in effect."		Section 606. No limitation; child having no presumed, acknowledged or adjudicated father *New Mexico Act reads*: (A) A proceeding to adjudicate the parentage of a child having no presumed, acknowledged, or adjudicated father may be commenced at any time, even after: (1) the child becomes an adult; or (2) an earlier proceeding to adjudicate paternity has been dismissed based on the application of a statute of limitation then in effect. (B) A proceeding to adjudicate child support pursuant to Subsection A of this section is limited by Sections 6-607 and 6-636 of the New Mexico Uniform Parentage Act.
Section 607. *Child having presumed father* *National Model reads*: (a) Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father must be commenced not later than two years after the birth of the child. (b) A proceeding seeking to disprove the father-child relationship between a child and the child's presumed father may be maintained at any time if the court determines that: (1) the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable		Section 607. *Limitation; general* *New Mexico Act reads*: (A) Any proceeding to adjudicate child support shall be brought not later than three years after the child has reached the age of majority. (B) Except as otherwise specifically provided for in another provision of the New Mexico Uniform Parentage Act, and proceedings to adjudicate the parentage of a child shall be commenced not later than three years after the child has reached the age of majority.

time of conception; and (2) the presumed father never openly held out the child as his own.		
Section 608. Authority to Deny Motion for Genetic Testing *Identical*		Section 608. Authority to Deny Motion for Genetic Testing
Section 609. Limitation; child having acknowledged or adjudicated father *Identical*		Section 609. Limitation; child having acknowledged or adjudicated father
Section 610. Joinder of Proceedings *Identical*		Section 610. Joinder of Proceedings
Section 611. Proceedings Before Birth *Identical*		Section 611. Proceedings Before Birth
Section 612. Child as Party; Representation *Identical*		Section 612. Child as Party; Representation
Article 6: Special Rules for Proceeding to Adjudicate Parentage, Part 2		Part 6: Special Rules for Proceeding to Adjudicate Parentage, Subpart 2
Section 621. Admissibility of Results of Genetic Testing; Expenses		Section 621. Admissibility of Results of Genetic Testing; Expenses
Section 622. Consequences of Declining Genetic Testing		Section 622. Consequences of Declining Genetic Testing
Section 623. Admission of Paternity Authorized		Section 623. Admission of Paternity Authorized
Section 624. Temporary Order		Section 624. Temporary Order
No analogue		Section 625. Pretrial Proceedings
No analogue		Section 626. Pretrial Recommendations
Article 6: Hearings and Adjudication, Part 3		Part 6: Hearings and Adjudication, Subpart 3
Section 631. Rules for Adjudication of Paternity *Identical*		Section 631. Rules for Adjudication of Paternity
Section 632. Jury Prohibited *Identical*		Section 632. Jury Prohibited
Section 633. Hearings, Inspection of Records *National Model text reads*: (a) On request of a party and for good cause shown, the court may close a proceeding under this [article]. (b) A final order in a proceeding under this [article] is available for public inspection. Other papers and records are available only with the consent of the parties or on order of the court for good cause.		Section 633. Hearings, Inspection of Records *New Mexico text reads*: (a) On request of a party and for good cause shown, the district court may close a proceeding *to the public and except for a final order, may declare the proceeding to be confidential and seal the file.* (b) A final order in a proceeding pursuant to this article is available for public inspection. Other papers and records are available only with the consent of the parties or on order of the court for good cause. (c) The provisions of this section are subject to any rules established by the supreme court of New Mexico.
Section 634. Order on Default *Identical*		Section 634. Order on Default
Section 635. Dismissal for Want of Prosecution *Identical*		Section 635. Dismissal for Want of Prosecution
Section 636. Order Adjudicating Parentage		Section 636. Order Adjudicating Parentage

National Model text reads:		*New Mexico Act text reads*:
(a) The court shall issue an order adjudicating whether a man alleged or claiming to be the father is the parent of the child. (b) An order adjudicating parentage must identify the child by name and date of birth. (c) Except as otherwise provided in subsection (d), the court may assess filing fees, reasonable attorney's fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this [article]. The court may award attorney's fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name. (d) The court may not assess fees, costs, or expenses against the support-enforcement agency of this State or another State, except as provided by other law. (e) On request of a party and for good cause shown, the court may order that the name of the child be changed. (f) If the order of the court is at variance with the child's birth certificate, the court shall order [agency maintaining birth records] to issue an amended birth registration.		A. The district court shall issue an order adjudicating whether a man alleged or claiming to be the father is the parent of the child. B. An order adjudicating parentage must identify the child by name and date of birth. C. Except as otherwise provided in subsection D of this section, the district court may assess filing fees, reasonable fees of counsel, *experts and the child's guardian ad litem*, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding pursuant to this article. *The district court may award attorney fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name. The district court may order these fees, costs and expenses to be paid by any party in proportions and at times as determined by the court, but to exceeding twelve years unless there is a substantial showing that paternity could not have been established and an action for child support could not have been brought within twelve years of the child's birth. The court may order the proportion of any indigent party to be paid from court funds.* D. The district court shall not assess fees, costs, or expenses against the support-enforcement agency of this State or another State, except as provided by other law. E. On request of a party and for good cause shown, the court may order that the name of the child be changed. F. If the order of the district court is at variance with the child's birth certificate, the district court shall order the bureau to issue an amended birth certificate. *G. The judgment or order may contain any other provision directed against or on behalf of the appropriate party to the proceeding concerning the duty of past and future support, the custody and guardianship of the child, visitation with the child, the furnishing of bond or other security for the payment of the judgment or any other matter within the jurisdiction of the court. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy, birth and confinement. The court shall order child support retroactive to the date of the child's birth, but not to exceed twelve years unless there is a substantial showing that paternity could not have been established and an action for child support*

		could not have been brought within twelve years of the child's birth pursuant to the provisions of Sections 40-4-11 through 40-4-11.3 NMSA 1978; provided that, in deciding whether or how long to order retroactive support, the court shall consider: *(1) whether the alleged or presumed father has absconded or could not be located; and* *(2) whether equitable defenses are applicable.* *H. Support judgments or orders ordinarily shall be for periodic payments, which may vary in amount. In the best interest of the child, a lump-sum payment or the purchase of an annuity may be ordered in lieu of periodic payments of support; provided, however, nothing in this section shall deprive a state agency of its right to reimbursement from an appropriate party should the child be a past or future recipient of public assistance.* *I. In determining the amount to be paid by a parent for support of the child, a court, child support hearing officer or master shall make such determination in accordance with the provisions of the child support guidelines pursuant to Section 40-4-11.1 NMSA 1978.*
Section 637. Bending Effect of Determination of Parentage		Section 637. Bending Effect of Determination of Parentage *New Mexico Act text*: • Adds "A (4) There was a final order in the proceeding that satisfies the requirements of Paragraph (1), (2) or (3) of Subsection C of this section." • At C (1), adds "child of the parties" following "'issue of the marriage'," • Adds "C (3) contains a stipulation or admission that the parties are the parents of the child."
No analogue		Section 638. Full Faith and Credit; Determination of Parentage
No analogue		Section 639. Enforcement of judgment or order.
No analogue		Section 640. Modification of judgment or order.
No analogue		Section 641. Right to counsel; free transcript on appeal.
No analogue		Section 642. Hearings and Records; Confidentiality
No analogue		Section 643. Birth Records
Article 7: Child of Assisted Reproduction		Part 7: Child of Assisted Reproduction
Section 701. Scope of Article *Identical*		Section 701. Scope of Article
Section 702. Parental Status of Donor *Identical*		Section 702. Parental Status of Donor
Section 703. *Paternity* of Child of Assisted Reproduction		Section 703. *Parentage* of Child of Assisted

Identical as to substance		Reproduction
Section 704. Consent to Assisted Reproduction *National Model text reads*: (a) Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction shall be in a record signed by the woman and the man. This requirement does not apply to a donor. (b) Failure of a man to sign a consent required by Subsection A of this section, before or after birth of the child, does not preclude a finding of paternity if the woman and the man, during the first two years of the child's life, resided together in the same household with the child and openly held out the child as their own.		Section 704. Consent to Assisted Reproduction *New Mexico Act text reads*: *A. The intended parent or parents shall consent to the assisted reproduction in a record signed by them before the placement of eggs, sperm or embryos. Donors shall also consent to an assisted reproduction before the retrieval of the donors' eggs or sperm.* B. Failure of a *parent* to sign a consent required by Subsection A of this section does not preclude a finding of *parentage if the parent*, during the first two years of the child's life, resided in the same household with the child and openly held out the child as *the parent's* own. C. All papers relating to the assisted reproduction, whether part of a court, medical or any other file, are subject to inspection only upon an order of the district court or with the consent, in a signed record, of: (1) the donor or donors; and (2) the parent or parents who consented to the assisted reproduction pursuant to Subsection A of this section or a child who was born as a result of the assisted reproduction pursuant to Subsection A if the child is eighteen years of age or older.
Section 705. Limitation on Husband's Dispute of Paternity *Identical*		Section 705. Limitation on Husband's Dispute of Paternity
Section 706. Effect of Dissolution of Marriage or Withdrawal of Consent		Section 706. Effect of Dissolution of Marriage or Withdrawal of Consent • New Mexico texts adds the clause, "unless otherwise agreed in a signed record" preceding the existing subparagraph (b) of the National Model. • New Mexico texts adds the clause, "if the placement has not occurred within one year after the consent" at the end of the first sentence in the existing subparagraph (b) of the National Model.
Section 707. Parental Status of Deceased Individual *Identical*		Section 707. Parental Status of Deceased Person
<u>Article 8: Gestational Agreements</u>		<u>Part 8: Gestational Agreements</u>
Section 801. Gestational Agreement Authorized Section 802. Requirements of Petition Section 803. Hearing to Validate Gestational Agreement Section 804. Inspection of Records Section 805. Exclusive, Continuing Jurisdiction		Section 801. Gestational Agreement not Authorized or Prohibited • New Mexico Act adopts only Section 401

Section 806. Termination of Gestational Agreement Section 807. Parentage under Validated Gestational Agreement Section 808. Gestational Agreement; Effect of Subsequent Marriage Section 809. Effect of Non-validated Gestational Agreement		

Child Support

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THE LEGISLATIVE CHILD SUPPORT MANDATE

The obligations owed by a parent to a child include the obligation to personally care for, support, educate, give moral and spiritual guidance and provide a home and the love and security that a home provides. **In re Adoption of Doe**, 100 N.M. 764, 676 P.2d 1329 (1984). Toward this end, New Mexico has adopted the Child Support Guidelines, set out in NMSA 1978, § 40-4-11.1(B), to accomplish the following public policy goals:

> (1) to establish as state policy an adequate standard of support for children, subject to the ability of parents to pay;
>
> (2) to make awards more equitable by ensuring more consistent treatment of persons in similar circumstances; and
>
> (3) to improve the efficiency of the court process by promoting settlements and giving courts and the parties guidance in establishing levels of awards.

There is a rebuttable presumption that the Guidelines accurately and adequately establish the proper amount of child support. Section 40-4-11.1(A); **Thompson v. Dehne**, 2009-NMCA-120, 147 N.M. 283, 220 P.3d 1132. Thus, the Guidelines reduce the discretion of the District Court. **Rosen v. Lantis**, 1997-NMCA-033, ¶ 7, 123 N.M. 231, 938 P.2d 729. The District Court's discretion in setting child support must be exercised in accordance with the Guidelines. **Quintana v. Eddins,** 2002-NMCA-008, ¶ 9, 131 N.M. 425, 38 P.3d 203. On appeal, the appellate courts will also review the District Court's findings of fact to determine if there is substantial evidence to support them.

New Mexico Statutes dealing directly with child support include:

> Child Support statute and guidelines - § 40-4-11.1
> Uniform Parentage Act § 40-11-1 to § 40-11-23
> Family Violence Protection § 40-13-1
> Wage Withholding § 40-4-11
> Mandatory Medical Support Act – §40-4C-1
> Uniform Interstate Family Support Act §40-6A-100
> Parental Responsibility § 40-5A-1

TO WHOM THE CHILD SUPPORT GUIDELINES APPLY

The Guidelines apply to all persons who are obligated to support a child or children, including dissolution of marriage, parentage actions, and adoption.

The application of the statute to the determination of child support is not dependent upon the marital relationship of the parents to each other, but is determined by the relationship of the child to the adults. **In Re Estate of DeLara**, 2002-NMCA-004, ¶ 8, 131 N.M. 430, 38 P.3d 198; *see also* **Mintz v. Zoernig**, 2008-NMCA-162, ¶ 11,145 N.M. 362, 198 P.3d 861 (discussing claims of a non-anonymous "sperm donor.")

CALCULATING THE CHILD SUPPORT OBLIGATION

In computing child support under NMSA 1978, Section §40-4-11.1(K), the starting point is the income of each parent, defined by the statute as the "actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed." Section 40-4-11.1(C)(1). Under NMSA 1978, § 40-4-11.1(E), the "basic child support obligation shall be calculated based on the combined income of both parents and shall be paid by them proportionately pursuant to Subsections K and L of this section."

The Guidelines arrive at an amount to be transferred from parent to parent for the support of the child or children. The Guidelines reflect the physical child custody determination made by the District Court and the income available to the parties. Thus, before the Court can establish the amount to be paid under the Guidelines, the District Court must first make a determination of custody and timesharing (or periods of responsibility) and must have information regarding both parties' income and expenses. See NMSA 1978, § 40-4-9.1.

The Statute provides two separate worksheets: a "Basic Child Support" schedule, often referred to as "Worksheet "A", and a "Shared Responsibility" schedule, or "Worksheet "B." The instructions for the use of the worksheets are found in Subsection K, which provides additional information not included in the statutory definitions.

Under § 40-4-11.1(D), **Basic Visitation/Worksheet A** means a custody arrangement where one parent has primary physical custody. This parent is sometimes referred to as the "custodial parent" or the "primary custodial parent". The other parent (sometimes called the non-custodial parent) may have periods of responsibility/timesharing/visitation with the child(ren); Worksheet A applies only if the non-custodial parent has visitation that amounts to **less than thirty-five percent of the time**.

Under § 40-4-11.1(D), **shared responsibility** for purposes of Worksheet B means a custody arrangement where the children of the parties spend **at least thirty-five percent of the year in each home,** and the parents significantly share the duties, responsibilities and expenses of parenting.

NOTE: the Court may provide for a partial abatement of child support where the child(ren) will visit with the non-custodial parent for one month or longer. Annual abatement of child support is not deviation from the guidelines; it is explicitly provided for in those guidelines. **Grant v. Cumiford**, 2005-NMCA-058, 137 N.M. 485, 112 P.3d 1142.

COMPUTING CHILD SUPPORT IN UNUSUAL CASES: *ERICKSON V. ERICKSON*

Erickson v. Erickson, 1999-NMCA-056, ¶ 1, 127 N.M. 140, 978 P.2d 347, noted that the use of the worksheets and schedules set forth in NMSA 1978, § 40-4-11.1 lead to the presumptively correct amount of child support. **Erickson** concerned the computation of Child Support in an unusual and special case. The **Erickson** parents had two children -- Andrew and Michelle. Andrew lived 59% of his time with Father and 41% of his time with Mother. Michelle lived 71% of her time with Mother and 29% with Father.

If Andrew had been the only child of the Erickson's marriage, the custodial arrangement would be "shared responsibility," because Andrew spends at least 35% of the year with each parent. Section 40-4-11.1(D)(3). But if Michelle were the only child of the parties, the custodial arrangement would be "basic visitation," because she spends less than 35% of her time with Father. Section 40-4-11.1(D)(2).

In **Erickson**, the District Court computed the child-support award using both Worksheets A (for basic visitation) and B (for shared responsibility). The Court of Appeals held that the district court should compute child support as follows:

> First, compute the child support for Michelle by treating her as the sole child in a basic visitation arrangement. Then compute the child support for Andrew by treating him as a child for whom Father and Mother have shared responsibility, adjusting the calculation to take into account that he is the sole child housed by Father and the second child housed by Mother.

The Court of Appeals summarized the propositions, policies and procedures as follows:

Under a basic-visitation arrangement:

> 1. The basic support is determined by the combined gross monthly income of the parents and the number of children.
>
> 2. Basic support increases for each additional child in the household, the amount of increase diminishing substantially for each additional child.
>
> 3. The non-custodial parent receives no "credit" for basic support for expenses incurred during visitation time with the child.
>
> 4. Each parent is responsible for that portion of basic support equal to that parent's share of the combined income. But the custodial parent is presumed to be paying all basic-support expenses in the first instance, so the non-custodial parent pays his or her share to the custodial parent.
>
> 5. The cost of child support in addition to basic support-such as for work-related child care and health insurance-is borne by the parents in proportion to their income, regardless of who has custody.

Under the shared responsibility arrangement:

1. The basic expenses of caring for the children increase by 50% because each parent provides a home for the children.

2. The basic obligation and additional expenses continue to be divided between the parents in proportion to their incomes.

3. Because each parent provides a home for the children, each should receive credit toward its share of the basic obligation in proportion to the time that the children reside with the parent.

MANDATORY ATTACHMENT OF WORKSHEET TO ORDER

NMSA 1978, 40-4-11.6 requires the completed Child Support Obligation Guideline – whether Worksheet A or Worksheet B – must be attached to all orders that establish or modify child support; the completed Worksheet must be incorporated as part of any child support order. The completed worksheet must be signed by the obligor and obligee or by their attorneys. The statute does provide that the worksheet may be sealed.

ADDITIONAL REQUIREMENTS IN A CHILD SUPPORT ORDER

In addition to attaching the Child Support Worksheet (Section 40-4-11.2), Section 40-4-11.4(B) specifically provides that a Child Support Order must contain a provision for the annual exchange of financial information by the obligor and obligee upon a written request by either party. In other words, the party is entitled to the information upon request, and need not obtain a specific discovery order or other intervention by the Court.

The financial information to be furnished must include:

(1) federal and state tax returns, including all schedules, for the year preceding the request;
(2) W-2 statements for the year preceding the request;
(3) Internal Revenue Service Form 1099s for the year preceding the request;
(4) work-related daycare statements for the year preceding the request;
(5) dependent medical insurance premiums for the year preceding the request; and
(6) wage and payroll statements for four months preceding the request.

The statute includes provisions excluding income and wages of subsequent spouses; the wages of a subsequent spouse may be omitted from the financial information provided by either the obligor or oblige.

INCOME

Income for purposes of determining Child Support is defined by § 40-4-11.1(C); **Income** means the *actual gross income* of a parent if *employed to full capacity* or *potential income if*

unemployed or underemployed. Income need not be imputed to the primary custodial parent actively caring for a child of the parties who is under the age of six or disabled. If income is imputed, reasonable child care expenses may be imputed. The gross income of a parent means only the income and earnings of that parent and not the income of subsequent spouses, notwithstanding the community nature of both incomes after remarriage; and

Gross income includes income from any source and includes but is not limited to income from salaries, wages, tips, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, significant in-kind benefits that reduce personal living expenses, prizes and alimony or maintenance received.

In determining income from self-employment, rent, royalties, proprietorship of a business or joint ownership of a partnership or closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required to produce such income, but ordinary and necessary expenses do not include expenses determined by the court to be inappropriate for purposes of calculating child support.

ADDITIONAL EXPENSES REQUIRED AND PERMITTED

NMSA 1978, Section 40-4-11.1(H) provides that both Worksheet A and B calculations include of the cost of providing medical and dental insurance for the children of the parties.

Worksheet A and B also allow the reasonable child-care costs incurred on behalf of the children due to employment or the job search efforts of either parent; each parent pays in proportion to that parent's income.

A child support determination may also include the payment of the following expenses not covered by the basic child support obligation:

1. Any extraordinary medical, dental and counseling expenses incurred on behalf of the children of the parties. The statutory definition of extraordinary expenses is uninsured expenses in excess of one hundred dollars ($100) per child per year,

2. Any extraordinary educational expenses for children of the parties, and

3. Any transportation and communication expenses necessary for long distance visitation or exercise of time sharing by a parent.

EXCLUSIONS FROM INCOME

Several income sources and types are expressly omitted from inclusion in gross income under NMSA 1978, §40-4-11.1(C)(2):

1. income received from means-tested public assistance programs (i.e., welfare, TANF), or child support received by a parent for the support of other children;

2. The community income earnings of a new spouse are not included in the determination of a parent's income. **DeTevis v. Aragon**, 104 NM 793, 727 P.2d 558 (Ct. App. 1986).

3. Gross income does not include a reasonable amount for a parent's obligation to support prior-born children who are in that parent's custody. NOTE: A duty to support subsequent children is not ordinarily a basis for reducing support owed to prior children of the parties, but may be a defense to a child support increase. A party may use Table A, set forth in NMSA 1978, § 40-4-11.1(K) to calculate the support for subsequent children. **Thompson v. Dehne**, 2009-NMCA-120, ¶¶ 13, 16, 147 N.M. 283, 220 P.3d 1132. "Prior" refers to birth order and not to the order of entry of child support orders.

IMPUTATION OF INCOME

The child support guidelines allow the imputation of income to an unemployed or under-employed parent to the level of employment at full capacity. **Quintana v. Eddins,** 2002-NMCA-008, ¶¶ 10, 16, 131 N.M. 425, 38 P.3d 203. In evaluating imputation of income and claim of underemployment, the Court must determine if the parent has "acted in good faith to earn and preserve as much money to his or her children as could reasonably be expected under the circumstances". 2002-NMCA-008, ¶16. Whether to impute income, and the proper amount to be imputed, is a matter for the discretion of the Court; in exercising its discretion, the Court should consider whether the parent has acted in good faith, and whether the parent's actions are reasonable under the totality of the circumstances." 2002-NMCA-008, ¶ 24.

Even if a parent is not acting primarily to avoid a child support obligation the "relevant inquiry is whether the parent's career choices are reasonable under the circumstances." **State ex. rel. Human Services Department v. Kelley,** 2003-NMCA-050, ¶ 513, 133 N.M. 510, 64 P.3d 527.

Under NMSA 1978, § 40-4-11(C), income is not imputed to the primary custodial parent who is actively caring for a child who is **under the age of six or disabled**. If income is imputed, a reasonable child care expense may be imputed.

The amount of income to be imputed is a separate question from actual income and earnings potential for the purpose of imputing income. **Quintana v. Eddins,** 2002-NMCA-008, ¶ 23, 131 N.M. 425, 38 P.3d 203.

LIMITATION ON AMOUNT OF SUPPORT DUE

NMSA 1978, Section 40-4-11.1(J) limits the support to be paid when the application of the Guidelines would require the obligor to pay **more than forty percent (40%) of the paying person's gross income** for a single child support obligation *for current support.* Under such circumstances, there is a statutory presumption of a substantial hardship, justifying a deviation from the guidelines. NOTE: The operation of this statutory provision of limitation is complicated where a payor is ordered to provide support to children of different obligees. **Thompson v. Dehne**, 2009-NMCA-120, 147 N.M. 283, 220 P.3d 1132.

DEVIATION FROM GUIDELINES

Any deviation from the amount of support determined by the application of the guidelines must be specifically referenced in the Order, which must contain a statement of the reason(s) for the deviation. **Grant v. Cumiford**, 2005-NMCA-058, ¶ 25, 137 N.M. 485, 12 P.3d 1142. NMSA 1978, § 40-4-11.2(A) specifies that any deviation upward or downward from the Guideline amounts as calculated by application of the statute shall be supported by specific written findings in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate. The findings must outline the circumstances creating the substantial hardship for the obligor, the obligee, or the child or children being supported, to justify a deviation upward or downward.

For example, the Court may allow a credit against basic child support for off-schedule sources of income -- such as social security benefits paid directly to the child. The Court is to exercise its discretion on a case-by-case basis, with the child's standard of living being a crucial factor. **Pederson v. Pederson**, 2000-NMCA-042, 129 N.M. 56, 1 P.3d 974.

MODIFICATION OF FUTURE CHILD SUPPORT

Child support orders may be modified. **Spingola v. Spingola**, 91 N.M. 737, 741, 580 P.2d 958, 962 (1978). Modification of a child support order requires a showing of a substantial change in circumstances. **Bustos v. Bustos**, 2000-NMCA-040, ¶ 15, 128 N.M. 842, 999 P.2d 1074. The prospective modification of child support (i.e. changing what the payor must pay in the future) is governed by Section 40-4-11.4. The statute provides that a Court may modify a child support obligation upon a showing of material and substantial changes in circumstances subsequent to the adjudication of the pre-existing order. 2000-NMCA-040, ¶ 15.

There is a presumption of material and substantial changes in circumstances if application of the Guidelines would result in a deviation upward or downward of **more than twenty percent (20%) of the existing obligation** and the petition for modification is filed **more than one year after the filing of the pre-existing order**.

The movant has the burden of proving the substantial and material change of circumstances. **Brannock v. Brannock,** 104 N.M. 385, 722 P.2d 636 (1986), **Chavez v. Chavez**, 98 N.M. 568, 679, 652 P.2d 228, 229 (1982).

Modification is permitted from the date of the filing of the petition, application or pleading filed to modify. **Zabolzadeh v. Zabolzadeh**, 2009-NMCA-046, 146 N.M. 125, ¶ 7, 207 P.3d 359. In other words, modification may be retroactive only to the date the motion or request to modify is filed; accrued child support generally cannot be retroactively modified. **Leeder v. Leeder**, 884 P.2d 494 (Ct.App. 1994) (holding the District Court should not have modified child support effective May 5, 1992, when wife's first pleading seeking increase in child support was filed on January 5, 1993).

As with all matters affecting children, in determining whether to modify a support order, "the controlling influence" should be the welfare and best interests of the child or children. **Fox v. Doak**, 28 N.M. 743, 744, 438 P.2d 153, 154 (1968).

Parties may not, by private agreement, modify future child support obligations; modification of future child support is to be determined by the District Court. **Ingalls v. Ingalls**, 119 N.M. 85, 86, 888 P.2d 967 (Ct. App. 1994).

With regard to a modification, reduction, or cessation of child support payments upon a child reaching majority age, when a prior decree directs that a non-custodial parent must make periodic child support payments for two or more children, and one of the children subsequently reaches the age of majority, the best procedure for a non-custodial parent who seeks a reduction in child support is to obtain a stipulated order authorizing such modification, or alternatively to request a hearing on a request for reduction. **McCurry v. McCurry**, 117 N.M. 564, 874 P.2d 25 (Ct. App. 1994).

Jurisdiction for the modification of out-of-state child support orders by a New Mexico District Court is governed by UIFSA (NMSA 1978, Section 40-6A-205) (see below). **Harbison V. Johnston**, 2001-NMCA-051, 130 N.M. 595, ¶ 15, 28 P.3d 1136.

Special Case: The fact that an obligor is incarcerated does not legally *require* a modification of the child support obligation during the period of incarceration**. Thomasson v. Johnson**, 120 N.M. 512, 516, 903 P.2d 254, 258 (Ct.App. 1995). The Court may take into account other factors in determining whether to modify the child support obligation of an incarcerated individual. By extension, the fact that a parent is incarcerated at the time an initial decision regarding child support is made would not, *ipso facto*, require the Court to deviate from the Guidelines in setting an amount to be paid.

The following facts and circumstances, among others, tend to establish that conditions existing at the time of a divorce decree have changed so as to justify an increase in child support payments:

□ Advance in age of children

□ Increase in cost of living

□ Need to procure new housing

□ Need to provide child with medical care

□ Desire to provide child with more costly education

□ Desire to provide child with special training

□ Worsening of mother's financial condition

□ Worsening of mother's health

□ Improvement of father's financial condition

□ Decrease in father's expenses

TAX EXEMPTION

Before the passage of the Tax Reform Act of 1984, federal tax law generally permitted a non-custodial parent to receive the tax exemption if he or she paid more than $1200 toward the support of a child in any calendar year and if the custodial parent did not clearly establish that he or she provided more support for the child during the calendar year than the non-custodial parent. **Macias v. Macias**, 1998-NMCA-170, ¶ 5, 126 N.M. 303, 968 P.2d 814. For purposes of allocating the dependency exemption, the 1984 tax law created a presumption that child support, and therefore entitlement to the dependency exemption, attached to custody. **Macias**, 1998-NMCA-170, P. 5.

Thus, under the tax law, the person who has physical custody of the child "shall be treated" as providing more than half the support and thus presumptively entitled to the exemption. *Id., citing* 26 U.S.C. § 152(e)(1)(B). That legal presumption is subject to certain exceptions, including one which allows the custodial parent to waive the exemption in favor of the non-custodial parent by signing a written declaration to that effect (Federal Tax Form 8332), pledging that the custodial parent will not take the exemption. *See* 26 U.S.C. § 152(e)(2).

New Mexico, like the majority of U.S. jurisdictions, considers dependency exemptions as a financial resource to be allocated for the benefit of minor children. **Macias,** 1998-NMCA-170, ¶ 8. Allocating the exemption to one parent or the other may -- as a practical matter -- liberate additional funds with which that parent can contribute more to the support and maintenance of the children. *Id.* For example, if the non-custodial parent enjoys a significantly higher income tax bracket than the custodial parent, then awarding the dependency exemption to the non-custodial parent may result in larger tax savings to the non-custodial parent than if the exemption were taken by the lower-income, custodial parent. *Id.* The Court can then route that tax savings into greater support for the children, because increased tax savings will mean increased financial resources that can be utilized for the children's benefit. *Id.* In theory, as well as in practice, allocating dependency exemptions can serve a constructive purpose that in every way conforms to the core responsibility of New Mexico courts to provide for the minor children of divorce. *Id.*

HEALTH INSURANCE

It is settled that the Court may allocate responsibility for the provision of health insurance to the party best able to obtain and pay for coverage for the children.

TERMINATION OF SUPPORT OBLIGATION

"[A]n undivided support award applicable to more than one child is presumed to continue in force for the full amount specified in the decree until the youngest child attains the age of majority." Bustos v. Bustos, 2000-NMCA-040, ¶¶ 10-11, 128 N.M. 842, 999 P.2d 1074; NMSA

1978, § 40-4-11.1(A) and (B); **cf. Hopkins v. Hopkins**, 109 N.M. 233, 237, 784 P.2d 420, 424 (Ct.App.1989) (holding that court did not abuse its discretion in requiring husband to pay $500 a month child support arrearages for two children after husband unilaterally withheld $250 .00 a month for the two-year period of time that one child lived with him).

In other words, there is no "automatic" termination of a child support order; modifications can only be made by court order**. Bustos,** 2000-NMCA-040, ¶ 15. The basic support for an additional child does not equal the amount of basic support for one child. The table recognizes that an additional child does not add as much expense to the household as did the first child. See **Spingola v. Spingola**, 91 N.M. 737, 744, 580 P.2d 958, 965 (1978) ("Experience indicates that the support level for one child must be considerably higher than that necessary for additional children."). When a prior decree directs that a non-custodial parent must make periodic child support payments for two or more children, and one of the children subsequently reaches the age of majority, the non-custodial parent who seeks a reduction in child support must file a motion for modification or obtain a stipulated order authorizing such modification. **McCurry v. McCurry**, 117 N.M. 564, 874 P.2d 25 (Ct. App. 1994).

EMANCIPATION

"Emancipation" as between parent and child is severance of parental relationship so far as legal rights and liabilities are concerned. **Fitzgerald v. Valdez**, 427 P.2d 655 (1967). "[Emancipation] ... occurs by operation of law. In the usual situation, the parental relationship is severed when the child reaches majority because the law fixes that as the point in time for parental rights and liabilities to cease...." **Phelps v. Phelps**, 85 N.M. 62, 65, 509 P.2d 254, 257 (1973).

Marriage and other conditions may emancipate a child from his or her status of minority, and thus relieve his or her parents from legal obligation of support before the age of majority is attained by the child. **Mason v. Mason,** 84 N.M. 720, 507 P.2d 781 (1973). In one New Mexico case, an older sister was appointed the guardian of the persons and estate of her minor sisters, but she did not agree to be the sole supporter of them; this created a partial emancipation of minors with respect to their parents' right to discipline and care for them, but the parents' duty of support was held not to be extinguished. **Fevig v. Fevig**, 90 N.M. 51, 559 P.2d 839 (1977).

PARENTAL ALIENATION

Where a custodial parent is financially able to support his or her children, and where the children refuse to visit the other parent due to the emotional influence of the custodial parent, the District Court may exercise its discretion to terminate the future support obligations of the non-custodial parent. **Barela v. Barela**, 91 N.M. 686, 579 P.2d 1253 (1978)

POST MAJORITY SUPPORT

In **Psomas v. Psomas**, 99 N.M. 606, 609, 661 P.2d 884, 887 (1982), overruled on other grounds by **Walentowski v. Walentowski**, 100 N.M. 484, 672 P.2d 657 (1983), Supreme Court held that the District Court had no jurisdiction to order support for children who have passed the age of

majority. NMSA 1978, § 40-4-7. Citing **Spingola v. Spingola**, 93 N.M. 598, 603 P.2d 708 (1979); **Phelps v. Phelps**, 85 N.M. 62, 509 P.2d 254 (1973); **In Re Coe's Estate**, 56 N.M. 578, 247 P.2d 162 (1952), the Supreme Court held that New Mexico statutes provide that the "district court shall have exclusive jurisdiction of all matters pertaining to the guardianship, care, custody, maintenance and education of the children ... so long as they ... remain minors." § 40-4-7.

In **Phelps**, the Supreme Court held that the trial court correctly determined it had no authority to enforce a judgment providing for child support payments for a child who was no longer a minor under New Mexico statutes. "[Emancipation] ... occurs by operation of law. In the usual situation, the parental relationship is severed when the child reaches majority because the law fixes that as the point in time for parental rights and liabilities to cease...." **Phelps,** 85 N.M. at 65, 509 P.2d at 257.

POST MAJORITY EDUCATION

New Mexico cases hold that the District Courts lack jurisdiction to order parties jointly responsible for the post-minority education of their children. **Christiansen v. Christiansen**, 100 N.M. 102, 666 P.2d 781 (1983); **Spingola v. Spingola**, 93 N.M. 598, 603 P.2d 708 (1979) (holding jurisdiction was not vested in trial court to enter an order concerning post-minority educational expenses of children).

NMSA 1978, § 40-4-7(C) was amended in 1997 to provide that "[t]he court may order and enforce the payment of support for the maintenance and education after high school of emancipated children of the marriage *pursuant to a written agreement between the parties*." (Emphasis added). The district court has the authority to construe an agreement regarding the care and education of minor children. **See id.; Rhinehart v. Nowlin**, 111 N.M. 319, 323, 805 P.2d 88, 92 (Ct.App.1990) ("[T]rial courts are given exclusive jurisdiction of all matters relating to the guardianship, care, custody, maintenance and education of the children.") That the education in question is to be obtained after the children's emancipation makes no difference. Post-minority education agreements in marital settlements merge into the divorce decree and the Court has jurisdiction to enforce such agreements. **Weddington v. Weddington**, 2004-NMCA-034, P. 14-15, 135 N.M. 198, 86 P.3d 623.

The Supreme Court, in a dictum, has recognized an exception for a child with mental or physical disabilities in **Fitzgerald v. Valdez**, 77 N.M. 769, 427 P.2d 655 (1967).

DISABLED CHILDREN

Under NMSA 1978, § 40-4-7, New Mexico parents have common law continuing duty to support a severely disabled child if the child was so disabled before reaching age of majority. **Cohn v. Cohn**, 1996, 123 N.M. 85, 934 P.2d 279, certiorari denied 122 N.M. 808, 932 P.2d 498. The District Court has the authority to order a parent to pay post-majority support for his or her disabled adult child, where the child's disability existed at the time the child attained the age of majority. **Id.**

SECURITY FOR PAYMENT OF OBLIGATION

When awarding child support, the District Court has the discretion to order the responsible parent to give security for payment of the award. Reasonable security for the payment of child support should be required only when compelling circumstances require it. Thus, a need to secure child-support obligations from a noncustodial parent's nonmarital property arises when the noncustodial parent is either unwilling or unable to make child-support payments.

The District Court may order a trust to be created and funded by the obligor, or order the obligor to maintain life insurance during the minority of the children as security for the payment of child support. A parent's share of the proceeds of the sale of the marital home or other significant asset divided or distributed in the community property settlement may be ordered held in an escrow account to secure payment of child-support. The Court may order an obligor to post bond to secure payment.

24A Am. Jur. 2d **Divorce and Separation** § 931 suggests that the Court may require a parent to set aside a portion of any settlement proceeds from a workers' compensation case as security for his or her child-support obligation, where the proceeds are the only funds available to secure his or her child-support obligation. The topic also notes that an obligor may be required to provide security for child-support obligations through designation of death benefits from his or her retirement funds, rather than through acquiring life insurance.

ENFORCEMENT OF CHILD SUPPORT ORDERS

WAGE WITHHOLDING UNDER 40-4-11 (C)

A Parenting Plan and Child Support Obligation, Domestic Relations Form 4A-313 NMRA, is required:

> (1) in a divorce proceeding if the parties are the parents of one or more children under eighteen (18) years of age or a child under nineteen (19) years of age who is attending high school; or
>
> (2) in a proceeding to establish the paternity of one or more children under eighteen (18) years of age or the paternity of a child under nineteen (19) years of age who is attending high school.

The Wage Withholding Order, Domestic Relations Form 4A-341 NMRA, provides for wages to be withheld from a parent's paycheck for payment of child support. If a party does not want child support to be withheld from the party's paycheck, the party must explain to the judge how child support will be paid. The court will sign a wage withholding order upon request of either party.

CONTEMPT

The party who has failed to pay on an existing, valid child support order has the burden of proving the inability to pay. **Nelson v. Nelson**, 82 N.M. 324, 327, 481 P.2d 403, 406 (1971); **Thomasson v. Johnson**, 120 N.M. 512, 516, 903 P.2d 254 (Ct.App. 1995).

LIENS

The **Parental Responsibility Act**, NMSA 1978, Sections 50-5A-1 to 40-5A-13, puts the coercive power of the state licensing divisions behind efforts to enforce child support orders. According to NMSA 1978, § 40-5A-2, the purpose of the Act is to require parents to eliminate child support arrearages in order to be issued, maintain or renew a license; and to require ongoing compliance with child support orders. The Act gives authority to the following boards, agencies, and commissions:

> **construction industries** commission, the construction industries division and the electrical bureau, mechanical bureau and general construction bureau of the construction industries division of the regulation and licensing department; the manufactured housing committee and manufactured housing division of the regulation and licensing department; a board, commission or agency that administers a **profession or occupation licensed** pursuant to Chapter 61 NMSA 1978; any other state agency to which the **Uniform Licensing Act** is applied by law; a licensing board or other authority that issues a license, certificate, registration or permit to engage in a **profession or occupation** regulated in New Mexico; the **department of game and fish**; the **motor vehicle division** of the taxation and revenue department; or the **alcohol and gaming** division of the regulation and licensing department.

NMSA 1978, § 40-5A-3. These agencies and boards have the power and authority to suspend, revoke, or decline to issue or renew licenses or permits to people who are not in compliance with child support orders. The District Court's power to enforce its child support orders is thus magnified by the concurrent power of other arms of the state. Enforcement by these commissions, boards and agencies begins when an obligor is more than thirty days in arrears in payment of amounts required to be paid pursuant to an outstanding judgment and order for support; and where an obligor has, after receiving appropriate notice, failed to comply with subpoenas or warrants relating to paternity or child support proceedings;

INTERSTATE CHILD SUPPORT ENFORCEMENT

To improve the enforcement of child support obligations among the states, New Mexico, like most other states, adopted the Uniform Interstate Family Support Act to address interstate disputes concerning the payment of child support and the enforcement of child support orders. NMSA 1978, § 40-6A-100 through -903. Under UIFSA, Under UIFSA, there are at least three different ways that a parent who is owed child support can seek to enforce a child support or garnishment order in New Mexico. See § 40-6A-301(b) (authorizing a petitioner to initiate a UIFSA proceeding by filing a petition); § 40-6A501 (providing that "[a]n income-withholding order issued in another state may be sent by or on behalf of the obligee, or by the support

enforcement agency to the obligor's employer without first filing a petition or comparable pleading or registering the order with a tribunal of this state"); § 40-6A-601 (registering a support order or income-withholding order in this state for enforcement).

UIFSA allows an obligor to contest an unregistered income-withholding order of another state that has been sent directly to an employer. Specifically, Section 40-6A-506(a) provides that:

an obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in this state by registering the order in a tribunal of this state and filing a contest to that order as provided in Sections 40-6A-601 through 40-6A-615 NMSA 1978, or otherwise contesting the order in the same manner as if the order had been issued by a tribunal of this state.

FEDERAL CHILD SUPPORT ENFORCEMENT LAW

See also the **Full Faith and Credit for Child Support Orders Act (FFCCSOA),** 28 U.S.C. § 1738B (2000), which provides that the "appropriate authorities" of each State shall enforce according to its terms a child support order made by a court of another State; and shall not seek or make a modification of such an order, except as follows:

Under 28 U.S.C. § 1738B(e)(1), a New Mexico District Court may modify a child support order issued by a court in another State if the issuing State no longer has jurisdiction over the obligor or child. The party or support enforcement agency that wants to modify (or wants to modify and enforce) the other State's child support order must register the order here in New Mexico (assuming New Mexico has jurisdiction over the nonmovant). Alternatively, the parties to the child support order can file written consent for a New Mexico Court to modify the order and assume continuing, exclusive jurisdiction over the order.

The FFCCSOA also provides rules of priority, where one or more child support orders have been issued with regard to an obligor and a child. 28 U.S.C. § 1738B(f).

WAIVER OF ARREARAGES

A party may waive arrearages in child support by the party's action. **Brannock v. Brannock** 104 N.M. 385, 722 P.2d 636 (1986). "Waiver" is the "intentional abandonment or relinquishment of a known right…." To constitute a waiver there must be an existing right, a knowledge of the existence and an actual intention to relinquish the right, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or a privilege." **Id.** at 385, 722 P.2d at 636. Any relinquishment or waiver must not "infringe on the rights of others." **Id.** at 386, 722 P.2d at 637.

GUARDIAN AD LITEM FEES

Guardian ad litem fees may not be deducted from child support. **Grant v. Cumiford**, 2005-NMCA-058, 137 N.M. 485, 112 P.3d 1142.

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Child Support Variables: When is the Difference Worth the Fight?
The Advantage of Calculating More Than One Worksheet

By David. P. Levin, Esq.

Child support disputes may sometimes be unnecessarily difficult. One approach for a reasonable result is to prepare more than one worksheet. Litigants may become locked into positions for many reasons, including emotions, histories, child related concerns, and principle, as well as economic necessity. However, there is another potentially helpful perspective: How does the difference over what number to enter in a worksheet actually impact the amount of support?

INCOME VARIABLES – BASIC SUPPORT & INCOME

An example will help. Mother has an annual gross income of $18,000 or $1,500 per month. Father states that his annual gross income is $36,000 or $3,000 per month. The child lives with Mother and visits Father for a limited number of days. Worksheet A for one child indicates monthly child support paid to Mother by Father of $420.

Mother claims Father has unreported income of $6,000 per year or $500 per month. Mother claims Father's actual gross monthly income should be $3,500. Mother expects this extra income will make a large difference. However, Worksheet A with the additional income of $500 per month only raises support to $464; an increase of $44.

Mother's Gross Monthly Income	Father's Gross Monthly Income	Worksheet A Father pays Mother
$1,500	$3,000	$420
$1,500	$3,500	$464

Unreported income is a real possibility in some cases. The discovery required to prove hidden income, however, may be extensive and expensive. The burden and risk of an evidentiary hearing may also be substantial. What may help both sides is the perspective of a cost-benefit analysis.

People do not commonly understand how the guidelines work. A $500 difference of income seems large. The guidelines, however, dilute the impact.

The $500 raises the combined gross monthly income of the parties from $4,500 to $5,000. This increase raises the Basic Support from the Table by $36 from $627 to $663. The Basic Support increase is then allocated between the parties in proportion to their respective incomes. Finally, the allocation of the basic support increase trickles down to change the amount of child support.

Do people need to understand how the guidelines math works? Not necessarily, but they do need to understand how the bottom line may or may not change, and if so, by how much.

For judges, an understanding of both the respective positions of the parties, and the practical range of results, may assist in applying judicial discretion to difficult cases.

INCOME VARIABLES – PERCENTAGE OF INCOME & ADDITIONAL EXPENSES

Note that if there are additional expenses, income changes impact more than the amount of basic support. In the example above, a $500 increase to Father's income changes the proportion of the parties income from Mother 33%/Father 67% to Mother 30%/Father %70. How this shift may affect child support is shown by the next example.

ADDITIONAL EXPENSE VARIABLES

A $500 change in an additional expense will impact support more than a $500 change in income. In the example above, where Mother's gross monthly income is $1,500 and Father's gross monthly income is $3,000, monthly child support is $420. If Mother incurs a day care expense of $500, then child support is $755; an increase of $335.

Mother's Income	Father's Income	Daycare Paid by Mother	Worksheet A - Father Pays Mother
$1,500	$3,000	$0	$420
$1,500	$3,000	$500	$755

Here, the guidelines math does not dilute the increase. The actual cost is allocated between the parties in proportion to their respective gross monthly incomes.

In the example above, a $500 increase to Father's income changes the proportion of the parties income from Mother 33%/Father 67% to Mother 30%/Father %70. The change of proportion increases support when daycare in added by $59.

Mother's Income	Father's Income	Daycare Paid by Mother	Worksheet A - Father pays Mother
$1,500	$3,000	$500	$755
$1,500	$3,500	$500	$814

IMPUTED INCOME & IMPUTED ADDITIONAL EXPENSES

An example why doing more than one worksheet is important where one party is a stay-at-home parent: Imputed income will raise the combined gross monthly income, which will raise the amount of Basic Support from the Table. Daycare may also be imputed. As a result, the child support paid to the stay-at- home parent may actually go up, which may not be what the other parent expected.

WHAT DIFFERENCE MAKES A DIFFERENCE?

Litigants, even with attorneys, may not know what difference makes a difference. A party may be clear and strong regarding why their position on a particular number is right. That party may not know how the result will be impacted, however. To more clearly understand an issue, one should do more than one worksheet.

The perspective gained from comparing various worksheet scenarios may facilitate resolution or a narrowing of the issues during a pre-trial conference. Doing so may likewise guide a judicial determination at a hearing on the merits.

The goal in doing so is not to become an expert in how the guidelines math works. Rather, its purpose is to use the guidelines as a tool for understanding the relevancy of an economic variable by running various scenarios.

TIME SHARING – DAYS FOR DOLLARS

The question whether child support is calculated pursuant to Worksheet A "for basic visitation situations," or pursuant Worksheet B "for shared responsibility arrangements," can have dramatic impact. Consider the difference between where Father has less that 35% of time and where Father has 50%:

Mother's Income	Father's Income	Worksheet	Father pays Mother
$1,500	$3,000	A - Basic Visitation	$420
$1,500	$3,000	B – 50/50 Time Sharing	$160

A threshold understanding of how to handle the difference if found in the statutory definitions, 40-4-11.1 (B) NMSA 1978:

> (2) "basic visitation" means a custody arrangement whereby one parent has physical custody and the other parent has visitation with the children of the parties less than thirty-five percent of the time. Such arrangements can exist where the parties share responsibilities pursuant to Section 40-4-9.1 NMSA 1978; and
>
> (3) "shared responsibility" means a custody arrangement whereby each parent provides a suitable home for the children of the parties, when the children of the parties spend at least thirty-five percent of the year in each home **and the parents significantly share the duties, responsibilities and expenses of parenting**. (Emphasis added).

Worksheet B arguably means more than a mere calculation of time. Therefore, before discussing the guidelines math, one must acknowledge a possible greater context for analysis suggested by the language of sub-paragraph (3) above.

Looking at the math, the tipping point is 35% of the time with the children, or approximately 128 periods of twenty-four-hour days of responsibility ("days"). In our example, child support drops once Father reaches 35% time or 128 days, and continues to drop incrementally as Father's time increases:

Mother's Income	Father's Income	Father's Time	Father pays Mother
$1,500	$3,000	Worksheet A 127 Days	$420
$1,500	$3,000	Worksheet B 128 - 129 Days	$301
$1,500	$3,000	Worksheet B 130 - 133 Days	$291

$1,500	$3,000	Worksheet B 134 - 136 Days	$282

Another perspective is to consider how changing a two week time sharing schedule might impact child support. This table assumes the two week schedule continues throughout the year and is not modified for vacations, holidays, or other reasons.

Mother's Income	Father's Income	Father's Time	Father pays Mother
$1,500	$3,000	4 of 14 Days Approx. 29%	Worksheet A $420
$1,500	$3,000	5 of 14 Days Approx. 36%	Worksheet B $291
$1,500	$3,000	6 of 14 Days Approx. 43%	Worksheet B $226
$1,500	$3,000	7 of 14 Days Approx. 50%	Worksheet B $160

The relationship between time and money suggests that three factors may arguably be inter-related:

- **Best Interests of Children** in determining an appropriate time sharing schedule;
- **Calculation of Time** in determining which worksheet may apply, and what percentage of time applies to Worksheet B;
- **Whether parents significantly share** the duties, responsibilities and expenses of parenting.

In theory, one should determine a time sharing schedule without regard to child support implications. In theory, the calculation of child support would be made separate and apart from time sharing. Yet, in the real world, many litigants link these considerations.

For judges, when considering the separate issues of time sharing and child support, awareness of how the parents may be linking the issues is an important consideration. Again, doing more than one worksheet may be probative and relevant for judicial decision making.

SUMMARY

Family law cases are inherently multi-dimensional; the economic and the personal are intertwined. Litigants, as a result, may become locked in a position based upon emotions, histories, child related concerns, and principle, as well as economic necessity. Relatively small differences in their positions may escalate into major conflict. For child support calculations, narrow-minded thinking may mask the true relevancy and weight of the issues. By doing more than one child support worksheet, a judge may gain a fuller understanding of the context for the issues, and may be assisted in making a more appropriate decision.

As Director of Court Alternatives, Second Judicial District Court, since 2002, David Levin provides dispute resolution services, develops dispute resolution policy and programs, and serves as a dispute resolution educator, speaker, and trainer.

Jurisdiction

By Amanda A. Pagan, Esq.

FEDERAL LAW

Parental Kidnapping Prevention Act

States are required under Article IV, Section 1 of the United States Constitution to give full faith and credit to the judicial proceedings of other states. In furtherance of this Constitutional provision, Congress enacted the Parental Kidnapping Prevention Act of 1980 (PKPA) 28 U.S.C.A. § 1738A that mandates full faith and credit be given to child custody determinations of sister states, so long as those determinations were made in conformity with the provisions of the PKPA, avoiding the jurisdictional competition and conflict between state courts. 28 U.S.C.A. § 1738A. States are required to "enforce and not modify custody proceedings of sister states, unless modification is permitted under the Act. The United States Supreme Court has held that the PKPA, however, does not create a private right of action in federal court to determine which of two conflicting child custody decrees is valid. *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513 (1988).

The Parental Kidnapping Prevention Act is applicable to all states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States. Indian tribes are excluded from application of the PKPA and, therefore, tribes are not bound to give full faith and credit, under the PKPA, to state court judgments or vice versa. *Garcia v. Gutierrez*, 147 N.M. 105, 118, 217 P.3d 591, 604 (S. Ct. 2009). It has also been held that the United States Constitution appears not to require tribes to give full faith and credit to state court judgments, but as a matter of practice or comity, tribal courts regularly give full effect to state court judgments and vice versa. *Id*. State laws including the UCCJEA, however, have been found to include tribes. *Id*.

Priority is given to the home state of the child in determining which state may exercise jurisdiction over a child custody dispute under the PKPA. Home state of the child, under the PKPA, "means the state in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any such person." 28 U.S.C.A. § 1738A(b)(4). "Temporary absences of any such persons are counted as part of the six-month or other period." *Id*.

Once a State has exercised jurisdiction under the PKPA and entered a custody decree, that jurisdiction remains the continuing, exclusive jurisdiction in modification proceedings, so long as the state remains the residence of the child and or any party to the dispute. 28 U.S.C.A. § 1738A(d). Another state may modify a prior custody determination (including visitation) only if that State now has jurisdiction under the PKPA and its internal law and the original jurisdiction no longer has jurisdiction, or has declined to modify the previous determination. 28 U.S.C.A. § 1738A(f), (g) and (h).

The Parental Kidnapping Prevention Act has been found not to apply to child neglect and dependency proceedings. *State Ex. Rel. Dept of Human Servs v. Avinger*, 104 N.M. 255, 720 P.2d 290 (S. Ct. 1986). Inclusion of child neglect and dependency proceedings have now been provided for in the UCCJEA, discussed below.

STATE LAW

Uniform Child Custody Jurisdiction and Enforcement Act

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), adopted in New Mexico in 2001 and codified at NMSA 1978, §§ 40-10A101- 40-10A-403, revises the 1968 Uniform Child Custody Jurisdiction Act (UCCJA), which was adopted in every state, and brings it into compliance with the PKPA. The UCCJA has been repealed in New Mexico. The purposes of the UCCJEA, as noted by the Uniform Law Commission, is to:

1. Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;

2. Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;

3. Discourage the use of the interstate system for continuing controversies over child custody;

4. Deter abductions of children;

5. Avoid relitigation of custody decisions of other States in this State; and

6. Facilitate the enforcement of custody decrees of other States; http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm

Although there are variations from state to state, the principal provisions of the UCCJEA have been adopted in all states and United States territories, except for Massachusetts, Vermont and Puerto Rico, who still have the UCCJA. A current list of states who have adopted the UCCJEA can be found at the Uniform Law Commissions website at www.nccusl.org.

The following contains the main provisions of New Mexico's version of the UCCJEA. Many sections are direct quotes from the statute, but organized in a different manner. Full citations are included for reference.

General Information:

Proceedings covered under the UCCJEA include dissolution of marriage, child custody of a child when dissolution of marriage is not an issue, neglect, abuse, dependency, guardianship, paternity,

termination of parental rights whether filed alone or with an adoption proceeding and protection from domestic violence. NMSA 1978, § 40-10A-201(4). Juvenile delinquency, contractual emancipation or enforcement under Article 3 of the UCCJEA are excluded. *Id*.

At the commencement or filing of the first pleading or in attached affidavit, each party shall give the following information under oath (NMSA 1978, § 40-10A-209(a)):

1. Child's present address or whereabouts; *Id*.

2. The places where the child has lived during the last five years; *Id*.

3. The names and present address of the person with whom the child has lived during that period; *Id*.

4. Whether the party has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child. If so, the court shall be identified, including the case number and date of the prior custody determination; NMSA 1978, § 40-10A-209(a)(1).

5. Whether the party knows of any proceeding that could affect the current proceeding, including proceeding for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions. If so, the court shall be identified, including the case number and the nature of the proceeding. NMSA 1978, § 40-10A-209(a)(2). Each party has an ongoing duty to inform the court of any proceeding that could affect the current proceeding; NMSA 1978, § 40-10A-209(d).

6. Whether the party knows the names and address of any person not a party to the proceeding who has physical custody of the child or claims right of legal custody or physical custody of, or visitation with, the child. If so, the names and address of those persons shall be provided. NMSA 1978, § 40-10A-209(c).

If the information is not furnished, New Mexico may, upon its own motion or motion by other party, stay the proceedings until the information is presented. NMSA 1978, § 40-10A-209(a)(1).

The Court may examine the parties under oath as to the information furnished and other matters pertinent to determine New Mexico's jurisdiction and disposition of the case. NMSA 1978, § 40-10A-209(c).

The information must be sealed from the other party or the public, if a party alleges under oath or in an affidavit that the health, safety or liberty of a party could be jeopardized by disclosure of the identifying information. NMSA 1978, § 40-10A-209(e). New Mexico may, after a hearing in which the court takes into consideration the health safety or liberty of the party or child, order disclosure of information if it determines that disclosure is in the interest of justice. *Id*.

Bases for Jurisdiction under the UCCJEA

Initial Child Custody Jurisdiction: New Mexico may make a child custody determination by initial decree only if:

1. New Mexico is the home state of the Child (NMSA 1978, § 40-10A-201(a)(1)) when the child has lived with a parent or a person acting as a parent in New Mexico for at least six months immediately before the commencement (filing of the first pleading) in a child custody proceeding. NMSA 1978, § 40-10A-102 (7) and (5). For a child less than six months of age, New Mexico is the home state if the child has lived in New Mexico from birth with a parent or a person acting as a parent. NMSA 1978, § 40-10A-102 (7). A period of temporary absence of the child, parent or a person acting as a parent from New Mexico is part of the six month period. *Id*. Priority is given to home state jurisdiction.

2. When, no other Court has home state jurisdiction or a court with home state jurisdiction has declined to exercise home state jurisdiction on the grounds that New Mexico is a more appropriate forum, and both requirements below are met:

    A. The child and the child's parents, or the child and at least one parent or a person acting as a parent have a significant connection with New Mexico other than mere physical presence; and

    B. Substantial evidence concerning the child's care, protection, training and personal relationships is available in New Mexico. NMSA 1978, § 40-10A-201 (2) (A) and (B).

3. When, all Courts with jurisdiction under the two criteria detailed above have declined to exercise jurisdiction on the grounds that New Mexico is the more appropriate forum. NMSA 1978, § 40-10A-201 (3).

4. When, no other court would have jurisdiction under the three criteria detailed above. NMSA 1978, § 40-10A-201(4).

Modification Jurisdiction: New Mexico may modify a child-custody determination made by another state if New Mexico has home state jurisdiction detailed above pursuant to NMSA 1978, § 40-10A-201(a)(1). Also modification jurisdiction exists if no other court has home state jurisdiction or a home state has declined jurisdiction because New Mexico is a more appropriate forum and both conditions below are met:

1. The child and the child's parents, or the child and at least one parent or a person acting as a parent have a significant connection with New Mexico other than mere physical presence; and

2. Substantial evidence concerning the child's care, protection, training and personal relationships is available in New Mexico. NMSA 1978, § 40-10A-201 (2) (A) and (B).

Further, New Mexico has modification jurisdiction if New Mexico otherwise has custody jurisdiction and , the court who entered the previous order determines it no longer has exclusive, continuing jurisdiction or that New Mexico would be a more convenient forum. NMSA 1978, § 40-10A-203(1). Lastly New Mexico has modification jurisdiction if it otherwise has custody jurisdiction and New Mexico or a court of the other state determines that the child, the parents and any person acting as a parent do not presently reside in the other state. NMSA 1978, § 40-10A-203 (2).

Continuing Exclusive Jurisdiction and Prohibition of Simultaneous Proceedings:

Except for Temporary Emergency Jurisdiction discussed below, a state exercising initial child custody jurisdiction (including New Mexico) pursuant to NMSA 1978, § 40-10A-201 or modification jurisdiction in accordance with NMSA 1978, § 40-10A-203 has exclusive, continuing jurisdiction over the custody determination until:

1. The child, or the child and one parent, or the child and the person acting as a parent do not have a significant connection with the initial decree decreeing state and substantial evidence is no longer available in such state concerning the child's care, protection, training and personal relationships; or

2. The child, the child's parents and any person acting as a parent do not presently reside in such state. NMSA 1978, § 40-10A-202.

Aside from Temporary Emergency Jurisdiction discussed below, a state may not exercise jurisdiction if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction in conformity with the UCCJEA, unless the proceeding has been terminated or stayed by the other court for a more convenient forum. NMSA 1978, § 40-10A-206(a). If the Court in New Mexico determines that a proceeding has been commenced in a court in another state having jurisdiction in accordance with the UCCJEA, the court of this state shall stay its proceeding and communicate with the other court. NMSA 1978, § 40-10A-206(b). In a modification proceeding, New Mexico may stay the proceedings pending entry of an order from the other court enforcing, staying, denying or dismissing the proceedings; enjoin the parties from continuing with the proceeding for enforcement; or proceed with modification under conditions it considers appropriate. NMSA 1978, § 40-10A-206(c).

Temporary Emergency Jurisdiction:

New Mexico has temporary emergency jurisdiction if the child is present in New Mexico and the child has been abandoned, defined as being left without provision for reasonable and necessary care or supervision according to NMSA 1978, § 40-10A-101(1), or it is necessary in an

emergency to protect the child because the child, or sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. NMSA 1978, § 40-10A-204(a).

If there is no previous child-custody determination entitled to be enforced under the UCCJEA and a child custody proceeding has not been commenced in a court having initial child custody jurisdiction [under (NMSA 1978, § 40-10A-201), exclusive, continuing jurisdiction (NMSA 1978, § 40-10A-202), or modification jurisdiction (NMSA 1978, § 40-10A-203)], a child-custody determination made under this section in New Mexico is only effective until an order is obtained from a court having jurisdiction. If no child custody proceeding is commenced, New Mexico's determination becomes final and New Mexico becomes the home state of the child. NMSA 1978, § 40-10A-204(b).

If there is a previous child custody determination entitled to be enforced under the UCCJEA or a child-custody proceeding has been commenced in a court having initial child custody jurisdiction [(NMSA 1978, § 40-10A-201), exclusive, continuing jurisdiction (NMSA 1978, § 40-10A-202), or modification jurisdiction (NMSA 1978, § 40-10A-203)], a child-custody determination made under the temporary emergency section is effective until an order is obtained from the other state with jurisdiction. The order must allow for adequate time to obtain an order from the other state and must provide an expiration of the temporary emergency order. NMSA 1978, § 40-10A-204(c).

The Courts shall immediately communicate to resolve the emergency, protect the safety of the parties and the child and determine a period for the duration of the temporary order. NMSA 1978, § 40-10A-204(d).

Declining Jurisdiction:

Inconvenient Forum: Upon motion of a party, the Court's own motion, or request from another Court, New Mexico may at any time decline to exercise jurisdiction if it determines that another state court is a more appropriate forum. NMSA 1978, § 40-10A-207(a). New Mexico shall first consider whether it is appropriate for another state court to exercise jurisdiction. To aid the Court in this determination the Court shall allow the parties to submit information and shall consider all relevant factors, including:

1. Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

2. The length of time the child's home state is or recently was another state;

3. The distance between the court in this state and the court in the state that would assume jurisdiction;

4. The relative financial circumstances of the parties with respect to travel arrangements;

5. Any agreement of the parties as to which state should assume jurisdiction;

6. The nature and location of the evidence required to resolve the pending custody litigation, including testimony of the child;

7. The ability of the court of each state to decide the custody issue expeditiously and the procedures necessary to present the evidence; and

8. Whether another state has a closer connection with the child or with the child and one or more of the parties, including whether the court of the other state is more familiar with the facts and issues in the pending litigation. NMSA 1978, § 40-10A-207(b).

If New Mexico determines that it is an inconvenient forum, it shall stay its proceeding until another proceeding is commenced in the more appropriate forum. NMSA 1978, § 40-10A-207(c). New Mexico may impose other conditions it considers just and proper. *Id*. New Mexico may decline to exercise jurisdiction under the UCCJEA while still retaining jurisdiction over a divorce or other proceeding incidental to the custody determination. NMSA 1978, § 40-10A-207(d).

Declination by Reason of Conduct: Except as otherwise provided for under the temporary emergency jurisdiction pursuant to NMSA 1978, § 40-10A-204, if New Mexico has jurisdiction under the UCCJEA because a person engaged in unjustifiable conduct, New Mexico shall decline to exercise jurisdiction unless:

1. The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

2. The court of the state otherwise having initial child custody jurisdiction (NMSA 1978, § 40-10A-201), exclusive, continuing jurisdiction (NMSA 1978, § 40-10A-202), and modification jurisdiction (NMSA 1978, § 40-10A-203), determines that New Mexico is a more appropriate forum pursuant to the inconvenient forum discussed above (NMSA 1978, § 40-10A-207); or

3. No court of any other state would have initial child custody jurisdiction (NMSA 1978, § 40-10A-201), exclusive, continuing jurisdiction (NMSA 1978, § 40-10A-202), and modification jurisdiction (NMSA 1978, § 40-10A-203). NMSA 1978, § 40-10A-208(a).

If New Mexico declines to exercise jurisdiction due to unjustifiable conduct, New Mexico may stay its proceedings until a child custody proceeding is commenced in the other state having jurisdiction under the UCCJEA. NMSA 1978, § 40-10A-208(b). New Mexico may also fashion an appropriate remedy to ensure the safety of the child and prevent repetition of the unjustifiable conduct. *Id*.

If New Mexico dismisses or stays its proceeding because it declined jurisdiction due to unjustifiable conduct, New Mexico shall assess against the party invoking New Mexico

jurisdiction unjustifiably necessary and reasonable expenses, including costs, communication expenses, attorney fees, investigative fees, expenses for witness, travel expenses and child care expenses during the course of the proceedings, unless the party whom fees are sought establishes that the assessment would be clearly inappropriate. NMSA 1978, § 40-10A-208(c). The New Mexico Court cannot assess fees, costs or expenses against the State, unless assessment is authorized under law other than the UCCJEA. *Id.*

Enforcement:

New Mexico may enforce an order for the return of a child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child-custody determination. NMSA 1978, § 40-10A-302. New Mexico shall recognize and enforce a child-custody determination of a court of another state if the later court exercised jurisdiction in substantial conformity with the UCCJEA and that child-custody determination has not be modified. NMSA 1978, § 40-10A-303(a). New Mexico may utilize any remedy available under other law of New Mexico to enforce the other state's child custody determination. NMSA 1978, § 40-10A-302(b).

Procedure to Enforce: New Mexico shall enforce a child custody determination with or without registration of the other state court's order. A petition for enforcement of a child custody determination must:

1. Be verified; NMSA 1978, § 40-10A-308(a).

2. Have attached to the Petition certified copies of all orders sought to be enforced; *Id.*

3. Have attached to the Petition a certified order confirming the registration, if any; *Id.*

4. State whether the court that issued the determination identified the jurisdictional bases it relied upon in exercising jurisdiction. If so, the Petition should state the basis; NMSA 1978, § 40-10A-308(b)(1);

5. State whether the child-custody determination for which enforcement is sought has been vacated, stayed or modified. If so, the Petition should identify the court, the case number and nature of the proceeding; NMSA 1978, § 40-10A-308(b)(2);

6. State whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions. If so, the Petition should identify the court, the case number and the nature of the proceeding; NMSA 1978, § 40-10A-308(b)(3);

7. State the present physical address of the child and the respondent, if known; NMSA 1978, § 40-10A-308(b)(4);

8. State whether relief, in addition to the immediate physical custody of the child and attorney's fees, is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and NMSA 1978, § 40-10A-308(b)(5);

9. State whether the child-custody determination has been registered and confirmed under the UCCJEA [40-10A-305 NMSA 1978], the date and place of registration. NMSA 1978, § 40-10A-308(b)(6);

Upon the filing of the Petition, New Mexico:

1. Shall issue an order directing the respondent to appear in person with or without the child at hearing and may enter any order necessary to ensure the safety of the parties and the child;

2. Must hold a hearing on the next judicial day after service of the order unless that date is impossible. The hearing date may be extend at the request of the party seeking enforcement of the child-custody determination;

3. The Order shall state the time and place of the hearing;

4. The Court's order's shall advise the respondent that at the hearing the court will do all of the following (NMSA 1978, § 40-10A-308(d)):

    A. Order that the petitioner may take immediate physical custody of the child;

    B. Order payment of fees, costs and expenses under NMSA 1978, § 40-10A-305; and,

    C. May schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that (NMSA 1978, § 40-10A-308(d)(1) and (2)):

        i. The child-custody determination has not been registered and confirmed under Section 305 [40-10A-305 NMSA 1978] and that:

            a. The issuing court did not have jurisdiction under Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the UCCJEA;

            b. The child-custody determination for which enforcement is sought has been vacated, stayed or modified by a court having jurisdiction to do so under Article 2 of the UCCJEA; and

            c. The respondent was entitled to notice, but notice was not given in accordance with the standards of Section 108 [40-10A-108 NMSA

1978] in the proceedings before the court that issued the order for which enforcement is sought; or

ii. the child-custody determination for which enforcement is sought was registered and confirmed under Section 305 [40-10A-305 NMSA 1978], but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Article 2 of the UCCJEA.

Visitation: If New Mexico does not have jurisdiction to modify a child-custody determination, it may issue a temporary order enforcing a visitation schedule made by another state court, even if the previous determination did not provide a specific visitation schedule. NMSA 1978, § 40-10A-304(a). If the previous child-custody determination did not specify a schedule, New Mexico's visitation order shall specify a period which it considers adequate to allow an order to be obtained from the court having jurisdiction under the UCCJEA. NMSA 1978, § 40-10A-304(b). New Mexico's order remains in effect until the order is obtained from the other court or the period expires. *Id*.

Registration of Child Custody Determination: A child-custody determination issued by another state may be registered in New Mexico, with or without a simultaneous request for enforcement. NMSA 1978, § 40-10A-305(a). The party requesting registration must submit the following to the Court:

1. A letter or document requesting registration; NMSA 1978, § 40-10A-305(a)(1).

2. Two copies, including one certified copy, of the determination sought to be registered; NMSA 1978, § 40-10A-305(a)(2).

3. A statement under penalty of perjury from the person seeking registration that to the best of their knowledge and belief the order has not been modified; *Id*.

4. Name and address of the person seeking the registration and any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination sought to be registered. NMSA 1978, § 40-10A-305(a)(3).

On receipt of the documents required above, the New Mexico court shall:

1. Cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

2. Serve notice upon the persons named pursuant to subsection (a)(3) and provide them with an opportunity to contest the registration in accordance with this section. NMSA 1978, § 40-10A-305(b).

The notice from the Court must state that:

1. A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

2. A hearing to contest the validity of the registered determination must be requested within twenty days after service of notice; and

3. Failure to contest the registration will result in confirmation of the child-custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

NMSA 1978, § 40-10A-305(b).

A person seeking to contest the validity of a registered order must request a hearing within twenty days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

1. The issuing court did not have jurisdiction under Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the UCCJEA;

2. The child-custody determination sought to be registered has been vacated, stayed or modified by a court having jurisdiction to do so under Article 2 of the UCCJEA; or

3. The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of Section 108 [40-10A-108 NMSA 1978], in the proceedings before the court that issued the order for which registration is sought. NMSA 1978, § 40-10A-305(d).

If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served must be notified of the confirmation. NMSA 1978, § 40-10A-305(e). Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. NMSA 1978, § 40-10A-305(f).

New Mexico may grant any relief normally available under the laws of New Mexico to enforce a child-custody determination made by another state and registered in New Mexico. NMSA 1978, § 40-10A-306(a). After registration of the child-custody determination, New Mexico shall recognize and enforce, but may not modify unless it later obtains jurisdiction under NMSA 1978, § 40-10A-201 to § 40-10A-210. NMSA 1978, § 40-10A-306(b).

The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses and child care expenses during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate. NMSA 1978, § 40-10A-306(b).

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Jurisdiction and Indian Tribal Members

By Delilah Tenorio Choneska, Esq.

State Court Jurisdiction over Domestic Relations Cases Involving Members of Indian Tribes

The Courts in New Mexico have frequently dealt with jurisdictional issues involving Indian tribes and their members. This holds true for the area of domestic relations, particularly regarding divorce and any issues related to the divorce such as a distribution of marital property, child support and child custody. In domestic relations cases, where members of Indian tribes are involved, the issue before the New Mexico courts is almost always whether the courts have personal or subject matter jurisdiction to hear a particular cause of action. This places the state courts in a peculiar position that first requires the court to determine the jurisdictional issue and then, if jurisdiction is proper, decide the case on its merits. This article gives a brief overview of the domestic relations cases in New Mexico involving members of Indian tribes and the jurisdictional issues they present. The article provides some commentary on whether the exercise of state court jurisdiction in cases involving members of Indian tribes is proper and examines the use of federal Indian case law by the New Mexico courts to inform their decisions on the jurisdictional issues. The article only addresses the issues of divorce and distribution of marital property. It does not include a discussion on the topics of child custody and child support, even though those can be issues related to a dissolution of marriage, because the statutory case law that governs those issues is too extensive to be covered in this review.

New Mexico State Court Jurisdiction Over Divorce Proceedings Involving Indians

Statutory law in New Mexico provides that a state court has jurisdiction to dissolve the marriage when at the time of filing the petition "either party has resided in the state for at least six months immediately preceding the date of filing and has a domicile in New Mexico." NMSA 1978, § 40-4-5. A person's domicile is determined by the person being physically present and having a place of residence in the state and having a present and good faith intent "to reside in this state permanently or indefinitely." Id. *Tenorio v. Tenorio*, 44 N.M. 89 (1940), is the only case in New Mexico that addresses the jurisdiction of the state court to issue a divorce to members of an Indian tribe who reside within the boundaries of their respective reservations. *Garcia v. Gutierrez*, 144 N.M. 761 (N.M. Ct. App. 2008) rev'd on other grounds, addresses whether the state court has jurisdiction to dissolve a marriage between a non-Indian and Pueblo Indian, who resided within the boundaries of the reservation.

In *Tenorio v. Tenorio*, supra., the New Mexico Supreme Court held that Pueblo lands were part of New Mexico territory for purposes of maintaining a divorce action in the New Mexico state courts. The parties in *Tenorio* were Pueblo Indian. Husband was a member and resident of the Pueblo of Santo Domingo. Wife was a member and resident of the Pueblo of San Felipe. During their marriage, the parties resided together for 14 years in the Pueblo of Santo Domingo. Wife left the marriage because of severe domestic abuse and returned to the Pueblo of San

Felipe. Husband filed a Complaint for Divorce in the District Court of NM in Sandoval County and alleged that Wife had abandoned the marriage. Wife filed a plea for abatement and alleged that the District Court lacked jurisdiction over the parties and subject matter because the parties were members of Pueblo Indian tribes who resided within the boundaries of their respective Pueblos and that that Pueblos had exclusive jurisdiction over the "personal and domestic affairs of its members." The District Court overruled Wife's plea and found that the parties were Pueblo Indians residing at their respective Pueblos, both at the time of the marriage and during the proceedings. The District Court also found that the parties were residents of Sandoval County, where the Pueblos are located, and determined that it had jurisdiction over the parties and to issue a divorce. Wife appealed the District Court's determination that it had jurisdiction to issue the divorce.

In reviewing Wife's appeal, the New Mexico Supreme Court focused specifically on whether Pueblo Indian lands were excepted out of state jurisdiction by any acts of Congress or the State of New Mexico. The Court reviewed the Treaty of Guadalupe Hidalgo, Organic Act Establishing the Territory of NM, the Enabling Act of NM, the NM Constitution and federal and state case law to inform their decision. The Court stated that under federal law, the only land that Congress intended to except out of state jurisdiction was land belonging to "treaty Indians." The Court noted that no treaty existed between Pueblo Indians and the U.S. government. Moreover, the Court recognized that members of Indian tribes, if they so chose, may maintain in action in state court to enforce their right to enjoyment of personal or real property or for personal injuries. Therefore, because Congress did not except Pueblo Indian lands out of state jurisdiction and because Pueblo Indians could maintain an action in state court, the Court concluded that Pueblo lands are considered New Mexico territory for purposes of residence and venue in a divorce action.

In *Garcia v. Gutierrez*,[1] *supra*, the New Mexico Court of Appeals considered whether it had jurisdiction to dissolve a marriage between a non-Indian wife and Pueblo Indian husband who both resided within the exterior boundaries of the Pueblo of Pojoaque. Husband is an enrolled member of the Pueblo of Pojoaque. Wife left husband after being physically abused by him, and went to live with her father on fee land located within the boundaries of Pueblo of Pojoaque. Wife filed a Petition for Dissolution of Marriage with the state court. Husband moved to dismiss the case for lack of jurisdiction. The district court denied Husband's motion and entered a divorce decree. Husband did not appeal from this order. The parties stipulated to a distribution of property, debts and child support and the district court entered and adopted findings of fact and conclusions of law which stated that the court had jurisdiction over the divorce, as well as over issues of custody, child support, distribution of assets and debts, and attorney's fees. Husband appealed this order and alleged that the district court exercise of jurisdiction over the Petition for Dissolution of Marriage infringed on the sovereign rights of the Pueblo.

In reviewing Husband's appeal, the Court of Appeals focused on Husband's argument that neither he nor wife resided in the state for a minimum of six months, which is required by § 40-4-5. The Court of Appeals disagreed with Husband's argument and stated that "tribal lands within a state are generally considered to be part of the state's territory." *Garcia*, 144 N.M. at

[1] *Garcia v. Gutierrez* also addresses the issue of whether a state court has jurisdiction to determine issues related to the dissolution of marriage such as a distribution of property, which will be discussed in the next section.

765. Thus, because tribal lands are part of the state's territory, the Court of Appeals concluded that the district court had jurisdiction to dissolve the marriage of the parties.

The holdings in *Tenorio* and *Garcia* are clear indications that a state district court will have jurisdiction to dissolve a marriage of any persons, whether members of Indian tribes or non-Indians, residing within the boundaries of an Indian reservation. Consequently, this means that a state court will have jurisdiction to issue a divorce to two members of the same Pueblo or Indian tribe, who reside on their reservation. Under these circumstances, the state court's jurisdiction could be successfully challenged despite the holdings of *Tenorio* and *Garcia*. This could be particularly true where the tribal members have a remedy in their own tribal court system. The question would then become not whether tribal lands are within the boundaries of the state of New Mexico, but rather, whether the application of state law would infringe on the Indian tribe's right to self-government. However, for now, members of Indian tribes who reside on the reservation have a remedy for divorce in the state courts of New Mexico.

State Court Jurisdiction to Determine Non-Custody Issues Raised in Divorce Proceedings

New Mexico statutory law states provides that once a state court determines that it has jurisdiction to dissolve a marriage, that court is authorized to make decisions regarding child custody, division of property and other issues related to the dissolution. NMSA 1978, § 40-4-7. There are two cases in New Mexico that challenge the state court's jurisdiction to distribute community property that is located on the reservation. These cases also illustrate the Appellate Court's use of federal and state Indian law to inform their decisions on jurisdiction. Footnotes are provided in this section to give an overview of the federal and state Indian law cases cited in the following cases.

In *Lonewolf v. Lonewolf*, 99 N.M. 300 (1982), Husband appealed an order awarding Wife a community interest in personal property that was located on the Pueblo of Santa Clara. Husband is an enrolled member and resident of Santa Clara Pueblo. Wife is non-Indian. Wife filed a Petition for Legal Separation in the state courts of New Mexico. Husband filed an answer and counterclaimed for divorce. Husband's answer questioned the jurisdiction of the district court, particularly over the parties' interest in community real and personal property located within the boundaries of the Santa Clara reservation. The district court entered a partial decree dissolving the parties' marriage and held an evidentiary hearing on jurisdiction. The district court found that it lacked jurisdiction over the real property located in Santa Clara Pueblo but that it had jurisdiction over the personal property of the parties. The parties stipulated to a property agreement which did not include the value and distribution of 56 pieces of "existing but missing" Indian pottery. The District Court held a hearing on this issue and found that the pottery was community property and that the total community interest in the pottery was $56,618. The District Court also found that Husband owed wife $18,309. Husband appealed and asserted that the District Court did not have jurisdiction to determine the distribution of community personal property located in the Pueblo of Santa Clara when one of the parties was an enrolled member of that Pueblo.

In its analysis of this issue, the Court stated that the test for determining whether a state court can exercise jurisdiction over matters involving Indians and Indian tribes has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.2 *Williams v. Lee*, 358 U.S. 217, 220 (1959). New Mexico has adopted this test and has recognized certain, additional criteria for determining whether the application of state law would infringe upon Indian self-government: 1) whether the parties are Indians or non-Indians; 2) whether the cause of action arose on the reservation, and 3) what is the nature of interests to be protected. See *Chino v. Chino*, 90 N.M. 203, 206 (1977).3 The Court applied the test elucidated in *Williams* and stated that the district court properly declined to exercise jurisdiction over the real property located on the reservation but that its exercise of jurisdiction to distribute the parties' community personal property did not infringe on Indian self-government. The Court stated that this is because rights to personal property were not tied to land within the reservation and as such, the Wife had the authority to control and dispose of the property if she so chose. The Court found that Wife properly invoked the jurisdiction of the district court under § 40-4-5 to dissolve the marriage and that in light of this, the district court had jurisdiction to determine the distribution of the parties' community personal property pursuant to §40-4-7.

Garcia v. Gutierrez, 144 N.M. 761 (N.M. Ct. App. 2008) rev'd on other grounds, affirmed the New Mexico Supreme Court's holding in *Lonewolf*. In *Garcia*, Husband and Wife stipulated to a distribution of property, debts and child support. The district court accepted the stipulation and entered a Partial Final Order. Husband appealed from a district court's order alleging that, under principles of federal Indian law, the district court's exercise of jurisdiction over issues related to the divorce infringed on the sovereign rights of the Pueblo.

The Court of Appeals disagreed with Husband and noted that the facts in *Lonewolf* were similar to those in *Garcia*. The Court also noted that while *Williams* governed whether a state court could exercise jurisdiction over a particular matter involving a non-Indian plaintiff against an Indian defendant, it was uncertain whether *Williams* was applicable in proceedings involving a divorce and distribution of property. The Court of Appeals held that a district court has jurisdiction over the "non-custody issues" in a divorce proceeding.4

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[2] Williams v. Lee, is a U.S. Supreme Court decision which involved a non-Indian creditor suing an Indian couple, who were both members and residents of the Navajo Nation, to collect for goods sold to the couple on credit. The creditor's business, a general store, was located within the boundaries of the Navajo Nation. The creditor sued the Indian couple in state courts of Arizona. The couple moved to dismiss the case and alleged that the tribal court had exclusive jurisdiction over the cause of action. The U.S. Supreme Court agreed and adopted what has come to be known as the infringement test.

[3] Chino v. Chino is a New Mexico Supreme Court decision that adopts the infringement test of Williams v. Lee and adds additional criteria for determining whether state law infringes on the right of tribal self-government. Chino involved an Indian mother, who was an enrolled member of Santa Clara Pueblo and owned a home located on the Mescalero Apache reservation, and her son, who is an enrolled member of the Mescalero Apache Tribe and who began living in the home against his mother's wishes. Mother brought a suit for forcible entry and detainer in state court. Son moved to dismiss and alleged that the state court lacked civil jurisdiction over the cause of action because the home was within the boundaries of the reservation. The New Mexico Supreme Court agreed and held, *inter alia*, that civil jurisdiction of land within the reservation belonged with the tribe.

[4] Garcia v. Gutierrez also addressed whether a district court would have jurisdiction to determine custody issues presented by the parties. The Court of Appeals held that under the Uniform Child Custody and Jurisdiction Enforcement Act, NMSA 1978, § 40-10A-201 et. seq., the district court did not have jurisdiction to determine custody issues because the children were residents of the Pueblo and the Pueblo was the children's home state. The Court of Appeal's decision regarding custody was subsequently overturned by the New Mexico Supreme Court's

The holdings of *Lonewolf* and *Garcia* clearly state that once the state court has determined it can exercise jurisdiction to issue a divorce, it can also exercise jurisdiction to determine issues related to the divorce such as a distribution of personal property, even where that property is located on an Indian reservation. However, a state court cannot exercise jurisdiction to distribute or divide real property that is located within the reservation. An exercise of state court jurisdiction may be improper where the parties are all members of the same Indian tribe, where they all reside within the reservation and where all of their property -- both real and personal -- is located within the boundaries of the reservation. This could especially be true where the Indian tribe provides a remedy for divorce and a distribution of property under its own written or customary law. The application of *Williams* and *Chino* to these circumstances does suggest that an exercise of state court jurisdiction is not only improper but infringes on the right of the Indian tribe to to govern itself.

Conclusion

The district courts in New Mexico can exercise jurisdiction over domestic relations cases involving members of Indian tribes who reside within the boundaries of an Indian reservation. *Tenorio v. Tenorio*, *supra*. Additionally, the district courts have jurisdiction to dissolve the marriage of a non-Indian and Indian who both resided within the boundaries of a Pueblo Indian reservation. *Garcia v. Gutierrez*, 144 N.M. 761 (N.M. Ct. App. 2008) *rev'd on other grounds*. Finally, the courts in New Mexico also have jurisdiction to determine the value of and distribute community personal property owned by an Indian husband and non-Indian wife which was located within the boundaries of an Indian reservation. *Lonewolf v. Lonewolf*, 99 N.M. 300 (1982) *aff'd by Garcia v. Gutierrez, supra*. However, even though New Mexico case law supports the exercise of state jurisdiction over the above issues, district courts should still be aware that circumstances may exist where the application of state law to divorce proceedings may infringe on the Indian tribe's right to self-government. Thus, it is important for the district court to fully determine the status of the parties as Indians or non-Indians, the residence of the parties, the location of any community property, and the availability of a remedy for divorce under the written or customary law of an Indian tribe.

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ruling in Garcia v. Gutierrez, 147 N.M. 105 (2009). However, the Court of Appeal's decision regarding divorce and distribution of property stands.

Pro Hac Vice Rule: Practice By Non-Admitted Lawyers Before State Courts

By Richard B. Spinello, Esq.

A non-admitted attorney wishing to appear in a state court is governed by Rule 24-106 NMRA. The non-admitted attorney may appear on behalf of a party in any civil proceeding if the attorney meets certain requirements and follows an application procedure.

Pro Hac Vice Requirements

- The non-admitted attorney must be authorized to practice law before the highest court of record in any state or country.
- The non-admitted attorney must associate with an active member, in good standing, with the State Bar of New Mexico.
- Non-admitted attorneys must certify that they will comply with applicable statutes, laws, procedurals rules and the Rules of Professional Conduct and Discipline.
- The non-admitted attorney must submit to the jurisdiction of the New Mexico courts and Disciplinary Board with respect to acts or omissions occurring during the attorney's admission under this rule.

Currently, there is no limit on the number of times an attorney can appear under this rule, but the attorney must apply separately for each civil action suit or proceeding in which the attorney intends to appear. Also note that the Rules of Professional Conduct, specifically Rule 16-505 (D) NMRA, do not allow a non-admitted attorney to establish an office or other systematic and continuous presence in this jurisdiction for the practice of law or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Pro Hac Vice Application Procedures

The Pro Hac Vice application procedure is a three-step process which is covered under the Pro Hac Vice Rule 24-106 NMRA and the Rule of Civil Procedure 1-89.1 NMRA or Rules of Appellate Procedure 12-302 (E) NMRA.

1. File a **Registration Certificate** with the State Bar of New Mexico, Office of General Counsel. The registration certificate contains contact information, case and local counsel information and the required certifications.

2. Pay a **non-refundable fee** (currently $250) which is held by the State Bar in a special fund to support the delivery of civil legal services to the poor. Fee waiver requests can be made in the following situations:
   - certification that the attorney is employed by a governmental authority and will be appearing on behalf of a governmental authority;

- certification that the attorney is employed by an agency providing legal service to indigent clients and will be appearing on behalf of an indigent client; and
- certification that the attorney is appearing on behalf of an indigent client and will be charging no fee for the appearance.

3. File an **affidavit** with the court stating that the attorney is admitted to practice law, is in good standing to practice law in another state or country, and has complied with Rule 24-106 NMRA. The affidavit shall be filed with the first paper filed in the court or as soon as practicable after a party decides on representation by a non-admitted counsel.

Information, including copies of the rules, registration certificate and a sample affidavit, can be obtained online at www.nmbar.org or by calling the Office of General Counsel at the State Bar of New Mexico (505) 797-6050. The registration certificate is available at http://www.nmbar.org/Attorneys/PHV/ProHacForm.pdf.

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Child Custody Evaluations

By Janice K. Griffin, Ph.D., New Mexico Licensed Clinical Psychologist

New Mexico law authorizes courts to order child custody evaluations by professional witnesses to aid in custody determinations. This chapter will explore when such evaluations are appropriate, explain what should be included in orders, and describe how the professional conducting the evaluation should conduct the evaluation and report his or her findings.

Judges are authorized to appoint experts to conduct child custody evaluations by Sections 40-4-1 through 40-4-20 NMSA 1978.

Specifically, Sections 40-4-8 B (5) and 40-4-9.1 G state that when custody is contested, the court will refer the parties to mediation if feasible. The statute continues that the court may also use "auxiliary services" such as a professional evaluation by applying Evidence Rule 706 (Rule 11-706 NMRA) or Rule 53 (Rule 1-053 NMRA) of the Rules of Civil Procedure for District Courts. Such auxiliary services may include child custody evaluations.

When Should a Custody Evaluation Be Ordered

Custody evaluations are ordered for the most severe, longstanding, and/ or complex custody disputes. Examples of situations that may require custody evaluations include:

- A parent wants to relocate outside New Mexico and take the children along;
- One or both parents are diagnosed with severe mental or physical illness;
- One or more children are diagnosed with severe mental or physical illness;
- The record suggests a history of domestic violence, substance abuse, child abuse, or criminal activity;
- A parent previously unknown to the child(ren) wants a relationship with them;
- Longstanding parental conflict has continued unabated.

Child custody evaluations, when properly conducted, will provide the Court with detailed and substantiated data about the issues in the dispute, well-formulated clinical judgments about the nature of the parents' conflict, and recommendations about what should be ordered in the best interests of the child(ren). Recommendations will be based on the data collected and interpreted.

Judges often appoint Rule 11-706 expert witnesses to conduct child custody evaluations when they have exhausted all other avenues for resolving parental custody disputes and/or the judges are unable to obtain needed information to resolve the case in any other manner.

Relationship of the Court and Child Custody Evaluators

Unlike expert witnesses presented by the parties, Rule 11-706 expert witnesses are appointed by court order. Although historically some mental health professionals have conducted child custody evaluations without court orders, this practice is discouraged by the American Psychological Association, the Association of Family and Conciliation Courts, and the New

Mexico Psychological Association. The Rule 11-706 expert witness is deemed an arm of the Court in discharging its duties to determine the best interests of the child(ren). As an arm of the Court, expert witnesses receive quasi-judicial immunity unavailable without a court appointment. Court appointment thus facilitates a high standard of objectivity.

Child Custody Evaluations vs. Other Custody Processes

A child custody evaluation conducted as the result of a dispute between the parents is an investigation on behalf of the Court into all pertinent allegations and concerns expressed by the parents. The evaluation should meet the criteria of the Domestic Relations Mediation Act, §40-12-1 through 6 NMSA 1978, which at subparagraph D defines "evaluation" as: "a complete assessment that may include multiple interviews with parents and children; psychological testing, home visits, and conferences with other appropriate professionals." A child custody evaluation is not an advisory consultation, priority consultation, or mediation. Section 40-12-3 defines each of these processes in the respective subsections:

- (A) "advisory consultation" mean a brief assessment about the parenting situation and a written report summarizing the information for the attorneys and the court, including an assessment by the counselor of the positions, situations and relationships of family members and suggestions regarding specific plans, general issues or requested action;
- (G) "priority consultation" means that the court has requested specific information and brief assessment regarding the parenting situation and suggestions regarding temporary arrangements;
- (F) "mediation" means a process in which parents meet with a counselor in order to assist the parents in focusing on the needs of the child and to assist the parents in reaching a mutually acceptable arrangement regarding the child.

An evaluation should be ordered when any of the other processes have been attempted and have failed, or were determined to be inappropriate.

"Ultimate Issue" Recommendations and Testimony

Often an opinion is needed on the "ultimate issue": which parent should provide primary or total (sole) care of the child(ren). Evidence Rule 11-704 NMRA states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." While the judge is always the final decision maker, New Mexico law allows the Rule 11-706 expert witness custody evaluator to recommend to the Court which parent should provide the child(ren)'s primary or only home. This is a controversial issue in the child custody literature, with many experts refusing to make ultimate issue recommendations, many judges refusing to allow experts to make ultimate recommendations, and with just as many experts and judges expecting that the expert will make such recommendations.

Orders that Appoint Rule 11-706 Experts

A court order that appoints a Rule 11-706 expert witness should, at minimum, include the following:

- A recitation of the court's jurisdiction
- Issues exist concerning X, Y, Z (identify issue, such as: legal custody, physical custody, more specific issues that necessitate the evaluation)
- Issues are to be effectively investigated and results of the investigation reported to the Court in a custody evaluation by a Rule 11-706 expert
- Name of licensed psychologist appointed as the Court's Rule 11-706 expert

While New Mexico law does not specify what type of professional may act as a Rule 11-706 expert witness for a custody evaluation, licensed psychologists are the only mental health professionals whose profession has established formal guidelines for conducting child custody evaluations. Licensed psychologists with doctoral level training and experience, when available, offer unique credentials to conduct psychological testing at the level of custody evaluation. In rural areas, however, the availability of licensed psychologists may be limited and other mental health professionals may qualify to do the work with testing supervision.

It is helpful to the process to also include the following in a Court order appointing a Rule 11-706 expert custody evaluator:

- Provisions for payment of expert witness' fees
- Timeline for initial contact with the expert witness
- Declaration that both parties will cooperate with all requirements of the expert such as signing releases of information, making and keeping appointments, ensuring the children and new partners are available to the expert, and submitting to psychological testing
- Order prohibiting ex parte communication by the attorneys with the expert unless initiated by the expert
- Requirement that the expert issue a written report with recommendations to the parties and their attorneys and notify the court when the report has been issued.

The expert should inform the court by letter with copy to counsel if she or he is unable to accept the appointment.

<u>Role of and Limitations on the Rule 11-706 Expert Witness in Child Custody Evaluations</u>

All Rule 11-706 experts conducting child custody evaluations should be cognizant of the definition, duties and functions, as well as limitations, of the custody evaluator.

<u>Duties of the evaluator:</u>

The custody evaluator should make every reasonable attempt to serve the court as an impartial examiner, advocating for the children's best interests. It is imperative that the custody evaluator conduct a study that is fair to all parties.

The evaluator must assess the emotional, psychological, and physical needs of the children, and the fitness or ability of the parents to care for the children and meet their needs. Evaluators must determine the ability of the parents to support the relationship between the children and the other parent as well as the ability to cooperate with each other to meet their children's best interests. An important consideration in addressing the needs of children is the children's attachment to

both parents. This is assessed during the course of the evaluation through the interviewing and observation processes.

Rule 11-706 experts must be able to substantiate all data used in creation of any recommendations. Evaluators must understand that they may make recommendations only about parties who are relevant to the case and who have been interviewed and assessed.

Limitations on the evaluator:

Evaluators should know that they may not act in any other role, such as therapist or mediator, with any party or child of any party before, during, or after a custody evaluation.

Confidentiality:

Evaluators should understand the limits of confidentiality in custody evaluations, which are quite different from confidentiality boundaries in therapy or mediation. In short, the role of custody evaluator is not confidential. To ensure that the parties and any collateral sources of information are aware that there is little to no confidentiality, it is vital that evaluators execute with the parties a signed agreement which includes a statement related to confidentiality. Evaluators should provide to collateral sources who are asked to write letters a statement advising them that their letters will not be confidential. The collateral sources should be directed to include this statement in their signed letters, to document that they have been so informed. By way of example, the author's form Statement of Understanding follows this article.

Other limitations:

Evaluators **do not** diagnose parties with psychiatric diagnoses in a child custody evaluation, although they use psychological testing as part of the evaluation process.

Evaluators **do not** recommend psychiatric medication, although they may recommend that a party undergo a medication evaluation by a licensed psychiatrist.

Evaluators **do not** make legal recommendations.

Expert Witness Report Format and Content

The Rule 11-706 expert witness who is appointed for the purpose of conducting a child custody evaluation is expected to produce a written report that specifies the following:

I. Introductory Section
- Date of completion
- Petitioner's and Respondent's Names
- Case number
- Children's names, ages, and dates of birth
- Statement of issues that were investigated such as legal and/or physical custody, relocation, psychological stability of parent(s) and/or child(ren).

These issues should be the same issues outlined in the Court order appointing the expert.

II. Main Report Sections: Methods and Procedures

Interview both parents - preferably at the beginning and near the end of the evaluation;
Interview any partners of parents currently involved in the lives of the parties and children;
Interview and/or conduct parent/child observations of all children;
Home visits - may not be necessary in all cases;
Psychological testing of both parents - use a battery of the same tests for both parents;
Psychological testing of any partners and/or children as necessary;
Interview in person or by telephone professional collateral sources of information - obtain a signed Release of Information from the parents;
Review letters by family members, friends, and co-workers of both parents;
Review all documents, photos, videos or audiotapes provided by both parents, which could comprise hundreds of items;
Review laboratory test results such as urinalysis and bloodwork requested by the evaluator in response to allegations of substance abuse.

Background and Current Status

This narrative will contain histories of each parent's life and their marriage to the other parent. Many statements made in this section will not be substantiated.

Parents' Concerns and Wishes

This section in often written in the form of lists of concerns and wishes of each party and each child.

9. Parent/Child Observations

This should be a brief narrative of everything that took place during the observation, beginning with the arrival of the parent and child(ren) to the expert's office and ending with their departure. Many statements made by parents and children during observations should be quoted verbatim.

10. Psychological Testing

Only a summary of the testing results should be included in this report. Many parents and/or their attorneys use and occasionally misuse the information to gain a legal advantage. Evaluators should offer each parent an opportunity to review their complete testing results with the evaluator after the evaluator's involvement in the case is concluded.

11. Collateral Sources of Data

Professional and non-professional collateral sources of data must be informed that anything they write or say to the evaluator may be used in the report and will be attributed to them. In other words, nothing they say or write to the evaluator is confidential.

Review of documents, photographs, etc. provided by both Parents

This section should include a complete listing of every item reviewed. Review of documents is often the most time-consuming portion of the evaluator's work.

12. Evaluator Concerns and Conclusions

This can be a narrative, list, or both. The evaluator's statement of concerns and conclusions must be as substantiated as possible and inferences must be drawn using the highest level of clinical judgment. The statement must address the reasons for the evaluation and may address other issues that the evaluator believes relevant.

III. Recommendations to the Court - This section should begin on a separate page that can be a stand-alone document. Recommendations usually include:

1. *Legal custody* - decision making power of one or both parents

Status Quo information is provided, describing the current status quo as well as parental requests for changes and what the evaluator deems to be reasonable changes:

- Residence: City/Town and State (specifying the exact address is often unnecessarily restrictive)
- Religion: Applies to parents causing the child(ren) to become members of any organized religion; it does not apply to simple attendance at a religious service or event
- School: Name of school
- Organized day care: Name of regular provider; does not apply to casual babysitting
- Physician: Name of physician
- Dentist: Name of dentist
- Specialist(s): Names of orthodontist, rehabilitation therapist, etc.
- Counselor: Name of counselor (if a counselor is in place)
- Organized Recreation: Applies to any activity parents must register the child(ren) and pay for that has a schedule of activity. Does not apply to casual play or play dates.

The status quo section should include explanatory information such as the following sample:

The process for proposing and obtaining agreement for changes to the status quo are: One or both parents may, at any time, propose a change to the status quo. The proposal should include pertinent information about the reason for proposing the change and information that assists in the agreement process. The parents should exchange information and proposals/counter-proposals in an effort to come to an agreement between themselves. If this is not possible, they should use dispute resolution methods described later in this document before litigating.

2. *Physical custody*

Regular, day-to-day timesharing - This is based on what is currently in place if it is developmentally (child) and logistically (parents) appropriate, and is also based on anything that needs to be changed. If changed from what is currently in place, it must be based on developmental and temperament needs of the child(ren), what is logistically possible for the

parents, and mindful of the level of parental conflict. Many accepted timesharing plans are available and experts should be aware of and consult references that offer timesharing guidelines. The main goal of a timesharing plan is that it establishes understandable, reasonable and developmentally appropriate periods of responsibility for the parent(s). A well formulated timesharing plan often contributes to the reduction of parental conflict.

Holiday timesharing – This is set after the regular timesharing is set and supersedes the regular timesharing plan when it is implemented. The evaluator, usually in consultation with the parents, first defines which holidays will be included. The amount of detail for each holiday period of responsibility (time of day, who will pick up and who will drop off) depends on the level of parental conflict. Developmental issues are also included, such as: if a parent has no or one overnight for regular time sharing, that parent will not be recommended to have four overnights for Thanksgiving. For many situations, the holidays are alternated and then reversed every other year.

Uninterrupted (vacation) timesharing – This usually includes the number of weeks per year allotted to each parent for uninterrupted time sharing. Other details include: how soon must the request for the time be made, the extent of the itinerary to be provided, and special details about out of state and out of country travel. Again, if one parent has no or one overnight, that parent will not usually be permitted to have the child(ren) for multiple overnights during their uninterrupted time.

Other timesharing schedules and provisions – Birthdays and Mothers/Fathers Day are described in this section.

3. Other recommendations may be included such as for the parent(s) and/or child(ren) to begin counseling, that the parents should never use the child(ren) as their messenger, they should never disparage the other parent to the child(ren), that a parent or a child should be evaluated by a psychiatrist for additional diagnosis and medication.

IV. Signature Block of the Rule 11-706 expert witness/evaluator that includes signed and typed name, title, and New Mexico License type and number.

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Parents Names/Case Names

Statement of Understanding of DATE

General Information

I have been appointed by the court to conduct an impartial evaluation of comparative custodial fitness. My purpose in conducting this evaluation is to gather information that will enable me to formulate an opinion concerning what custody/visitation arrangement is most likely to be in the best interest of your child(ren). Though the manner in which my fees will be paid has been determined either by the court or through negotiations among the parties and their attorneys, and though my fees are not paid by the court, the work that I will be doing will be done for the court. Regardless of the source from which an impartial evaluator receives remuneration, an impartial evaluator is expected to operate as though she is employed by the court. It is particularly important that this position be understood when the fees are being paid wholly or primarily by one of the two parties. The fee-paying parties cannot call a halt to the evaluation. The authority to instruct an evaluator to perform no further services rests with the court, not with the party/parties who bear(s) the financial responsibility for payment of the evaluator's fees (nor with attorneys).

Forensic psychologists are expected to secure verification of assertions made by those who they are evaluating. I do not presume that those whom I am evaluating are lying; however, neither do I presume that they are being truthful. Your cooperation will be expected as verification of assertions made by you is sought.

Ordinarily, unless otherwise directed by the court, at the conclusion of the evaluation I will send both litigants a draft of my advisory report for them to review. You will be asked to make notations on your copy, initial each page, and return the draft after having reviewed it. Shortly afterwards, the final report will be prepared and mailed. Unless otherwise instructed by the court, copies will be sent to the litigants, the attorneys for both litigants and to the attorney representing the children if they are represented. If an individual is representing him/herself, I will follow direction from the court concerning whether or not to provide that individual with a copy of the report. Although I will not send a copy of the report directly to court, I will mail a notice of completion to court.

Your signature on page 8 of this document will authorize me to release information to the attorneys and to the court at any point in the evaluative process, to release to them my final advisory report, and to release my file to anyone who is authorized by law to review it. With the exception of information presented to you in order to afford you an opportunity to respond, information gathered by me is ordinarily not disclosed prior to the completion of the evaluation. Under certain circumstances, however, disclosure of information may be deemed advisable by me or may be requested by the attorneys or by the court. If disclosure is deemed appropriate, only *information* will be shared. Interim recommendations will *not* be offered.

Authority to release to others (such as treating professionals) my advisory report and/or any of the information utilized by me in preparing the report rests with the court.

Initial _____

Janice K. Griffin, Ph.D.

Confidentiality, Privilege, and Privacy

Principles of confidentiality and privilege do not apply within the context of an assessment such as the one being conducted. Information provided by you, regardless of the form in which it has been provided (your statements, tape recordings, diaries, correspondence, photographs, etc.) may be shared with others involved in the evaluation (including, where necessary and appropriate, children and collateral sources). By presenting information to others, verification of information provided can be sought, and the other party can be afforded the opportunity to respond to allegations that may have been made. Statements made by children may have to be cited in an advisory report, and it is therefore important that you not mislead your children. Do not tell a child that what is said is confidential. It is not. Information concerning your payments (amounts, source of payments, form of payments) is also not confidential.

Office staff must check my telephone messages, read my mail, and type my correspondence and reports. Those who work for me receive instruction in matters relating to privacy.

The need may arise for me to discuss the evaluation with other professionals and/or provide a copy of the final advisory report and pertinent supporting documents to colleagues for their review and comments. In either case, all names and identifying information will be changed.

Fees

Fees are as shown on the cost sheet that has been attached. Note that I reserve the right to increase fees (with appropriate notice to you). Also note that fees for an assessment of this type are not reimbursable by health insurance.

It must be emphasized that the $5,000. figure shown on the cost sheet does *not* necessarily represent the total cost of the evaluation. A comprehensive evaluation may entail additional services, fees for which cannot be specified in advance.

My services as an evaluator commence with my acceptance of the assignment to conduct an evaluation. Though I do not actively seek information prior to our first evaluative session, information may come to me in the form of statements made in telephone interactions, etc. Even information not actively sought by me will be considered by me in the formulation of my opinions (ignoring unsought information is not a viable option). Additionally, in most cases, some time will have been expended by me prior to your receipt of this document (for example, phone time with the court and correspondence time). For these reasons, fees are charged retroactively; that is, from the time of my notification by the court of my appointment to conduct this evaluation.

If, in my judgment, it is advisable that I consult with other mental health professionals, attorneys, or other professionals, time expended by me in such consultations will be billed for. Any fees charged to me by those with whom I consult will *not* be passed along to the person(s) financially responsible for the cost of the evaluation.

The record-keeping requirements of forensic work make it necessary to log each telephone message and make a record of even the briefest telephone call. The cost of managing most telephone calls and messages is included in the cost sheet. However, there will be a minimum fee of $10. charged for any phone contact longer than 3 minutes.

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Once an evaluation has been conducted, fees paid may be reapportioned through negotiations among the parties and their attorneys or by the court order; however, while the evaluation is in progress, fees cannot be apportioned based upon what was done for whom. All work relating to the assessment (obtaining and reviewing documents, contacting others for information, etc) is done in order to obtain as much relevant information as possible and cannot be viewed as work done for one party or the other. Similarly, fees cannot be apportioned in a manner that involves assigning financial responsibility for fees associated with certain services to one party and responsibility for fees associated with other services to the other party.

There may be times when an individual being evaluated will be required to pay fees for time expended by me in obtaining and reviewing information that the individual would have preferred that I not obtain or review. Similarly, there may be times when the financially responsible party (parties) will be required to pay fees in connection with the evaluation of a third party whom the financially responsible party (parties) would have preferred that I not evaluate.

If it should become necessary for me to report allegations of abuse/neglect to Children, Youth, and Families Division (CYFD), the financially responsible party (parties) will be billed for any time expended in filing the report, being interviewed by CYFD, etc. This may mean that a financially responsible party will have to pay for the time expended in reporting him/her to CYFD.

There may be times when the actions of one party will make it necessary for me to make phone calls and/or write letters. In calculating fees for my services, no distinction is made between time expended in administrative matters and time expended in providing evaluative services. Fees for time expended in administrative matters are apportioned as are all other fees. In summary, fees are charged for time expended in any/all professional activities associated with the evaluative process or arising from the evaluative process. This includes time expended in addressing fee-related matters.

It is to your advantage to organize any material that you submit for my consideration. You are paying for my time and more time is required to review material if it has been poorly organized. Any items submitted to me should be clearly identified with your name. This is particularly important in the case of photographs, audiotapes, diary pages, and notes.

The performance of evaluation-related services by me does not cease with the issuance of my report. Fees for all post-evaluation services (correspondence, phone time, attendance at conferences, etc.) are the responsibility of the party requesting the services, unless other arrangements have been made in advance or the court has ordered that responsibility for these fees be apportioned in some other manner.

If one wishes an expert to make a court appearance or appear at a deposition, one must pay the expert's fees for the time expended, including reasonable fees for time expended in preparation. **Though the judicial system protects experts from being compelled to appear without remuneration when their opinions are being sought, the law does not protect experts from being subpoenaed as fact witnesses (for example, to describe, events that transpired in their presence).** I must, therefore, require that you agree that if my presence is requested for *any* reason, the fees specified on the cost sheet will be paid by the party requesting my presence, unless other arrangements have been made in advance or the court has ordered that responsibility for these fees be apportioned in some other manner. Additionally, the scheduling of my testimony will be done in consultation with me and with an appropriate recognition of possible conflicting personal or professional commitments. In the unlikely event that an appearance by me is requested by the court, my fees will be paid by the party (parties) responsible for the other costs associated with my evaluation and in the same proportions.

Initial_____

Janice K. Griffin, Ph.D.

Return of Fees

Though fees paid for services rendered are not returned even when an evaluation has not been completed, you are not expected to pay for services that have never been performed. Since fees for certain services (such as the report outlining the findings of the evaluation) are paid in advance, certain circumstances (such as settlement) may make it unnecessary to perform services for which fees have already been paid. Under such circumstances, fees paid in advance will be refunded. It must be understood, however, that no refunds will be made until I have been formally notified, either by the court or by the attorneys for both parties, that it is the position of all involved that my task has been completed, that no further services will be requested, and that I am discharged. Upon receipt of such formal notice, a final account statement will be prepared and any funds owed by me to the financially responsible party (parties) will accompany the final account statement.

Limitations, Risks, and Services *Not* Provided

The profession of psychology has not developed specific required methods and procedures for use in assessing comparative custodial fitness, and neither the profession of psychology nor the state of New Mexico has established specific criteria. The criteria that I employ and the methods and procedures that I utilize have been chosen by me in accordance with aspirational guidelines promulgated by the American Psychological Association and the Association of Family and Conciliation Courts. The evaluative procedure is outlined briefly on the attached cost sheet. Any questions that you may have will be responded to during our initial evaluative session.

Unless instructed otherwise by the court, I will, as the evaluation progresses, share information (including preliminary impressions) with a guardian ad litem if one has been appointed. Detailed information concerning my findings, however, will be communicated in writing only. Be aware that the dispute is not resolved with the issuance of my report. Though the information provided and opinions expressed are intended to assist the court, the court may reject all or portions of the information provided and/or may reject the opinions offered. Also recognize that, the possibility exists that, even after having completed a thorough examination of the issues, I may not be able to offer an opinion with a reasonable degree of professional certainty. Neither under this circumstance nor under circumstances in which completion of the evaluation becomes either impossible or unnecessary are fees for services already rendered refunded. (If an evaluation has not begun, fees for time expended in attempts to commence the evaluation, document review, etc., will be subtracted from any retainer fee paid and the balance will be refunded.)

It is not possible to guarantee that an evaluation will be concluded by a specific date. Ordinarily, judges who have requested that forensic evaluations be performed wish to have advisory reports prepared prior to the commencement of a trial. Though quite unlikely, it is possible that a judge will begin trial prior to receiving an advisory report.

Reasonable steps are taken to minimize the distress associated with the evaluation process. Nevertheless, I must presume that there will be a trial and must conduct myself accordingly. This means that information that you provide will be questioned and, at times, you may feel as though you are being interrogated rather than interviewed. In order to perform my court-ordered function, I must be an examiner; not a therapist.

Initial_____

Janice K. Griffin, Ph.D.

It must be understood that I cannot provide psychological advice to individuals whom I am evaluating. If counseling or psychotherapy services are desired, I will be pleased to provide the names of appropriate professionals. Since I cannot provide emergency assistance to someone whom I am evaluating, my cell phone is *not* to be used when my office is closed either by those whom I am evaluating or by their attorneys. If an emergency situation arises, assistance should be sought as appropriate depending of course, on the nature of the emergency.

Unless I have been directed otherwise by the court, I will presume that all items in the case file are discoverable (that is, subject to examination) by both parties, their attorneys, the attorney for the children if there is one, and any expert(s) who may have been retained by counsel for either party. In the event of a trial, unless I have been directed otherwise by the court, all items in the case file will be brought with me to court any day that I am scheduled to offer testimony.

If there is a trial and if you should request that I testify, it is important that you understand my obligations as an evaluator and as a testifying expert. I am obligated to maintain my impartiality and openness to new information throughout the course of the evaluation and during the trial. It is *not* my obligation to defend the precision of facts reported, the accuracy of data interpretations made, or the validity of opinions offered in the face of newly introduced information that might reasonably call them into question. Though it is more likely than not that testimony offered by me will explain and be supportive of the contents of my report, no assurances can be offered that this will be the case. A cross-examining attorney may bring to my attention information of which I was unaware (either because it was not brought to my attention during the course of my evaluation or because it pertains to events occurring subsequent to the issuance of my report). The attorney may ask how the new information might affect my professional opinion of you and/or the other parent. I will, of course, respond honestly. You must recognize that I am not an advocate for the person who seeks my testimony and that I am obligated to offer any/all pertinent information that might be of assistance to the trier of fact. I must, for example, provide information concerning your parenting deficiencies and the other parent's parenting strengths. Put most simply, fees paid to me represent compensation for time expended. The person paying my fees cannot be assured that my testimony will be helpful to his/her case.

Opinions expressed by me in my advisory report will be formulated on the basis of information provided to me between the day on which I was initially contacted and the day on which the report is prepared.

If any questions arise concerning legal matters, you must consult with your attorney. It is inappropriate for someone not trained in the law to attempt to respond to questions concerning legal matters.

Psychological Testing

It is expected that when individuals being evaluated come to my office for the purpose of taking psychological tests, they will arrive unaccompanied. Spouses, children, companions, and friends can serve as sources of distraction. If someone must transport the test taker, that person will be asked to leave and not return until the test taker has finished.

Submission and Retention of Documents

Ordinarily, in consultation with your attorney, it will be possible for you to anticipate what documents I am likely to require. Obtaining pertinent documents prior to the commencement of the evaluation will expedite the evaluative process.

Initial _____

Documents that you wish me to consider must be delivered in a manner that ensures their safe transfer into my custody and I should receive written notice that documents submitted for my review have been provided to the other party.

Under no circumstances are litigants or others to make unannounced visits to my office in order to deliver documents. Because I may be called upon to produce all items (documents, tapes, photographs, etc.) that I have considered in formulating my professional opinion, it is my policy to retain any items that are presented to me for my consideration. You are therefore strongly encouraged to make copies of any material that you intend to turn over to me. If you neglect to make copies and if you later require copies, you will be charged for time expended in preparing copies. Documents and other items will be returned only after I have been informed either by the court or by attorneys for both parties that it is no longer necessary for me to retain them. If, prior to trial, a lawful request is made that I copy and release items in my file for examination by an attorney or by an appropriate reviewing mental health professional, all involved will be notified. Unless an objection to the release of the requested items is brought before the court and honored by the court, the requested items will be released. (You are reminded that your signature on this document will constitute an authorization to release requested items to those lawfully entitled to receive them. Under most circumstances, those lawfully entitled to receive them include the court, the attorneys for both parties, and any consultants retained by the attorneys.) The individual requesting copies will pay the cost associated with producing the copies. Currently, the fee for photocopying is $. 15 per page.

(I reserve the right to charge a higher fee for pages both sides of which must be copied and/or for items on non-standard-size pages, that is, other than 8.5" x 11".)

Out-of-Session Contact

Out-of-session contact (casual waiting-room conversation, telephone calls, e-mail) with me should be avoided. It is to your disadvantage to communicate information to an evaluator in an informal manner. Phone and email contact should be limited to scheduling appointments and addressing other procedural matters. Information concerning matters pertinent to the evaluation itself should not be communicated by phone. If you must contact me by phone, leave a message clearly stating the reason for your call, provide a telephone number at which you can be reached, and specify the times at which you can be reached. Inappropriate out-of-session contact will be taken into consideration in the evaluative process.

Obtaining Additional Information

Individuals being evaluated must agree to authorize me to obtain any documents that I may wish to examine and to authorize communication between me and any individuals who, in my judgment, may have information bearing upon the subject of the assessment. In many cases, information needed from professionals (teachers, other mental health practitioners, etc.) will be obtained by telephone. Individuals who are likely to be advocates for one party or the other will be expected to provide information in writing (though I reserve the right to contact such individuals by phone if clarification and/or additional information is required). If you wish to have individuals write to me on your behalf, you will be provided with stick-on labels that read: "I understand that the information I have provided is *not* confidential." The statement must be signed by the writer and the letter must be mailed directly to me. (Letters are not to be forwarded to me by you or by your attorney.) It is your responsibility to explain to anyone from whom you solicit a letter that the information contained in the letter

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may be revealed to *any* of the individuals involved in the evaluation (including children, if necessary and appropriate) and may be quoted in the advisory report. Unless advance approval is obtained, any information transmitted via fax by anyone other than the attorneys or the court will be discarded unread.

Where specific instructions concerning those to be evaluated (and how extensively they are to be evaluated), information to be obtained, etc. has not been included in the order appointing me, the decisions concerning these matters will be made by me. There may be instances in which I will be asked to review information that I reasonably believe is likely to be more prejudicial than probative and instances in which I will be asked to contact individuals whom it would, in my judgment, be inappropriate to contact. I must be the final arbiter in such situations.

I reserve the right to consider any information regardless of the manner in which it has been obtained (unless it has been obtained illegally). If I am asked to consider information that may have been illegally obtained, I will follow instructions from the attorneys if they are in agreement. If they cannot agree, I will request direction from the court.

Contact with Attorneys

Once I have received word that I will be conducting an impartial evaluation of comparative custodial fitness, I endeavor to avoid *ex parte* communication with the attorneys representing the litigants. If a guardian ad litem has been appointed, I will speak periodically to him/her and will exchange information with him/her (unless instructed not to do so by the court). In my judgment, our roles are similar and it is, therefore, appropriate that we share information. During the evaluation, oral communication with attorneys for the parties will occur only if it is not in contravention of a court directive, only if it can be done by means of a conference or conference call, and only if unusual circumstances make such communication necessary. If correspondence becomes necessary, it must be on a copies-to-all basis. Once the evaluation has been completed and my report has been released, I *will* engage in oral discussions with the attorneys if I deem it advisable to do so, if no objections to such discussions are raised, and if such discussions are not in contravention of the court's order or subsequent directives.

Allegations of Abuse/Neglect

It must be understood that I *am required by law to report allegations of abuse or neglect*. The penalties imposed on mandated reporters who fail to report such allegations are severe. If allegations are made, they will be reported, and my action in reporting them must not be interpreted as a display of support for the individual who has made the allegations or as an indication that I disapprove of the alleged actions of the person who has been accused. Most important, it must not be inferred that my reporting of such allegations suggests that I find them credible.

Postevaluation Developments

Following the preparation of the draft of my report, I will take reasonable steps to avoid contact with the litigants and with counsel. No substantive response will be provided to letters, faxes, e-mails, or phone messages. If a trial has been scheduled and either party feels that new information should be considered by me, this will be done only if a formal request is made by both attorneys or ordered by the court and only if each party is afforded an opportunity to present his/her perspective on the additional information.

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Ordinarily, if the need for an updated evaluation is agreed upon or ordered by the court, psychological tests will not be re-administered. The time-related limitations to the applicability of the test data will be addressed in my testimony.

I do not participate in post-evaluation settlement discussions unless (1) the law permits litigants to waive privilege; (2) both litigants, with written approval by counsel, have done so; and (3) this post-evaluation role has been agreed to, in writing, at the outset of the evaluation.

A litigant who believes an evaluator's findings and/or recommendations to be flawed is entitled to request that the evaluator's work be reviewed by another mental health professional. Though the favored party may not wish the evaluator's work to be critically examined, such scrutiny is entirely appropriate, and the evaluator's entire file should be made available to the consultants retained by the attorneys for the purpose of conducting such a review. It is my policy to cooperate with those seeking to review my work. An exception: Mental health professionals who are related to or involved in social or professional relationships with litigants should not offer their services either as evaluators or as reviewers. Efforts by such individuals to obtain my file will be resisted, and the file will be released only in response to court order.

I ask that you thoroughly review this document with your attorney. The evaluation will not proceed until both parties have expressed their understanding of and willingness to abide by the policies and procedures set forth in this document. Please initial pages 1, 2, 3, 4, 5, 6, 7 and 9 and sign this page in the space provided below.

Your signature below indicates (1) that you have received, read, and understood my policies and procedures; (2) that you recognize that neither the principle of confidentiality nor the principle of privilege applies to any information in my file concerning this matter; and, (3) that you are authorizing the release by me, either orally or in written form, of any/all information in my file, including my advisory report, to the court, the guardian ad litem, the attorneys for both parties, and qualified mental health professionals retained to review my work.

With specific regard to information that might ordinarily be protected from disclosure by HIPAA provisions, in signing this document, you acknowledge that pursuant to HIPAA Section 164.512(e)(1)(i) of the Code of Federal Regulations, disclosures of otherwise protected health information may be provided in the course of judicial or administrative proceedings. Your authorization for the release of my file is not qualified; it includes an authorization to release information provided to me by health service providers who may have been collateral sources of information. You also acknowledge that once records have been released by me to the court, to the attorneys, or to consultants retained by the attorneys, I no longer exercise control over who may access the information contained in those records.

It is not to be inferred that you agree with these policies and procedures. Further, by signing this document, you are not waiving any rights you may have to raise objections to any policies or procedures. Though this copy must be signed and returned, you are urged to make a photocopy and retain it for your reference during the course of the evaluation. Fee information appears on page 9.

_____

Signature of Litigant Date

_____

Printed Name of Litigant

Janice K. Griffin, Ph.D.

Custody Evaluation Cost Sheet

This cost sheet lists evaluation activities and their costs.
Not all evaluations will include all activities.
Minimum evaluation fee/retainer is $5,000
The cost of some activities such as some consultations are not included in the $5,000 retainer fee.
All additional fees beyond minimum evaluation fee are due before the draft report is released.

Individual interviews with both parents	800.
Individual interviews with each child	150. per child
Parent/child observations	200.
Psychological testing of both parents	1000.
Review of documents	600.
Collateral sources of information	300.
Telephone/email/written communication*	200.
Report assembly and preparation – draft and final	1000.
Individual interviews with each stepparent	150. per stepparent
Psychological testing of each stepparent or child	500. per stepparent
Individual interviews with stepchildren, grandparents, others	150. per individual
Home visits – One for each home	600. plus mileage
Consultation	100. per hour
* Telephone calls over 3 minutes	10. per call

After the report is released monies will be charged for any and all legal proceedings:

Preparation/Travel for any legal proceeding: $200.00 per hour
Attendance at any legal proceeding: $300.00 per hour

There is no charge for postevaluation meetings with parents *to review their psychological testing results.*

The above amounts are current as of July 1, 2010 and may change with notice to litigants in ongoing evaluations.

Initial _____

Safe Haven Exchanges

By Paul L. Biderman, Esq., Safe Haven Volunteer

The dark-haired seven-year old girl sits quietly at the play table in the small classroom, while her two-year old brother plays noisily on the floor with his truck. Their mother's eyes silently follow her son's increasingly energetic play. "Shhh!" cautions his older sister, "That's too much noise for a church school." Mother takes the little boy in her arms to calm him, whispering, "Your father will be here to get you soon." Indeed, I soon appear at the door to announce their father's arrival. After parting kisses with their mom, the children soon run past me to their father in the next room, carrying their child-sized backpacks.

Family Court in the First Judicial District refers numerous couples with shared custody to the Safe Haven program run by ChildrenFirst. Typically, one parent, we'll say the mother, brings the children on Friday afternoon to a neutral, non-threatening location: in Santa Fe, that is one of several religious schools. A Safe Haven representative waits with her and the children in one classroom. Fifteen minutes later, the father arrives in an adjoining classroom, where a second Safe Haven volunteer waits. The children are transferred by the Safe Haven volunteers from mother to father, and leave with the father. The mother waits in the classroom until the father has driven out of the parking lot with the children. They will reverse the sequence on Sunday afternoon, with father arriving first with the children and the mother arriving shortly thereafter to pick them up, leaving with them while the father waits. The parents are not supposed to see one another during these exchanges.

The parents may be divorcing or may be an unmarried couple with a restraining order. All of them have found it difficult to meet face to face. Safe Haven exchanges protect the children from the hostility that can erupt, even to the point of violence, when their parents meet without supervision.

The composite scene described above reflects that exchanges are often relatively routine, especially as the children become accustomed to it. On occasion, however, especially in new exchanges, children can become confused, tearful and clinging, requiring gentle coaxing from the volunteers to effectuate the transition from one parent to another. Reactions like these, and guidance for parents on helping their children thrive through their transition to shared custody, can be addressed through co-parenting classes offered by *ChildrenFirst*. Family court judges may find it valuable to draw upon co-parenting, Safe Haven and other such services in their communities, or to try to start such programs if they don't already exist.

Safe Haven is a program of *ChildrenFirst*, whose mission is to intervene in support of children in troubled family environments before emotional, behavioral or academic problems arise. Their objectives include keeping the children engaged with both parents while protecting the children from the developmentally damaging effects of hostility between their parents. For more information on Safe Haven, co-parenting classes and other ChildrenFirst programs, go to www.ChildrenFirstNM.com, or call 505-473-7630.

Parenting Plans and Custody

By Martha Kaser, J.D.., L.I.S.W.

"Custody" decisions in New Mexico are governed by NMSA Sec. 40-4-9.1 (1978 Comp.) which also requires entry of a parenting plan.

A "Parenting Plan" is a document submitted for approval of the court, setting forth the responsibilities of each parent individually and the parents together in a joint custody arrangement. NMSA Sec. 40-4-931 (L) (6). Parenting plans are also very helpful in sole legal custody cases, discussed below.

Parenting plans are actually much more than that. The parenting plan is a road map, or contract, between separating parents that defines the parameters of their co-parenting relationship for the rest of their child's minority.

Existing custody arrangements, of sole or joint legal custody, are not to be changed without a showing of "substantial and material change of circumstances affecting the welfare of the child" since entry of the previous order, such that the previous order is no longer in the best interests of the child.

New Mexico law presumes that joint custody is in the best interest of a child in an initial custody determination. *Jaramillo v. Jaramillo*, 113 N.M. 57, 61, 823 P.2d 299, 303 (1991), *citing* NMSA 1978, § 40-4-9.1(A) (Repl.Pamp.1989). Once joint custody has been decreed, it is not to be terminated unless there has been a substantial and material change in circumstances affecting the welfare of the child, such that joint custody is no longer in the child's best interests. *Id.* The "best interests" criterion, of course, is the lodestar for determining a custody award, under both statute and case law in New Mexico, and probably in all other jurisdictions in this country. *See, e.g.*, § 40-4-9(A) (custody of minor under age fourteen to be determined in accordance with child's best interests).

Thus, the following needs to be shown by the petitioning parent seeking to change the form of custody:

(1) A substantial and material change of circumstances since entry of the lost order;
(2) affecting the welfare of the child; such that
(3) continuing the previous order is not in the best interest of the child.

There is no reported case law on what constitutes a "substantial and material change of circumstances affecting the welfare of the child "in New Mexico. Some trial courts have agreed that a substantial passage of time qualifies as a change in circumstances; others have not. A more reasoned view, we think, is to examine the developmental stage of the child when evaluating whether a material and substantial change has occurred. Particularly in the first six years of life, children's needs and tolerances for parenting time schedules change frequently as they mature.

Examples of reasons to modify a parenting plan could include parental remarriage or repartnering, subsequent divorce, moving, disability or illness directly affecting the parents' ability to care for the child, a substantial change in parental work schedules, or a change in the child's school. The party seeking to make the change has the burden to show that the prior arrangement is no longer workable. Jaramillo v. Jaramillo, 113 N.M. 57, 823 p. 2d 299 (1991).

The distinction between custody modification and parenting time modification is often lost on litigants. The statute distinguishes a request to modify parenting time and other provisions of a parenting plan, from a request for a custody change. Custody modifications require the showing above, but the statute is silent concerning pre-conditions to modifications of parenting time or other provisions of the parenting plan. Case law provides few specific examples. In practice, courts require a showing of changed circumstances for modification of either the form of custody or the parenting time arrangement.

JOINT LEGAL CUSTODY AND SOLE LEGAL CUSTODY

NMSA Sec. 40-4-9(A) sets forth five relevant factors for any custody decision:

(1) the wishes of the child's parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parents, his siblings and any other person who may significantly affect the child's best interest;
(4) the child's adjustment to his home, school and community; and
(5) the mental and physical health of all individuals involved.

NMSA Sec. 40-4-9.1 (B) adds nine more factors to be considered in a joint custody decision:

(B) In determining whether a joint custody order is in the best interests of the child, in addition to the factors provided in Section 40-4-9 NMSA 1978, the court shall consider the following factors:

(1) whether the child has established a close relationship with each parent;
(2) whether each parent is capable of providing adequate care for the child throughout each period of responsibility, including arranging for the child's care by others as needed;
(3) whether each parent is willing to accept all responsibilities of parenting, including a willingness to accept care of the child at specified times and to relinquish care to the other parent at specified times;
(4) whether the child can best maintain and strengthen a relationship with both parents through predictable, frequent contact and whether the child's development will profit from such involvement and influence from both parents;
(5) whether each parent is able to allow the other to provide care without intrusion, that is, to respect the other 's parental rights and responsibilities and right to privacy;
(6) the suitability of a parenting plan for the implementation of joint custody, preferably, although not necessarily, once arrived at through parental agreement;
(7) geographic distances between the parents' residences;

(8) willingness or ability of the parents to communicate, cooperate or agree on issues regarding the child's needs; and
(9) whether a judicial adjudication has been made in a prior or the present proceedings that either parent or other person seeking custody has engaged in one or more acts of domestic abuse against the child, a parent of the child or other household member. If a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child, the abused parent or other household member.

Note that three of these factors directly implicate the ability of the parents to co-parent with each other (NMSA Secs. 40-4-9.1 (B) (3), (5) and (8)). The best single predictor of a child's adjustment following divorce is the level of conflict between the parents. Therefore, these factors deserve consideration by the court.

The court may change the form of custody if parents cannot agree or cooperate. Strosnider v. Strosnider 101 N.M. 639 (CA 1984); Creusere v. Creusere, 98 N.M. 788 (1982), Thomas v. Thomas, 1999 –NMCA -135, 128 N.M. 177 cert. den. 128 N.M. 150 (1999).

The Court of Appeals has held that procedural safeguards must be followed before a Court may terminate joint legal custody in favor of sole legal custody to one parent. *Taylor v. Tittman*, 120 N.M. 22, 896 P.2d 1171 (Ct. App.1995). The Court must consider what legal custody arrangement is in the best interest of the child, as influenced by the factors outlined in NMSA 1978, §§40-4-9 and -9.1. Proper notice to both parties is required, to allow their attendance and representation at a court hearing at which the issue of modification of joint custody and related issues will be addressed by the Court. The parties must be permitted an evidentiary hearing at which to make a record of their respective positions on the issue. After presentation of the preliminary facts, both for and against relocation by the parties, the Court should allow the parties to develop details comparing the status quo with the proposed relocation. The analysis may include documentary evidence, presentation of witnesses such as teachers, doctors, a Guardian ad Litem, other family members, child care providers, and other significant individuals with whom the child has regular contact.

An order for joint custody may be modified or terminated upon the motion of one or both parties or on the court's own motion if the best interests of the minor require the modification or termination of the order. *The court shall state in its order the reasons for modification or termination of the joint custody order if either party opposes the modification or termination order.*"

Determining the Child's Wishes

If a child is fourteen years of age or older, the court is required to consider the child's wishes. Note that many parents believe that the child this old is permitted to determine with whom s/he will live: This is not the case. NMSA Sec. 40-4-9 (B) only requires consideration of the child's wishes, among other factors. Normand v. Ray, 109 N.M. 403 (SCT 1990).

How the child's wishes are communicated to the court is up to the court. The guardian ad litem is a good way to convey information regarding the child's wishes. Child therapists generally should not testify to their client's wishes as to custody, as doing so would breach confidentiality.

Some courts take testimony from the child. NMSA Sec. 40-4-9(C) provides for a private hearing in chambers with transcription by a court reporter, and does not permit filing of the transcript of the child's conversation with the court unless the decision is appealed.

Caution is advised in taking direct testimony from an adolescent. It is generally agreed that having a child "choose" one parent over another, even if the child may want to do so at the time, can be very harmful to the child in later years. Although the transcript of the hearing is not filed, parents will figure out (or assume) what their child told the trier of fact, creating still more conflict in what is already a high conflict case and further damage the child's relationship with the "rejected" parent. For this reason, stating the child's wishes in a written opinion of the court is not advisable. At the same time, adolescents have a strong need to feel included in such important decisions as where they will live. Children never forget the day they went to court and told the judge "where they wanted to live." Proceed with caution.

TYPES OF PARENTING PLANS AND ADOPTION OF PARENTING PLANS

Temporary Plans

The Temporary Domestic Order ("TDO"), Form 4A-112 NMRA, provides for continuation of the relationship between parent and child. "If you are living apart, you shall each continue to have frequent contact and communication with any minor child of both parties, personally and by telephone." The TDO does not specify how this is to occur. Parents should be encouraged to agree to, and to follow, a regular schedule pending adoption of a permanent parenting plan. If they cannot agree, intervention may be necessary at an early stage.

Parties may request an interim order addressing parenting time or time sharing. Pro se parties can use Form 4A – 111 NMRA, Motion for Temporary Order (domestic relations actions). This is done by motion, frequently on an emergency basis, and may require the court to issue a determination of parenting time which will remain in place pending final resolution via mediation, custody evaluation, settlement, or trial. Districts have different resources to facilitate this process; some have court-based mental health professionals who can do a brief assessment or mediation of a temporary plan, but most do not.

When asked to decide at an early stage of litigation, the court is often stymied by a lack of well-developed neutral information. As a general rule, the interim custody and time sharing order should provide stability in the child's living arrangement and provide an outline of each parent's role with the child during the period between filing the petition and final decree. Absent a specific allocation of decision making authority, the status quo for the child prior to filing the petition for dissolution or paternity should be maintained as provided by the TDO.

The "Permanent" Parenting Plan

The time of filing of parenting plans shall be set by a local rule. NMSA Sec. 40-4-9.1 (F)(5). LR4-701 NMRA (Fourth Judicial District) requires that the parenting plan be delivered to the court at least fifteen days prior to trial.

Domestic Relations Form 4A-20S NMRA states that a Parenting Plan and Child Support Obligation, Domestic Relations Form 4A-313 NMRA, is required in all divorce or paternity cases involving parties with children under 19 who have not graduated from high school. The rule permits local courts, or individual courts, to require use of a different parenting plan. Form 4A-313 is a good, basic parenting plan that covers most situations in an ordinary divorce case.

The Sixth Judicial District has developed a parenting plan by local rule (LR6-Form 3.03): Ordered Parenting Plan for Children of Separated Parents. LR6-303: Parenting Plans provides that all parenting plans "must include the topics set forth in LR6-Form 3.03," implying that the form itself need not be used if all topics are covered by the plan submitted to the court.

Dona Ana County, in the Third Judicial District, also has a form of parenting plan, LR3-Form 3.60: Parenting Plan Requirements.

The Thirteenth Judicial District has an order regarding parenting instructions, LR13-Form F-2, which is not a parenting plan, but sets forth in 24 optional paragraphs, rules of "good behavior" for separated or divorced parents to co-parent their children. Not all topics are applicable in all cases. The provisions on relocation apparently permitting parents to move up to 60 miles from each other without seeking modifications of the parenting plan could be problematic. However, many of the other topics and paragraphs contain useful ideas for the court and practitioners. Topics include: encouraging children to love both parents, not using children as messengers, not requesting that children "spy" for the other parent or keep secrets, permitting children free communication with both parents, care of children's belongings, use of drugs or alcohol around children and long distance timesharing. If parents disagree about all of the terms and conditions of the parenting plan, NMSA 40-4-9.1(F) states "the parties shall each submit parenting plans to the court before final hearing." The court can choose one party's plan, a combination of both, or make its own ruling "as it deems necessary in the child's best interests."

The parenting plan becomes a final court order when incorporated by reference into the final decree of divorce. Because the court retains jurisdiction over questions of the custody and welfare of the parties' children, the parenting plan is subject to court modification.

Rule 1-125 NMRCP (effective December 31, 2010) permits a mediator operating under a Domestic Relations Mediation Act Program to write a parenting plan as agreed to by parents in mediation and to submit it to the parties and their counsel for signature and approval. Once signed, the parenting plan shall be submitted to the district court along with an order adoption the plan. This rule clarifies that the mediator is empowered to create an actual parenting plan, and not just a record of the parties' mediated agreement.

CONTENTS OF THE PARENTING PLAN

The contents of the parenting plan are set forth at NMSA Sec. 40-4-9.1(F.) The only mandatory item in the parenting plan is each parent's periods of time and care for the child, or "parenting time."

The permissible or optional contents of the parenting plan are set forth at NMSA Sec. 40-4-9.1 (F) (1) through (5), and include:

> -the "status quo" for the child – his or her current religion, education, medical care providers (medical, dental and therapy), recreation and child care;
> - designation of authority to make decisions. In joint custody situations usually both parents must make any major decisions; however, this is not required;
> -provision for communication, transportation, and exchange of the child for parenting time;
> -future decision making and dispute resolution procedures, if the parents cannot agree; and
> -anything else the parents wish to include relating to their child.

The statute provides considerable latitude to parties, who can choose how much detail and how many topics to cover in the parenting plan. A model parenting plan developed by the author follows this chapter.

Language and Confidentiality in Parenting Plans

Because the parenting plan is a document many parents refer to and use over time to guide them in raising their children, language matters. Parents need every encouragement to view each other as having a continuing and mutually important role as parents, plural. Continuation of the litigation mindset and the use of 'us versus them' mentality it engenders will not help parents reformat their relationship in a positive and constructive way. Rather than referring to people as "Petititioner," "Respondent," and "the subject child," or other legalese-riddled labels, we suggest calling the parties "Mother," "Father" and "Johnny" or "Suzy," for example. Rather than calling parenting time "timesharing" which brings annual two-week vacation rentals to mind, or "custodial periods" which objectifies children into chattel, think about using functional terminology such as "parenting time" or the "on-duty parent" to describe shared responsibility.

On the other hand, these are public documents. Identity theft is an increasing threat. We suggest eliminating any identifiers from parenting plans that are not absolutely necessary. The child's date of birth, street address, social security number or any other unique identification should be eliminated from the parenting plan (and the divorce documents as needed).

Parenting Time

A detailed discussion of the options for parenting time is beyond the scope of this manual. Suffice it to say, this is one of the most hotly contested issues in divorce. There are almost infinite ways for parents to divide and allocate the 168 hours, or 8,880 minutes in a week. The

lodestar for the court is, "What is in the best interests of the child of the parties?" The crux of the controversy is that in many cases, parents both sincerely believe that their proposal is in the best interests of their child, and that of the other parent is not.

The child support formula- Worksheet A versus Worksheet B – further obfuscates the situation, where one parent (the payor) tries to have parenting time which qualifies for Worksheet B and the other, the payee, tries to stay on Worksheet A. Both parents can be guilty of letting child support determine their position regarding parenting time. This can lead to ridiculous parenting plan provisions, counting of minutes and hours during each week, extended disagreement, frequent requests for modification and accusations of non-use of parenting time. It is up to the trier of fact to discern genuine from financially driven motives. Probably the best evidence is how involved the parent was with the child before the parties separated, but even this is not foolproof. One example: Fathers report that they were 'shut out' of their child's life during marriage, or not an attentive parent during the marriage, and they genuinely seek to rectify the situation post-divorce. Mothers doubt the sincerity of this position. Fathers respond by accusing mothers of seeking the lion's share of parenting time to increase their child support payment. And so it goes… .

Parenting Time – Resources for Help

The best resource by far we have found to assist judges and parents calculate and determine parenting time for children after divorce is:

> **"Planning for Parenting Time: Arizona Guide for Parents Living Apart"**
> © 2009 Arizona Supreme Court Services Division, Court Programs Unit.

The complete 68-page document can be seen at http://www.supreme.state.az.us/nav2/ParentingPlansWorkgroup/Documents/PPWguidelines.pdf. It can be used by non-profit organizations and by parents and other professionals who are attempting to resolve parenting issues. It provides numerous options for parenting time for children at six different developmental stages. The options are designed to be reflective of the children's needs, and the parents' skills, conflict level, and proximity.

Other good sources of information about parenting time schedules are:

> Does Wednesday Mean Mom's House or Dad's House? By Marc J. Ackerman, (John Wiley & Sons, Inc., 2nd Ed., 2008).
>
> "Developmental Needs of Children of Divorce" pamphlet, published by the Second Judicial District Court Clinic, Bernalillo County, available from the court.
>
> "Oregon Judicial Department: Safety Focused Parenting Plan: How do I know if I should use this Plan? "(In Spanish and in English) Available at http://courts.oregon.gov

What Level of Detail Should Parenting Plans Contain? Or: What is "Reasonable Visitation?"
Rule of Thumb: The more detail the better.

The Model Parenting Plan following this article sets forth a highly detailed parenting plan and time schedule. The reason is obvious: if parents have a disagreement, and their parenting plan is silent, nothing can happen until the disagreement is resolved. The parent in control of the dispute may not be motivated to resolve it. Children and parties may suffer while they await resolution of the problem.

We recommend a specific time (hour) for all parenting exchanges; discernible times, including the day and hour, for holiday parenting time; and a detailed description of how disputes are to be resolved, including time limits on each step of the dispute resolution process.

If appropriate, the parenting plan commonly begins with a provision which empowers parents who agree to customize, while providing enumerated details absent agreement. For example: "The parents will have parenting time with their children as they both agree, and if they cannot agree, then the following schedule shall apply." This can reward cooperation, while providing a clear set of rules if conflict occurs.

Here is what can happen, however, if details are omitted and parents disagree:

The parenting plan stated that the child would spend "Father's Day with Father." Father wanted to pick the child up at 8 AM and return him at 8 PM; Mother disagreed, proposing 9 AM to 4 PM. Father ended up picking up child at 9 AM, and returning him to Mother at 11:50 PM!! This could have been avoided if the parenting plan had included language as follows: "The child will spend Father's Day from 8 AM to 6 PM with Father" (or other reasonable time).
Parents are generally receptive to a fairly detailed parenting plan once these foreseeable consequences; and the unforeseeability of their future lives; and the changing needs of children, are explained to them. In your experience as judges and hearing officers, you have probably seen similar, or worse results arising from a plan that lacks specifics or assumes that the parents will be able to resolve small disputes between themselves.

PARENTING TIME SCHEDULES

The key variables in parenting time are the age of the child, the level of conflict of the parents, and the distance between the parents. Other important variables are the temperament and special needs of the child, involvement of third parties, and the similarity between households.

Age: Children's needs for parenting time vary greatly at different ages. Most developmental specialists acknowledge that, at a minimum, parenting time will change as children's needs change at these general intervals:

(a) Birth and 18 months;
(b) 18 months and 36 months;
(c) Three and five years;
(d) Six and nine years;
(e) Ten and twelve years; and
(f) Teenage years.

Other variables are possible, of course, but these represent major developmental stages.

A general rule of thumb: the younger the child, the more frequent and shorter the parenting time for the non-custodial parent. For infants of less than two years, having a primary caretaker, usually the Mother, is essential to meet development need. This can be difficult for Fathers to accept or agree to. As children age, longer visits and fewer transitions become more important.

Level of Conflict: The higher the conflict, the greater the detail needed in the plan. Do not deceive yourself, however. Parents who want to fight will find a way. If there is extensive detail, however, the child may at least have a regular schedule.

Distance between parents: When parents live far apart, exchanges that are too frequent and involve too much transportation time and cost are not in the best interests of the children. If the child is of an age and temperament to tolerate it, fewer, longer periods of responsibility are preferred. Also consider the child's activities: Does the parent have to take the child to regular lessons or practices that are far from the parent's home?

Special Issues and Warning Signs For Parenting Plans

Be aware of the special needs which may be created by these factors:

Blended Families: Remarriage of one parent may trigger co-parenting problems in blended families. Coordination of parenting time in blended families, especially around holidays, is important. Potential stressors on the parents and child can include issues of how to refer to the step-parent, step-sibling rivalry, the other parent's anger at the parent's remarriage, children's jealousy at having to "share" their room, moving to a new home, and introduction of a new parental figure.

Breastfeeding: Breastfeeding is the preferred nutrition for infants, recommended by the American Academy of Physicians and many other health organizations as the exclusive source of nourishment for the first six months of life, and continuing for at least the first year, as other food sources are gradually introduced. The child's breastfeeding needs to be balanced with the child's need to also bond with his/her father. Nursing needs should not be used as a reason to stop father from parenting time with the infant After nursing routines are established, sending mother's (pre-pumped) breastmilk along with the infant is the best option for provision of nourishment during father's parenting time.

Absent Parents/Reunification: When a parent has been out of a child's life for an extended period, professional help is usually required to gradually reintroduce the parent to the child. A graduated schedule of increasingly frequent and longer visits will work, but professional help and the custodial parent's support for the reintegration is essential. The longer the other parent has been absent, the poorer the prognosis.

High Conflict Parents: The higher the level of conflict, the more detail in the parenting plan is advisable. Transitions planned at school or daycare will reduce the opportunities for conflict.

Parents can be referred for co-parenting education or counseling. Continuing conflict may require modification of the form of custody or parenting time.

Military Deployment: Divorcing families should think about deployment possibilities and include a long distance parenting plan option for when parents no longer live in the same area. For overseas or combat deployment situations, parenting time will primarily occur during military leave, and the other parent must accommodate this.

Safety Issues: NMSA Sec.40-4-9.1(B)(9) requires that if an adjudication of domestic abuse has occurred, the court must make findings that the parenting time ordered "adequately protects the child, the abused parent, or the other household member."

Incarcerated Parents: The child's need to stay connected with an incarcerated parent may be very different from the other parent's needs. However, incarcerated parents are still parents. Children may need preparation concerning what to expect at a visit.

Alcohol or Drug Use or Abuse: The plan may provide for limitation on use of alcohol before or during parenting. If drug or alcohol testing is required, the parenting plan should specify who can order/request it, how quickly it must occur, who pays for it, and what happens if the result is positive.

Children of Different Ages: Generally, children should stay together. If there is a wide gap in ages, or many children, it may be appropriate to provide some time alone for each child with each parent. Teenagers may have numerous activities and social engagements and spend less time with either parent than their younger siblings.

Special Needs Children: The treatment recommendations of therapists, physicians or educators (the child's Individualized Education Plan, or IEP) must be followed. Parenting plans need to identify special needs and the behavioral and medical protocols to be followed, including administration of medication. It is important that parents both understand and participate in doctor visits and required treatment. For children with certain behavioral problems, the "standard" parenting time schedule will not work. Note that it is not uncommon for one parent to believe that the child has significant special needs, while the other does not so believe.

Third Party Involvement (Grandparents and other relatives): Generally speaking, third parties' active participation in parenting decisions or provision of significant amounts of child care can lead to very high conflict between the parents.

Parents who Travel Frequently: If travel is regular, the parenting plan can accommodate it. If travel is not scheduled regularly, but occurs frequently, accommodation is required. "Make up time" should be addressed in the plan: whether it will occur, how long after the missed parenting time, and so on.

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The author's model form of Parenting Plan follows.
GENERAL OBSERVATION: The more detail the better, especially with respect to the times of parenting obligations. You can always tell the parents that as long as they agree they do not need to observe the formalities. If the specifics aren't there, however, the parent may not be able to function in the disputed area until they go through dispute resolution, a time consuming and costly process.

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No.

Name of Petitioner,

Petitioner,

v.

Name of Respondent,

Respondent.

PARENTING PLAN

THIS PARENTING PLAN is agreed to by **Petitioner (hereafter referred to as "Father") and by Respondent (hereafter referred to as "Mother") regarding their children:**

NAME OF CHILD, now age X and

NAME OF CHILD, now age Y. [Note: Date of birth is omitted for privacy reasons]

LEGAL CUSTODY:

A. Both parents are fit and proper persons to raise their children and it is in the best interests of the children that the parents share joint legal custody.

B. "Joint legal custody" means that the parents will consult with each other on major decisions involving their children before implementing those decisions; neither parent will make a decision nor take an action which results in a major change in children's lives until the matter

has been discussed with the other parent and the parents agree. If the parents after discussion cannot agree, the disagreement will be resolved by the methods chosen in this Agreement. Until an agreement or resolution, no change will be made.

Major decisions are: elective medical and dental treatment, school, day care, place of residence, religious denomination and religious activities, and recreational activities. The parents may agree that other decisions (below) are also "major decisions." Day to day decisions that are not major decisions will be made by the parent during his or her periods of responsibility.

C. The parents agree that children's wishes should and must be considered when they make decisions about the children. How much weight they will give a child's wishes will depend on the age of the child and the nature of the decision. The parents will never ask a child to choose between them, and they will not burden a child with any decision that is inappropriate for his age and development. Until a decision about a major change has been agreed to b the parents, the parents will not tell the child that a change is being considered.

D. OPTIONAL: Other Decisions: The parents agree that neither one shall unilaterally make decisions in the following areas: tattoos, piercing, provision of an automobile, haircuts or salon services that substantially change hair styles or colors, non-work related daycare providers, provision of contraceptives(non-prescription or prescription) for whatever reason, provision of a cell phone, provision of a television or personal computer in the child's room. NOTE: These are optional areas of decision making – it is sometimes wise to consider these in advance. Consider financial implications as well. For example, a car requires insurance, fuel and upkeep. Who will pay? Will this affect child support? Do you want to get into the area of overnight guests (adult variety)??

E. Communication Between Children and Parent: The children shall have the right to reasonable communication with the absent parent during the other parent's parenting time. "Reasonable communication" means one telephone call per day, not during mealtime, and at least thirty minutes before the children's bedtimes. The children shall have the right to call their other parent at reasonable times, as well. NOTE: This can be a very difficult area. It is important for children to 'check in' with their other parent, but it is equally important for the other parent not to intrude unnecessarily into the development of a regular family life with each parent. If parents live far apart, communication via telephone, Skype, text, etc. will be more frequent.

II. STATUS QUO

Residence: Address(generally, "Albuquerque Standard Metropolitan Statistical Area", or Roswell, New Mexico. City and state only. Do not provide street address. **Note potential problems with, for example, a far West-side parent and a parent living in Tijeras, or a parent in Santa Fe and one in Bernalillo. Some states impose a mileage requirement on "move away" cases; the key is whether the existing parenting time will be reasonable following the move and the effect on the child)**

Religion: Specify (Practicing or not, what church and denomination? If religious instruction will be required (Catechism, for example) who will take the child and who will pay for it)

Doctor: Name (Is there more than one? Any specialists?)

Dentist: Name (Orthodontia in place or planned?)

Therapist: Name

School: Name(Include any specifics such as special education, advanced placement, etc.)

Work-Related Child Care: Name and address (Has the child historically attended a summer camp? Are arrangements different during the summer?)

Major Recreational Activities: Specify how costs will be shared and decisions to participate will be made.

Special Needs: regular medications such as ADHD, psychotropic or asthma medications, annual visitation with grandparents alone, tutors, other therapies, etc.

III. TIMESHARING (Please educate yourselves about what is age appropriate parenting time, especially with respect to children under the age of five years.)

A. The parents shall share time with the children as they agree. If they cannot agree then the parents shall follow this plan:

B. The children with reside with both Mother and Father.

C. Mother and Father will share responsibility of the children as follows: The minor children will reside with [Mother/Father] from day at time a.m. p.m. through day at time a.m. p.m. and with [Mother/Father] from day at time a.m. p.m. to day at time a.m. p.m. Every other weekend the children will reside with [Mother/Father]from day at time a.m. p.m. until day at time a.m. p.m., when they will be returned to their [Mother/Father]. **Questions: passports, out of country travel, provision of itineraries, communication during vacations, etc.**

(NOTE: WILL A PARENT'S VISITATION DURING HOLIDAYS ADJOIN THEIR REGULAR TIMESHARING? WILL THIS MAKE A DIFFERENCE IN HOW LONG

THE CHILD SHOULD BE WITH THE PARENT WITHOUT SEEING THE OTHER PARENT?)

D. HOLIDAY PARENTING TIME. The parents will share time with their children during the holidays as follows:

1. Spring Break: Regular schedule. **Or, Spring break will begin on the last day of school at (time), and resume the day before school resumes at (time).**

2. Birthdays: Regular timesharing will control. Or, Child A shall spend her birthday with Mother in even-numbered years from _ to _, and Child B shall spend his birthday with Father in even-numbered years from __ to _____, and this schedule shall be reversed in odd- numbered years. **Note whether the birthday occurs when school is in session or during the summer vacation.**

3. Mother's birthday and Mother's Day with Mother each year from (time) to (time).

4. Father's birthday and Father's Day with Father each year from (time) to (time).

5. Thanksgiving Day: the children will spend the first half of the day with Mother Father until time a.m. p.m. and second half of the day with Mother Father until time a.m. p.m.. Regular timesharing will control the remaining holiday weekend.(Or, specify other arrangement- from the time school is out for the holiday on Wednesday, until [specify a time], or other agreement.

6. Winter Break: Regular schedule, exceptions are as follows: with Mother Father on Christmas Eve until time a.m. p.m. then with Mother Father overnight and on Christmas Day in even-numbered years, reversed in odd-numbered years. Or, from the time

school is dismissed through the first half of Winter Break with one parent; and the remainder of Winter Break until the day before school resumes with the other parent.

7. Easter: The Easter holiday shall be celebrated from Friday after school through Monday return to school, and alternated between the parents, with Mother in even numbered years and father in odd numbered years.

8. Three day (holiday) weekends (MLK, Labor Day, Memorial Weekend, Columbus, 4th of July): Regular timesharing will control. Or, fill in.

9. Any other holidays to be considered? (Halloween, Kwanzaa, other religious holidays, first communion, solstice, etc.)

D. SUMMER & VACATION TIMESHARING. Each parent may have the opportunity to have the children for two one-week or one two-week vacation period(s) **SPECIFY**: **FOR YOUNGER CHILDREN (UNDER SIX) - TWO WEEKS IS GENERALLY TOO LONG FOR THEM TO NOT SEE THEIR OTHER PARENT. CONSIDER- IF A PARENT HAS TO TRAVEL FOR FAMILY VISITATION, CONSIDER THE LENGTH OF THE VACATION AND THE AMOUNT OF TIME THAT WILL BE SPENT TRAVELING.** The parents will notify each other by [day] of every year of their proposed vacation schedules and will attempt to be flexible to allow for family events and the convenience of each party. If the parents after discussion cannot agree on specific vacation times by day of every year, Mother's wishes will control in even-numbered years and Father's wishes will control in odd-numbered years.

E. PICK UP AND DROP OFF: (Parent) shall deliver the child to (other parent) at the end of parent's time. Or, exchanges shall occur at school or daycare whenever possible. Specify who is doing what. If the parents meet at a neutral or "half-way" point, determine how long a parent

has to wait for the other parent, how to prove that they were there and waited the requisite time (buying an item at McDonalds and keeping the receipt), and what the consequences are for being late. Is the visit missed? Is it made up?

IV. CHILD SUPPORT

A. Child support will be set according to the New Mexico Child Support Guidelines, Worksheet A, attached to the Martial Settlement Agreement hereto.

V PARENTING PROVISIONS

A. Parental Involvement: The parents further agree to be actively involved in the decisions and responsibilities regarding the children and to communicate and be flexible about the needs of the children, especially as those needs change due to the growth and development.

B. Supportive of Relationships: The parents agree to be supportive of the children's relationship with the other parent. Each will give permission to the children to enjoy the relationship with the other parent and neither will interfere with nor hinder the parent-child relationship with the other parent. The parents agree that neither will align the children with him nor her against the other parent or the other parent's family.

C. Change of Addresses and Telephone Numbers: The parents will promptly notify each other of any changes in residential addresses and residential, work and mobile telephone numbers.

D. Telephone and Mail: We agree that the children have a right to place phone calls to and receive phone calls from the absent parent, and to send and receive letters and packages, without interference from the other parent.

E. Emergencies: We agree that in case of a medical emergency the parent with that period of responsibility will contact the other parent concerning treatment of the children as soon as possible. If the absent parent cannot be reached, the available parent will make any decision for emergency medical treatment in the children's best interest.

F. Exceptions & Temporary Changes to the Timesharing Schedule: Either party may ask the other for exceptions to this timesharing schedule from time to time, but both understand that the other parent has the right to say "No." Neither parent will argue about nor criticize the decision. If a parent cannot care for the children during his or her scheduled period of responsibility, he or she will notify the other parent who may care for the children during that period of responsibility.

G. Parent Cannot Care for the Children During His or her Period of Responsibility:

Each parent should have the right of first refusal if either parent is unavailable to care for the children for more than _____. [Options: overnight, six hours, etc.]

H. Removal from New Mexico: Neither parent will remove, cause to be removed, nor permit removal of the children from the State of New Mexico, except for temporary visits which do not interfere with the timesharing schedule, without the written consent of the other parent or resolution of the dispute by the methods chosen in this Agreement. Notice of [_____days] will be provided for all out of state excursions. Passports will/will not be provided, and will be held by_____.

I. Relationships with other family members: Parents are encouraged to promote relationships between the children and their other family members during their respective time with the children.

J. **Information concerning the children: Each parent is entitled to receive information concerning the children's medical, dental, therapeutic, educational and other "status quo", and neither parent shall prevent the other from having free access to that information (as the provider believes appropriate; therapists may limit the amount of information they release to parents depending on the child's age). Each parent shall inform the other of how he or she can access information concerning the children, however, it is each parent's responsibility to obtain such information for him- or herself.**

VI. DISPUTE RESOLUTION

A. Concerns, day-to-day matters and temporary changes to the timesharing schedule: The parents will discuss concerns, day-to-day matters regarding their child, and temporary changes to the timesharing schedule. The parents will make good faith efforts to reach agreement. If the parents cannot reach agreement and either party requests, they will participate in dispute resolution as set forth in this Article.

B. Changes in Status Quo and Permanent Changes to Timesharing Schedule: If either parent wants to change permanently the timesharing plan or one or more aspects of the status quo, the parent who wants the change will give to the other a written change proposal. The written change proposal will include: (1) what (s)he wants to change; (2) why (s)he wants the change; and, (3) enough information so that the other parent will be able to investigate. For example, the change proposal will include necessary names, addresses and phone numbers and a reasonable time limit (no more than___) for responding. The parent who receives the change proposal will investigate the proposed change and will respond in writing within a reasonable time (no more than ___). If one parent does not agree to the proposed change, (s)he must say why, and when appropriate, make a counter-proposal, also in writing.

C. Neither parent will withhold financial support nor access to the children before, during or after dispute resolution.

D. Court Referral: If the parents cannot settle a dispute themselves or agree on a change, then the parents will submit the matter to mediation. If mediation is unsuccessful, the parent(s) may petition the District Court for resolution. The District Court may refer the matter to a special master or other alternative dispute resolution process, appoint a Guardian ad Litem or hold a hearing on the matter, or other procedures as determined by the District Court.

VII. GENERAL PROVISIONS

A. Total Agreement. This written document contains the entire understanding of the parties. The parties rely on no representations other than those expressly stated in this document.

B. **OPTIONAL: Post-Majority Financial Obligations: Father and Mother fully understand that the Court does not have jurisdiction to order them to provide post-minority financial support for their children. Despite this limitation, both parties freely and voluntarily agree to provide financial support [in proportion to their gross incomes or other option] after the children attain age eighteen as long as they are enrolled full-time in an accredited institution of post-secondary education or until the child reached the age of 22, whichever first occurs. They agree that the promises to provide financial support for their children after they attain age eighteen are enforceable as contractual obligations pursuant to the law of the State of New Mexico relating to contract enforcement. "Support" means [specify what it means, what it covered and what limitations are required, such as financial aid, employment, student loans, number of course hours required per semester and so forth.]**

C. Modification and Waiver of Provisions: A permanent modification or waiver of this Agreement must be in writing and signed [in front of a notary public.] Either party's failure to insist upon performance of any provision of this Agreement will not be a modification or waiver of that provision. Modification of child support obligations must be entered with the Court as a court order to be enforceable.

D. Payment of Attorney Fees and Costs: Both parties will assume and pay their attorney fees and costs incurred in the negotiation and preparation of this Parenting Plan.

E. Payment of Attorney Fees and Costs Upon Default: In the event of default by a party, the defaulting party agrees to pay the other's reasonable attorney fees and costs incurred in enforcing the terms of this Agreement, unless otherwise adjusted by the Court or as agreed to by the parties.

F. New Mexico Law. This Agreement will be governed, construed and enforced in accordance with the laws of the State of New Mexico.

APPROVED BY:

Name of Petitioner Petitioner/Father	Name of Respondent Respondent/Mother
YOUR NAME HERE Attorney for Petitioner (505)	*OTHER NAME HERE* Attorney for Respondent (505)

ACKNOWLEDGMENT

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

SUBSCRIBED AND SWORN to before me on March ____2011 by Petitioner.

_____
Notary Public

ACKNOWLEDGMENT

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

SUBSCRIBED AND SWORN to before me on March ____2011 by Respondent.

Relocation

By Helen Bennett, Esq. and Edith M. Reeves, Esq.

A proposed move or relocation of a child by one parent is proper, so long as the relocation is consistent with the best interests of the child. *See Newhouse v. Chavez*, 108 N.M. 319, 772 P.2d 353 (Ct. App.1988); *Alfieri v. Alfieri*, 105 N.M. 373, 733 P.2d 4 (Ct. App. 1987). A presumption exists that joint custody is in the best interest of a child in an initial custody determination. *See* NMSA 1978, §40-4-9.1(A). Thereafter, a request to "modify" a custody order or decree requires the party seeking modification to establish, that a substantial and material change in circumstances affecting the welfare of the child has occurred since the prior custody order was entered, and that joint custody is no longer in the best interest of the child. *Id.*

"An order for joint custody may be modified or terminated upon the motion of one or both parties or on the court's own motion if the best interests of the minor require the modification or termination of the order. *The court shall state in its order the reasons for modification or termination of the joint custody order if either party opposes the modification or termination order.*"

FACTORS TO CONSIDER:

As a practical matter, objections to the relocation are ordinarily raised when the primary custodial parent wishes to relocate. As a preliminary matter, the Court should consider:

1. At what stage are the parties in the proceeding? Is this an initial custody determination, or post-decree modification?

2. What parenting plan provisions, notice, or limitations on relocation were reduced to writing by the parties when they divorced?

3. Does the final decree or parenting plan require specific dispute resolution or mediation before initiating motions with the Court, and were those provisions utilized before initiating litigation?

In New Mexico, the protection afforded the right to travel in the child-custody context has been explicitly recognized by both this Court and the court of appeals. *See Jaramillo v. Jaramillo*, 113 N.M. at 63, 823 P.2d at 305 (1991). The best interests of the child are paramount, and if those interests are best served by being with a parent outside this jurisdiction, removal should be permitted. *Garcia v. Garcia*, 81 N.M. at 279, 466 P.2d at 556. As a general rule, the non-custodial parent's right to visitation should not prevent the custodial parent from moving when the reasons for the move are legitimate and the best interests of the children will be served by accompanying the custodial parent. *Newhouse*, 108 N.M. at 323, 772 P.2d at 357.

The non-relocating parent's right to maintain his or her close association and frequent contact with the child should be equally free from any unfavorable presumption that would place him or

her under the burden of showing that the proposed removal of the child would be contrary to the child's best interests. *Jaramillo*, 113 N.M. at 64, 823 P.2d at 306.

No specific New Mexico statute specifically addresses the "relocation" of a child from his original place of residence to another place in New Mexico, or to another state or country. The inquiry is generally considered one involving the modification of a custody order or parenting plan. As in most custody and timesharing considerations, the Court is to be guided by the "best interests" of the child in determining whether or not to allow the relocation. Note that relocation to a great distance can still result in a modified joint legal custody, but with a parenting plan that anticipates some decisions will be made by the custodial parent as a matter of practical necessity. Courts should provide explicit guidance to parents of how custody will operate after relocation.

NMSA 1978, §40-4-9 directs the Court to consider all relevant factors when determining custody or a change in custody, including:

1. The wishes of the child's parent or parents as to his custody;
2. The wishes of the child as to his custodian;
3. The interaction and interrelationship of a child with his parents, his siblings and any other person who may significantly affect the child's best interest;
4. The child's adjustment to his home, school and community; and
5. The mental and physical health of all individuals involved.

When considering a relocation request, consistent with New Mexico law, the following factors may be weighed by the Court in evaluating whether to allow a custodial parent to relocate with the children:

(1) Whether the relocation is in the best interest of the child,
(2) Whether the request for relocation is made in good faith,
(3) Whether there has been compliance with statutory factors.

In 1997 the American Academy of Matrimonial Lawyers developed a list of factors for judges to use in evaluating a prospective relocation. AAML Relocation Standard § 405 suggests that Courts consider the following factors:

1. The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the nonrelocating person, siblings, and other significant persons in the child's life;

2. The age, developmental stage, needs of the child, and likely impact of relocation on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;

3. The feasibility of preserving the relationship between the nonrelocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties;

4. The child's preference, taking into consideration the age and maturity of the child;

5. Whether the person seeking relocation has an established pattern of conduct promoting or thwarting the nonrelocating person's relationship with the child;

6. Whether the relocation will enhance the general quality of life for both the custodial party seeking relocation and the child, including but not limited to financial or emotional benefit or educational opportunity;

7. The reasons each person seeks or opposes relocation; and

8. Any other factor affecting the best interest of the child.

In sum, and as a general matter, the Court's broad discretion can encompass the following considerations:

(a) The advantages for the move to improve the quality of life for the custodial parent and the child,

(b) The custodial parent's motives in moving, (an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual's contact with the child).

(c) The non-custodial parent's motives in opposing the move, (a pattern of conduct by the non-relocating individual to control, promote or thwart an established custodial situation can weigh either for or against allowing a child to relocate with the other parent).

(d) The realistic opportunity for preserving the relationship between the non-custodial parent and the child.

(e) The distance involved in the proposed change of residence.

(f) The hardship and expense involved for the non-relocating parent to exercise parenting time or grandparent visitation, and financial accommodations by the relocating parent, including deviation from child support guidelines where appropriate.

(g) The financial circumstances of the parties, before and anticipated after the move.

Jurisdictional questions which may arise in a relocation dispute are addressed in the chapter discussing the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

Helen Bennett is a solo practitioner in Albuquerque. Her practice includes family law appeals and Collaborative Family Law, and she provides family law legal services as a volunteer for Legal FACS. Edith M. Reeves, Esq. practices family law in her Reeves Law Firm.

Kinship Guardianship Act

By Amanda H. Frazier, Esq.

The Kinship Guardianship Act, NMSA Sec. 40-10B-1 *et seq*., was created to provide a way for kinship caregivers (anyone with a significant bond to a minor child) to suspend the parent's rights and assume the role of parent for a child when the parents are unable or unwilling to parent.

Before the Kinship Guardianship Act ("KGA") was created, only two ways existed to give a non-parent caregiver legal relationship with a child: one was through the Probate Code (a custodial parent has died and left a will); the other was through the Children's Code (the Children, Youth and Families Department or the Court has become involved with the family). Both of these statutes limited the circumstances in which caregivers could become legal guardians. The KGA allows any caregiver, who is over 21, and with whom a child has been living without a parent, to petition the court for guardianship over that child.

The purpose of the KGA is to provide a safe, appropriate home for a child with a caregiver when a parent has left the child in the care of others for 90 days or more, or when the parent consents to the appointment, or when a child over the age of 14 nominates a guardian.

The KGA *suspends* parental rights to the child in favor of the guardian, with the parents retaining the ongoing obligation of child support. This does allow for the guardians to have access to the child's finances; however the parents remain "on the hook" financially. Often visitation is at the discretion of the guardian, though regular visits can be ordered.

The KGA provides that the Court ordering the guardianship shall maintain ongoing jurisdiction of the case, until the child either turns 18 or the guardianship is revoked. This means that any motion or petition to revoke or modify the guardianship will be heard by the same Court, which will have access to the history of the initial case.

The significant aspects of the KGA are the petition requirements, notice to the parents, and the burden of proof.

PETITION

Who can petition:

A true kinship caregiver (meaning anyone over 18, related to the child and who is caring for the child);

Anyone over the age of 21 who has no kinship, but has a significant bond with the child or

Anyone over the age 21 without kinship whom a child at least 14 years old has nominated, and who is a safe person to be guardian.

A caregiver designated formally or informally by a parent in writing as long as the parent understands the effect of the guardianship, has received notice of the Petition and hearings and is informed that he/she may appear in court at the hearing.

Key elements in reviewing a petition:

The names of the parents

The child's birth certificate (and if not available, why not?). This is important if a petitioner is gaining guardianship with the goal of establishing Special Immigrant Juvenile Status for the child.

If there are any pending custody/probate/abuse and neglect cases involving the child. If so, the court needs to be aware of those.

Verification:

The Petition shall be verified by the Petitioner and allege the following with respect to the child:

Facts that if proved will meet the requirements of the Act;

The age and place of birth of the child, if known, and if not known, the reason for the lack of knowledge (a copy of the birth certificate is not mandatory, but good practice to include);

The legal residence of the child and the place where he resides, if different from the legal residence;

The marital status of the child;

The name and address of Petitioner;

The names and addresses of the parents of the child;

The names and addresses of persons having legal custody of the child (it could be a stepparent);

Whether or not the parents consent to the guardianship;

If the parents do not, then the child must have been living with the petitioner at least 90 days BEFORE the date of filing the Petition.

The existence of any matters pending involving the custody of the child (i.e., is there a probate proceeding that may involve custody of the child? Grandparent rights issues? Ongoing family custody case in this jurisdiction or another?).

A statement that the petitioner agrees to accept the duties and responsibilities of guardianship;

The existence of any matters under the Children's Code Child Abuse and Neglect Act and if so, a statement that CYFD consents to the relief requested;

A statement as to whether or not the child is subject to the Indian Child Welfare Act. If so, tribal affiliations of the child and or parents need to be determined and the Tribe contacted. There must be a statement of specific actions taken to notify the parent's tribe and results of the contacts including the names, addresses, titles and contact information of the persons and copies of correspondence with the tribe.

Any other facts in support of the Guardianship.

If the child is 14 years old or older, the child can nominate the guardian, and this can be done either in writing (though many kids don't have an ID that a notary will accept) or in front of the Judge during the hearing.

The KGA states that if a child over 14 years of age does nominate a proper guardian, the judge shall order that person a guardian.

Unlike the Adoption Act, which is purely statutory, the KGA allows some discretion and determination by the judge in how to proceed. The Act itself states that there can be "extraordinary circumstances" which would allow for guardianship and that a parent must be noticed of the Petition, regardless of any lack of parenting, excluding actual termination of parental rights.

NOTICE

The parents must be served with the petition and notice of hearing. They may waive service if they receive a copy of the petition before filing. This is different from the adoption statutes, in which an alleged father need not receive service. Under the KGA, all parents must be noticed even if they have not been involved or present in the child's life.

A child over the age of fourteen must also be notified of the Petition.

The Petition must also state whether or not the child is a member of a Tribe, and if so, whether the Tribe has been contacted about the Petition. It is good practice for the Petitioner to contact the Tribe before filing, to see if the Tribe will intervene. Certainly it is required that the Petitioner contact the Tribe to see if the child is in fact enrolled, if that is not clear from the outset.

The Petition should include what response, if any, the Tribe gave Petitioner when advised of the proceedings.

The KGA does not require a home visit or a social worker to evaluate the safety of the home; however, it is suggested that a background check be done on everyone in the home over 18 years of age. This can be a simple online search of nmcourts.gov, or a more in-depth check. This is to ensure that the caregiver and others in the home are not a safety concern for the child. A social worker home visit is another way to ensure the proposed guardian's home is appropriate for the child.

If a parent contests a petition for guardianship, the Judge can appoint a *guardian ad litem* to represent the child in the proceedings. The Judge can also order a temporary guardianship in place while a permanent decision is being made.

If a *guardian ad litem* is appointed, a hearing on the motion for temporary guardianship shall be heard within twenty (20) days of the date the *guardian ad litem* is appointed.

A motion for temporary guardianship may be entered *ex parte* upon good cause shown.

HEARING

Petitioners must request a hearing at the time they submit the petition for kinship guardianship. The parents, unless waiving notice, shall be notified of the date and time of the hearing.

It is important to remember that even if a parent has consented to the guardianship, it is possible for the parent to appear and contest the guardianship at the hearing. This reason alone is a good basis for requiring the ninety (90) day notice be met, as well as a social worker report, so if the proceeding appears at first to be uncontested and then becomes contested, the petitioner will have met the burden of proof even without the parent's consent, and perhaps will have enough proof in preparation for the parent actively contesting the guardianship, so that the court does not have to re-set the hearing.

BURDEN OF PROOF

Elements of proof to appoint a guardian under the Act:

At the hearing, the petitioner must prove that:

- He or she is a qualified person to serve as guardian (over 21? back ground check ok? social worker visit ok?)
- that the parents are unable (incarcerated? dead? missing? rights terminated?
- or unwilling to parent (signed a consent? leaving child with Petitioner and not coming around?)
    - if the parent consented to the appointment it must be in writing and submitted to the Court, and should be notarized
    - parent is living but all parental rights to the child have been terminated or suspended by prior court order
- and that the appointment is in the child's best interests

- or that exceptional circumstances exist to merit appointing the guardian.

the child has resided with the petitioner **without** either parent for a period of ninety (90) days or more immediately preceding the date the petition is filed.

A consenting parent may actually **live** with the Petitioner and the child but be unable to parent, due to physical or mental health issues. Make sure that if parent has mental health issues, that the parent **can** in fact consent.

A parent having legal custody of the child is notified of the Petition.

Often a Petitioner may claim that since one or both parents are out of the picture and hasn't visited, s/he doesn't have to be served. However, if the father is on the birth certificate and no orders exist regarding custody between the mother and father, he shares legal custody of the child. If the petitioner knows who the father is, even if he is not on the birth certificate, he should still be notified.

NOMINATION

A child fourteen years old or older can nominate a guardian. The KGA states that the Court SHALL appoint a guardian who is nominated by a child fourteen (14) years old or older. Many minors do not have state-issued identification that can be used by a notary to affirm the nomination, so the judge may have to accept the nomination orally in court.

GUARDIAN AD LITEM

If a petition for guardianship is contested by a parent, the court may appoint a *Guardian ad litem* ("GAL") to the case to investigate the child's best interests. The GAL should make a written report to the court, sending copies to all parties, with the findings. The parties then have an opportunity to dispute those findings. The GAL is finding what is in the child's best interests, and *pro se* parties should be reminded that the GAL does not represent either party.

ORDER

The final order often contains language regarding visitation and financial responsibility. Section 8 of the KGA states that a parent retains financial responsibility for the child, and this particularly means the parent is still "on the hook" for child support. However, if there is a trust, or other income that the child may have access to, this language should be removed, as the parent may insist that by retaining financial responsibility, they also retain the right to manage the trust or other funds.

Visitation is an issue that can be addressed by the court. Often language that leaves the issues of visitation to the discretion of the guardian is less likely to create ongoing court orders of enforcement. However, in a contested guardianship it may be necessary for the court to outline definite visitation schedules, or to prohibit any visitation.

It is recommended that *pro se* petitioners are advised to get one copy of the guardianship order certified in order to prove their guardianship to Medicaid, Social Security, schools, and other entities.

Amanda H. Frazier, Esq., is the Director of the New Mexico Guardianship Project at Advocacy, Inc.

Private Adoption Law

By Carolyn J. Waters, Esq.

Overview

Adoptions of minors are governed by NMSA Sec. 32A-5-1, et seq., New Mexico's Adoption Act. A minor adoption proceeding also may be subject to the Interstate Compact on Placement of Children, NMSA Sec. 32A-11-1, et seq., the Indian Child Welfare Act of 1978, 25 U.S.C. §502, et seq., the Servicemembers Civil Relief Act, 50 U.S. C. App. 501 et seq., and local rules.

The Adoption Act ensures that the parties and the court will be aware of the applicability or inapplicability of federal laws in every adoption proceeding by requiring that every petition filed under NMSA Sec. 32A-5-26 state whether the Indian Child Welfare Act or the Interstate Compact on the Placement of Children applies to the proceeding. In addition, the final order of adoption also must include provisions stating whether the Indian Child Welfare Act and/or the Interstate Compact on the Placement of Children apply, and if so, the steps taken to comply. NMSA Sec. 32A-5-36(F)12-13.

If the child is an "Indian child" – either a member of an Indian tribe or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe – the general procedures of the Adoption Act do not apply, and the provisions of NMSA Secs. 32A-5-4 and 32A-5-5 must be followed.

Adoptions were not known at common law. Rather, adoptions are a statutory creation, and the jurisdictional requirements must be strictly followed. *Barwin v. Reidy*, 62 N.M. 183, 307 P. 2d 175 (1957).

Adult adoptions are addressed in NMSA Secs. 40-14-1 through 40-14-15.

Who May Adopt a Minor Child

If a **resident** of New Mexico, any individual who has been approved by the Court as a suitable adoptive parent can adopt. However, a married person may only adopt without a spouse's joining in the adoption if:

a) the non-joining spouse is the parent of the adoptee;
b) the individual and the non-joining spouse are legally separated; or
c) the failure of the non-joining spouse to join in the adoption is excused by the Court for reasonable circumstances.

A non-resident may adopt a child if the parent meets the requirements for a resident and the adoptee is a resident of New Mexico; or if the adoptee was born in New Mexico and is less than six months of age and was placed by the Department or an agency licensed by the State of New Mexico. NMSA Sec. 32A-5-11(C).

A resident is one who immediately prior to the filing of the petition for adoption has resided in the state for at least six months or has become domiciled in the state by establishing legal residence with the intention of maintaining the residence indefinitely. NMSA Secs. 32A-5-3 (Y); 40-14-2 (G).

Who May Adopt an Adult

If a **resident** of New Mexico, any individual who has been approved by the Court as a suitable adoptive parent can adopt. However, a married person may only adopt without a spouse's joining in the adoption if:

a) the non-joining spouse is the parent of the adoptee;

b) the individual and the non-joining spouse are legally separated; or

c) the failure of the non-joining spouse to join in the adoption is excused by the Court for reasonable circumstances.

Unmarried individuals and domestic partners are not prohibited from adopting a minor child and/or an adult.

Who May Be Adopted

Any adult and any child may be adopted. NMSA Secs. 32A-5-11(A); 40-14-5(A).

There are two phases to every minor child adoption. The first is the termination of the parent-child relationship with the biological parents (or the current parents if the child was previously adopted). This can be done by voluntary relinquishment (NMSA Sec. 32A-5-21), subsequently approved by the Court in an order terminating the parental rights, or by involuntary termination of parental rights (NMSA Sec. 32A-5-16), discussed further below. The second phase is the finalization of the adoption.

Procedural Rules

The Children's Court Rules (Rule 10-101, et seq.) apply to abuse and neglect proceedings, and the termination of parental rights under the abuse and neglect statutes. (NMSA Secs. 32A-4-1, et seq.). Other proceedings are governed by the Rules of Civil Procedure for the District Courts. Rule 10-101. Requests for a jury for non-abuse and neglect proceedings are governed by Rule 1-038.

Confidential Hearings under the Adoption Act

Minor adoption hearings are confidential, and to be conducted in a manner that protects confidentiality. NMSA Sec. 32A-5-36 (A). The hearings shall be held in closed court without the admittance of any person, other than the parties, their counsel, and individuals the parties authorize. NMSA Sec. 32A-5-8(C).

All records relating to the minor's adoption are confidential. Only the attorneys for the parties and the department are authorized to have access to the court file while the adoption is pending.

Others are allowed access only by order of the court for good cause shown. NMSA Sec. 32A-5-8(B). The final order granting the adoption shall include the new name of the adoptee, but shall not include any former names and shall not include the former parents' names, again, to maintain confidentiality, since that order will be used to change birth certificates, and to enroll in school. Sec. NMSA 32A-36(I).

The adoption petitioner(s) shall attend the final hearing as well as the adoptee, unless the court for good cause waives a party's appearance. Good cause may include burdensome travel requirements. NMSA Secs. 32A-5-36(A); 40-14-12(A).

Venue

For minor adoptions, the adoption petition may be filed in the County where:

a. a petitioner is present;
b. the adoptee is physically present at the time the petition is filed;
c. an office of the agency that placed the adoptee for adoption is located; or
d. the department's office from which the child was placed is located.

NMSA Sec. 32A-5-10.

Note: A proceeding to terminate parental rights must be filed in the county where the child is present or in the county from which the child was placed. NMSA Sec. 32A-5-16(A).

For adult adoptions, the adoption petition may be filed in the county where:

a. the petitioner resides; or
b. the adoptee resides.

NMSA Sec. 40-14-4(A).

A Court with jurisdiction under the Adult Adoption Act may decline jurisdiction if it is determined that circumstances make it an inconvenient forum. The court can then transfer the matter on any conditions that are just. NMSA Sec. 40-14-4(B).

Guardian ad litem/counsel

In a *minor* adoption, upon a motion of a party or upon the Court's own motion, a *guardian ad litem* may be appointed for the adoptee or any incompetent or any child subject to the proceeding. NMSA Sec. 32A-5-33. In any contested proceeding, the court shall appoint a *guardian ad litem* for the adoptee. NMSA Sec. 32A-5-33.

In an *adult* adoption, upon the motion of a party or upon the Court's own motion, the court may appoint an attorney for the adoptee whom the court finds incompetent. The costs may be assessed against the parties as the Court determines. NMSA Sec. 40-14-11.

Terminating the parent-child relationship

Remember: If the child is subject to the Indian Child Welfare Act, there must be compliance with those laws. Also, if the child is subject to the Interstate Compact on the Placement of Children, there must be compliance with those laws.

Before a child can be adopted, the legal relationship between the child and the biological parents [or previous adoptive parent(s)] must be dissolved. The termination can be done two ways:

1. the parent voluntarily relinquishes the parental rights, and thereafter the Court accepts the relinquishment and terminates the parental rights; or
2. an involuntary termination after hearing.

Relinquishments or termination of rights are required for the following:

1) the adoptee's mother if the matter is not a step-parent adoption by her current spouse, and

2) the adoptee's presumed father or acknowledged father.

NMSA Sec. 32A-5-17(A).

A presumed father is

1) the husband of the biological mother at the time the adoptee was born;

2) an individual who was married to the biological mother and either the adoptee was born during the term of the marriage or the adoptee was born within three hundred days after the marriage was terminated by death, annulment, declaration of invalidity or divorce; or

3) before the adoptee's birth, an individual who attempted to marry the adoptee's biological mother by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid and if the attempted marriage:

a. could be declared invalid only by a court, the adoptee was born during the attempted marriage or within three hundred days after its termination by death, annulment, declaration of invalidity or divorce; or

b. is invalid without a court order; the adoptee was born within three hundred days after the termination of cohabitation.

NMSA Sec. 32A-5-3(V).

An acknowledged father is a father who:

1) acknowledges paternity of the adoptee pursuant to the putative father registry; NMSA Sec. 32A-5-20;

2) is named, with his consent, as the adoptee's father on the adoptee's birth certificate;

3) is obligated to support the adoptee under a written voluntary promise or pursuant to a court order; or

4) has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee as follows:

a. for an adoptee under six months of age at the time of placement:

(1) has initiated an action to establish paternity;

(2) is living with the adoptee at the time the adoption petition is filed;

(3) has lived with the mother a minimum of ninety days during the two-hundred-eighty-day-period prior to the birth or placement of the adoptee;

(4) has lived with the adoptee within the ninety days immediately preceding the adoptive placement;

(5) has provided reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee's birth in accordance with his means and when not prevented from doing so by the person or authorized agency having lawful custody of the adoptee or the adoptee's mother;

(6) has continuously paid child support to the mother since the adoptee's birth in an amount at lease equal to the amount provided in NMSA Sec. 40-4-11.1, or has brought current any delinquent child support payments; or

(7) any other factor the court deems necessary to establish a custodial, personal or financial relationship with the adoptee; or

b. for an adoptee over six months of age at the time of placement:

(1) has initiated an action to establish paternity;

(2) has lived with the adoptee within the ninety days immediately preceding the adoptive placement;

(3) has continuously paid child support to the mother since the adoptee's birth in an amount at least equal to the amount provided in NMSA Sec. 40-4-11.1, or is making reasonable efforts to bring delinquent child support payments current;

(4) has contact with the adoptee on a monthly basis when physically and financially able and not prevented by the person or authorized agency having lawful custody of the adoptee; or

(5) has regular communication with the adoptee, or with the person or agency having the care or custody of the adoptee, when physically and financially unable to visit the adoptee and when not physically and financially able and not prevented by the person or authorized agency having lawful custody of the adoptee. NMSA Sec. 32A-5-3(F).

Counseling required

For good cause shown, the Court may waive any or all counseling requirements. NMSA Sec. 32A-22(A).

When counsel? Counseling shall occur prior to the consent to adoption or the relinquishment of parental rights. NMSA Sec. 32A-5-22 (A).

Who to be counseled?

a. the adoptee if ten years of age or older;

b. the adoptee's parent who is consenting to the adoption or relinquishing parental rights;

c. in a step-parent adoption or second parent adoption, when the parties have not been married two years or more, then both the consenting parent and the petitioning step-parent. NMSA Sec. 32A-5-22 (B).

Content and form of the counseling

All counseling shall be in the primary language of the individual being counseled. NMSA Sec. 32A-5-22(E).

A counseling narrative shall be prepared by the counselor pursuant to department regulation and shall thereafter be attached to the consent or relinquishment that is signed. NMSA Sec. 32A-5-22(F). A copy of the counselor's certification shall be attached to the narrative. NMSA Sec. 32A-5-22(H).

A person outside of the state may receive counseling from a person who possesses qualifications equivalent to a person qualified to perform counseling by the state of New Mexico. In this case, the person's qualifications to perform the counseling shall be attached to the counseling narrative. NMSA Sec. 32A-5-22(H).

Counseling Specifics NMSA Sec. 32A-5-22

a. An adoptee who is ten years of age or older:

Content:

1) the adoptee's understanding of the adoption process, the consequences of the adoption and alternatives to the adoption;

2) the adoptee's feelings and wishes regarding the adoption;

3) the adoptee's readiness for the adoption; and

4) any other issues relevant to the adoption, given the specific circumstances of the adoption.

Form: a minimum of two separate counseling sessions with at least one of the sessions to be conducted without the presence of the adoptee's parent or guardian or adoption petitioner.

b. An adoptee's parent consenting to the adoption or relinquishing parental rights:

Content:

1) on alternatives to the adoption, and

2) the consequences of the adoption.

Form:

1) for a minor parent, a minimum of two separate counseling sessions with at least one of the sessions to be conducted without the presence of the minor parent's parent or guardian or adoption petitioner

2) for an adult, counseled individually a minimum of one session.

c. In a step-parent or second parent adoption, the custodial parent and step-parent/second parent:

Content:

1) alternatives to adoption;

2) consequences of the adoption;

3) child custody; and

4) child support.

Form:

1) for a minor parent, a minimum of two separate counseling sessions with at least one of the sessions to be conducted without the presence of the minor parent's parent or guardian or adoption petitioner

2) for an adult, counseled individually a minimum of one session.

Consents Required NMSA Sec. 32A-5-17

Consent to the adoption of a minor are required of the following:

1. the adoptee if fourteen years of age or older, except when the court finds that the adoptee does not have the mental capacity to consent;
2. the adoptee's mother or father if a step-parent or second parent adoption;
3. the adoptee's proposed prospective parent;
4. the department or the agency to whom the adoptee has been relinquished that has placed the adoptee for adoption or the department or the agency that has custody of the adoptee; provided, however, that the court may grant the adoption without the consent of the department or agency if the court finds the adoption in the best interests of the adoptee and that the withholding of consent by the department or the agency is unreasonable; and
5. the guardian of the adoptee's parent when, pursuant to provisions of the uniform Probate Code, that guardian has express authority to consent to adoption.

NMSA Sec. 32A-5-17(A) (1993).

A consent executed by a parent who is a minor shall not be subject to avoidance or revocation solely by reason of the parent's minority. NMSA Sec. 32A-5-17(C)(1993).

Indian children: Remember, the consent for an Indian child must be from an Indian custodian as required under the Indian Child Welfare Act of 1978. NMSA Sec. 32A-5-17(B)(1993).

Relinquishment of Parental Rights

Voluntary parental relinquishments

A parent may voluntarily relinquish his/her parental rights, provided that 1) an adoption proceeding is imminent, or 2) that good cause exists and that relinquishment is in the child's best interests. (See NMSA Sec. 32A-5-24(C). The consent must be in writing and contain the following:

1. The date, place and time of execution;
2. the date, and place of birth of the adoptee and any names by which the adoptee has been known;
3. if the parent is also consenting to the adoption, then the identity of the adoption petitioner, if known, or, if an independent adoption, and the petitioner is unknown, how the petitioner was selected by the consenting party;
4. the name and address of the agency or department;

5. that the person executing the document has been counseled, as provided in NMSA Sec. 32A-5-22, by a certified counselor of the person's choice and with this knowledge the relinquishing/consenting parent is voluntarily and unequivocally consenting to the adoption (see below on counseling requirements);

6. that the signing parent has been advised of the legal consequences of the relinquishment/consent whether by independent legal counsel or by a judge;

7. if the adoption is a closed adoption, that the parent understands that the court will not enforce any contact, regardless of any informal agreements that have been made between the parties;

8. that the signing parent understands that the relinquishment/consent can not be withdrawn;

9. that the parent signing the relinquishment/consent has received or been offered a copy of the consent or relinquishment;

10. that a counseling narrative has been prepared pursuant to department regulations by the counselor who did the required counseling, and it is attached to the consent/relinquishment;

11. that the person who performed the counseling meets the requirements set forth in the Adoption Act; and

12. that the parent executing the relinquishment/consent waives further notice of the adoption proceedings. NMSA Sec. 32A-5-21(A).

Note that if the primary language of the parent relinquishing/consenting is not English, then the consent/relinquishment must also include that the document was read and explained to the signer in their language and that they fully understood. NMSA Sec. 32A-5-21(C).

No consent or relinquishment is valid if executed within 48 hours after the child's birth. NMSA Sec. 32A-5-21(G).

A consent/relinquishment of a parent of an Indian child must meet the requirements of the federal Indian Child Welfare Act of 1978. NMSA Sec. 32A-5-21(H).

Fraud is the only stated ground for allowing the withdrawal of the parental relinquishment/ consent to an adoption. NMSA Sec. 32A-5-21(I). See also, *State ex rel. Human Services Department in re Kira M., 118 N.M. 563, 883 P.2d 149 (1994).*

Who takes the consent?

Consents are to be signed before and approved on the record by a judge who has jurisdiction over adoption proceedings within or without the state and who is in the jurisdiction where the child is present or in which the parent resides at the time of the signing. NMSA Sec. 32A-5-23.

Other consents

Consent of the 14-year-old or older adoptee:

The consent shall be in writing and contain:

1. The date, place and time of execution;

2. the date, and place of birth of the adoptee and any names by which the adoptee has been known;

3. the name of the adoption petitioner(s);

4. that the adoptee has been counseled regarding the consent pursuant to department regulations;

5. that the adoptee has been advised of the legal consequences of the consent;

6. that the adoptee is voluntarily and unequivocally consenting to the adoption;

7. that the consent can not be withdrawn;

8. that a counseling narrative has been prepared pursuant to department regulations and is attached to the consent; and

9. that the person who performed the counseling meets the requirements set forth in the Adoption Act. NMSA Sec. 32A-5-21(B).

Consent of the Agency or Department

The consent shall contain:

1. The date, place and time of execution;

2. the date, and place of birth of the adoptee and any names by which the adoptee has been known;

3. the name of the adoption petitioner(s); and

4. the consent of the agency or department. NMSA Sec. 32A-5-21(E).

Involuntary terminations

A proceeding to terminate parental rights is proper in the county where the child is physically present or in the county from which the child was placed. NMSA Sec. 32A-5-16A. The adoptive parent(s) shall verify the document.

The petition or motion to involuntarily terminate parental rights shall contain:

1. the date, place of birth and marital status of the child/adoptee;

2. the grounds for termination and the facts and circumstances supporting the grounds for termination;

3. the names and addresses of the person to whom transfer of custody is sought;

4. the basis for the Court's jurisdiction;

5. that the petition or motion is in anticipation of adoption;

6. the relationship or legitimate interests of the applicant to the child; and

7. whether the child is an Indian child, and if so:

    a. the tribal affiliation of the child's natural parents;

    b. the specific actions taken by the moving party to notify the parents' tribe and the results of the contacts, including the names, addresses, titles, and telephone numbers of the persons contacted. Copies of any correspondence with the Indian Tribe shall be attached as exhibits to the petition; and

    c. what specific efforts were made to comply with the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the appropriate Indian tribes.

NMSA Sec. 32A-5-16(B).

Service of the request to terminate parental rights shall be served as set forth in NMSA Sec. 32A-5-16(C). If a parent's location is unknown, a motion may be filed to obtain a court order to allow publication of service. See also NMSA Sec. 32A-1-13(C). A notice of pendency of action can be published instead of the entire adoption petition and termination motion.

***Guardian ad litem* for the child/prospective adoptee**

When there is a contested involuntary termination, the court shall appoint a *guardian ad litem* for the child. NMSA Sec. 32A-5-16(F).

Appointment of counsel for natural parent(s)

The court shall upon request appoint counsel for an indigent parent. NMSA Sec. 32A-5-16(E).

Hearing time:

The hearing on involuntary termination of parental rights must be at least thirty days after service on the parent or the completion of publication. NMSA Sec. 32A-5-16(G).

Criteria for involuntary termination

The best interests of the child -- physical, mental and emotional-- and the child's needs shall be the primary consideration. NMSA Sec. 32A-5-15(A).

Parental rights shall be terminated when:

1. the child has been abandoned by the parents;
2. the child is a neglected or abused child and the court finds that the conditions and causes of neglect and abuse are unlikely to change in the foreseeable future; or
3. the child has been placed in the care of others, including care by other relatives, either by court order or otherwise and the following conditions exist:

a. the child has lived in the home of others for an extended period of time;
b. the parent-child relationship has deteriorated;
c. a psychological parent-child relationship has developed between the substitute family and the child;
d. if the court deems the child of sufficient capacity to express a preference, the child no longer prefers to live with the natural parent;
e. the substitute family desires to adopt the child; and
f. a presumption of abandonment created by the conditions described in sub-paragraphs "a" through "e" of this paragraph has not been rebutted.

NMSA Sec. 32A-5-15(B). If the court finds that all of the conditions of subparagraphs "a" through "e," above, exist, a rebuttable presumption of abandonment is created. NMSA Sec. 32A-5-15(C).

The grounds for termination shall be proved by clear and convincing evidence. NMSA Sec. 32A-5-16(H). However, if the child is an Indian child, then the standard of proof is "beyond a reasonable doubt" and must meet the requirements of the Indian Child Welfare Act of 1978.

Implied consent or relinquishment

The court can infer an implied consent or relinquishment of parental rights when a parent, without justifiable cause, has:

1. left the adoptee without provision for the child's identification for a period of fourteen days; or
2. left the adoptee with others, including the other parent or an agency, without provisions for support and without communication for a period of:
    a. three months if the adoptee was under the age of six years at the commencement of the three-month period; or
    b. six months if the adoptee was over the age if six years at the commencement of the six-month period. NMSA Sec. 32A-5-18.

The parent must be served with the notice of the time and place of the hearing at which the consent/relinquishment may be implied. NMSA Sec. 32A-5-18(B).

The implied consent or relinquishment shall have the same effect as though the consent or relinquishment was given voluntarily. NMSA Sec. 32A-5-18(B).

Persons whose consents or relinquishments are not required

Consents or relinquishments are not needed from:

1. A parent whose rights with reference to the adoptee have been terminated pursuant to law;
2. a parent who has relinquished the child to an agency for adoption;
3. a biological father of an adoptee conceived as a result of rape or incest;
4. a person who has failed to respond when given notice pursuant to the provisions of the adoption statutes; or
5. an alleged father who has failed to register with the putative father registry within ten days of the child's birth and is not otherwise an acknowledged father. NMSA Sec. 32A-5-19. *See* NMSA Sec. 32A-5-20 on the procedures for a father to register with the putative father registry.

Order terminating parental rights

The order of involuntary termination of parental rights terminates all legal rights and duties of the parent for the child. However, this does not affect the child's right of inheritance through the former parent. NMSA Sec. 32A-5-16(J).

Open Adoption Agreements

Open adoptions are ones where the birth parents (or prior parents, and relatives of the birth parents) and the adoptive parents agree in writing to have some contact with each other, or with the adoptee. NMSA Sec. 32A-5-35(A).

The contact may range from exchanging letters, to telephone calls, to meeting, exchanging photographs, and to having visits between the adoptee and the birth or former parent(s) or relatives.

The agreement is presumed to be in the child's best interests absent a finding to the contrary. NMSA Sec. 32A-5-35(A).

Open Adoption Guardian-ad-Litem for the adoptee: The court may appoint a *guardian ad litem* for the adoptee when visitation between the biological family and the adoptee is included in the open adoption agreement. If the adoptee is fourteen years of age or older, the court may appoint an attorney for the child. NMSA Sec. 32A-5-35(B).

The wishes of the child are to be considered but shall not control the court's findings in the best interest of the adoptee. NMSA Sec. 32A-5-35(C).

THE ADOPTION

Once the natural parents' rights have been terminated either by accepting their voluntary relinquishment, or by involuntary termination, the process of the adoption may proceed. The process is the same for Department and private adoptions.

Petition for Adoption

The prospective parents file a petition for adoption. NMSA Sec. 32A-5-26. In some cases, the petition for adoption will have been combined with the petition seeking relinquishment/involuntary termination, rather than in a separate pleading. The petition must be verified. NMSA Sec. 32A-5-26.

Contents of Petition

The Petition shall allege all the criteria set forth in NMSA Sec. 32A-5-26:

A. the name, age and place and duration of residence of the petitioner, and if married, the place and date of marriage, the date and place of any prior marriage, separation or divorce, and the name of any present or prior spouse;

B. the date and place of birth of the adoptee, if known;

C. the places where the adoptee has lived within the past three years and the names and addresses of the persons with whom the adoptee has lived, unless the adoptee is in the custody of an agency or department, in which case the petitioner shall state the name and address of the agency or the department's county office from which the child was placed;

D. the birth name of the adoptee, any other names by which the adoptee has been known and the adoptee's proposed new name, provided that in the case of an agency adoption, if the petitioner and the biological parents have not agreed to the release of the adoptee's identity to the other person, the birth name and other names by which the adoptee has been known shall be filed with the Court as a separate document at the time the petition is filed;

E. where the adoptee is residing at the time of the filing of the petition and, if the adoptee is not living with petitioner, when the adoptee will commence living with petitioner;

F. that the petitioner desires to establish a parent and child relationship with the adoptee and that the petitioner is a fit and proper person able to care and provide for the adoptee's welfare;

G. the existence of any court orders, including placement orders, that are known to petitioner and that regulate custody, visitation, or access to the adoptee, copies of which shall accompany and be attached to the petition as exhibits;

H. the relationship, if any, of Petitioner to the adoptee;

I. the name and address of the placing agency, if any;

J. the names and addresses of all persons from whom consents or relinquishments are required, attaching copies of those obtained and alleging the facts that excuse or imply the consents or relinquishments of others; provided that if the petitioner has not agreed to the release of his identity to the parent or if the parent has not agreed to the release of his identity to the petitioner; the names and addresses of all persons from whom consents or relinquishments are not required shall be filed with the court as a separate document at the time the petition for adoption is filed;

K. whether the adoption will be an open adoption, pursuant to the provisions of NMSA Sec. 32A-5-25;

L. whether the consent of the child's father is alleged to be unnecessary, the results of a search of the putative father registry;

M. whether the adoptee is an Indian child, and, if so, the petition shall allege:

(1) the tribal affiliation of the adoptee's parents;

(2) what specific actions have been taken and by whom to notify the parents' tribe and the results of the contact, including the names, addresses, titles and telephone numbers of the persons contacted. Copies of any correspondence with the Indian tribe shall be attached as exhibits to the petition; and

(3) what specific efforts were made to comply with the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the appropriate Indian tribe;

N. whether the adoption is subject to the Interstate Compact on the Placement of Children, NMSA Sec. 32A-11-1, and, if so, a copy of the interstate compact form indicating approval shall be attached as an exhibit to the petition;

O. whether the adoptee is foreign-born and, if so, copies of the child's passport and United States visa and of all other documents demonstrating that the adoptee is legally free for adoption, including a certificate from the United States secretary of state that certifies that the adoption is a convention adoption;

P. whether the adoption is a Convention adoption and, if so, the petition shall allege:

(1) that the country in which the child has been residing is a party to the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption;

(2) that the agency or person who is providing the adoption service has been approved as an accrediting entity; and

(3) that the certificate issued by the United States secretary of state that certifies the adoption as a Convention adoption has been filed with the court; and

Q. the name, address and telephone number of the agency or individual who has agreed to conduct the post-placement report in accordance with NMSA Sec. 32A-5-31, if different than the agency or individual who prepared the pre-placement study in accordance with NMSA Secs. 32A-5-13;
32A-5-26.

Notice of the Petition

Unless previously waived in writing, the petition for adoption is served on the following:

1. The Department, by providing the Court Clerk with a copy for service on the Department by the Court;
2. any person, agency or institution whose consent or relinquishment is required by NMSA Sec. 32A-5-17, unless notice has been previously waived;
3. any acknowledged father of the adoptee;
4. the legally appointed custodian or guardian of the adoptee;
5. the spouse of any petitioner who has not joined in the petition;
6. the spouse of the adoptee;
7. the surviving parent of a deceased parent of the adoptee;
8. any person known to petitioner having custody or visitation with the adoptee under a court order;
9. any person in whose home the child has resided for at least two months within the preceding six months;
10. the agency or individual authorized to investigate the adoption under NMSA Sec. 32A-5-13; and
11. any other person designated by the court. NMSA Sec. 32A-5-27(A). Rules of Civil Procedure for District Courts shall apply for how to serve. NMSA Sec. 32A-5-27(F). If a parent can not be found, the Court may issue an order for service by publication. NMSA Sec. 32A-5-27(F).

Note: If the child is an Indian child, then notice shall also be given on the appropriate Indian tribe and on an Indian custodian pursuant to the provisions of the federal Indian Child Welfare Act of 1978. NMSA Sec. 32A-5-27(D).

Contents of the Notice

The notice must state that responses must be made to the petition within twenty days, except for the agency preparing the post-placement report, which agency has twenty days from the date the report is completed. NMSA Sec. 32A-5-27(E).

Placement issues

The adoptee must be placed in the home of the prospective adoptive parents prior to the adoption by:

1. the department;
2. by an appropriate public authority of another state;
3. by an agency; or
4. pursuant to a court order, as provided in NMSA Sec. 32A-5-13,

except: NMSA Sec. 32A-5-12(B)

a. if a step-parent of the adoptee seeks to adopt and prior to the filing of the petition for adoption petition, the adoptee has lived with the step-parent for at least one year after the marriage of the step-parent to the custodial parent and the family has received counseling, as required in NMSA Sec. 32A-5-22 [step-parents married over one year but less than 2 years];

b. a relative within the fifth degree of consanguinity to the adoptee or that relative's spouse seeks to adopt the adoptee, and prior to the filing of the adoption petition, the adoptee has lived with the relative or relative's spouse for at least one year; or

c. a person designated to care for the adoptee in the will of the adoptee's deceased parent seeks to adopt the adoptee, and prior to the filing of the adoption petition, the adoptee has lived with that person for at least one year.

Pre-placement Study

Prior to obtaining a placement order, the pre-placement study, if one is required, must be filed with the Court. NMSA Sec. 32A-5-13(A).

The pre-placement study must have been done within one year immediately prior to the date of placement. NMSA Sec. 32A-5-13(B).

Request for placement

The petition or motion for placement shall contain all the allegations required by NMSA Sec. 32A-5-13(F).

Effect of placement order

The petitioner, after obtaining the placement order, shall have physical custody and control of the adoptee, and shall be responsible for the care, maintenance and support of the adoptee, including all necessary medical, dental, psychological or surgical treatment, pending the further order of the court. NMSA Sec. 32A-5-29.

Other Requirements to be met prior to finalization of adoption

1. *Criminal records check* nationwide on the petitioners and on other adults residing in the prospective adoptive parents' household. NMSA Sec. 32A-5-14.1. A check for *record of abuse or neglect* must also be done by the Children, Youth, and Families Department. A form is available to request same.

2. *Post-placement Report*, if one is required. For contents of the report see NMSA Sec. 32A-5-31. However, under NMSA Sec. 32A-5-12(B), the report is not required if:

a. a step-parent of the adoptee seeks to adopt and prior to the filing of the petition for adoption petition, the adoptee has lived with the step-parent for at least one year after the marriage of the step-parent to the custodial parent and the family has received counseling, as required in NMSA Sec. 32A-5-22 [step-parents married over one year but less than 2 years];

b. a relative within the fifth degree of consanguinity to the adoptee or that relative's spouse seeks to adopt the adoptee, and prior to the filing of the adoption petition, the adoptee has lived with the relative or relative's spouse for at least one year; or

c. a person designated to care for the adoptee in the will of the adoptee's deceased parent seeks to adopt the adoptee, and prior to the filing of the adoption petition, the adoptee has lived with that person for at least on year.

3. *Accounting of all fees and costs* of anything of value made or agreed to be made by or on behalf of the petitioner in connection with the adoption. The accounting shall be signed under penalty of perjury, shall be itemized in detail and include the dates of payment, and the names and addresses of each recipient. The "approved" payments are detailed in NMSA Sec. 32A-5-34 . In a Department adoption, this is usually included in the post-placement report.

4. The requirement of at least *ninety days* passing from the time the adoption petition is filed to the time the final decree is entered, **except** the court may shorten or waive this requirement in cases where the child is adopted by a step-parent, a relative or a person named in the child's deceased parent's will. NMSA Sec. 32A-5-36 (F)(6).

5. The adoptee has been *placed* with the petitioner for a period of ninety days if the adoptee is under the age of one year at the time of placement, or for a period of one hundred eighty days if the adoptee is one year of age or older at the time of placement, unless for good cause shown, the requirement is waived by the court NMSA Sec. 32A-5-36 (F)(2).

Final Adoption Order [See NMSA Sec. 32A-5-26]

The final adoption order shall be issued if the petitioner has proved by clear and convincing evidence that:

1. the court has jurisdiction to enter a decree of adoption affecting the adoptee;
2. the adoptee has been placed with the petitioner for a period of ninety days if the adoptee is under the age of one year at the time of placement, or for a period of one hundred eighty days of the adoptee is one year of age or older at the time of placement, unless for good cause shown, the requirement is waived by the court;
3. all necessary consents, relinquishments, terminations or waivers have been obtained;
4. the post-placement report, if required, has been filed with the court;
5. service of the petition for adoption has been made or dispensed with as to all persons entitled to notice;
6. at least ninety days have passed since the filing of the petition, except the court may shorten or waive this period of time in cases where the child is being adopted by a step-parent, a relative, or a person named in the child's deceased parent's will;[1]
7. the petitioner is a suitable adoptive parent and the best interests of the adoptee are served by the adoption;
8. if visitation between the biological family and the adoptee is contemplated, that the visitation is in the child's best interests;
9. if the adoptee is foreign born, the child is legally free for adoption and a certificate issued by the United States secretary of state that certifies the adoption as a convention adoption has been filed with the court;
10. that the results of the criminal records check have been received and considered;
11. if the adoptee is an Indian child, the requirements set forth in the federal Indian Child Welfare Act of 1978 have been met;
12. when the child is an Indian child, the placement preferences set forth in the federal Indian Child Welfare Act of 1978 or the placement preferences of the appropriate Indian tribes have been followed or, if not followed, good cause for noncompliance has been clearly stated and supported, as required by the federal Indian Child Welfare Act of 1978 and provision has been made to ensure that the Indian child's cultural ties to the Indian child's tribe are protected and fostered;
13. if the adoption involves the interstate placement, the requirements of the Interstate Compact on the Placement of children have been met.
14. The Court shall make findings with respect to each allegation in the petition. NMSA Sec. 32A-5-36(G).

If all of the requirements above are not met, the petition for adoption shall be denied and the court shall determine in the best interests of the child, who shall have custody of the child. NMSA Sec. 32A-5-36 (H).

The adoption order shall not include any reference to the adoptee's prior name(s) or the names of former parents. NMSA Sec. 32A-5-36(I).

[1] Some jurisdictions will waive the 90-day waiting period based on the equities of the situation.

Deadline to enter final adoption order NMSA Sec. 32A-5-36(J).

The final order shall be entered within 6 months of the filing of the adoption petition if the adoptee is under age one year at the time of the filing, or within twelve months if the adoptee is one year of age or older at the time the petition for adoption is filed.

The court may upon its own motion or the request of a party, extend the time.

Adoptee status after adoption NMSA Sec. 32A-5-37.

The adoptee and the petitioner shall sustain the legal relation of parent and child as if the adoptee were the biological child of the petitioner and the petitioner were the biological parent of the child. The adoptee shall have all the rights and be subject to all the duties of that relation, including the right of inheritance from and through the petitioner, and the petitioner shall have all the rights and be subject to all the duties of that relation, including the right of inheritance from and through the adoptee.

But the judgment of the court terminating the parental rights of a biological parent does not affect the child's right of inheritance through the former parent. NMSA Sec. 32A-5-16(J).

New birth certificates NMSA Sec. 32A-5-38.

New birth certificates may be issued by the state vital statistics office where the adoptee was born, upon application. For foreign born persons, the request is sent to the state registrar of vital statistics. For a foreign born adoptee, the court shall make findings if requested on the date and place of birth of the adoptee to be included with the application for a new birth certificate.

CHECKLIST FOR PRIVATE ADOPTION PROCEDURES

1. Adoption Petition is filed. Notice is given as required in NMSA Sec. 32A-5-27.

2. A pre-placement study is conducted, if required under NMSA Sec. 32A-5-14.

3. A criminal records check on the adoptive parents is filed. NMSA Sec. 32A-5-14.1

4. A motion for a placement order is filed, placing the legally adoptee(s) with the prospective adoptive parents until final determination on the adoption petition.

5. The order for placement pending the outcome is submitted for the Judge's approval.

6. A motion is filed to terminate the parental rights of the natural parents either by litigated hearing or by accepting the relinquishment(s) of the natural parents.

7. If a natural parent is going to voluntarily relinquish, he or she must have counseling (NMSA Sec. 32A-5-22 NMSA 1978) and a written counseling narrative prepared by an individual

authorized to do so. Then, a time to appear before the judge is arranged so that the individual can sign the relinquishment in the presence of the judge. The relinquishment can not be signed until the child is at least 48 hours old. NMSA Sec. 32A-5-21(F).

8. If a formal hearing is needed to terminate parental rights is needed, then a motion is filed with a request for setting on the motion.

9. Once both parents have either voluntarily relinquished, with Court approval and acknowledgment by order, or when termination of parental rights results from formal hearing, then a request is submitted for setting the final adoption hearing.

10. A post-placement study, if needed under NMSA Sec. 32A-5-31, is conducted and the report filed.

11. Adoptee's consent to the adoption is needed if the child is 14 years of age or older. If it is a step-parent or second parent adoption, consent is also required of the adoptee's current parent. Before the consent, there must be counseling as to the legalities of the consent. A child of 10 and older must still be counseled, even though their consent is not required unless they are 14 years of age or older.

12. The accounting of fees and costs associated with the adoption is filed. NMSA Sec. 32A-5-34.

13. The final adoption hearing is held. The final order MUST NOT include any reference to the adoptee's former name or the former parents' names. NMSA Sec. 32A-5-36(I). It should include a statement that a new birth certificate may issue from the vital records department of the state where the adoptee was born, and that the matter is dismissed. If there was a written open adoption agreement between the adoptive parents and the natural parent(s), it shall be attached as an exhibit to the final order and the order should state that the Court retains jurisdiction over the agreement. NMSA Sec. 32A-5-35.

14. The accounting of fees and costs associated with the adoption is filed. NMSA Sec. 32A-5-34.

Carolyn J. Waters, Esq., is an attorney practicing family law in her law firm Baca Waters, P.C.

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT COURT

IN THE MATTER OF THE ADOPTION
PETITION OF_____,

Petitioners.

Case No. SA-
Judge

CERTIFICATE OF REQUIREMENTS

I, _____, certify that prior to requesting a setting on the Petition
(name of attorney)
for Adoption in the herein matter, all of the basic requirements listed below have been met:

	Activity	Date filed
1	Natural Mother Consent/no consent needed	Natural mother relinquishment filed 8/29/06
2	Natural Father consent/no consent needed	Natural father relinquishment filed _____ (Date) OR No father with constitutional rights identified, confirmed in _ _____ order
3	Child's Consent (32A-5-17) if 14 years or older	
4	Child's counseling narrative (32A-5-22) if 10 years old or older	
5	Petitioners counseling if required	
6	Post-placement Home Study for Petitioners	
7	Criminal records check for Petitioner(s) [32A-5-14(A) & 32A-5-14.1]	

Respectfully submitted,

_____
Attorney for Petitioners

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Appointment of *Guardian Ad Litem* in Family Court Proceedings

By Honorable Gerard J. Lavelle, Second Judicial District, Division XI

Chapter 40 of New Mexico Statutes Annotated (NMSA)1978 provides for the appointment of a Guardian Ad Litem (GAL) in several different instances in Family Court proceedings.

Contested Custody Proceedings

In a contested custody proceeding, "the court may appoint an attorney at law as guardian ad litem...to appear for and represent the minor children. Expenses, costs and attorney's fees for the guardian ad litem may be allocated among the parties as determined by the Court". **NMSA 1978 §40-4-8. A.** (Emphasis added).

(Note: Appointment of a GAL is typically made in a very small percentage of contested custody cases, usually reserved for only the most contentious and difficult cases. Factors to consider in making an appointment and examples of situations where a GAL might assist the Court will be discussed below).

Rule 1-053.3 NMRA outlines the role of the GAL in contested custody proceedings, the factors the court should consider in determining whether an appointment should be made, and the duties to be performed by a GAL after appointment.

"The guardian ad litem serves as an arm of the Court and assists the court in discharging its duty to adjudicate the child's best interests," **Rule 1-053.3. A. NMRA**.

The Order appointing the GAL "shall specify the guardian ad litem's role, tasks, duties, any limitations, the reasons for the appointment and the duration of the appointment." **Rule 1-053.3 B. NMRA.**

"The guardian ad litem is a 'best interests' attorney who shall provide independent services to protect the child's best interests without being bound by the child's or either party's directive or objectives and who shall make findings and recommendations". **"Rule 1-053.3.C. NMRA**

While the appointment of a GAL can be a useful mechanism in assisting a Court in resolving a custody case, note the "Prohibited Delegation" language of **Rule 1-053. 3D. NMRA**: "In no event shall the court delegate the ultimate determination of the child's best interests, unless the parties have agreed to arbitrate such issues under Section **40-4-7.2 NMSA 1978.**"

Rule 1-053.3.E. NMRA lists seventeen factors the court may consider in determining whether a GAL should be appointed, including "any other relevant factors," in addition to the sixteen specific factors mentioned in the Rule.

Factors. In determining whether an appointment will be made, the court may consider relevant factors, including:

(1) the wishes of the parents or other parties;
(2) the age of the child;
(3) the contentiousness of the parties or other dynamics affecting the child, including past or present mental health issues of a party or a household member;
(4) the extent to which the appointment will assist the court by providing factual information useful to the court in determining the child's best interest;
(5) the ability of the parties to pay;
(6) the views or concerns expressed by the child;
(7) the requests for extraordinary remedies, including supervised visitation;
(8) a proposed relocation;
(9) the likelihood that the child will be called as a witness or be examined by the court in chambers;
(10) past or present substance abuse, sexual abuse, emotional abuse or domestic abuse by, or to, a party, the child or a household member;
(11) disputes as to paternity;
(12) interference, or threatened interference, with custody or parenting time, including abduction;
(13) special physical, educational or mental health needs of the child;
(14) inappropriate adult influence on, or manipulation of, the child;
(15) the extent to which the litigation process is harmful to the child;
(16) whether the child's needs can be protected through the limitation of the appointment to a specific issue; and
(17) any other relevant factors.

Examples of "other relevant factors" might include:

a. The court's lack of information on an issue due to the parties' failure to call the appropriate witnesses at hearings;
b. The court's desire to insulate certain professionals (e.g. therapists, school personnel, medical personnel) from having to be called as witnesses at hearings, unless absolutely necessary, while also requiring the factual information these witnesses might provide;
c. The court's desire to insulate the child from having to be interviewed in camera. (**See NMSA 1978 § 40-4-9C.**)

Rule 1-053.3.F. NMRA outlines several specific duties of the guardian ad litem, "in addition to other duties stated in the order" appointing the GAL. The court may direct the GAL to perform other specific duties in addition to those listed in the Rule.

Duties. The guardian ad litem shall have the following duties, in addition to other duties stated in the order:

(1) if the child is age six (6) or older, interviewing the child face-to-face outside the presence of both parents and counsel; interviewing both parents in conformity with **Rule 16-402 NMRA**; interviewing any therapist for the child after obtaining the necessary authorization for the release of information; interviewing other persons at the guardian ad litem's or court's discretion after obtaining any necessary authorizations for the release of information and reviewing relevant records;
(2) determining the child's wishes, if appropriate;

(3) serving a written report of investigation and separate written recommendations to all parties and counsel at least ten (10) days before the recommendations are filed with the court, except in the case of emergency; and
(4) filing the recommendations with the court.

Examples of "additional" duties the court might request in a specific case include:
a. Interviewing a child's school teacher, coach, scout leader, etc., to obtain factual information to resolve a "he said/she said" dispute in terms of whether the child is faithfully attending to school assignments and/or extracurricular activities;
b. Doing a home visit to obtain information to resolve an "inadequate housing" claim;
c. Obtaining school transcripts to determine the child's attendance record and academic standing at school;
d. Interviewing a school counselor to obtain information regarding whether the child has been referred for mental health counseling outside of school.

(Query: In view of the **Rule 1-053.3.F.** provision that the GAL shall perform certain duties, can a court require that the GAL only perform certain specific "additional" duties – in lieu of the duties listed in **Rule 1-053.3.F** -- to limit the GAL'S involvement in a case? Note that **Rule 1-053.3.B.** provides that the court can list "any limitations" in the order of appointment. Also **Rule 1-053.3.E (16) NMRA** provides that the court must consider "whether the child's needs can be protected through the limitation of the appointment to a specific issue." Such a limitation on GAL duties could reduce the expense of the GAL process considerably.)

Rule 1-053.3.G. NMRA addresses the procedures for filing, accepting or objecting to a GAL's recommendations. Objections to the GAL's recommendations must be filed within ten (10) days after the filing of the recommendations and must identify the specific portions of the recommendations to which the party objects. The court will set a hearing on the objections.

Rule 1-053.3 H. NMRA lists the GAL's duties to the child, including explanation of the role of the GAL, informing the child that the GAL may use the information obtained from the child to assist the court and considering the child's objectives.

(Note: Since the GAL is a "best interests" attorney for the child, the GAL should also advise the child that the GAL recommendations may not exactly reflect the child's preferences. See **Rule 1-053.3.C NMRA** wherein the GAL is described as an "attorney who shall provide independent services...without being bound by the child's or either party's directives or objectives."). (Emphasis added).

Rule 1-053.3 I. NMRA addresses the confidential nature of communications between the GAL and the child, citing the Rules of Professional Conduct as the standard for prohibiting disclosure of a child's confidential communication as if the child were in an attorney-client relationship with the GAL.
(Note: Often the child does not want the GAL to expressly state in court the views, concerns or preferences the child has expressed confidentially to the GAL. The court can assist the GAL in protecting this confidentiality by simply asking: "In making your recommendations have you considered the views, concerns and preferences expressed by the child?")

1-053.3. J. NMRA gives the GAL the right to call and examine witnesses at hearings. (Note: Courts typically require the GAL to present recommendations in the form of testimony or a narrative report at hearings, subject to examination by the parties or their counsel as to the basis for the GAL's recommendations).

Rule 1-053.3. K. provides the court with the authority to state the GAL's retainer, hourly rate, billing practices and allocation of fees and costs as between the parties. (Note: Nothing in the rule compels the GAL to accept an appointment on the terms set by the Court).

Dissolution of Marriage Proceedings - "Insane Spouse"

NMSA § 40-4-10 contemplates the appointment of a GAL for an "insane" spouse in a domestic relations proceeding and provides that "the court shall appoint an attorney at law as guardian ad litem to appear for and represent the insane spouse." (Emphasis added) (See also **NMSA § 38-4-15** for appointment of GAL to defend suit for incapacitated person; **NMSA § 45-5-401 to § 45-5-315** for guardians of incapacitated person; and **NMSA § 45-5-401 to § 45-5-432** for protection of property of persons under disability and minors).

Kinship Guardianship Proceedings

The Kinship Guardianship Act, **NMSA § 40-10B-1** et seq, provides for situations wherein the appointment of a GAL can be either discretionary or mandatory. Pursuant to **NMSA § 40-10B-9**, "the court may appoint a guardian ad litem for the child upon the motion of a party or solely in the court's discretion." However, **NMSA§ 40-10B-9** further provides that "the court shall appoint a guardian ad litem if a parent of the child is participating in the proceeding and objects to the appointment requested." (Emphasis added)

Similarly, "[i]n a proceeding in which a parent of the child has petitioned for the revocation of a guardianship established pursuant to the Kinship Guardianship Act and the guardian objects to the revocation, the Court shall appoint a guardian ad litem." **NMSA § 40-10B-9. B.** (Emphasis added)

NMSA § 40-10B-9. C. provides guidance for the payment of a GAL in a Kinship Guardianship proceeding, including the authority to order all or some of the parties to pay a reasonable fee of the GAL or to award a reasonable fee to be paid out of funds of the court.
(Note: Kinship Guardianship cases often involve limited financial resources on the part of the parties and the court, yet appointment of a GAL is often mandatory in these proceedings).
(Note: Although the Kinship Guardianship Act does not specify the role or duties of a GAL and **Rule 1-053.3 NMRA** does not specify that its provisions apply to a Kinship Guardianship Act proceeding, the court should consider whether the GAL should be appointed pursuant to the factors – except for mandatory appointments -- and should serve the same role and perform the same duties in a Kinship Guardianship Proceeding as in a contested custody proceeding.)

Uniform Parentage (UPA) Act Proceedings

NMSA § 40-11A-612. B. provides that "[t]he district court shall appoint a guardian ad litem to represent a minor or incapacitated child if the child is a party or the district court finds that the interests of the child are not adequately represented." See **NMSA §40-11A-612.A.** regarding a minor child as a party in a UPA proceeding.

(Note: Although the UPA does not specify the role or duties of the GAL or the factors for the court to consider in whether to appoint a GAL in a UPA proceeding, and **Rule 1-053.3 NMRA** does not specify that its provisions apply to a UPA proceeding, the court should consider whether the GAL should be appointed pursuant to the same factors and should serve the same role and perform the same duties in a UPA proceeding as in a contested custody proceeding.)

Collaborative Divorce

By Jennifer Rodriguez Rodgers, Esq.
and Gretchen M. Walther, Esq.

A MODEL GAINING MOMENTUM

Collaborative Divorce is an emerging model of dispute resolution which aims to support and enhance productive relating behaviors and results – needed especially for co-parenting -- by a less adversarial process than litigation, while availing to the divorcing pair the essential expertise of legal, mental health, and financial professionals. Born two decades ago, the model has developed standards and proven utility such that a Uniform Collaborative Law Act is being adopted in states across the country.

THE PROBLEM COLLABORATIVE DIVORCE SEEKS TO ADDRESS

Professionals in both the law and psychology have often expressed concern with the effects that the family court system had on families going through divorce.[40] Psychologists watched as loving parents became manipulative and combative as they competed for the affections of their child in order to win custodial rights.[41] Lawyers were alarmed as they watched their clients win the legal battles, but remain personally miserable.[42] As members of the adversarial process, they were professionally bound to try to win more assets, custody and future income. Failing to do so could lead to a case for legal malpractice, so the process that produced the most unhappiness to each party escalated in spite of the attorney's desire to find a reasonable solution.[43] It was clear that the traditional adversarial model was ill-suited to grapple with the very personal and individual issues that arose in a divorce case. Family law involves the legal management of one's most basic and personal relationships.[44] "Winning is antithetical to family harmony and healthy child development when cooperation and accommodation are priorities."[45] Attorneys and psychologists began searching for a better way to preserve personal privacy and autonomy, while encouraging the development of a legal process that would provide interpersonal solutions that minimize rather than exacerbate the current conflict. Collaborative divorce was born from this desire.

All litigation occurs in the context of disappointment and unmet expectations, but that sense is especially poignant in the divorce setting. Divorcing couples experience grief, depression, and fear in a way that most parties to litigation will never experience. Parties often experience a period of "diminished capacity" following the demise of their relationship that leaves them less able to grapple with the complex legal questions that may surround their divorce.[46] Divorcing and separating parents with opposing views on custody and property

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[40] Pauline H. Tesler & Peggy Thompson, *Collaborative Divorce*, 4 (HarperCollins 2007).
[41] *Id.* at 5.
[42] *Id.* at 6.
[43] Marsha Kline Pruett, *Mental Notes: Reform as Metaphor & Reality*, 44 Fam. Ct. Rev. 571, 572 (October 2006).
[44] Pruett, supra note 4, at 571.
[45] *Id.* at 572.
[46] Tesler, supra note 1, at 17.

division will often have those conflicts escalated rather than decreased in the court system. The family courts are courts of equity where judicial decisions are made by factual analysis on a case by case basis. Framing the facts in a light that best amplifies one party's strength as a parent can purposely or inadvertently involve the vilification of the other. Several studies have identified that the "diminished capacity to parent" that accompanies divorce is exacerbated by the adversarial model.[47] Parents may yield to their child's demands and refrain from providing appropriate discipline to avoid having that discipline characterized negatively in court.[48] The least confident parents are the most likely to be vulnerable to diminished capacity to parent and may feel exploited by a system that seems to favor the more aggressive spouse.[49] Often, that diminished capacity period will lead to years of reduced parental involvement following the divorce, both emotionally and financially, a consequence that produces devastating damage in that parent's child(ren). Instability and uncertainty in the parental relationship affects a child's development, particularly his or her ability to form satisfying relationships as an adult.[50]

The adversarial system is based on a principle that each party will be represented by counsel that can present that party's best case and its greatest evidence. This is not the case in most family law cases where the majority of parties are unable to afford counsel for the entire process.[51] Court costs to the public are also costly and inefficient in family law. Judges who are paid for their expertise in the law and skill at managing the trial process often spend more time explaining the fundamentals of civil procedure and rules of evidence to *pro se* litigants than they do in deciding the case before them.[52] Attorneys, when they can be afforded, spend much of their time in preparation for litigation and waiting in court for their case to be called. The entire focus on litigation drains both the public and personal funds of the parties from the delivery of services to families in transition. Often, parents in a family dispute must choose between having legal counsel or mental health and/or financial counseling. With the stakes so high, it is not surprising that parents choose to fund their legal battle over counseling, a decision with short term gain, but long-term damage.[53]

An insidious consequence of the adversarial divorce is the effect on the practitioner. In addition to the toll on families, family lawyers report a high level of burn-out and disillusionment. They watch how their best efforts at securing all that is legally available to their client only creates greater animosity and inability to work toward a positive solution. In the end, even when the outcome is a "win"-- in the sense that the attorney was able to secure all or most of the interests of the client -- family law attorneys reported that their client was miserable, often more unhappy with the positive result than they were in their initial interview. Eventually, these unhappy outcomes take a toll on a legal practitioner, explaining the high rate of attrition for family law practitioners who simply decide to get out of divorce law altogether.

Attorneys, mental health professionals, and families alike have desired a less adversarial divorce process that supports families rather than challenging them further. This desire has led

[47] K.D. Pruett & M. K. Pruett, *Only God decides: Young Children's perceptions of divorce and the legal system*, 38 J. of American Academy of Child and Adolescent Psychiatry 1544, 1548.
[48] *Id.*
[49] *Id.*
[50] Firestone, supra note 7 at 205.
[51] *Id.*
[52] *Id.*
[53] *Id.*

to new methods of alternative dispute resolution (ADR) tailored to the special needs of family law including mediation, arbitration, cooperative divorce and, finally, collaborative divorce.

SOME ALTERNATIVES:

Mediation: Mediation was the first attempt to fashion an ADR solution to the litigated divorce. While there are many variations, most divorce mediation models share certain characteristics. A neutral third party works directly with the divorcing couple to fashion a compromised marriage settlement agreement. The advice and recommendations of the mediator are non-binding. It is generally less expensive, more private, and more expeditious than litigated divorce.[54]

A major difference between mediation and collaborative divorce is the approach to the negotiations. Mediation utilizes the same position-based approach to bargaining that litigation does to achieving the greatest advantage. Each party identifies the most she or he can legally achieve, then approaches the other party with these demands, so that each has a strong position from which to negotiate. Collaborative divorce takes an entirely different approach with interest-based negotiations, where each party identifies the important goals that she or he hopes to achieve in the settlement, presents those goals to the other party, and then works with that party to fulfill the reasonable objectives of both parties as much as possible.[55]

Sometimes both methods are used in one case. Collaborative attorneys have sometimes chosen to engage neutral mediators when their clients in a collaborative process have reached an impasse and cannot reach an agreement on their own.[56] Mediation can be used to prevent the termination of the collaborative process. Collaborative lawyers report that a neutral mediator allowed the collaborative process to get back on track: either the parties agreed to abide by the mediator's suggestions, or they were able to fashion their own after hearing the mediator's advice.[57] Collaborative practitioners agree that all team members who can assist the parties in identifying issues and discovering solutions should be invited to participate in the collaborative mediation.[58] This differs significantly from most family court-directed mediation where attorneys are expressly forbidden from being involved in the mediation.

Cooperative Divorce: Cooperative divorce, also called little "c" divorce, is a process in which the parties sign a two-way agreement not to litigate, committing to resolving their issues privately.[59] They are each represented by an attorney who agrees to conduct the meetings aimed at reaching a settlement, and to bring in independent counselors, child specialists and financial specialists as the parties deem them necessary to reach an agreement. A key difference between this and a *collaborative* divorce, however, is that the *attorneys* do not sign a commitment

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[54] Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: a Longitudinal Evaluation*, 17 Fam. L.Q. 497, 498-499 (1984).
[55] Carrie Helmcamp, *Collaborative Family Law: a Means to a Less Destructive Divorce*, 70 Tex. Bar J. 196, 198 (February 2007).
[56] P. Oswin Chrisman, Gary G. Cox & Petra Novotna, *Collaborative Practice Mediation: Are we Ready to Serve this Emerging Market?*, 6 Pepp. Disp. Resol. L.J. 451, 451 (2006).
[57] *Id.* at 460.
[58] *Id.* at 462.
[59] Daniel M. Weitz, *Renovations to the Multidoor Courthouse*, 14 No. 1 Disp. Resol. Mag. 21, 23 (2007).

promising not to resort to litigation. This leaves open the possibility that, if there is an impasse, the attorneys may step in and suggest litigation or arbitration.[60]

Couples may choose this option for precisely that possibility: so the door to litigation is never closed if they are concerned that they will not be able to reach an agreement. However, it is that ever-present understanding that litigation is an option, that may stall their efforts to effectively reach an agreement. Attorneys who are trained and practice collaborative divorce are often reluctant to engage in cooperative divorce because they believe that a couple may never fully commit to the collaborative process if they know that there is always the possibility of taking the contentious issues to court.[61] A further deterrent to open negotiation is that the confidentiality of the collaborative process may be compromised if the attorneys can then turn around and use some of the information discovered during negotiations when determining strategy for litigation.[62]

Collaborative Divorce: Distinct from all of the alternatives, the collaborative family law process is built around three essential principles.[63] First, the couple *and their respective attorneys* sign an agreement committing them all to resolving the divorce issues without resorting to adversarial tactics or litigation.[64] If either party decides to break away from the negotiations and take the disputed matter to court, *both attorneys must withdraw* from the entire divorce and neither can have any further involvement in the case.[65] This shifts the incentives of attorneys, as well as parties, to negotiate in good faith. Second, the parties must agree to full transparency where all information is freely exchanged, because there is no formal discovery.[66] Third, negotiations must be interest-based and goal-based rather than position-based. The interests of the spouses and the children must drive the settlement discussions, instead of relying on the legal positions of the adversarial parties.[67] For example, instead of demanding that the attorney fight for the maximum spousal support that the law allows, the spouse may explain that he or she wants to remain at home with the children full time until they enter school, and then that interest is assessed against the family's financial ability to fund that goal.[68]

The collaborative model is a team approach to the divorce, because a range of expertise is needed. The team consists of the divorcing parties, their attorneys, and neutral professionals like financial specialists, child psychologists, and communications specialists, often called divorce coaches.[69] The financial specialist educates the parties on the value of their assets and debts, the likely future needs of each party, and proposed budget solutions to the financial problems that each party may experience as a result of the divorce. The child psychologist or therapist meets with the child(ren), and sometimes the parents, to assess their specific needs and concerns and then advises the parents on custodial plans that are most likely to fit the unique concerns of that

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[60] *Id.*
[61] *Id.*
[62] Helmcamp, supra note 18, at 197
[63] *Id.* at 196.
[64] Stuart G. Webb & Ronald D. Ousky, *The Collaborative Way to Divorce*, 53 (Plume 2007).
[65] Chrisman, supra note 19, at 451
[66] Helmcamp, supra note 18, at 196.
[67] *Id.*
[68] Webb, supra note 27 at 111.
[69] Helmcamp, supra note 18, at 196-197

family.[70] The divorce coach is often the most vital member of the collaborative team. This person aids the spouses in understanding and managing their emotions and the reactions of the other spouse, so that each can focus on making wise decisions about her or his future and the future of their children in the negotiation sessions.[71]

Most importantly, all decisions about the divorce are made by the divorcing spouses. The collaborative attorneys are there to advise each spouse of all their options and the consequences associated with each option so that each can make informed decisions. The decisions, therefore, are entirely in the hands of the parties, along with the responsibility to create a solution that both parties can live with. The team allows the parties to be supported by a structured process *and* full information as they negotiate. The collaborative approach usually requires three to five joint sessions before a comprehensive marital settlement agreement is reached.[72] The successful collaborative process forges a new relationship between the spouses, one where non-combative communication produces positive results. This new relationship enhances the capacity of the shifted family to resolve future issues like support modification and custodial changes without the assistance of legal professionals.[73] After all, research suggests that a good working relationship between parents may prove to be the most important factor for successful children of divorced parents.[74]

The collaborative model is not just for spouses who are getting along and can reach an agreement. Indeed, it is unnecessary for families who can reach an agreement without assistance. Most divorcing families, however, understand how catastrophic divorce can be to their sense of peace in relationships with family and friends.[75] Most people who have witnessed a nasty divorce know that its effect on the family, particularly the children, can be devastating. While there may be strong emotions on both sides, the common factor for families that choose to collaborate is a desire to shift their relationships respectfully, in spite of the current conflict.[76] Thus, the process can be a more cost-effective and satisfying investment of those community assets which will be spent on settling the matter, one way or another.

A secondary benefit of the collaborative approach has been the reduction in burn-out of family law practitioners.[77] Most collaborative divorce attorneys have a history in litigated divorces, and many continue to practice both, especially in areas where the demand for collaborative divorce is still not strong. Collaborative practitioners describe a more satisfying relationship with their clients, one that allows for lasting relationships. Further, the relationship with the other party and that party's counsel is described as more amiable and familiar. Collaborative attorneys describe the experience as more personally and professionally rewarding than litigation.[78]

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[70] Webb, supra note 27 at 90.
[71] Helmcamp, supra note 18, at 197.
[72] *Id.*
[73] *Id.*
[74] Susan Gamache, *Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce*, 65 La. L. Rev. 1455, 1456 (2005).
[75] Gary Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 Tex. Wesleyan L. Rev. 45, 49 (2004)
[76] *Id.*
[77] Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. Disp. Resol. 179, 191 (2004).
[78] *Id.* at 191-193.

The collaborative process is based on this community-building principle: the feelings of the parties are to be respected and acknowledged as an integral part of the decision-making, so that parties have a sense of self-determination and restoration through the team process.

CONCLUSION:

Several alternatives exist for divorcing couples and those in need of family dispute resolution. Collaborative divorce is an emerging model offering a distinctive emphasis and some unique benefits. The model's growth may help to reduce courts' burden of avoidable disputes. Judges are encouraged to familiarize themselves with the model and a court's anticipated role in it, should they be confronted with a collaborative case. Finally, none of these alternatives would work as a carrot toward a family's resolution, without the big stick of the court to administer justice when called upon. The rule of law, in its wisdom, is the glue which binds our social contracts, one to another, when voluntary bonds fail.

ADDITIONAL INFORMATION:

International Academy of Collaborative Professionals:
http://www.collaborativepractice.com

New Mexico Collaborative Practice Group:
http://www.nmcollaborativedivorce.org

Uniform Collaborative Law Act:
http://www.nccusl.org/nccusl/uniformact_why/uniformacts-why-ucla2.asp

Gretchen M. Walther, Esq. led the way in establishing Collaborative Law in New Mexico. Ms. Walther and Jennifer Rodriguez Rodgers both specialize in Family Law and collaborative practice at Walther Family Law. www.waltherfamilylaw.com.

Resources

1. American Academy of Matrimonial Lawyers:
   www.aaml.org
   (See, Ethics & Professionalism, by David L. Walther, Esq.)

2. Tips in co-parenting and helping children adjust:
   http://www.helpguide.org/mental/coparenting_shared_parenting_divorce.htm
   (Id.)

3. Explains divorce from a child's perspective: www.KidsHealth.org
   (Id.)

4. "Evaluation of Early Mediation Programs," 2004 California study, still cited presented to ABA Dispute Resolution Section Annual Conference:
   www.courtinfo.ca.gov/reference/documents/empprept.pdf.
   (See, New Challenges Confront Judges, by David P. Levin, Esq.)

5. Defense Finance and Accounting Service, forms and instructions:
   www.dfas.mil/garnishment/retiredmilitary.html
   (See, Dividing Military Retired Pay, by Honorable Mike Murphy, Third Jud.Dist.)

6. Bureau of Vital Records: http://www.vitalrecordsnm.org/PutFathReg.shtml
   (See, Parentage, by Geoffrey R. Nims, Esq.)

7. Pro Hac Vice registration certificate:
   http://www.nmbar.org/Attorneys/PHV/ProHacForm.pdf.
   (See, Pro Hac Vice Rule: Practice by Non-Admitted Lawyers Before State Courts) by Richard B. Spinello, Esq.)

8. Supervised exchange of children: www.ChildrenFirstNM.com
   (See, Safe Haven, by Paul L. Biderman, Esq.)

9. Planning for Parenting Time: Arizona Guide for Parents Living Apart:
   http://www.supreme.state.az.us/nav2/ParentingPlansWorkgroup/Documents/PPWguidelines.pdf
   (*See, Parenting Plans & Custody, by Martha Kaser, Esq., L.I.S.W.)*

10. "Oregon Judicial Department: Safety Focused Parenting Plan: How do I know if I should use this Plan? (In Spanish and in English).
    http://courts.oregon.gov
    (Id.)

11. Discussion and analysis of new issues in family law and related topics:
    http://lawprofessors.typepad.com/family_law/

12. New Mexico Child Support Guidelines Software Plus by David Levin: www.davidplevin.com

13. Public Employee Retirement Association forms: http://www.pera.state.nm.us/forms.html

14. Educational Retirement Board (NM) downloadable forms: http://www.nmerb.org/downloadableforms.htm

15. International Academy of Collaborative Professionals: http://www.collaborativepractice.com
    (See, Collaborative Divorce by Jennifer Rodriguez Rodgers, Esq. & Gretchen M. Walther, Esq.)

16. New Mexico Collaborative Practice Group: http://www.nmcollaborativedivorce.org
    (Id.)

17. Uniform Collaborative Law Act: http://www.nccusl.org/nccusl/uniformact_why/uniformacts-why-ucla2.asp
    (Id.)

STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT COURT

_____, **Plaintiff/Petitioner,**
(print first, middle and last name)

v. **Case No.** _____
Judge: _____

_____, **Defendant/Respondent.**
(print first, middle and last name)

PARENTING PLAN

This Plan: ❒ is a new plan
❒ modifies (changes) an existing plan dated _____
❒ modifies (changes) an order dated _____

1. CHILDREN SUBJECT TO THIS PARENTING PLAN

The following child(ren) are subject to this parenting plan:

LEGAL NAME (first, middle, last)	BIRTH DAY	AGE

2. OBJECTIVES OF THIS PARENTING PLAN

2.1 To protect the best interest(s) of the minor child(ren);

2.2 To provide for the physical care of the minor child(ren);

2.3 To set forth the authority and responsibilities of each parent with respect to the minor child(ren);

2.4 To maintain the child(ren)'s emotional stability and minimize the child(ren)'s exposure to parental conflict; and

2.5 To help the parents avoid future court battles over the minor child(ren).

3. DEFINITIONS USED IN THIS PARENTING PLAN

As used in this parenting plan:

3.1 **"Mother"** means _____ *(print first, middle and last name)*;

3.2 **"Father"** means _____ *(print first, middle and last name)*;

3.1 **"child(ren)"** means a person under the age of eighteen;

3.2 **"custody"** means the authority and responsibility to make major decisions in a child's best interests in the areas of residence, medical and dental treatment, education or child care, religion and recreation;

3.3 **"joint custody"** means an order of the court awarding custody of a child to two parents. Joint custody does not imply an equal division of the child's time between the parents or an equal division of financial responsibility for the child;

3.4 **"parent"** means a natural parent, adoptive parent or person who is acting as a parent who has or shares legal custody of a child or who claims a right to have or share legal custody;

3.5 **"parenting plan"** means a document submitted for approval of the court setting forth the responsibilities of each parent individually and the parents jointly in a joint custody arrangement;

3.6 **"period of responsibility"** means a specified period of time during which a parent is responsible for providing for a child's physical, developmental and emotional needs, including the decision making required in daily living.

3.7 **"sole custody"** means an order of the court awarding custody of a child to one parent; and

3.8 **"visitation"** means the period of time available to a parent during which a child resides with or is under the care and control of that parent.

4. FORM OF LEGAL CUSTODY

☐ 4.1 **JOINT LEGAL CUSTODY. The parents will share joint legal custody of the child(ren).**

Sharing joint legal custody means that *BOTH* parents have shared decision-making responsibility for major decisions that affect the child(ren) and that:

4.1.a *EACH* parent shall have significant, well-defined periods of responsibility for the child(ren);

4.1.b *EACH* parent shall have, and be allowed and expected to carry out, responsibility for the child's financial, physical, emotional and developmental needs during that parent's periods of responsibility; and

4.1.c *NEITHER* parent shall make a decision or take an action which results in a major change in a child's life until the matter has been discussed with the other parent *AND THE PARENTS AGREE*. If the parents cannot agree, either of them may initiate the dispute resolution measures agreed to in this plan.

❒ 4.2 **SOLE LEGAL CUSTODY.** ❍ **Mother** ❍ **Father will have sole legal custody of the child(ren).**

Sole legal custody means that *ONLY* this parent has the authority and responsibility to make major decisions in the child(ren)'s best interests in the areas of residence, religion, education, medical and dental treatment, and recreation activities. The other parent will have time-sharing with the child(ren) as explained in this plan

4.2.a ***REQUIRED:*** Print here why this decision is in the best interests of the child(ren):

_____

_____

_____

5. DESIGNATION OF CUSTODIAN

❒ Mother ❒ Father is designated the primary custodian SOLELY for the purposes of any other applicable state and federal laws which require such a designation or determination. THIS DESIGNATION DOES NOT AFFECT EITHER PARENT'S RIGHTS OR RESPONSIBILITIES UNDER THIS PARENTING PLAN.

5. CURRENT ARRANGEMENTS

The parents have listed the child(ren)'s arrangements on the attached Exhibit A. The parents agree these arrangements should not be changed unless the parents agree or it has been otherwise resolved by the methods described in this plan.

6. TIME-SHARING (Visitation)

6.1 TIME-SHARING SCHEDULE:

The parents will maintain a consistent regular time-share plan so that the child(ren) have the security of knowing when contact with each parent will occur. **If the parents cannot mutually agree on a time-sharing schedule, they will follow the time-sharing schedule attached to this plan.**

6.2 TIMIE-SHARING SCHEDULE CHANGES:

A parent may ask the other parent for additional time with a child(ren), or for an activity that would conflict with the other parent's scheduled time. The other parent has the absolute right to say "no" and the requesting parent must accept that answer.

6.2.a Making the request.

The parent making a request for a change shall make the request:

❍ in person ❍ by telephone ❍ in writing ❍ by email ❍ any method is acceptable

Before the change is to occur, the request will be made no less than:

❍ 24 hours ❍ one week ❍ two weeks ❍ other_____

6.2.b Responding to the request.

The parent responding to a request for a change shall respond:

❍ in person ❍ by telephone ❍ in writing ❍ by email ❍ any method is acceptable

After receiving the request, the response will be within

❍ 24 hours ❍ one week ❍ two weeks ❍ other_____

6.2.c The parent requesting a change shall be responsible for any additional child care or transportation costs that result from the change.

6.3 INTERFERENCE:

Neither parent will make plans for the child(ren) that conflicts with the other parent's period of responsibility unless both parents agree in advance to the plans.

6.4 MISSED VISITS:

Neither parent shall reduce or withhold visitation from the other parent because of disagreements between the parents.

6.4.a If a parent cannot exercise their particular visitation period, they shall notify the other parent as soon as practically possible. The missed time will not be "made up" unless both parents mutually agree to do so.

6.4.b If one parent causes the other parent to miss a particular visitation period, for any reason, then both parents will act in good faith to fairly modify visitation as soon as practically possible.

6.4.c Illness serious enough to require medical attention may be cause to cancel a visit *if the child(ren)'s doctor so advises*. Visitation will not be canceled due to the child(ren)'s minor illnesses.

6.5 TRANSPORTATION OF THE CHILD(REN):

❒ The parent receiving the child(ren) is responsible for transporting the child(ren).

❒ ❍ Mother ❍ Father will provide all the transportation between the parents.

6.6 EXCHANGES OF THE CHILD(REN) FROM PARENT TO PARENT:

Exchanges shall occur on time. Each parent shall be on time for the drop-off and pick-up of the child(ren) and shall have the child(ren) ready. If a parent is more than 30 minutes late WITHOUT CONTACTING THE

OTHER PARENT to make other arrangements, then no visitation will take place and the parent with the child(ren) may proceed with other plans and activities for the child(ren).

- ❒ Exchanges shall be at the Mother's and Father's homes unless another place is agreed upon.
- ❒ Exchanges shall be at _____ unless another place is agreed upon.
- ❒ When school is in session, all exchanges shall occur at the child(ren)'s school.
- ❒ Exchanges may be made only by the Mother and the Father of the child(ren).
- ❒ Exchanges may be made by a non-parent but ONLY if both parents agree to do so.

7. TRAVEL AND RELOCATION

7.1 TRAVEL IN GENERAL:

Either parent may travel with the child(ren) during his/her visitation period as long as the travel does not interfere with the time-sharing schedule described in this plan.

7.1.a Travel outside the County.

A parent may travel out of _____ County with the child(ren) for *TEMPORARY* visits but ONLY with the written consent of the other parent or resolution of the dispute by the methods described in this plan.

7.1.b Travel outside the State.

A parent may travel out of the State of New Mexico with the child(ren) for *TEMPORARY* visits but ONLY with the written consent of the other parent or resolution of the dispute by the methods described in this plan. An itinerary, including address and telephone numbers for use in the event of an emergency, shall be provided to the other parent.

7.1.c Travel outside the United States.

- ❒ Mother may not travel with the child(ren) to a foreign country.
- ❒ Father may not travel with the child(ren) to a foreign country.
- ❒ The parents agree that the child(ren) may travel with the other parent out of the country. At least _____ days before leaving, the traveling parent shall provide a detailed itenerary, including locations and telephone numbers where the child(ren) and parent can be reached during the trip. Each parent agrees to provide whatever documentation is necessary for the other parent to take the child(ren) out of the country.

7.2 RELOCATION IN GENERAL.

Neither parent may move the child(ren) out of state unless there is a signed court order allowing the move.

7.2.a If either parent plans a to change his/her home city or state of residence, written notice shall be served on the other parent either in person or by certified mail not less than 30 days before the proposed change. The notice must include the date of the relocation, the destination, the reasons

for the relocation, and a proposed revised visitation schedule.

7.2.b After receiving the written notice, the parents shall try to modify the parenting plan agreement that is best for the child(ren). If the parents cannot agree, either may initiate the dispute resolution methods described in this plan.

7.2.c If the parents cannot agree and one parent relocates, the child(ren) shall stay with the remaining parent until the parents reach a modified parenting agreement or until the court orders a modification.

8. DECISION MAKING

8.1 DAY-TO-DAY DECISIONS. During the parent's period of responsibility, that parent is authorized to make decisions regarding the day-to-day care and control of the child(ren).

8.2 SPECIFIC DECISIONS. The parents agree it is in the child(ren)'s best interests to designate decision making on the following specific issues:

8.2.a	Driving.	Decisions for the child(ren) to obtain a driver's license, use a car, purchase a vehicle or use other vehicles (motorcycles or all terrain vehicles) will be made:	❒ Jointly ❒ By Mother ❒ By Father
8.2.b	Firearms:	Decisions to allow the child(ren) to use a firearm, engage in hunting or target practice will be made:	❒ Jointly ❒ By Mother ❒ By Father
8.2.c	Legal Actions.	The decision to designate either parent as the representative of the child(ren) for purposes of a legal action will be made:	❒ Jointly ❒ By Mother ❒ By Father
8.2.d	Military Service.	The decision to allow the child(ren) to enlist in the military will be made:	❒ Jointly ❒ By Mother ❒ By Father
8.2.e	Employment.	The decision to allow the child(ren) to become employed will be made:	❒ Jointly ❒ By Mother ❒ By Father
8.2.f	Cosmetic Surgery, body piercing, tattooing.	Consent to cosmetic surgery, body piercing or tattooing will be made:	❒ Jointly ❒ By Mother ❒ By Father
8.2.g	Dating.	The decision to allow the child(ren) to begin dating will be made:	❒ Jointly ❒ By Mother ❒ By Father

	Other		❒ Jointly ❒ By Mother ❒ By Father

8.3 MAJOR DECISIONS. The parents agree it is in the child(ren)'s best interests to designate decision making on the following major issues:

8.3.a EDUCATION

8.3.a.1 Major decisions concerning the child(ren)'s education, including changes in enrollment, will be made: ❒ Jointly ❒ By Mother ❒ By Father

8.3.a.2 Each parent shall be responsible for getting records, calendars, and reports directly from the child(ren)'s school.

8.3.a.3 Both parents shall have equal and independent authority to confer with the child(ren)'s school and with the child(ren)'s teachers.

8.3.a.4 Both parents shall be listed as "emergency contacts" for the child(ren).

8.3.b MEDICAL

8.3.b.1 All medical treatment shall be by a licensed physician, osteopath, chiropractor or other recognized health care provider. Any dental work, including orthodontia or periodontal work shall be performed by a licensed dentist.

8.3.b.2 EACH parent has authority to make **emergency** medical decisions in the best interests of the child(ren). In case of a medical emergency, the parent with the period of responsibility will immediately contact the other parent concerning the emergency.

8.3.b.3 EITHER parent arranging a routine medical examination will give the other parent _____ days notice in advance of the appointment so that the other parent can attend the examination if they desire.

8.3.b.4 EACH parent shall have access to medical records of the child(ren) and shall be permitted to independently consult with any and all medical professionals involved with the child(ren).

8.3.b.5 The parents shall cooperate with each other in sharing information related to the health of the child(ren) and they shall sign any necessary documentation ensuring that both parents have access to the child(ren)'s medical records.

8.3.b.6 Specific medical decision responsibility:

Elective, non-emergency medical treatment	Decisions will be made:	❒ Jointly ❒ By Mother ❒ By Father
Elective, non-emergency dental treatment	Decisions will be made:	❒ Jointly ❒ By Mother ❒ By Father
Orthodontic care	Decisions will be made:	❒ Jointly ❒ By Mother ❒ By Father
Psychological counseling	Decisions will be made:	❒ Jointly ❒ By Mother ❒ By Father
Optical care	Decisions will be made:	❒ Jointly ❒ By Mother ❒ By Father
Other		❒ Jointly ❒ By Mother ❒ By Father
Other		❒ Jointly ❒ By Mother ❒ By Father

8.3.c RELIGION

❒ The child(ren)'s religious upbringing and training shall be: _____.
This religious affiliation will not be changed unless both parents mutually agree to the change.

❒ Each parent has the right to expose the child(ren) to a particular religion as s/he sees fit and shall be entitled to take the child(ren) to the religious services either one of them attends.

8.3.d ACTIVITIES

8.3.d.1 Enrollment in activities.

❒ Each parent may enroll the child(ren)'s in organized activities, special training, and social events that occur while the child(ren) reside with that parent.

❒ Neither parent may enroll the child(ren) in any organized activity, special training or social event without the express consent of the other parent.

❒ Neither parent will enroll the child(ren) in an activity that occurs while the child(ren) is with the other parent.

8.3.d.2 Attendance.

Each parent shall be responsible for ensuring that the child(ren) attend regularly scheduled activities

while the child(ren) are with that parent.

8.3.d.3 Exchange of information.

Each parent will make a good faith effort to give information to the other parent about events and organized activities in the child(ren)'s lives including school programs, concerts, award ceremonies, plays, sports events and other activities in which the child(ren) are participating.

9 CO-PARENTING GUIDELINES

9.1 PARENT BEHAVIOR.

9.1.a Each parent shall promote a healthy, beneficial relationship between the child(ren) and the other parent.

9.1.b Neither parent shall demean or speak out negatively in any manner that would damage the relationship between either parent and the child(ren).

9.1.c The parents shall not criticize or otherwise be disrespectful of each other in the presence of the child(ren) and shall not permit others to do so.

9.1.d The parents shall not use the child(ren) as messengers to convey information, ask questions or set up schedule changes.

9.2 DISCIPLINE.

❒ Either parent may use reasonable discipline techniques, but the parents will not use physical discipline.

❒ Either parent may use reasonable discipline techniques, with physical discipline as a last resort.

❒ Either parent may use reasonable discipline techniques, including physical discipline.

9.3 CHILD CARE BY NON-PARENT.

❒ Each parent may choose appropriate child care providers for the time the child(ren) are with that parent.

❒ The parents will be the primary child care providers unless otherwise agreed.

❒ Other: _____

9.3 GRANDPARENTS AND EXTENDED FAMILY MEMBERS

9.3.a Both parents shall protect and encourage relationships between the child(ren) and relatives and family friends on both sides of the family, including maintaining ties with both the maternal and paternal relatives. Unless both parents mutually agree otherwise, the child(ren) will visit with the paternal relatives during times the child(ren) are with their father and with the maternal relatives during times they are with their mother.

9.3.b Both Mother and Father are expected to make sure that their family and friends abide by the spirit of this Parenting Plan and obey the directives set out herein when around the child(ren). If any family member or friend violates the terms of this plan or encourages others to do so, then Mother and Father have the right to forbid that person from having further contact with the child(ren). If parent

fails to enforce the provisions of this plan or the rules set out herein with respect to their own families, then the other parent shall have the right to seek a modification of this parenting agreement.

9.4 POSSESSIONS/CLOTHING/EQUIPMENT/MEDICINE

9.4.a Each parent shall provide separate clothes for the child(ren) at their own residence.

9.4.b Any additional clothing, books and toys the child(ren) takes to the other parent shall be returned with the child at the conclusion of the visitation.

9.4.c If a parent plans a special activity that requires clothing or equipment that would normally not be with the child(ren), it is that parent's responsibility to provide such clothing or equipment.

9.5.d All medications required by the child(ren) will be transferred with that child(ren). Each parent will provide the other with instructions on the proper administration of the medications.

9.5 SAFETY LAWS

9.5.a Both parents and all others driving the child(ren) shall do so under a valid driver's license.

9.5.b Both parents and all others driving the child(ren) shall have the child(ren) securely fastened in restraint devices whenever the motor vehicle is moving.

9.5.c If the vehicle is a bicycle, motor scooter, motorcycle, or a motorized all terrain vehicle, both parents and all others driving such vehicle shall have the child(ren) wear a securely fastened helmet approved by the Federal Department of Transportation or Snell Memorial Foundation whenever the vehicle is moving.

9.6 ALCOHOL, ILLEGAL OR UNPRESCRIBED DRUGS

Neither parent shall permit the child(ren) to be subjected to persons abusing alcohol or using illegal or unprescribed drugs in the presence of, or within 24 hours of contact with, the child(ren). This includes the abuse of alcohol or the use of illegal drugs by the parent.

9.7 EXCHANGE OF INFORMATION

9.7.a As required by §40-4-9.1H NMSA and notwithstanding any other provisions of law, access to records and information pertaining to the child(ren), including medical, dental and school records, shall not be denied to a parent because that parent is not the child(ren)'s physical custodial parent or because that parent is not a joint custodial parent.

9.7.b Both parents shall update each other with written notice of changes to the following information:
Residential and mailing address
Telephone number
Social Security number
Driver's license number

Name, address, and phone number of employers

Health insurance coverage for the child(ren)

Health insurance available through either parent's employer which could cover the minor child(ren)

❒ It is appropriate that the personal information of the ❒ Mother ❒ Father shall remain confidential and shall not be provided to the other parent because: _____ _____.

10. COMMUNICATION

10.1 CONTACT WITH THE OTHER PARENT.

Notwithstanding an emergency involving the child(ren), the parents will only communicate with each other:

❍ in person ❍ by telephone ❍ in writing ❍ by email ❍ any method is acceptable

10.2 CONTACT WITH THE CHILD(REN) WHEN WITH THE OTHER PARENT.

10.2.a Telephone. The child(ren) have the right to place and receive telephone calls from a parent without the interference from the other parent. Telephone calls shall not be monitored by the other parent unless s/he believes in good faith that the child(ren) is having a problem.

10.2.a.1 Child(ren) Calling Parent.

The child(ren) may call the parent with whom they are not visiting:

❒ At any time.

❒ At least _____ times a week.

❒ Weekdays between _____ am/pm and _____ am/pm

❒ Weekends and holidays between _____ am/pm and _____ am/pm

❒ Telephone calls shall not exceed _____ minutes in a 24 hour period.

Long distance calls from the child(ren) to the parent will be paid for by the parent receiving the call.

10.2.a.2 Parent Calling Child(ren).

A parent may call the child(ren) when they are visiting the other parent:

❒ At any time.

❒ At least _____ times a week.

❒ Weekdays between _____ am/pm and _____ am/pm

❒ Telephone calls shall not exceed _____ minutes in a 24 hour period.

❒ Weekends and holidays between _____ am/pm and _____ am/pm

Long distance calls from parent to the child(ren) will be paid for by the parent making the call.

10.2.b Mail. The child(ren) have the right to send and receive letters and packages without interference by either parent.

10.2.c Email. The child(ren) and the other parent may communicate by email if a computer is available.

10.2.d Internet social networks. The child(ren) and the other parent may communicate by other internet social networks if a computer is available.

11. RESOLVING DISAGREEMENTS

11.1 RESOLVING DISAGREEMENTS (DISPUTES):

If the parents disagree about this parenting plan they must make a good faith effort to resolve the issue. If the parents are unable to reach an agreement, either parent may initiate resolution of the disagreement by the following methods. These provisions shall not apply if immediate court action is necessary in an emergency situation to protect the child(ren).

❒ NO ALTERNATIVE DISPUTE RESOLUTION. Disputes between the parents do NOT require alternative dispute resolution process. Either parent may ask the court to resolve the dispute.

❒ ALTERNATIVE DISPUTE RESOLUTION. Before asking the court to resolve the dispute, the parents agree to:

- ❍ Participate in family counseling to try to reach an agreement.
- ❍ Participate in mediation to try to reach an agreement
- ❍ Submit the matter to _____ (name of individual or agency) for binding arbitration.
- ❍ Give ultimate responsibility to _____ (name of individual or agency) to reach a decision for the parents.

11.2 In resolving disputes, preference shall be given to carrying out this parenting plan.

11.3 If the court finds that a parent has used or frustrated the resolution process without good reason, the court may award attorney's fees and/or financial sanctions to the other parent.

11.4 Unless the dispute is decided under binding arbitration, the parents have the right of review from the dispute resolution process (if selected) to the district court.

11.5 The cost of the alternative dispute process (if selected) shall be allocated between the parents as follows:

- ❍ Based on each parent's proportional share of income as determined from the child support worksheet.
- ❍ As determined in the resolution process.
- ❍ Mother: _____% Father: _____%

12. MODIFYING (CHANGING) THIS PARENTING PLAN

12.1 Either parent may file a motion to modify this agreement when that parent believes that there a) has been a substantial change in circumstances and b) it is in the best interests of the child(ren) to modify this agreement.

- ❒ If the parents agree to make a *substantial* change in this agreement, it will be put in writing, signed by both parents and filed with the court with a motion to modify.
- ❒ If the parents agree to make a *minor* change in the agreement, it will be put in writing and signed by both parents. *Minor* changes are not required to be filed with the court unless the parents wish to do so.
- ❒ *Any* change in this agreement must be in writing, signed by both parents, and filed with the court.

12.2 The parents agree to review this plan every:

- ❍ year
- ❍ 2 years
- ❍ other:_____

By our signatures below, we declare that we have read this document and agree with its contents and that all of the statements contained are true and correct to the best of our knowledge and belief. We acknowledge one parent's failure to comply with a provision of this parenting plan will not affect the other parent's obligation to comply with this parenting plan. If this parenting plan becomes an order of the court, we understand it may be enforced by contempt, the penalties for which may include incarceration, civil monetary penalties, and/or community service.

Date signed:_____ Date signed:_____

_____ _____

(MOTHER'S SIGNATURE) *(FATHER'S SIGNATURE)*

(Print name) _____ *(Print name)* _____

(Mailing address) _____ *(Mailing address)* _____

(City/State/Zip) _____ *(City/State/Zip)* _____

(Your telephone) _____ *(Your telephone)* _____

Date signed: _____ Date signed: _____

EXHIBIT A
CURRENT ARRANGEMENTS:

Pursuant to Section 5 of the parenting plan, the parents agree these arrangements should not be changed unless the parents agree or it has been otherwise resolved by the methods described in this plan.

CHILD(REN)'S NAME:	1.	2.	3.	4.
RESIDENCE: address city state zip code telephone number				
RELIGION:				
DOCTOR: Name address city state zip code telephone number				
DENTIST: Name address city state zip code telephone number				
SCHOOL: Name address city state zip code telephone number				
CHILD CARE: Name address city state zip code telephone number				
ACTIVITIES:				
OTHER:				

EXHIBIT B
TIME-SHARING (VISITATION) SCHEDULE
(Page 1 of 4)

Pursuant to Section 6 of this Parenting Plan, visitation is to take place as the parents agree. If the parents cannot agree, then the following will be enforced.

This time-sharing schedule applies to: ❒ MOTHER ❒ FATHER

	Starts	Ends	Responsible for	
			Pick-up	Return
❒ **Alternate Weeks Schedule** If selected, parents will alternate the child(ren) every 7 days. The parent checked above will have the child(ren) during even-numbered weeks.	Mondays at ❒ School begins ❒ 6 pm ❒ ___ am/pm	Mondays at ❒ School ends ❒ 6 pm ❒ ___ am/pm	❒ Parent exercising the visitation ❒ Mother ❒ Father	❒ Parent exercising the visitation ❒ Mother ❒ Father
❒ **Weekends** If selected, the above parent will have the child(ren) the 1st, 3rd, and 5th weekend of each month. A weekend starts on Friday and ends on Sunday.	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
❒ **Mid-Week Visit** If selected, the above parent will have the child(ren) Wednesday of each school week	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 8 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Thanksgiving Starts Wednesday before Thanksgiving and ends on Sunday *(odd-numbered years)*	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Winter Break Starts the last day of school before winter break and ends December 28th *(even-numbered years)*	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Winter Break Starts December 28th and ends the last day of winter break *(odd-numbered years)*	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Spring Break Starts the last day of school before Spring break and ends the day before school starts again *(even-numbered years)*	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Standard Summer Vacation July 1 - July 31	❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Other Summer Vacation If selected, schedule must be only 1 or 2 blocks of time, each at least 1 week long, and NOT during the last week of the summer break. Week #1 _____ Week #2 _____	❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father

EXHIBIT B
TIME-SHARING (VISITATION) SCHEDULE
(Page 2 of 4)

Pursuant to Section 6 of this Parenting Plan, visitation is to take place as the parents agree. If the parents cannot agree, then the following will be enforced.

This time-sharing schedule applies to: ❒ MOTHER ❒ FATHER

	Starts	Ends	Responsible for	
			Pick-up	Return
❒ **Alternate Weeks Schedule** If selected, parents will alternate the child(ren) every 7 days. The parent checked above will have the child(ren) during odd-numbered weeks.	Mondays at ❒ School begins ❒ 6 pm ❒ ___ am/pm	Mondays at ❒ School ends ❒ 6 pm ❒ ___ am/pm	Parent exercising the visitation	N/A
❒ **Weekends** If selected, 2nd, and 4th weekend of each month. A weekend starts on Friday and ends on Sunday.	N/A	N/A	N/A	N/A
Thanksgiving Starts Wednesday before Thanksgiving and ends on Sunday *(even-numbered years)*	N/A	N/A	N/A	N/A
Winter Break Starts the last day of school before winter break and ends December 28th *(odd-numbered years)*	N/A	❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Winter Break Starts December 28th and ends the last day of winter break *(even-numbered years)*	❒ After school ❒ 6 pm ❒ ___ am/pm	N/A	❒ Mother ❒ Father	❒ Mother ❒ Father
Spring Break Starts the last day of school before Spring break and ends the day before school starts again *(odd-numbered years)*	N/A	N/A	N/A her	N/A
Summer Vacation Starts the last day of school before summer break and ends the day before school starts again, EXCEPT the days the child(ren) are with the other parent as indicated on page 1	N/A	N/A	N/A	N/A

EXHIBIT B
TIME-SHARING (VISITATION) SCHEDULE
(Page 3 of 4)

Pursuant to Section 6 of this Parenting Plan, visitation is to take place as the parents agree.
If the parents cannot agree, then the following will be enforced.

This time-sharing schedule applies to holidays and other special events.

	Mother	Father	Starts	Ends	Responsible for	
					Pick-up	Return
New Year's Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Martin Luther King Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Presidents' Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Easter Day (unless coincides with Spring Break)	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Memorial Day (if no school)	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
July 4th (unless coincides with Summer Break)	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Labor Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Halloween	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 8 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Christmas Eve	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Christmas Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Child(ren)'s Birthday If the child(ren)'s birthday does not fall during a regularly scheduled visit a parent, that parent may be with the child(ren) on the child(ren)'s birthday.	N/A	N/A	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 8 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Father's Day The child(ren) will be with Father on Father's Day weekend. The weekend starts on Friday before Father's Day and ends on Father's Day.	N/A	N/A	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father

Mother's Day The child(ren) will be with Mother on Mother's Day weekend. The weekend starts on Friday before Mother's Day and ends on Mother's Day	N/A	N/A	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm	❒ Mother ❒ Father	❒ Mother ❒ Father
Other:						
Other						

EXHIBIT B
TIME-SHARING (VISITATION) SCHEDULE

Pursuant to Section 6 of this Parenting Plan, visitation is to take place as the parents agree. If the parents cannot agree, then the following will be enforced.

WEEKDAY AND WEEKEND SCHEDULE

❒ **Option 1** **Alternate Weeks Schedule:**

Parents will alternate the child(ren) every 7 days.

❒ Mother ❒ Father will have the child(ren) during even-numbered weeks.

❒ Mother ❒ Father will have the child(ren) during odd-numbered weeks.

The parents will alternate the child(ren) on _____ *(weekday)* at:

❒ beginning of school ❒ end of school ❒ 6 pm ❒ _____ am/pm

❒ **Option 2** **Weekends/Mid-Week Schedule:**

This schedule applies to ❒ Mother ❒ Father:

1st, 3rd, and 5th weekend of each month. A weekend starts on Friday and ends on Sunday as follows:

Starts: ❒ After school ❒ 6 pm ❒ ____ am/pm

Ends: ❒ Next school day ❒ 6 pm ❒ ____ am/pm

AND this parent will have a mid-week visit on _____ *(weekday)* as follows:

Starts: ❒ After school ❒ 6 pm ❒ ____ am/pm

Ends: ❒ Next school day ❒ 8 pm ❒ ____ am/pm

❒ **Option 3** **Write your agreement here:**

_____

_____

_____

_____

_____

_____

_____

EXHIBIT B
TIME-SHARING (VISITATION) SCHEDULE

Pursuant to Section 6 of this Parenting Plan, visitation is to take place as the parents agree. If the parents cannot agree, then the following will be enforced.

SUMMER SCHEDULE

❒ Option 1 The weekday and weekend schedule selected above will apply to all 12 calendar months, with no specific changes during the summer.

❒ Option 2 The child(ren) will spend July 1 - 31 with ❒ Mother ❒ Father

Starts: ❒ 6 pm ❒ ____ am/pm

Ends: ❒ 6 pm ❒ ____ am/pm

❒ Option 3 ❒ Mother ❒ Father will have the child(ren) from one week after school lets out until *(date)* _____ and the other parent will have the children from that date until one week before school starts.

Starts: ❒ 6 pm ❒ ____ am/pm

Ends: ❒ 6 pm ❒ ____ am/pm

❒ Option 4 The child(ren) will spend: *(how many?)* _____ vacation ❒ days or ❒ weeks with: ❒ Mother ❒ Father and the remainder with the other parent. Vacation cannot take place during the week before school begins.

Vacation days *(list the days)* _____

Start: ❒ 6 pm ❒ ____ am/pm

End: ❒ 6 pm ❒ ____ am/pm

Week #1 _____ Starts: ❒ 6 pm ❒ ____ am/pm

Ends: ❒ 6 pm ❒ ____ am/pm

Week #2 _____ Starts: ❒ 6 pm ❒ ____ am/pm

Ends: ❒ 6 pm ❒ ____ am/pm

EXHIBIT B
TIME-SHARING (VISITATION) SCHEDULE

Pursuant to Section 6 of this Parenting Plan, visitation is to take place as the parents agree. If the parents cannot agree, then the following will be enforced.

WINTER SCHOOL BREAK

❒ Option 1 — No change.

The weekday and weekend schedule selected above will apply to winter break with no specific changes.

❒ Option 2 — Every year or alternate years.

❒ Mother ❒ Father will have all of winter break every year.

❒ Mother ❒ Father will have all of winter break in odd years.

❒ Mother ❒ Father will have all of winter break in even years.

❒ Option 3 — Alternating one-half of winter break.

❒ Mother ❒ Father will have the first half of winter break in odd years.

❒ Mother ❒ Father will have the first half of winter break in even years.

The first half of winter break starts on the last day of school before winter break and ends December 28th. The second half of winter break December 28th and ends on the last day of winter break before school resumes.

Starts: ❒ 6 pm ❒ ____ am/pm

Ends: ❒ 6 pm ❒ ____ am/pm

EXHIBIT B
TIME-SHARING (VISITATION) SCHEDULE

Pursuant to Section 6 of this Parenting Plan, visitation is to take place as the parents agree. If the parents cannot agree, then the following will be enforced.

OTHER HOLIDAYS AND SPECIAL EVENTS

❒ Option 1 No change.

The weekday and weekend schedule selected above will apply to all other holidays and special events listed with no specific changes.

❒ Option 2 Every year or alternate years.

The parents have selected from the chart below how other holidays and special events will be spent. If not selected, the weekday and weekend schedule will apply for that particular holiday or special event.

	With Mother	With Father	Starts	Ends
New Year's Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm
Martin Luther King Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm
Presidents' Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm
Spring Break (Starts the last day of school before Spring break and ends the day before school starts again)	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm
Easter Day (unless coincides with Spring Break)	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm
Memorial Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm
July 4th (unless coincides with Summer Break)	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ 6 pm ❒ ___ am/pm	❒ 6 pm ❒ ___ am/pm
Labor Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ___ am/pm	❒ Next school day ❒ 6 pm ❒ ___ am/pm

EXHIBIT B
TIME-SHARING (VISITATION) SCHEDULE

Pursuant to Section 6 of this Parenting Plan, visitation is to take place as the parents agree. If the parents cannot agree, then the following will be enforced.

	With Mother	With Father	Starts	Ends
Columbus Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ____ am/pm	❒ Next school day ❒ 6 pm ❒ ____ am/pm
Halloween	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ____ am/pm	❒ Next school day ❒ 8 pm ❒ ____ am/pm
Thanksgiving (Starts Wednesday before Thanksgiving and ends on Sunday)	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ After school ❒ 6 pm ❒ ____ am/pm	❒ 6 pm ❒ ____ am/pm
Christmas Eve	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ 6 pm ❒ ____ am/pm	❒ 6 pm ❒ ____ am/pm
Christmas Day	❒ Even-years ❒ Odd-years ❒ Every year	❒ Even-years ❒ Odd-years ❒ Every year	❒ 6 pm ❒ ____ am/pm	❒ 6 pm ❒ ____ am/pm
Child(ren)'s Birthday If the child(ren)'s birthday does not fall during a regularly scheduled visit a parent, that parent may be with the child(ren) on the child(ren)'s birthday.	N/A	N/A	❒ After school ❒ 6 pm ❒ ____ am/pm	❒ Next school day ❒ 8 pm ❒ ____ am/pm
Father's Day The child(ren) will be with Father on Father's Day weekend. The weekend starts on Friday before Father's Day and ends on Father's Day.	N/A	N/A	❒ After school ❒ 6 pm ❒ ____ am/pm	❒ 6 pm ❒ ____ am/pm
Mother's Day The child(ren) will be with Mother on Mother's Day weekend. The weekend starts on Friday before Mother's Day and ends on Mother's Day	N/A	N/A	❒ After school ❒ 6 pm ❒ ____ am/pm	❒ 6 pm ❒ ____ am/pm
Other:				

Property Division Analysis

Asset/Debt	Separate		Community	Community Division	
	Wife	Husband	Interest	Wife	Husband
Real Estate					
Retirement accounts					
Investments & bank accounts					
Vehicles					
Personal property					
TOTALS			0	0	0
		Equalizing payment:		0	0
		Net division		0	0

STATE OF NEW MEXICO
COUNTY OF *
* JUDICIAL DISTRICT COURT

NO. D-0101-DM-2001-

*,

Petitioner,

vs.

*,

Respondent.

MEDICAL CHILD SUPPORT ORDER

THIS COURT having entered a Final Decree of Dissolution of Marriage coincident with the entry of this Order, such decree having incorporated by reference the provisions of this Order so as to become part of such Final Decree, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED:

1. This Order is intended to serve as a Qualified Medical Child Support Order ("QMCSO") which orders the Medical Plan specified below to provide medical benefits to the children of Petitioner and Respondent, as specified below ("Alternative Recipients") pursuant to a Stipulated Final Decree of Dissolution of Marriage entered on *, 200*, and in accordance with Section 609 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

2. The Medical Plan subject to this Order is as follows: [*Name of each Plan.] The Plan Administrator is: [*Name, address].

3. The Participant is the *Petitioner/Respondent, *, whose last known address, Social Security Number, and date of birth are:

a. [*Address]

b. [*Social Security Number]

c. [*Date of Birth]

4. The last known address, Social Security Number, and date of birth of the [*non-participant] *Petitioner/Respondent is:

a. [*Address]

b. [*Social Security Number]

c. [*Date of Birth]

5. The Alternative Recipients and their last known addresses, Social Security numbers, dates of birth, and custodial parent(s) are:

a. [Name, Child #1]
   1. Address
   2. Social Security No.
   3. Date of Birth
   4. Primary Custodial Parent

b. [Name, Child #2]
   1. Address
   2. Social Security No.
   3. Date of Birth
   4. Primary Custodial Parent

6. The Petitioner and the Respondent were married on *, and divorced on *.

7. The Alternative Recipients shall receive the following coverage under *. [Insert full Plan name for each Plan, listed separately, and type of coverage for each Plan.]

[EXAMPLE: Such family medical coverage as exists under the option with the smallest premium cost available under the Employers Medical Plan.]

[Note: If HMO coverage is selected, address situation of moving outside the service area.]

If any Medical Plan is changed so that the medical benefits specified in this paragraph are no longer available, the medical benefits provided shall be the family medical coverage, taking into account extend of coverage, coinsurance amount, and deductible (if applicable) which the custodial parent determines is most similar to the coverage specified; however, such benefits shall be benefits which are permitted under the Medical Plan, or its successor.

8. The *Petitioner/Respondent having been awarded primary physical custody of each of the Alternative Recipients, pursuant to ERISA 609, the *Petitioner/Respondent is deemed to have been appointed by each of the Alternative Recipients with respect to this Order for purposes of reporting and disclosure requirements.

9. Any payment of medical benefits made pursuant to this Order in reimbursement of expenses paid by an Alternate Recipient or an Alternate Recipient's custodial parent shall be made to the Alternative Recipient of the Alternate Recipient's primary custodial parent.

10. This Order does not require the Medical Plan to provide any type or form of benefit, or any option, not otherwise provided under the Medical Plan, nor does it limit the employer's ability to modify any type of coverage or amend or terminate any plan.

11. The employee-participant shall pay premiums for coverage hereunder in the manner in which other employee-participants pay premiums.

12. The period during which this Order applies to each alternate Recipient shall end on the first to occur of i) the date on which the Alternate Recipient attains the age of which children cease to be eligible under the Plan, ii) the date on which Participant ceases

to be a Participant in the Medical Plan; iii) the employer ceases to provide a family coverage under the Medical Plan, or iv) non payment of premiums for coverage of the Alternate Recipient has continued for a grace period equal to that set forth in Code Section 4980b(f)(2)(b)(iii).

13. The Court retains jurisdiction over the issue of the final qualification of this Order to correct, amend or enforce this Order.

_____
District Judge

Approved:

_____
Attorney for Petitioner

_____
Attorney for Respondent

ESTIMATED BUDGET WORKSHEET

EXPENSES:

1. Support:
   - a. Child Support $_____
   - b. Alimony $_____
   - c. Visitation Transportation $_____

2. Residence:
   - a. Mortgage $_____
   - b. Taxes $_____
   - c. Renter's Insurance $_____
   - d. Maintenance & Repairs $_____
   - e. Yard Maintenance $_____
   - f. Domestic Help $_____
   - g. Security $_____
   - h. Exterminator $_____
   - i. Storage Rental $_____
   - j. Association Fees $_____

3. Utilities
   - a. Gas $_____
   - b. Water/Refuse $_____
   - c. Electricity $_____
   - d. Telephone $_____
   - e. Cable $_____

4. Furniture/Appliances/Electronic Equip.:
   - a. Payment $_____
   - b. Maintenance $_____

5. Transportation/Auto:
   - a. Payment $_____
   - b. Gasoline $_____
   - c. Maintenance & Repairs $_____
   - d. Insurance $_____
   - e. Parking/Fares/Fees $_____
   - f. License $_____
   - g. AAA Membership $_____

6. Food:
   a. Groceries/Household Supplies $_____
   b. Meals Out $_____
   c. School Lunches $_____

7. Clothing:
   a. Self $_____
   b. Child/Children $_____
   c. Laundry/Cleaning/Tailoring $_____
   d. Uniforms $_____

8. Medical:
   a. Insurance Premium $_____
   b. Medical - Uncovered/Deductible $_____
   c. Dental Insurance Premium $_____
   d. Dental/Orthodontia - Uncovered/Deductible $_____
   e. Prescriptions/Supplements $_____
   f. Vision Expenses - Exam/Glasses $_____
   g. Chiropractor $_____

9. Counseling/Therapy:
   a. Self $_____
   b. Child/Children $_____

10. Life & Disability Insurance:
   a. Life - Self $_____
   b. Life - Child/Children $_____
   c. Disability - Self $_____

11. Child Expenses - Day Care/Education/Activities:
   a. Day Care $_____
   b. Baby-sitting $_____
   c. Transportation - School/Day Care $_____
   d. Tuition/Tutoring/Special Needs/College Exp. $_____
   e. School - Supplies/Yearbook/Photo/Field Trips $_____
   f. Activities - Sports/Leagues/Lessons/Camp $_____
   g. Allowance $_____
   h. Toys/Games/Hobbies/Books/Tapes/Videos $_____

i. Personal - Hair Cuts $_____

12. Your Education:
    a. Tuition $_____
    b. School Expenses - Books/Supplies $_____
    c. Seminars/Workshops/Speakers $_____

13. Professional Activities/Expenses:
    a. Membership Dues $_____
    b. Publications $_____
    c. CPA/Attorneys/Other $_____
    d. Divorce Expenses $_____

14. Divorce Expenses:
    a. Attorney Fees $_____
    b. Custody Evaluation $_____
    c. Vocational/Spousal support evaluation $_____
    d. Accountant $_____
    e. Other Professionals $_____
    f. Office Supplies & Copying $_____

15. Recreation - Entertainment/Vacation:
    a. Gym/Memberships $_____
    b. Hobbies/Sports $_____
    c. Movies/Videos/Season Tickets $_____
    d. Trips/Vacations $_____

16. Saving/Retirement/Investment:
    a. Savings Account $_____
    b Retirement $_____
    c. IRA $_____

17. Incidental:
    a. Church/Donations $_____
    b. Subscriptions/Newspaper/Books/Tapes/CDs $_____
    c. Gifts/Cards $_____
    d. Holiday Expenses $_____

e.	Personal - Manicures/Jewelry/Cosmetics/Massage	$_____
f.	Household Misc. -Postage/Computer/Copies/Film	$_____
g.	Fees - Bank/NSF/Past Due/Finance Charge	$_____
h.	Pet Expenses - Grooming/Vet/Food/Pet Hotel	$_____
i.	Misc. - Cigarettes	$_____

18. Credit Cards/Dept. Stores/Gas Cards/Charge Accounts:

a.	Visa	$_____
b.	Mastercard	$_____
c.	AMEX	$_____
d.	Discover	$_____
e.	Other (attach list)	$_____

19. Loans/Debts:

a.	Student Loans	$_____
b.	Finance Co.	$_____
c.	Personal Loans	$_____
d.	Medical/Legal	$_____
e.	Other (attach list)	$_____

20. Taxes:

a.	Back Taxes/Penalty Charges	$_____
b.	Current Payment	$_____

21. Other:

a.	Elder Parent Care	$_____
b.	Other (attach list)	$_____

TOTAL MONTHLY EXPENSES $_____

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_____'S ESTIMATED COMMUNITY HOUSEHOLD GOODS WORKSHEET

Household Goods:		Value	Husband	Wife
1.	Entrance Hall	$_____	$_____	$_____
2.	Living Room	_____	_____	_____
3.	Den/Study	_____	_____	_____
4.	Family Room	_____	_____	_____
5.	Dining Room	_____	_____	_____
6.	Kitchen:			
	a. Large appliances	_____	_____	_____
	b. Small appliances	_____	_____	_____
	c. Everyday kitchenware	_____	_____	_____
	d. Furniture	_____	_____	_____
7.	Master Bedroom	_____	_____	_____
8.	Bedroom 2	_____	_____	_____
9.	Bedroom 3	_____	_____	_____
10.	Bedroom 4	_____	_____	_____
11.	Bathroom(s), Linens	_____	_____	_____
12.	Washer/Dryer	_____	_____	_____
13.	TVs, Stereo Equipment	_____	_____	_____
14.	Video/Cameras/Computers	_____	_____	_____
15.	Records/Tapes/CDs	_____	_____	_____
16.	Luggage	_____	_____	_____
17.	Garage/Workshop/Tools/Mower	_____	_____	_____
18.	Sporting/Exercise Equipment	_____	_____	_____
Other:				
	a. _____	_____	_____	_____
	b. _____	_____	_____	_____
	c. _____	_____	_____	_____
20.	Total Goods Page 2	_____	_____	_____
	Total Household Goods	$_____	$_____	$_____

22.	Artwork/Pictures:				
	a.	_____	_____	_____	_____
	b.	_____	_____	_____	_____
	c.	_____	_____	_____	_____
23.	China/Crystal:				
	a.	_____	_____	_____	_____
	b.	_____	_____	_____	_____
24.	Collections/Hobbies:				
	a.	_____	_____	_____	_____
	b.	_____	_____	_____	_____
	c.	_____	_____	_____	_____
25.	Figurines		_____	_____	_____
26.	Heirlooms		_____	_____	_____
27.	Rugs		_____	_____	_____
28.	Silverware		_____	_____	_____
29.	Other		_____	_____	_____
	Total Valuables		$_____	$_____	$_____

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DETERMINING THE PRIMARY CARETAKER

Find out who:

- ☐ Gets up with the child(ren) in morning
- ☐ Helps the child get dressed
- ☐ Fixes breakfast (types of food)
- ☐ Packs school lunches (types of food)
- ☐ Fixes lunches and dinners (types of food)
- ☐ Helps the child with homework
- ☐ Teaches the child about academic subjects, sports, religion, and/or life in general (with what values)
- ☐ Reads stories and plays games with the child
- ☐ Bathes the child
- ☐ Toilet trains the child
- ☐ Puts the child to bed
- ☐ Purchases the child's clothes
- ☐ Takes the child for haircuts
- ☐ Attends parent-teacher conferences
- ☐ Participates in school activities (e.g. room parent, field trip chaperone, tutor, PTA organizer, fund raiser)
- ☐ Arranges for extracurricular activities
- ☐ Drives the child to school or extracurricular activities
- ☐ Participates in extracurricular activities, such as coaching a team, being a Scout Master
- ☐ Arranges for the child to get together with friends
- ☐ Stays home when the child is sick
- ☐ Takes the child to the physician and dentist
- ☐ Takes the child to religious activities
- ☐ Looks after the child's safety, at home and in the neighborhood
- ☐ Supervises the child's household chores
- ☐ Supervises the child's TV watching
- ☐ Talks to the child about the child's problems (Does the child turn to one parent more than the other?)

SUTIN, THAYER & BROWNE A Profession Corporation

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STATE OF NEW MEXICO
COURT CLINIC SERVICES

The Court Clinic provides services to individuals who have been Court ordered by a District Court Judge, Special Commissioner or Hearing Officer to address issues involving custody and/or time-sharing of the child(ren). The Clinic does not address financial issues, property settlements, or child support. If allegations of child abuse are made against one of the parties, the case will be referred to Children, Youth and Families Department (CYFD). The Clinic cannot conduct abuse or neglect investigations; however, they will consult with CYFD to make sure the best interest of the child(ren) are served.

CLINIC HOURS: The Clinic is open Monday through Friday from 8:00 a.m. until noon and 1:00 p.m. until 5:00 p.m. except on holidays. In the event of bad weather, the District Court follows the APS schedule for closure or delays.

LOCATION/PHONE: Bernalillo County Courthouse, 415 Tijeras NW, Albuquerque, NM 87102, (505) 841-7409.

FEES: There are no fees for the Priority Consultation or Mediation. If parties are unable to mediate or if the Judge has ordered an Advisory Consultation only, fees will be assessed based on a sliding scale using the combined income of the parties and the number of children involved. The fee is split proportionally between the parties based on income. The fee must be paid in full by cashier's check, money order, cash or attorney draft made payable to the Clerk of the District Court. Personal checks and partial payments will not be accepted.

TIME-SHARING GUIDELINES: The Court Clinic uses a child development model in making time-sharing recommendations. A booklet entitled "Time-Sharing Guidelines", written by Dr. Louise Kodituwakku, Clinical Director, is available at the Clinic for $5.00.

ORIENTATION: Prior to the beginning of any Court Clinic services, each party must attend Orientation. Parties are typically scheduled for separate orientation appointments. If parties are returning to the Clinic and it has been longer than a year since they last attended Orientation, they will be required to repeat it. The Orientation includes a video tape presentation by Judge Anne Kass who defines Joint Legal Custody and discusses the problems associated with litigation. Court Clinic staff present information regarding the Clinic's process and issues related to the needs of children. The Orientation is open to the public.

PRIORITY CONSULTATION: A Priority Consultation (PC) occurs when the Judge, Special Commissioner, or Hearing Officer has determined that an emergency exists and that it cannot be handled by the On-call Clinician. The Judge then orders immediate action be taken in order to serve the best interest of the child(ren) until a more permanent plan can be determined. Immediately after the hearing, all parties and/or their attorneys must appear in person at the Clinic to schedule the appointments for Orientation and the session with the Clinician (Local Rule 504F). The PC is a time limited process that involves the parties meeting with a Clinician to determine the nature of the problem, interim custody and/or time-sharing only. Parents may negotiate a

settlement. If the parties do not agree, recommendations will be made. These recommendations become the order of the Court pending further action by the Court. Therefore, the parties must follow the recommendations until a Court hearing can be scheduled. The PC will not be used for long-term planning or to make critical decisions such as to whether a parent should be permitted to relocate to a different city and take the child(ren).

Follow-up appointments will not be scheduled for a PC. If additional (less critical) issues remain after the process and the Judge does not order Mediation at the same time the PC is ordered, a new order will be required. Therefore, the Priority Consultation will only deal with specific emergency issues for the purpose of temporarily resolving an immediate problem. It will not be used to deal with long-term, permanent parenting plans.

MEDIATION: Mediation is a process where the parties meet with the Clinician to negotiate a settlement to their custody and/or time-sharing issues. The mediator serves as a neutral third party who may make suggestions of time-sharing plans that are consistent with the child(ren)'s developmental needs, but cannot tell the parties how to resolve the issues. Mediation requires that all parties feel equally empowered to have input into the process. This prevents one person from agreeing to a plan because he/she feels intimidated by the other person. The only people involved in mediation are those specifically named as parties in the court order (parents, grandparents, step-parents, etc.) Therefore, extended family members will not be involved in the mediation unless there is an agreement between the named parties for this to occur. Parties are encouraged to discuss potential agreements with step-parents or significant others prior to the final parenting plan being written.

Children are not typically brought into the mediation process. Occasionally, a child may be interviewed by agreement of both parties and at the discretion of the Clinician.

Mediation may be completed in one session or may require several sessions as the parties work towards an agreement. Parties may try several plans before they agree to a final plan. Parties may reach temporary agreements that allow time to try a parenting plan prior to finalizing it, or they may reach partial agreements that set a specific date to return for additional mediation. Parties are encouraged to remember that most parenting plans must be renegotiated after two years due to the fact that either the child(ren)'s needs or the parties' needs change. The Court Clinic will not endorse a plan that is not consistent with the developmental needs of the child(ren) even if the parties agree to it. The Court Clinic has an obligation to be the advocate for the child(ren) and not for either party.

The only documentation that will be issued following the mediation process is the plan which reflects the parties' mediated agreements. A copy of this plan goes to each party and to the attorneys (if any). After the plan has been reviewed and confirmed by both parties, it will be entered into the Court record by the Court Clinic. Once the mediated plan becomes a Court order, the parties will need to obtain a new order to return to the Clinic. This may be done by a Stipulated Order or may require a hearing where the Judge orders further Clinic involvement.

Parties should be aware that mediation is not a confidential process. Any information gathered during mediation may be used in the assessment process, should that become necessary. However, the Court Clinic records are confidential and will not be released to anyone without written permission from the parties or an order of the Court.

ADVISORY CONSULTATION: The Advisory Consultation (AC) is initiated when the parties are unable to mediate an agreement, the issues are inappropriate for mediation or when the Judge so orders. It is an assessment process for the purpose of providing the parties and attorneys with recommendations concerning possible solutions to the dispute and meet the best interests of the child(ren). The process may involve individual and/or joint interviews with the parties, observations of each person with the child(ren), interviews with the child(ren), psychological testing of the parties, consultation with professionals who have been associated with the family (i.e. teachers, psychologist, day care providers, etc.), home visits, background checks, etc. The process will result in a report that may include background information, concerns of each person, information provided by collateral contacts, and recommendations of possible solutions to resolve the dispute. This report will be provided to both attorneys. It will not be sent to the Judge. Each party and his/her attorney may request to meet with the Clinician to review test results and discuss the rationale for the recommendations. If the parties agree with the recommendations, they must be entered as a Court order to be enforceable. If the parties disagree with the recommendations, they may request a hearing with the Judge where the Clinician may be called to testify or may stipulate to a second opinion by an evaluator outside the Court Clinic.

ON-CALL CLINICIAN: Each day a Clinician is assigned to respond to requests by a Judge, Hearing Officer, or Special Commissioner. The Clinician will attempt to assist the parties and their attorneys reach a temporary resolution to a time-sharing and/or custody dispute. The Clinician may make suggestions to the Court, but the Court will make the final ruling. The Clinician can be accessed only through the Court.

DOMESTIC VIOLENCE cases require special procedures. If there are allegations or findings of domestic violence, the parties or attorneys should inform the assigned clinician prior to beginning any process at the Court Clinic.

OUT OF DISTRICT CASES: Cases from other districts involve specific procedures which require the Judges in both districts to approve the referral order. The only service available is Mediation.

OTHER: The Court Clinic reserves the right to inform attorneys and the Judge when a family has used the Clinic excessively. In other words, if a family has been through the mediation process, an Advisory Consultation has already been completed, etc., the Clinic may suggest that the case be referred to an outside mediation/evaluation process by a private clinician. However, the Judge will be the final authority.