CHAPTER 40
Domestic Affairs

ARTICLE 1
Marriage in General

40-1-1. [Marriage is civil contract requiring consent of parties.]

Marriage is contemplated by the law as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential.

History: Laws 1862-1863, p. 64; C.L. 1865, ch. 75, § 2; C.L. 1884, § 978; C.L. 1897, § 1415; Code 1915, § 3425; C.S. 1929, § 87-101; 1941 Comp., § 65-101; 1953 Comp., § 57-1-1.

ANNOTATIONS

Cross references. — For marriage settlement and separation contracts, *see* 40-2-4 to 40-2-7 NMSA 1978.

For dissolution of marriage, *see* 40-4-1 NMSA 1978 et seq.

For jurisdiction of children's court to authorize marriage of minor, *see* 32A-1-8 NMSA 1978.

For magistrates solemnizing contract of marriage, *see* 35-3-2 NMSA 1978.

Purpose of marriage laws. — The purpose of New Mexico marriage laws is to bring stability and order to the legal relationship of committed couples by defining their rights and responsibilities as to one another, their children if they choose to raise children together, and their property. *Griego v. Oliver*, 2014-NMSC-003.

Same-gender marriages. — Barring individuals from marrying and depriving them of the rights, protections and responsibilities of civil marriage solely because of their sexual orientation violates the equal protection clause of Article II, Section 18 of the New Mexico constitution. The state of New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights, protections and responsibilities that derive from civil marriage under New Mexico law. *Griego v. Oliver*, 2014-NMSC-003.

Meaning of the phrase "civil marriage" in New Mexico marriage laws. — The phrase "civil marriage" in New Mexico marriage laws shall be construed to mean the voluntary union of two persons to the exclusion of all others. All rights, protections and responsibilities that result from the marital relationship shall apply equally to both same-

gender and opposite-gender married couples. When reference is made to marriage, husband, wife, spouse, family, immediate family, dependent, next of kin, widow, widower, or any other word, which in context denotes a marital relationship, the same shall apply to same-gender couples who choose to marry. *Griego v. Oliver*, 2014-NMSC-003.

Effect of section is to deny validity to mere consent marriage. *In re Gabaldon's Estate*, 1934-NMSC-053, 38 N.M. 392, 34 P.2d 672, 94 A.L.R. 980.

Marriage, standing alone, is presumed valid. — That is, the party attacking it carries the burden of proof and the invalidity must be proven by clear and convincing evidence. *Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

Lack of evidence of license does not rebut presumption. — Mere lack of evidence of a record of the issuance of a license or of a ceremonial marriage is not sufficient to rebut the presumption of a ceremonial marriage. *Trower v. Board of Cnty. Comm'rs*, 1965-NMSC-040, 75 N.M. 125, 401 P.2d 109, *overruled on other grounds Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

Presumption attaches to marriage that is later in time. *Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

Evidence to prove valid marriage. — While this article prescribes the manner in which a marriage may be solemnized in this state, nowhere does it set forth rules of evidence by which a valid marriage must be proven. The fact of marriage may be proven either by direct or circumstantial evidence, documentary evidence or by parol, and the sufficiency of the evidence to establish a marriage is governed by the general rules of evidence. *Trower v. Board of Cnty. Comm'rs*, 1965-NMSC-040, 75 N.M. 125, 401 P.2d 109, *overruled on other grounds Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

Common-law marriages historically invalid. — Until the enactment of this section, the law relating to marriages in New Mexico stood as if the rule of the council of Trent of 1563 was the law of the land, except as modified by the section compiled as 40-1-2 NMSA 1978. Under said rule, valid marriages must have been celebrated before the parish or other priest, or by license of the ordinary, and before two or three witnesses, and consent marriages were invalid. Section40-1-2 NMSA 1978 added only the provision that any clergyman or a civil magistrate could perform marriages, and the law of which the present section was a part added the first regulatory provisions without changing the basic foundation of lawful marriages. Since the civil law rule was modified by statute prior to the adoption of the common law as the rule of practice and decision here, the latter had no effect, and common-law marriages have never been valid in New Mexico. *In re Gabaldon's Estate*, 1934-NMSC-053, 38 N.M. 392, 34 P.2d 672, 94 A.L.R. 980.

Marriage is a contract. — In New Mexico, marriage is a civil contract which must be licensed and a contract in which the public is interested and to which the state is a party. *In re Bivians Estate*, 1982-NMCA-132, 98 N.M. 722, 652 P.2d 744, cert. quashed, 98 N.M. 762, 652 P.2d 1213.

Marriage not recognized unless formally contracted and solemnized. — New Mexico does not recognize any marriage consummated therein which is not formally consummated by contract and solemnized before an official. *Hazelwood v. Hazelwood*, 1976-NMSC-074, 89 N.M. 659, 556 P.2d 345; *Merrill v. Davis*, 1983-NMSC-070, 100 N.M. 552, 673 P.2d 1285.

De facto marriage not ground for retroactive modification of alimony. — A "de facto marriage," whatever may be required to constitute such, does not constitute grounds for retroactively modifying or abating accrued alimony payments; although, the district court does have discretion to modify prospectively or terminate an alimony award, if the circumstances so warrant, where the termination of alimony was largely predicated on its finding of a de facto marriage, the judgment of the trial court was reversed and the cause remanded. *Hazelwood v. Hazelwood*, 1976-NMSC-074, 89 N.M. 659, 556 P.2d 345.

Civil claims between unmarried cohabitants disputing ownership of a business. — Where plaintiff and defendant lived together as an unmarried couple from 2005 to 2015, and where plaintiff claimed that the parties agreed to start a business together and agreed to share ownership of that business, and where, after the parties separated in 2015, plaintiff filed suit against defendant for breach of contract, unjust enrichment, promissory estoppel, common law fraud, constructive fraud, conversion, negligent representation, breach of implied covenant of good faith and fair dealing, and prima facie tort, and where defendant filed a motion for summary judgment, the district court did not err in granting defendant's motion on the breach of contract claim, because pursuant to New Mexico precedent, plaintiff had the burden to provide evidence resulting in reasonable inferences that the parties entered into an express agreement to jointly own property, and it was undisputed that there was never any written contract and there was no evidence of a verbal contract between the parties. An inference based on the parties' conduct that a contract existed is an implied contract, which is insufficient to raise a genuine issue of fact regarding whether two cohabitating parties entered an agreement to jointly own property. *Battishill v. Ingram*, 2024-NMCA-001, cert. denied.

Summary judgment improper where unmarried cohabitant was unjustly enriched. — Where plaintiff and defendant lived together as an unmarried couple from 2005 to 2015, and where plaintiff claimed that the parties agreed to start a business together and agreed to share ownership of that business, and where, after the parties separated in 2015, plaintiff filed suit against defendant for breach of contract, unjust enrichment, promissory estoppel, common law fraud, constructive fraud, conversion, negligent representation, breach of implied covenant of good faith and fair dealing, and prima facie tort, and where defendant filed a motion for summary judgment, the district court

erred in granting defendant's motion on the unjust enrichment claim, because to establish unjust enrichment, plaintiff was required to demonstrate a genuine issue of fact regarding whether defendant knowingly benefitted at plaintiff's expense in such a manner that allowing defendant to retain the benefit would be unjust, and in this case, plaintiff presented evidence that she worked at the business without compensation for at least two years, which is sufficient evidence to allow reasonable minds to differ on whether defendant received unjust benefits from plaintiff's professional services. *Battishill v. Ingram*, 2024-NMCA-001, cert. denied.

Promissory estoppel not warranted for unmarried cohabitant providing homemaking services. — Where plaintiff and defendant lived together as an unmarried couple from 2005 to 2015, and where plaintiff claimed that the parties agreed to start a business together and agreed to share ownership of that business, and where, after the parties separated in 2015, plaintiff filed suit against defendant for breach of contract, unjust enrichment, promissory estoppel, common law fraud, constructive fraud, conversion, negligent representation, breach of implied covenant of good faith and fair dealing, and prima facie tort, and where plaintiff relied on the homemaking services she provided as evidence of a reasonable inference that defendant made a promise to share ownership of the business, the district court did not err in granting defendant's motion for summary judgment on the promissory estoppel claim, because homemaking services provided in the context of the romantic relationship do not lead to a reasonable inference that defendant promised half ownership of the business, and there was no evidence that defendant made an actual promise which in fact induced action or forbearance on the part of plaintiff. *Battishill v. Ingram*, 2024-NMCA-001, cert. denied.

Unmarried cohabitant failed to demonstrate negligent misrepresentation. — Where plaintiff and defendant lived together as an unmarried couple from 2005 to 2015, and where plaintiff claimed that the parties agreed to start a business together and agreed to share ownership of that business, and where, after the parties separated in 2015, plaintiff filed suit against defendant for breach of contract, unjust enrichment, promissory estoppel, common law fraud, constructive fraud, conversion, negligent representation, breach of implied covenant of good faith and fair dealing, and prima facie tort, the district court did not err in granting defendant's motion for summary judgment on the negligent misrepresentation claim, because for plaintiff's negligent misrepresentation claim to survive a motion for summary judgment, plaintiff was required to raise issues of fact that defendant made a material misrepresentation to plaintiff, that plaintiff relied upon the representation, that defendant knew the representation was false or made it recklessly, and that defendant intended to induce reliance by plaintiff, and in this case, plaintiff failed to provide any evidence that defendant made an express representation to plaintiff that the parties jointly own the business, and therefore plaintiff failed to provide evidence that would lead to a reasonable inference that defendant knew any misrepresentation made was false or made recklessly, or that defendant intended to induce reliance by plaintiff. *Battishill v. Ingram*, 2024-NMCA-001, cert. denied.

Unmarried cohabitant failed to demonstrate common law fraud. — Where plaintiff and defendant lived together as an unmarried couple from 2005 to 2015, and where plaintiff claimed that the parties agreed to start a business together and agreed to share ownership of that business, and where, after the parties separated in 2015, plaintiff filed suit against defendant for breach of contract, unjust enrichment, promissory estoppel, common law fraud, constructive fraud, conversion, negligent representation, breach of implied covenant of good faith and fair dealing, and prima facie tort, the district court did not err in granting defendant's motion for summary judgment on the common law fraud claim, because for plaintiff's common law fraud claim to survive a motion for summary judgment, plaintiff was required to raise issues of fact that defendant misrepresented a fact that he knew to be false, it was made with the intent to deceive and to induce plaintiff to act in reliance, and that plaintiff actually relied on the representation to her detriment, and in this case, plaintiff failed to provide any evidence that defendant made a representation that he knew to be false with the intent to deceive and to induce plaintiff to act in reliance. *Battishill v. Ingram*, 2024-NMCA-001, cert. denied.

Unmarried cohabitant failed to provide evidence of constructive fraud. — Where plaintiff and defendant lived together as an unmarried couple from 2005 to 2015, and where plaintiff claimed that the parties agreed to start a business together and agreed to share ownership of that business, and where, after the parties separated in 2015, plaintiff filed suit against defendant for breach of contract, unjust enrichment, promissory estoppel, common law fraud, constructive fraud, conversion, negligent representation, breach of implied covenant of good faith and fair dealing, and prima facie tort, the district court did not err in granting defendant's motion for summary judgment on the constructive fraud claim, because an action for constructive fraud is maintainable where there is a nondisclosure of material facts and the person charged with the constructive fraud had a duty to speak under the circumstances, and in this case, plaintiff failed to provide any evidence of an express agreement to share ownership of the business and therefore there was no evidence that defendant owed plaintiff a duty to speak under the circumstances, and, because the parties were not married, there was no fiduciary relationship between the parties. *Battishill v. Ingram*, 2024-NMCA-001, cert. denied.

Unmarried cohabitant failed to provide evidence of conversion by demand and refusal. — Where plaintiff and defendant lived together as an unmarried couple from 2005 to 2015, and where plaintiff claimed that the parties agreed to start a business together and agreed to share ownership of that business, and where, after the parties separated in 2015, plaintiff filed suit against defendant for breach of contract, unjust enrichment, promissory estoppel, common law fraud, constructive fraud, conversion, negligent representation, breach of implied covenant of good faith and fair dealing, and prima facie tort, and where defendant claimed that there were material facts that demonstrate she had ownership and right to possession of one-half interest in the business because she formed a partnership with defendant and thus defendant is liable of conversion by demand and refusal because he engaged in deceptive practices in order to have the corporation established without granting 50 percent of the stock in the corporation to plaintiff, the district court did not err in granting defendant's motion for summary judgment on the conversion claim, because plaintiff failed to establish a

question of fact regarding her right of possession of personal property because a business partnership between unmarried cohabitants requires an express contract. *Battishill v. Ingram*, 2024-NMCA-001, cert. denied.

Unmarried cohabitant failed to provide evidence of prima facie tort. — Where plaintiff and defendant lived together as an unmarried couple from 2005 to 2015, and where plaintiff claimed that the parties agreed to start a business together and agreed to share ownership of that business, and where, after the parties separated in 2015, plaintiff filed suit against defendant for breach of contract, unjust enrichment, promissory estoppel, common law fraud, constructive fraud, conversion, negligent representation, breach of implied covenant of good faith and fair dealing, and prima facie tort, and where plaintiff claimed that by failing to convey half the interest of the business to plaintiff, there was a reasonable inference that defendant intended to injure plaintiff, the district court did not err in granting defendant's motion for summary judgment on the prima facie tort claim, because plaintiff failed to raise a material issue of fact as to the absence of justification for the alleged injurious act and failed to provide any evidence that leads to a reasonable inference that the parties entered into an express agreement to jointly own the business. Accordingly, defendant was justified in not conveying any business interest to plaintiff. *Battishill v. Ingram*, 2024-NMCA-001, cert. denied.

Unmarried cohabitant failed to provide evidence of covenant of good faith and fair dealing. — Where plaintiff and defendant lived together as an unmarried couple from 2005 to 2015, and where plaintiff claimed that the parties agreed to start a business together and agreed to share ownership of that business, and where, after the parties separated in 2015, plaintiff filed suit against defendant for breach of contract, unjust enrichment, promissory estoppel, common law fraud, constructive fraud, conversion, negligent representation, breach of implied covenant of good faith and fair dealing, and prima facie tort, the district court did not err in granting defendant's motion for summary judgment on the implied covenant of good faith and fair dealing claim, because the parties' cohabitating romantic relationship required them to enter into an express agreement to jointly own property, and plaintiff failed to provide evidence of an express agreement. Therefore, there is no agreement and no implied covenant of good faith and fair dealing. *Battishill v. Ingram*, 2024-NMCA-001, cert. denied.

Special power of attorney for application and marriage by proxy. — The execution of a special power of attorney, for the purpose of participating in the application for a marriage license and subsequently in a marriage ceremony by proxy, should be before a person authorized to administer oaths, including military officers on active duty and should specify completely the required information as to age, relationship of the engaged persons, consanguinity, present marital status, and a specific statement authorizing the named attorney in fact or proxy to enter into a contract with the person named. 1957 Op. Att'y Gen. No. 57-13.

Law reviews. — For article, "Annulment of Marriages in New Mexico: Part II - Proposed Statute," see 2 Nat. Resources J. 270 (1962).

For note and comment, "The Irrational Legacy of Rooner v. Evans: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation that Denies Equal Protection to Members of the Gay Community," see 36 N.M.L. Rev. 565 (2006).

For note and comment, "New Tort Rules for Unmarried Partners: The Enhanced Potential for Successful Loss of Consortium and NEID Claims by Same Sex Partners in New Mexico After Lozoya," see 34 N.M.L. Rev. 461 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Marriage §§ 4, 6, 7.

Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation, 94 A.L.R.3d 552.

Marriage between persons of the same sex, 81 A.L.R.5th 1.

55 C.J.S. Marriage § 18.

40-1-2. Marriages solemnized; ordained clergy or civil magistrates may solemnize.

A. The civil contract of marriage is entered into when solemnized as provided in Chapter 40, Article 1 NMSA 1978. As used in Chapter 40, Article 1 NMSA 1978, "solemnize" means to join in marriage before witnesses by means of a ceremony.

B. A person who is an ordained member of the clergy or who is an authorized representative of a federally recognized Indian nation, tribe or pueblo may solemnize the contract of marriage without regard to sect or rites and customs the person may practice.

C. Active or retired 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 marriage. Civil magistrates solemnizing contracts of marriage shall charge no fee therefor.

History: Laws 1859-1860, p. 120; C.L. 1865, ch. 75, § 1; C.L. 1884, § 977; C.L. 1897, § 1414; Code 1915, § 3426; C.S. 1929, § 87-102; 1941 Comp., § 65-102; 1953 Comp., § 57-1-2; Laws 1983, ch. 193, § 1; 1989, ch. 78, § 1; 2001, ch. 99, § 1; 2013, ch. 144, § 2.

ANNOTATIONS

Cross references. — For magistrates solemnizing contract of marriage, *see* 35-3-2 NMSA 1978.

The 2013 amendment, effective June 14, 2013, defined "solemnized"; in the, deleted "clergyman", and added "marriages solemnized; ordained clergy" and after "solemnize",

deleted "fees"; added Subsection A; in Subsection B, after "A person", deleted "may solemnize the contract of matrimony by means of" and added "who is", after "who is an ordained", deleted "clergyman" and added "member of the clergy", after "the clergy or", added "who is an", after "recognized Indian", deleted "tribe" and added "nation, tribe pueblo may solemnize the contract of marriage", and after "without regard to sect", deleted "to which he may belong"; and in Subsection C, in the first sentence, added "Active or retired judges".

The 2001 amendment, effective June 15, 2001, substituted "A person may solemnize" for "It is lawful, valid and binding to all intents and purposes for those who may so desire to solemnize" in Subsection A; and inserted "United States constitution" and "or laws or the United States" in Subsection B.

The 1989 amendment, effective June 16, 1989, in Subsection A, inserted "or authorized representative of a federally recognized Indian tribe" and added "or the rites and customs he may practice", and made minor stylistic changes throughout the section.

Proof and presumption of marriage ceremony. — A marriage ceremony may be proved by any competent witness present at the ceremony, and when proven, the contract, the capacity of the parties, and the validity of the marriage will be presumed. *United States v. de Amador*, 1891-NMSC-025, 6 N.M. 173, 27 P. 488; *United States v. de Lujan*, 1891-NMSC-026, 6 N.M. 179, 27 P. 489; *United States v. Chaves*, 1891-NMSC-027, 6 N.M. 180, 27 P. 489.

Statute preceded common-law rule. — This section and historical fact indicate that, in the belief of those who framed and passed it, either because of the requirement of the council of Trent in 1563, or otherwise, the only valid marriage theretofore was one celebrated by a Roman Catholic priest, and so a mere consent marriage was and is invalid, since common-law marriages were never legalized in New Mexico, and the first regulating statute, of which 40-1-1 NMSA 1978 was a part, preceded the adoption of the common law as the rule of practice and decision. *In re Gabaldon's Estate*, 1934-NMSC-053, 38 N.M. 392, 34 P.2d 672, 94 A.L.R. 980.

Marriage not recognized unless formally contracted and solemnized. — New Mexico does not recognize any marriage consummated therein which is not formally consummated by contract and solemnized before an official. *Hazelwood v. Hazelwood*, 1976-NMSC-074, 89 N.M. 659, 556 P.2d 345; *Merrill v. Davis*, 1983-NMSC-070, 100 N.M. 552, 673 P.2d 1285.

Civil magistrates within section. — Probate judges, justices of the peace (now magistrates), and judges of the district court are civil magistrates within this section, although not specifically mentioned. Golden v. Golden, 1937-NMSC-021, 41 N.M. 356, 68 P.2d 928.

County clerk not included. — Since county clerk is not a civil magistrate he cannot perform a marriage ceremony. 1941 Op. Att'y Gen. No. 41-3746.

Army or navy chaplain may perform marriage. — A duly ordained clergyman serving as an army or navy chaplain may perform marriage ceremony in this state. 1942 Op. Att'y Gen. No. 42-4028.

Police judge may perform marriage. — A police judge may legally perform a marriage ceremony in this state since he is a "civil magistrate." 1942 Op. Att'y Gen. No. 42-4133.

Area where judge may perform marriage ceremony. — A municipal judge cannot perform a marriage ceremony outside of the municipality in which he sits. 1988 Op. Att'y Gen. No. 88-36 (rendered under prior law).

A magistrate judge cannot perform a marriage ceremony outside of his district. 1988 Op. Att'y Gen. No. 88-36 (rendered under prior law).

Territorial jurisdiction of judge. — Except for probate and municipal judges, judges and justices may solemnize marriages anywhere in New Mexico. 1991 Op. Att'y Gen. No. 91-09.

Ceremony performed with proxy. — Marriage ceremony may be performed where one of the parties is represented by a proxy as has been allowed and recognized in the Catholic church since before the Council of Trent. 1943 Op. Att'y Gen. No. 43-4283.

Fee for probate judge performing ceremony. — A probate judge may perform a marriage ceremony; and while he may not charge a fee, he could keep as his own any voluntary gift for the service. 1917 Op. Att'y Gen. No. 17-2010; 1929 Op. Att'y Gen. No. 29-17; 1931 Op. Att'y Gen. No. 31-27; 1943 Op. Att'y Gen. No. 43-4352.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Marriage § 40.

Right to attack validity of marriage after death of a party, 47 A.L.R.2d 1393.

Admissibility of evidence in prosecution for false pretense by promise of marriage of similar attempt on other occasion, 78 A.L.R.2d 1359.

Validity of marriage as affected by intention of the parties that it should be only a matter of form or jest, 14 A.L.R.2d 624.

Presumption as to advancement to child by gift on marriage, 31 A.L.R.2d 1036.

Validity of marriage as affected by lack of legal authority of person solemnizing it, 13 A.L.R.4th 1323.

55 C.J.S. Marriage § 29.

40-1-3. Ceremony by religious society.

It is lawful for any religious society or federally recognized Indian nation, tribe or pueblo to solemnize marriage conformably with its rites and customs, and the secretary of the society or the person authorized by the society or federally recognized Indian nation, tribe or pueblo shall make and transmit a transcript to the county clerk certifying to the marriages solemnized.

History: Laws 1862-1863, p. 66; C.L. 1865, ch. 75, § 8; C.L. 1884, § 984; C.L. 1897, § 1421; Code 1915, § 3428; C.S. 1929, § 87-104; 1941 Comp., § 65-103; 1953 Comp., § 57-1-3; Laws 1983, ch. 193, § 2; 1989, ch. 78, § 2; 2013, ch. 144, § 3.

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Compiler's notes. — As originally enacted, this section also contained the words: "and it shall be the duty of said clerk to record said marriages in the same manner as provided for in the foregoing section, and in case said society or the secretary or the person president thereof fail to comply with the provisions hereof, the same shall incur the penalty provided in the fifth section of this act, which shall be recovered in the same manner as is prescribed in said section." That provision was deleted by the 1915 Code compilers as impliedly repealed by Laws 1905, ch. 65, § 4 (40-1-15 NMSA 1978).

The 2013 amendment, effective June 14, 2013, provided for the solemnization of marriage pursuant to the rites and customs of Indian nations, tribes of pueblos; after "recognized Indian", changed "tribe" to "nation, tribe or pueblo"; after "or pueblo to", deleted "celebrate" and added "solemnize"'; after "society or the person", deleted "presiding over" and added "authorized by"; and after "recognized Indian", deleted "tribe" and added "nation, tribe or pueblo".

The 1989 amendment, effective June 16, 1989, twice inserted "or federally recognized Indian tribe", and made minor stylistic changes.

Lack of evidence of license does not rebut presumption of marriage. — Mere lack of evidence of a record of the issuance of a license or of a ceremonial marriage is not sufficient to rebut the presumption of a ceremonial marriage. *Trower v. Board of Cnty. Comm'rs*, 1965-NMSC-040, 75 N.M. 125, 401 P.2d 109, *overruled on other grounds by Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

40-1-4. [Lawful marriages without the state recognized.]

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.

History: Laws 1862-1863, p. 64; C.L. 1865, ch. 75, § 10; C.L. 1884, § 986; C.L. 1897, § 1423; Code 1915, § 3429; C.S. 1929, § 87-105; 1941 Comp., § 65-104; 1953 Comp., § 57-1-4.

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Validity governed by law of place where performed. — New Mexico applies the rule of comity, that the law of the place where the marriage is performed governs the validity of that marriage. *In re Estate of Lamb*, 1982-NMSC-130, 99 N.M. 157, 655 P.2d 1001.

Common-law marriage valid where consummated, valid in New Mexico. — Although a valid common-law marriage may not be consummated in New Mexico, if valid where consummated, it will be recognized in New Mexico. *Gallegos v. Wilkerson*, 1968-NMSC-156, 79 N.M. 549, 445 P.2d 970.

De facto spouse under Australian law was not a marriage. — Where an Australian court determined that petitioner was the de facto spouse of the decedent under the Australian property relationships law based on the facts that petitioner and decedent had a twenty-year relationship, lived together openly and publicly, and were involved in each other's business and economic affairs; the Australian property relationships law conferred the same succession rights on de facto spouses as it conferred on spouses in marriage; the Australian court expressly stated that the Australian property relationships law did not create a marriage; petitioner and the decedent were not married to each other; and the de facto spouse status conferred by the Australian property relations law was distinct from the status of marriage under both the Australian marriage law and the Australian family law; and the de facto relationship was not a common-law marriage, the de facto spouse relationship under the Australian property relationships law was not a marital relationship under New Mexico law. *Dion v. Rieser*, 2012-NMCA-071, 283 P.3d 871, cert. denied, 2012-NMCERT-006.

Comity. — Although this state does not authorize common-law marriages, it will recognize such marriages if valid in the jurisdiction where consummated. New Mexico applies the rule of comity, that the law of the place of contract governs the validity of a marriage. *In re Estate of Bivians*, 1982-NMCA-132, 98 N.M. 722, 652 P.2d 744, cert. quashed, 98 N.M. 762, 652 P.2d 1213.

What constitutes common-law marriage. — Common-law marriage is considered to be a status arrived at by express or implied mutual consent or agreement of the parties, followed by cohabitation as husband and wife and publicly holding themselves out as such. *Gallegos v. Wilkerson*, 1968-NMSC-156, 79 N.M. 549, 445 P.2d 970.

Validity of common-law marriage formed in foreign jurisdiction governed by its law. — To determine whether a valid common-law marriage was formed in a foreign jurisdiction, it is necessary to look to the substantive law of that jurisdiction. The threshold question is whether a couple established significant contacts with a

jurisdiction recognizing common-law marriage. *In re Estate of Lamb*, 1982-NMSC-130, 99 N.M. 157, 655 P.2d 1001.

New Mexico law applies as to evidence required for validity. — Although foreign law determines the requisites of an asserted foreign common-law marriage, New Mexico law determines the competency, admissibility, quality, degree and quantum of evidence required to establish the vital facts. *In re Estate of Bivians*, 1982-NMCA-132, 98 N.M. 722, 652 P.2d 744, cert. quashed, 98 N.M. 762, 652 P.2d 1213.

Transmuting illicit relationship into valid common-law marriage. — For an illicit relationship to become transmuted into a valid common-law marriage, the evidence must show actual matrimony by mutual consent of each of the parties within the state authorizing common-law marriage, plus each of the other elements required in that jurisdiction. *In re Estate of Bivians*, 1982-NMCA-132, 98 N.M. 722, 652 P.2d 744, cert. quashed, 98 N.M. 762, 652 P.2d 1213.

Proof required where original relationship in this state illicit. — If the original relationship of a couple in New Mexico is illicit and the couple continue to maintain legal residence in New Mexico, a common-law marriage cannot be inferred absent proof of each element necessary to establish a common-law marriage and a showing of substantial contacts by the parties with the state where the alleged common-law marriage occurred. *In re Estate of Bivians*, 1982-NMCA-132, 98 N.M. 722, 652 P.2d 744, cert. quashed, 98 N.M. 762, 652 P.2d 1213.

Evidence of common-law marriage in Texas. — Where proof is present that parties went to El Paso, rented an apartment, agreed to a marriage between themselves, lived together there, and held themselves out as husband and wife, the finding of the court of a valid common-law marriage in Texas is thus supported by substantial evidence and should not be disturbed by supreme court. *Gallegos v. Wilkerson*, 1968-NMSC-156, 79 N.M. 549, 445 P.2d 970.

Common-law marriage of New Mexico residents. — This section makes lawful "all marriages celebrated beyond the limits of this state, which are valid according to the laws" of the place where celebrated. No exception is made for residents of New Mexico. That the court should not hold invalid a common-law marriage contracted by the parties in Texas, even though residents of New Mexico, would seem to be the direction of the section. *Gallegos v. Wilkerson*, 1968-NMSC-156, 79 N.M. 549, 445 P.2d 970.

Uncle/niece marriages. — This state recognizes the general rule, which is that a marriage valid when and where performed is valid everywhere, and has no judicial decision invalidating an uncle-niece marriage validly contracted outside the state. *Leszinske v. Poole*, 1990-NMCA-088, 110 N.M. 663, 798 P.2d 1049, cert. denied, 110 N.M. 533, 797 P.2d 983.

Same-sex marriages. — A same-sex marriage that is valid under the laws of the country or state where it was consummated would be found valid in New Mexico. 2011 Op. Att'y Gen. No. 11-01.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Habit and repute as essential to common-law marriage, 33 A.L.R. 27.

Common-law marriage between parties to divorce, 82 A.L.R.2d 688.

Divorced woman's subsequent sexual relations or misconduct as warranting, alone or with other circumstances, modification of alimony decree, 98 A.L.R.3d 453.

55 C.J.S. Marriage § 8.

40-1-5. Repealed.

History: Laws 1862-1863, p. 64; C.L. 1865, ch. 75, § 3; C.L. 1884, § 979; C.L. 1897, § 1416; Code 1915, § 3427; Laws 1923, ch. 100, § 1; C.S. 1929, § 87-103; 1941 Comp., § 65-105; 1953 Comp., § 57-1-5; Laws 1973, ch. 51, § 1; 1975, ch. 32, § 1; 1978 Comp., § 40-1-5, repealed by Laws 2013, ch. 144, § 14.

ANNOTATIONS

Repeals. — Laws 2013, ch. 144, § 14 repealed 40-1-5 NMSA 1978, as enacted by Laws 1862-1863, p. 64, relating to consent of parent or guardian for minor to marry, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

40-1-6. Restrictions on marriage of minors.

A. The county clerk shall not issue a marriage license to an unemancipated person sixteen or seventeen years of age, and no person authorized by the laws of this state to solemnize marriages shall knowingly unite in marriage any person sixteen or seventeen years of age, unless the minor first receives the written consent of each of the minor's living parents as shown on the minor's certificate of birth, or the district court has authorized the marriage of such person upon request of a parent or legal guardian of the person for good cause shown, and a certified copy of the judicial authorization is filed with the county clerk.

B. The county clerk shall not issue a marriage license to any person under sixteen years of age, and no person authorized by the laws of this state to solemnize marriages shall knowingly unite in marriage any person under sixteen years of age, unless the children's or family court division of the district court has first authorized the marriage of the person upon request of a parent or legal guardian of the person in settlement of proceedings to compel support and establish parentage, or where an applicant for the

marriage license is pregnant, and a certified copy of the judicial authorization is filed with the county clerk.

History: Laws 1876, ch. 31, § 2; C.L. 1884, § 993; C.L. 1897, § 1426; Code 1915, § 3431; Laws 1923, ch. 100, § 2; C.S. 1929, § 87-107; 1941 Comp., § 65-106; Laws 1953, ch. 112, § 1; 1953 Comp., § 57-1-6; Laws 1972, ch. 97, § 70; 1975, ch. 32, § 2; repealed and reenacted by Laws 2013, ch. 144, § 4.

ANNOTATIONS

Repeals and reenactments. — Laws 2013, ch. 144, § 4 repealed former 40-1-6 NMSA 1978, and enacted a new section, effective June 14, 2013.

Cross references. — For age of majority, 18 years, *see* 28-6-1 NMSA 1978.

For jurisdiction of children's court to authorize marriage of minor, *see* 32A-1-8 NMSA 1978.

Knowledge of person's age not element of offense. — The marrying of a female under 15, prohibited by this section (before its amendment), the penalty for which was provided by 40-1-8 NMSA 1978, belonged to that class of statutory misdemeanors where knowledge of the person's age and an intent to marry one under age is not a necessary element of the offense. *Territory v. Harwood*, 1910-NMSC-029, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504.

Such marriages to be declared void by court. — Section 40-1-9 NMSA 1978 (before its amendment) did not make the marriages of males under 18 or females under 15 voidable for they were declared void by this section (before its amendment), but merely provided that they should be declared void by court decree, and rendered less harsh the operation of the statute upon participants in such illegal marriages and their possible and innocent offspring without affecting the liability of the presiding official. *Territory v. Harwood*, 1910-NMSC-029, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504.

Law reviews. — For article, "Annulment of Marriages in New Mexico: Part II - Proposed Statute," see 2 Nat. Resources J. 270 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Marriage § 14.

Attack on marriage of a child after his death, 47 A.L.R.2d 1393.

Marriage as affecting jurisdiction of juvenile court over child, 14 A.L.R.2d 336.

55 C.J.S. Marriage § 11.

40-1-7. Incestuous marriages.

All marriages between relations and children, including grandparents and grandchildren of all degrees; between brothers and sisters of full blood or of half blood; between uncles and nieces; and between aunts and nephews are declared incestuous and absolutely void.

History: Laws 1876, ch. 31, § 1; C.L. 1884, § 992; C.L. 1897, § 1425; Code 1915, § 3430; C.S. 1929, § 87-106; 1941 Comp., § 65-107; 1953 Comp., § 57-1-7; 2013, ch. 144, § 5.

ANNOTATIONS

Compiler's notes. — Prior to Comp. Laws 1884, this section contained the words "and first cousins" following the word "nephews." Those words were deleted to accord with Laws 1880, ch. 37, § 1, which repealed "such parts of all laws as prohibit the marriage of cousins of any degree."

The 2013 amendment, effective June 14, 2013, defined incestuous marriages, added the title of the section; at the beginning of the section, deleted "Sec. 6"; after "children, including", deleted "grandfathers" and added "grandparents"; after "all degrees; between", deleted "half"; after "brothers and sisters", deleted "as also"; after "of full blood", added "or of half blood"; after "uncles and nieces" added "and between"; and deleted the former second sentence, which extended the section to illegitimate children to legitimize them.

Marriage valid where celebrated. — New Mexico's public policy against incest did not preclude the district court from awarding a mother primary physical custody of her children, after taking into account her plans to marry her uncle, where that choice was in the best interests of the children, and mother and uncle intended to reside in California. *Leszinske v. Poole*, 1990-NMCA-088, 110 N.M. 663, 798 P.2d 1049, cert. denied, 110 N.M. 533, 797 P.2d 983.

Law reviews. — For article, "Annulment of Marriages in New Mexico: Part II - Proposed Statute," see 2 Nat. Resources J. 270 (1962).

For article, "New Mexico's 1969 Criminal Abortion Law," see 10 Nat. Resources J. 591 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Incest §§ 1, 7.

Incestuous marriage, attack after death of party, 47 A.L.R.2d 1393.

55 C.J.S. Marriage § 16.

40-1-8. Repealed.

History: Laws 1876, ch. 31, § 3; C.L. 1884, § 994; C.L. 1897, § 1427; Code 1915, § 3432; C.S. 1929, § 87-108; 1941 Comp., § 65-108; 1953 Comp., § 57-1-8; 1978 Comp., § 40-1-8, repealed by Laws 2013, ch. 144, § 14.

ANNOTATIONS

Repeals. — Laws 2013, ch. 144, § 14 repealed 40-1-8 NMSA 1978, as enacted by Laws 1876, ch. 31, § 3, relating to contracting or performing ceremony for unlawful marriage, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

40-1-9. Prohibited marriages.

No marriage between relatives within the prohibited degrees or between or with persons under the prohibited ages shall be declared void except by a decree of the district court upon proper proceedings. A cause of action may be instituted by the minor, by next friend, by either parent or legal guardian of the minor or by the district attorney. In the case of minors, no party to the marriage who may be over the prohibited age shall be allowed to apply for or obtain a decree of the court declaring the marriage void; but the minor may do so, and the court may, in its discretion, grant alimony until the minor becomes of age or remarries. If the parties should live together until they arrive at the age under which marriage is permitted by statute, then the marriage shall be deemed legal and binding.

History: Laws 1876, ch. 32, § 1; C.L. 1884, § 997; C.L. 1897, § 1430; Code 1915, § 3434; Laws 1927, ch. 110, § 1; C.S. 1929, § 87-110; 1941 Comp., § 65-109; 1953 Comp., § 57-1-9; Laws 1973, ch. 51, § 2; 2013, ch. 144, § 6.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, eliminated annulment; in the title, deleted "annulment"; after "or between or with", deleted "infants" and added "persons"; deleted the former fourth sentence, which provided that children of a void marriage are legitimate with the right of inheritance from both parents; and in the current fourth sentence, after "under which marriage is", deleted "prohibited" and added "permitted".

Penal provision not repealed by this section. — Penal provision of 40-1-8 NMSA 1978, directed against the uniting of persons under age in marriage, was not repealed by this section, enacted by same legislature, providing that such marriages should be declared void only by court decree. *Territory v. Harwood*, 1910-NMSC-029, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504.

Prohibited marriages to be declared void by court. — When the legislature provided in this section (before its amendment) that the marriages prohibited by 40-1-6 NMSA 1978 (before its amendment) and 40-1-7 NMSA 1978 should be declared void by court decree, it left them none the less contrary to law and none the less among those

"declared invalid" by the preceding act. The effect was to render less harsh the operation of the statute upon the participants in such illegal marriage and their possible and innocent offspring. *Territory v. Harwood*, 1910-NMSC-029, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504.

Applicability to alimony where bigamous marriage admitted. — This act applies to no invalid or void marriages other than those enumerated, and cannot be grounds of alimony where a bigamous marriage is in effect admitted. *Prince v. Freeman*, 1941-NMSC-006, 45 N.M. 143, 112 P.2d 821.

Presumption as to validity of later marriage. — In dual marriage situations, where validity of second marriage is attacked on the basis of the first being a subsisting relationship at the time the second was contracted, the presumption of validity attaches to the second marriage. *Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

To overcome presumption of validity which attaches to later marriage proof is required of the prior marriage plus the fact that it has not been terminated by death or divorce. *Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

Law reviews. — For article, "Annulment of Marriages in New Mexico," see 1 Nat. Resources J. 146 (1961).

For article, "Annulment of Marriages in New Mexico: Part II - Proposed Statute," see 2 Nat. Resources J. 270 (1962).

For symposium, "Equal Rights in Divorce and Separation," see 3 N.M.L. Rev. 118 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Annulment of Marriage § 1; 52 Am. Jur. 2d Marriage §§ 6, 72 to 77, 148, 149.

Misrepresentation or mistake as to identity or condition in life of one of the parties as affecting validity of marriage, 50 A.L.R.3d 1295.

Mental capacity to marry, 57 A.L.R.2d 1250, 82 A.L.R.2d 1040.

Effect of intoxication on mental capacity to marry, 57 A.L.R.2d 1250, 82 A.L.R.2d 1040.

Effect of annulment of marriage and rights arising out of acts or transactions between parties prior thereto, 2 A.L.R.2d 637.

Avoidance of procreation of children as ground for annulment, 4 A.L.R.2d 227.

Cohabitation of persons ceremonially married after learning of facts negativing dissolution of previous marriage of one, as affecting right to annulment, 4 A.L.R.2d 542.

Validity of marriage as affected by intention of the parties that it should be only a matter of form or jest, 14 A.L.R.2d 624.

Antenuptial knowledge relating to alleged grounds as barring right to annulment, 15 A.L.R.2d 706.

What constitutes duress sufficient to warrant annulment of marriage, 16 A.L.R.2d 1430.

Racial, religious or political differences as ground for annulment, 25 A.L.R.2d 928.

Refusal of sexual intercourse as fraud sufficient for annulment, 28 A.L.R.2d 499.

Rights and remedies in respect of property accumulated by man and woman living together in illicit relations or under void marriage, 31 A.L.R.2d 1255.

Applicability, to annulment actions, of residence requirements of divorce statutes, 32 A.L.R.2d 734.

Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting matrimonial actions, 54 A.L.R.2d 390.

Right to allowance of permanent alimony in connection with decree of annulment, 54 A.L.R.2d 1410.

Court's power as to custody and support of children in annulment proceedings, 63 A.L.R.2d 1008.

Concealment of unchastity prior to marriage, as ground for annulment of marriage, 64 A.L.R.2d 742.

Determination of paternity, legitimacy or legitimation of children in action for annulment, 65 A.L.R.2d 1381.

Mental health of contesting parent as factor in award of child custody in annulment proceeding, 74 A.L.R.2d 1073.

Determination of property rights in wedding presents in action for annulment, 75 A.L.R.2d 1365.

Concealment of or misrepresentation as to previous marriage or divorce as ground for annulment of marriage, 15 A.L.R.3d 759.

Incapacity for sexual intercourse as ground for annulment, 52 A.L.R.3d 589.

Annulment as affecting will previously executed by husband or wife, 71 A.L.R.3d 1297.

Right to allowance of permanent alimony in connection with decree of annulment, 81 A.L.R.3d 281.

Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation, 94 A.L.R.3d 552.

Homosexuality, transvestism, and similar sexual practices as grounds for annulment of marriage, 68 A.L.R.4th 1069.

Excessiveness of adequacy of attorneys' fees in domestic relations cases, 17 A.L.R.5th 366.

Sexual intercourse between persons related by half blood as incest, 34 A.L.R.5th 723.

Mental health of contesting parent as factor in award of child custody, 53 A.L.R.5th 375.

55 C.J.S. Marriage §§ 35, 36.

40-1-10. License required; county clerk.

A. Each couple desiring to marry pursuant to the laws of New Mexico shall first obtain a license from a county clerk of this state and following a ceremony conducted in this state file the license for recording in the county issuing the license.

B. To obtain a marriage license, the couple shall personally appear at the office of the county clerk issuing the license and provide sufficient identification to satisfy the county clerk as to each person's identity and qualification to receive a marriage license pursuant to Chapter 40, Article 1 NMSA 1978. On application to a judge of the district court, the court, for good cause, may authorize a person unable to appear personally to obtain a license from the county clerk, and a certified copy of the judicial authorization shall be filed with the county clerk.

C. The county clerk:

(1) shall collect the social security number of an applicant for a marriage license only as provided for in Section 27-1-10 NMSA 1978;

(2) shall not make available a social security number to another person except as provided for in Section 27-1-10 NMSA 1978; and

(3) may, thirty days after the commencement of each fiscal year, dispose of, in a secure manner, those social security numbers collected in the previous fiscal year that have not been requested as provided for in Section 27-1-10 NMSA 1978.

History: Laws 1905, ch. 65, § 1; Code 1915, § 3435; C.S. 1929, § 87-111; Laws 1939, ch. 25, § 1; 1941 Comp., § 65-110; 1953 Comp., § 57-1-10; Laws 1969, ch. 104, § 1; 1973, ch. 51, § 3; 2013, ch. 144, § 7.

ANNOTATIONS

Cross references. — For validation of marriages in 1905 where no license obtained, *see* 40-1-20 NMSA 1978.

For removal of local officers, *see* 10-4-1 to 10-4-29 NMSA 1978.

For age of majority, 18 years, *see* 28-6-1 NMSA 1978.

The 2013 amendment, effective June 14, 2013, required that applicants for a marriage license personally appear before the county clerk; required the county clerk to obtain the social security numbers of applicants; in Subsection A, after "couple desiring to marry" deleted "in" and added "pursuant to the laws of", after "New Mexico shall", added "first", after "county clerk", added "of this state", after "of this state and", added "following a ceremony conducted in this state", after "conducted in this state, file the", deleted "some" and added "license" and deleted "following the marriage ceremony", and deleted the former second sentence, which prohibited the county clerk from issuing a marriage license to persons under the age of majority and required the county clerk to obtain the affidavits of two persons as to the age of the applicants when there was a doubt as to their age; and added Subsections B and C.

Ceremonial marriage without a license is not void. — The New Mexico marriage licensure statute is merely directory. Ceremonial marriages performed without a New Mexico license are valid. *Rivera v. Rivera*, 2010-NMCA-106, 149 N.M. 66, 243 P.3d 1148, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Marriages performed pursuant to license issued by another state. — Where the parties obtained a marriage license in Texas; the marriage license authorized any person who was authorized by the laws of Texas to perform marriage ceremonies in Texas to marry the parties; the parties were married by an ordained minister in New Mexico who was authorized to perform marriage ceremonies in New Mexico and in Texas; and the parties completed the marriage license by showing that the marriage had occurred in New Mexico and recorded the marriage license with the county clerk's office in Texas that had issued the marriage license, the marriage of the parties was valid. *Rivera v. Rivera*, 2010-NMCA-106, 149 N.M. 66, 243 P.3d 1148, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Lack of evidence of license does not rebut presumption of marriage. — Mere lack of evidence of a record of the issuance of a license or of a ceremonial marriage is not sufficient to rebut the presumption of a ceremonial marriage. *Trower v. Board of Cnty. Comm'rs*, 1965-NMSC-040, 75 N.M. 125, 401 P.2d 109, *overruled on other grounds by Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

Marriage is civil contract which must be licensed. — In New Mexico, marriage is a civil contract which must be licensed. It is also a contract in which the public is interested and to which the state is a party. *In re Estate of Bivians*, 1982-NMCA-132, 98 N.M. 722, 652 P.2d 744, cert. quashed, 98 N.M. 762, 652 P.2d 1213.

Only one parent's consent necessary. — When parental consent to the marriage of a minor is required, the consent of only one parent is necessary. 1964 Op. Att'y Gen. No. 64-135.

County clerk may issue marriage license where neither party has appeared personally to apply for the license where the form of application used is substantially in agreement with 40-1-18 NMSA 1978 and the county clerk is satisfied as to the ages. 1967 Op. Att'y Gen. No. 67-88.

Oath as to age before notary of another state. — The only reason that the parties appear before the county clerk or the deputy clerk is to allow the clerk's office to determine if the parties are of legal age to be married in this state without parental consent. The parties can take an oath as to their age before a notary of any other state. 1967 Op. Att'y Gen. No. 67-88.

There is no time limitation on validity of marriage licenses. 1968 Op. Att'y Gen. No. 68-53.

Marriage valid even though performed in county other than where license obtained. — A marriage is valid even though the marriage ceremony was performed in a county of this state other than the county wherein the marriage license was obtained by the parties. 1961 Op. Att'y Gen. No. 61-104.

Persons performing ceremonies not liable. — The act of a duly qualified justice of the peace (now magistrate), priest or minister, in performing a marriage ceremony where the marriage license was obtained in a county of this state other than that where the marriage ceremony was celebrated, does not fall within the mandatory or prohibited provisions, and the wording of this section does not expressly or by inference refer to persons performing the marriage ceremony. Therefore, such persons may perform such ceremonies without violating the marriage laws or subjecting themselves to criminal penalty. 1961 Op. Att'y Gen. No. 61-104.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Marriage §§ 33, 34.

Right to attack validity of marriage after death of party thereto, 47 A.L.R.2d 1393.

Validity of solemnized marriage as affected by defective license, or license wrongfully issued or obtained, 61 A.L.R.2d 847.

55 C.J.S. Marriage §§ 25, 26.

40-1-11. Fees; disposition.

The county clerk shall receive a fee of twenty-five dollars ($25.00) for issuing, acknowledging and recording a marriage license and marriage certificate. Fifteen dollars ($15.00) of each fee shall be remitted by the county treasurer to the state treasurer, within fifteen days of the last day of each month, for credit to the children's trust fund.

History: 1953 Comp., § 57-1-10.1, enacted by Laws 1957, ch. 33, § 1; 1977, ch. 253, § 64; 1979, ch. 131, § 1; 1985, ch. 52, § 1; 1986, ch. 15, § 10; 2013, ch. 144, § 8.

ANNOTATIONS

Cross references. — For county clerks, *see* N.M. Const., art. VI, § 22 and Chapter 4, Article 40 NMSA 1978.

For the state treasurer, *see* N.M. Const., art. V, § 1 and 8-6-1 NMSA 1978.

For county treasurers, *see* Chapter 4, Article 43 NMSA 1978.

For the department of health, *see* Chapter 9, Article 7 NMSA 1978.

For the secretary of health, *see* 9-7-5 NMSA 1978.

For the children's trust fund, *see* Chapter 24, Article 19 NMSA 1978.

The 2013 amendment, effective June 14, 2013, eliminated the requirement that applicants for a marriage license file physicians' certifications; in the title, deleted "Certificate required" and added "Fees; disposition"; deleted former Subsection A, which required that applicants for a marriage license file physicians' certifications that they have had all tests and examinations required by the health and environment department; deleted former Subsection B, which required the health services division to provide a form of certification; deleted former Subsection C, which required the health and environment department to make rules and employ personnel necessary to enforce the certification requirements; and deleted former Subsection D, which permitted county clerks to accept certifications from other states with a premarital law.

Premarital blood tests to be made at any laboratory. — Clearly the statute authorizes the performance of premarital blood tests at any laboratory approved by the department of health and is not confined in its operation to laboratories operated directly by the department. 1958 Op. Att'y Gen. No. 58-140.

Serological tests during pregnancy must be made at laboratory operated directly by state health department (now department of health), although premarital blood tests may be processed by any approved laboratory. 1958 Op. Att'y Gen. No. 58-140.

Repeal of regulations. — The department of health may legally repeal regulations enacted pursuant to this section that require marriage license applicants to obtain and file physician's certificates. 1995 Op. Att'y Gen. No. 95-02.

40-1-12. Repealed.

History: 1953 Comp., § 57-1-10.2, enacted by Laws 1957, ch. 33, § 2; 1978 Comp., § 40-1-12, repealed by Laws 2013, ch. 144, § 14.

ANNOTATIONS

Repeals. — Laws 2013, ch. 144, § 14 repealed 40-1-12 NMSA 1978, as enacted by Laws 1957, ch. 33, § 2, relating to exceptions, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

40-1-13. Repealed.

History: 1953 Comp., § 57-1-10.3, enacted by Laws 1957, ch. 33, § 3; 1978 Comp., § 40-1-13, repealed by Laws 2013, ch. 144, § 14.

ANNOTATIONS

Repeals. — Laws 2013, ch. 144, § 14 repealed 40-1-13 NMSA 1978, as enacted by Laws 1957, ch. 33, § 3, relating to penalties, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

40-1-14. Production of license and proof of legal qualifications.

Prior to a ceremony, all persons authorized to solemnize marriage shall require the parties contemplating marriage to produce a license signed and sealed by the county clerk issuing the license. Nothing in Chapter 40, Article 1 NMSA 1978 shall excuse any person authorized by the laws of this state to solemnize the contract of marriage from being satisfied as to the legal qualifications of any parties desiring to be married, in addition to the authority conferred by the license.

History: Laws 1905, ch. 65, § 3; Code 1915, § 3437; C.S. 1929, § 87-113; 1941 Comp., § 65-112; 1953 Comp., § 57-1-12; 2013, ch. 144, § 9.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, required all persons authorized to solemnize marriage to require the parties to produce a marriage license; added the title of the section; after the title, deleted "Sec. 13"; in the first sentence, added "Prior to a ceremony" and after "county clerk", deleted "authorizing said marriage" and added "issuing the license"; and in the second sentence, after "excuse any person", deleted "from exercising the same care in satisfying himself" and added "authorized by the laws

of this state to solemnize the contract of marriage from being satisfied" and after "any parties desiring", deleted "him to perform the marriage ceremony, now required of him by law" and added "to be married".

40-1-15. Certification of marriage; recording and indexing.

A. It is the duty of all persons solemnizing the contract of marriage in this state to certify the marriage to the county clerk within ninety days from the date of the marriage ceremony. Upon ensuring the information on the certificate is complete and legible, the county clerk shall immediately upon receipt of the certificate cause it to be properly recorded and indexed in a permanent record as a part of the county records.

B. The county clerk may issue a certificate of correction or correct or reissue an application for a marriage license, a marriage license or a certificate of marriage as a result of a typographical or data entry error by the office of the county clerk. The county clerk shall issue a certificate of correction or correct or reissue an application for a marriage license, a marriage license or a certificate of marriage to correct an error on the document upon order of the district court.

History: Laws 1905, ch. 65, § 4; Code 1915, § 3438; C.S. 1929, § 87-114; 1941 Comp., § 65-113; 1953 Comp., § 57-1-13; 2013, ch. 144, § 10.

ANNOTATIONS

Cross references. — For county clerks, *see* N.M. Const., art. VI, § 22 and Chapter 4, Article 40 NMSA 1978.

The 2013 amendment, effective June 14, 2013, provided for correction of marriage certificates; added the title; in Subsection A, in the first sentence, after "duty of all persons", deleted "performing the marriage ceremony" and added "solemnizing the contract of marriage", after "from the date of the marriage", added "ceremony"; and in the second sentence, at the beginning of the sentence, added "Upon ensuring the information on the certificate is complete and legible, the", and after "permanent record", deleted "book kept for that purpose"; and added Subsection B.

Lack of evidence of license does not rebut presumption. — Mere lack of evidence of a record of the issuance of a license or of a ceremonial marriage is not sufficient to rebut the presumption of a ceremonial marriage. *Trower v. Board of Cnty. Comm'rs*, 1965-NMSC-040, 75 N.M. 125, 401 P.2d 109, *overruled on other grounds by Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

Clerk's duty absolute even if marriage performed in other county. — The county clerk's duty to record marriage certificates is absolute and it cannot be avoided by the fact that the marriage was not performed in his county. 1943 Op. Att'y Gen. No. 43-4225.

40-1-16. Application of law.

A. A child born to parents who are not married to each other has the same rights pursuant to the law as a child born to parents who are married to each other.

B. Nothing in Chapter 40, Article 1 NMSA 1978 shall be construed to in any manner interfere with the records kept by any civil magistrate, religious society, church organization or federally recognized Indian nation, tribe or pueblo or with any additional form of ceremony, regulation or requirement prescribed by them.

History: Laws 1905, ch. 65, § 5; Code 1915, § 3439; C.S. 1929, § 87-118; 1941 Comp., § 65-114; 1953 Comp., § 57-1-14; 2013, ch. 144, § 11.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, provided for the legal rights of children born to parents who are not married to each other; added the title; added Subsection A; and in Subsection B, after "church organization", added "or federally recognized Indian nation, tribe or pueblo".

40-1-17. Uniform use form.

To ensure a uniform system of records of all marriages contracted and the better preservation of the records for future reference, the form of application, license and certificate shall be substantially as provided in Section 40-1-18 NMSA 1978, each blank to be numbered consecutively corresponding with the page number of the record book in the clerk's office; provided that the medical evaluation language shall not be printed on the application until such time as the secretary of health deems such evaluation necessary through the issuance of rules.

History: Laws 1905, ch. 65, § 7; Code 1915, § 3441; C.S. 1929, § 87-120; 1941 Comp., § 65-116; 1953 Comp., § 57-1-15; 2013, ch. 144, § 12.

ANNOTATIONS

Cross references. — For county clerks, *see* N.M. Const., art. VI, § 22 and Chapter 4, Article 40 NMSA 1978.

The 2013 amendment, effective June 14, 2013, provided for the use of uniform applications, licenses and certificates; added the title; after "preservation of", deleted "said record" and added "the records"; after "license and certificate", deleted "provided herein"; after "shall be substantially as", deleted "follows" and added "provided in Section 40-1-18 NMSA 1978"; and after "in the clerk’s office", deleted "all such blanks to be provided free of cost by the county for public use" and added the reminder of the sentence.

County clerk may issue marriage license where neither party has appeared personally to apply for the license where the form of application used is substantially in agreement with 40-1-18 NMSA 1978 and the county clerk is satisfied as to the ages. 1967 Op. Att'y Gen. No. 67-88.

Lack of witnesses would not invalidate marriage. — Lack of witnesses at a marriage ceremony, where marriage was valid in other respects, would not invalidate the marriage. 1943 Op. Att'y Gen. No. 43-4280.

40-1-18. Form of application, license and certificate.

APPLICATION FOR MARRIAGE LICENSE

No. _____ STATEMENTS

RECEIVED AND FILED

IN COUNTY CLERK'S OFFICE

at _____ o'clock _____ m.

_____ 19 _____

DATE OF PREMARITAL PHYSICAL EXAMINATION

Bride _____

Groom _____

COUNTY CLERK _____ COUNTY

By _____ Deputy

To the County Clerk: We the undersigned hereby make application to be united in marriage and certify that we are not related within the degree prohibited by the laws of this state; that neither is bound by marriage to another; that there exists no legal impediment to this marriage; and that the information contained herein is correct.

Male Applicant	Female Applicant
Date of Birth _____	Date of Birth _____
Place of Birth _____	Place of Birth _____
Present Address _____	Present Address _____

_____ _____
Signature Signature

Subscribed and sworn to before me this _____ day of _____
A.D. 19 ___

(seal)

_____ by _____ Deputy
Signature County Clerk

CONSENT OF PARENT OR GUARDIAN

(Where either party is under age)

I, the parent (guardian) of _____, hereby consent to the granting of a license to marry, waiving the question of minority.

_____
Signature Parent (Guardian)

I, the parent (guardian) of _____, hereby consent to the granting of a license to marry, waiving the question of minority.

_____
Signature Parent (Guardian)

MARRIAGE LICENSE

State of New Mexico)
County of _____) ss.

To any Person Authorized by Law to Perform the Marriage Ceremony:

Greeting:

You are hereby authorized to join in marriage _____ of _____ and _____ of _____ and of this license you will make due return to my office within the time prescribed by law.

Witness my hand and the seal of said court at _____ this _____ day of _____, 19 ____.

_____
County Clerk

Recorded _____, 19 ____, at ____ .m.
In marriage record book no. ____, page ____.

_____
County Clerk

MARRIAGE CERTIFICATE

State of New Mexico)
County of _____) ss.

I hereby certify that on the _____ day of _____, A.D., 19 ____, at _____ in said county and state, I, the undersigned, a _____, did join in the Holy Bonds of Matrimony in accordance with the laws of the state of New Mexico and the authorization of the foregoing license _____ of _____ and _____ of _____.

Witness my hand and seal the day and year last above written.

_____
(Official Title)

WITNESSES:

_____
_____

Signed _____ Groom.

Signed _____ Bride.

Recorded this _____ day of _____, A.D., 19 ____, at ____M.

Marriage Record Book No. _____, Page No. _____.

_____
County Clerk

History: 1953 Comp., § 57-1-16, enacted by Laws 1961, ch. 99, § 1.

ANNOTATIONS

Gender-neutral forms. — To comply with the New Mexico constitution, gender-neutral language must be utilized in identifying the applicants and spouses in the forms required by 40-1-18 NMSA 1978. *Griego v. Oliver*, 2014-NMSC-003.

Form indicates that only one parent need consent to marriage of underage child. 1964 Op. Att'y Gen. No. 64-135.

40-1-19. Offenses; penalties.

A. For failure to perform the county clerk's responsibilities and duties pursuant to Chapter 40, Article 1 NMSA 1978, a county clerk is responsible on the county clerk's official bond for damages suffered by the injured party.

B. A person who performs the marriage ceremony or certifies a marriage to the county clerk, who neglects or fails to comply with the provisions of Chapter 40, Article 1 NMSA 1978 and any person who willfully violates the law by deceiving or attempting to deceive or mislead any officer or person in order to obtain a marriage license or to be married contrary to law is upon conviction guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: Laws 1905, ch. 65, § 9; Code 1915, § 3443; C.S. 1929, § 87-122; 1941 Comp., § 65-118; 1953 Comp., § 57-1-17; 2013, ch. 144, § 13.

ANNOTATIONS

Cross references. — For county clerks, *see* N.M. Const., art. VI, § 22 and Chapter 4, Article 40 NMSA 1978.

The 2013 amendment, effective June 14, 2013, increased penalties; added the title; deleted "Any county clerk or"; added Subsection A; in Subsection B, after phrase "A person", deleted "authorized by law to perform" and added "who performs", after "marriage ceremony", added "or certifies a marriage to the county clerk", after "any officer or person", deleted "authorized to perform the marriage ceremony", after "contrary to law", deleted "shall be deemed" and added "is upon conviction", and after "misdemeanor and", deleted language which provided for a minimum fifty dollar and a maximum one hundred dollar fine or imprisonment, and added the remainder of the sentence.

Penalty for performing marriage in county other than where license obtained. — The act of a duly qualified justice of the peace (now magistrate), priest or minister in performing a marriage ceremony where the marriage license was obtained in a county of this state other than that where the marriage ceremony was celebrated does not fall within the mandatory or prohibited provisions, and the wording of 40-1-10 NMSA 1978 does not expressly or by inference refer to persons performing the marriage ceremony. Therefore, such persons may perform such ceremonies without violating the marriage laws or subjecting themselves to criminal penalty. 1961 Op. Att'y Gen. No. 61-104.

40-1-20. [Marriages without license in 1905 validated.]

All marriages celebrated or contracted in the territory of New Mexico, during the year A.D. 1905, without the persons entering into the marriage relation, having first obtained a license from the probate clerk of the proper county, but which marriages were valid according to the law as it existed prior to April 13, 1905, are hereby validated and legalized and shall have the same force and effect as if such marriages had been celebrated or contracted after the parties contracting such marriage had first obtained a license to marry from the probate clerk of the county wherein such marriage occurred.

History: Laws 1909, ch. 91, § 1; Code 1915, § 3444; C.S. 1929, § 87-123; 1941 Comp., § 65-119; 1953 Comp., § 57-1-18.

ANNOTATIONS

Cross references. — For probate court clerks, *see* 34-7-4 NMSA 1978.

ARTICLE 2
Rights of Married Persons Generally

40-2-1. [Mutual obligations of husband and wife.]

Husband and wife contract toward each other obligations of mutual respect, fidelity and support.

History: Laws 1907, ch. 37, § 1; Code 1915, § 2744; C.S. 1929, § 68-101; 1941 Comp., § 65-201; 1953 Comp., § 57-2-1.

ANNOTATIONS

Cross references. — For dissolution of marriage, *see* 40-4-1 to 40-4-20 NMSA 1978.

For Uniform Interstate Family Support Act, *see* 40-6A-100 NMSA 1978.

As a general rule, spouses are permitted to sue each other for intentional torts. *Papatheofanis v. Allen*, 2010-NMCA-036, 148 N.M. 791, 242 P.3d 358, cert. quashed, 2010-NMCERT-011, 150 N.M. 490, 262 P.3d 1143.

Claims for intentional torts between spouses. — Where, during the marriage of plaintiff and defendant, defendant induced plaintiff to convey a one-half interest in the family home, which was plaintiff's solely owned property, to defendant by representing to plaintiff that if plaintiff died, the parties' child would not have an interest in the home; defendant falsely commenced a domestic violence claim against plaintiff; defendant falsely reported to plaintiff's employer that plaintiff was misusing government property at plaintiff's workplace; without the knowledge or permission of plaintiff, defendant opened credit card accounts by forging plaintiff's name on application forms, leased a vehicle using plaintiff's information, and registered a patent in defendant's name using plaintiff's

intellectual property; and defendant was an attorney and a mortgage loan officer, the jury verdict in plaintiff's action against defendant finding defendant liable for fraud, breach of fiduciary duty, malicious abuse of process, and defamation was supported by substantial evidence. *Papatheofanis v. Allen*, 2010-NMCA-036, 148 N.M. 791, 242 P.3d 358, cert. quashed, 2010-NMCERT-011, 150 N.M. 490, 262 P.3d 1143

Abatement of alimony is properly granted where it is shown that a wife has procured a divorce on cross-complaint in her husband's suit for divorce; that she had received $22,500 in a property settlement and an award of $60.00 per month alimony; that she had no children, but was the sole support of her mother; that she had remarried but was suing to have the second marriage annulled on the ground of fraud. *Mindlin v. Mindlin*, 1937-NMSC-012, 41 N.M. 155, 66 P.2d 260.

Alimony accruing subsequent to remarriage. — Where divorced wife admitted her remarriage and no proof of such exceptional circumstances as would justify a continuance of the husband's duty to support his ex-wife subsequent to her remarriage, it appeared trial court erred in awarding wife alimony accruing subsequent to her remarriage. *Kuert v. Kuert*, 1956-NMSC-002, 60 N.M. 432, 292 P.2d 115, superseded by statute, *Galassi v. Galassi*, 2009-NMCA-026, 145 N.M. 630, 203 P.3d 161.

Alimony after remarriage not good public policy unless exceptional circumstances. — When the wife contracts a subsequent marriage with another, thus creating a duty of support in him, good public policy does not demand that she continue to receive support from her first husband unless she prove exceptional circumstances. *Kuert v. Kuert*, 1956-NMSC-002, 60 N.M. 432, 292 P.2d 115, superseded by statute, *Galassi v. Galassi*, 2009-NMCA-026, 145 N.M. 630, 203 P.3d 161.

Proof of remarriage establishes case for alimony modification. — Proof of his former wife's remarriage establishes the divorced husband's prima facie case for modification of alimony payments coming due subsequent to such remarriage. *Kuert v. Kuert*, 1956-NMSC-002, 60 N.M. 432, 292 P.2d 115, superseded by statute, *Galassi v. Galassi*, 2009-NMCA-026, 145 N.M. 630, 203 P.3d 161.

Wife's mother entitled to recover from husband for necessities. — In the case of a wife whose husband neglected and abandoned her when she was sick in bed and without provisions, and her mother took her home and provided her with the necessities of life, including nursing and medical care, the mother was entitled to recover of the husband the cost of such necessities. *Nicholas v. Bickford*, 1940-NMSC-018, 44 N.M. 210, 100 P.2d 906 (decided under former law).

When husband fails to provide necessities. — In suit by a mother against her daughter's husband for necessaries furnished the daughter by the mother, it must appear that the husband had failed to provide the necessaries, including medical care. *Nicholas v. Bickford*, 1940-NMSC-018, 44 N.M. 210, 100 P.2d 906 (decided under former law).

Father entitled to recovery for support furnished wife. — In action for divorce the wife is not entitled to recovery for support furnished her by her father as cause of action for such support, if any, is vested in the father. *Harper v. Harper*, 1950-NMSC-024, 54 N.M. 194, 217 P.2d 857 (decided under former law).

Husband's liability for medical services. — A husband is not liable for medical services rendered his wife upon her individual written promise to pay therefor, it not being shown that he had neglected to furnish or provide for adequate service of the kind. *Chevallier v. Connors*, 1927-NMSC-084, 33 N.M. 93, 262 P. 173 (decided under former law).

Removal of wife from county to defeat recovery on note. — Agreement by husband to remove his wife from the county of their domicile, and to keep her out of the county, was not such an illegal contract as could be availed of by the maker of a promissory note to defeat recovery thereon. *Dominguez v. Rocas*, 1929-NMSC-072, 34 N.M. 317, 281 P. 25 (decided under former law).

Duty of support is owed from husband to wife at common law and under this section. 1963 Op. Att'y Gen. No. 63-151.

Remarriage of wife relieves former husband of the duty of support of the ex-wife as of her remarriage. 1963 Op. Att'y Gen. No. 63-151.

Law reviews. — For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M.L. Rev. 11 (1973).

For symposium, "Equal Rights in Divorce and Separation," see 3 N.M.L. Rev. 118 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For article, "Arbitration of Domestic Relations Disputes in New Mexico," see 16 N.M.L. Rev. 321 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Support of Persons §§ 21, 22.

Rights and remedies in respect of property accumulated by man and woman living together in illicit relations or under void marriage, 31 A.L.R.2d 1255.

Marriage as extinguishing contractual indebtedness between parties, 45 A.L.R.2d 722.

Husband's liability to third person for necessaries furnished wife separated from him, 60 A.L.R.2d 7.

Wife's liability for necessaries furnished husband, 11 A.L.R.4th 1160.

Necessity, in action against husband for necessaries furnished wife, or proving husband's failure to provide necessities, 19 A.L.R.4th 432.

Modern status of rule that husband is primarily or solely liable for necessaries furnished wife, 20 A.L.R.4th 196.

40-2-2. [Contract rights of married persons.]

Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried; subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other.

History: Laws 1907, ch. 37, § 4; Code 1915, § 2750; C.S. 1929, § 68-201; 1941 Comp., § 65-206; 1953 Comp., § 57-2-6.

ANNOTATIONS

Cross references. — For transfer of rights in public lands of United States, being invalid without consent of wife, *see* 19-3-3 NMSA 1978.

I. GENERAL CONSIDERATION.

Right not extended. — The right granted by this section is not extended by 40-2-8 NMSA 1978, except the authority to enter into separation agreements. *McDonald v. Lambert*, 1938-NMSC-065, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250, *overruled on other grounds by Chavez v. Chavez*, 1952-NMSC-050, 56 N.M. 393, 244 P.2d 781.

Law of Spain and Mexico as basis for interpretation. — Since the civil law of Spain and Mexico served as the model for the statutory law of this state concerning the property rights of husband and wife, that law will be looked to as the basis for interpretation and definition. *McDonald v. Senn*, 1949-NMSC-020, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966.

Right of conveyance by wife to husband. — Since the enactment of Laws 1901, ch. 62, § 5 (repealed by Laws 1907, ch. 37, § 34) and this section, a married woman has an unquestioned right to convey real estate directly to her husband, subject to the general rules of the common law which control the actions of persons occupying confidential relations with each other. *Duncan v. Brown*, 1914-NMSC-013, 18 N.M. 579, 139 P. 140.

Husband or wife as agent or attorney-in-fact for other. — As to contracts between husband and wife in relation to all subjects, either the husband or wife may be constituted the agent or attorney-in-fact of the other or contract with the other as fully as

if such relation did not exist. *McAllister v. Hutchison*, 1904-NMSC-005, 12 N.M. 111, 75 P. 41.

Suit to cancel deed and settlement agreement. — Where, in suit to cancel for lack of consideration deed and settlement agreement entered into prior to divorce, the transaction was so inequitable to the wife as to shock the conscience and the only possible defense was the statute of limitations, or laches, to establish which the burden rests upon the defendant husband, trial court should determine, first, whether husband at time of execution of the deed and the agreement held a fraudulent intent not to perform on his part, and, second, when the wife first discovered this fraud. *Primus v. Clark*, 1944-NMSC-030, 48 N.M. 240, 149 P.2d 535.

Mutual rescission of insurance policy where wife cashed premium check. — Where insurer returned insured's check for amount of premiums paid subsequent to reinstatement of a life and disability policy accompanied by a letter declaring rescission of the reinstatement for concealments in the application for reinstatement and the wife cashed the check six months after its receipt without insured's knowledge, a mutual rescission was nevertheless accomplished by reason of retention of the check for six months and insured's failure for three years and three months after learning that his wife had cashed the check to repudiate her authority to do so. *Warren v. N.Y. Life Ins. Co.*, 1936-NMSC-031, 40 N.M. 253, 58 P.2d 1175.

Separation agreement provisions for alimony subject to change. — In a separation agreement the provisions for alimony are entirely severable from the provisions as to property, and where the separation agreement was merged in the decree of divorce and became a part thereof, the provision for alimony is, by reason of the statute authorizing the court to modify provision for alimony at any time, subject to change. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

Separation agreement not set aside where just and equitable. — A separation agreement between husband and wife, fairly entered into under these sections, whereby the wife releases, for an adequate consideration, her entire interest in the community, will not be set aside at the suit of the wife, where just and equitable in terms. *McDaniel v. McDaniel*, 1932-NMSC-062, 36 N.M. 335, 15 P.2d 229.

Agreement may be set aside in discretion of court. — A separation agreement in New Mexico, though binding upon the parties during such time as they are separated as husband and wife, when submitted in a divorce case for consideration of the court, is subject to such action as the court in its discretion may take, and the court may disregard any previous agreement for support and make such award as in the discretion of the court may seem just and fair. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

Agreement void where contrary to public policy. — Provisions of a separation contract which would cut the plaintiff off without support from her former spouse in the case of spouse's remarriage though plaintiff remained single, or in the case of spouse's

change of occupation, are void as contrary to public policy. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

Promissory note binds wife's separate property. — A promissory note is an engagement respecting property which a married woman may make, although it can be enforced only against her separate property; if she signs a note for her husband as an accommodation maker, she is liable although executed for a community debt. *First Sav. Bank & Trust Co. v. Flournoy*, 1917-NMSC-093, 24 N.M. 256, 171 P. 793.

Appellant-wife had a complete right to enter into an undertaking and to subject her property to liabilities differing from those which under the law would otherwise apply by executing a note as an accommodation to her husband for the benefit of the bank and pledging her separate credit which is liable for the judgment. *Commerce Bank & Trust v. Jones*, 1971-NMSC-107, 83 N.M. 236, 490 P.2d 678.

Even though indebtedness may be community in nature as between the conjugal partners, the wife, by her acts or omissions in dealings with third parties, may make her separate property liable for its payment. *Commerce Bank & Trust v. Jones*, 1971-NMSC-107, 83 N.M. 236, 490 P.2d 678.

II. CONFIDENTIAL RELATIONSHIP; UNDUE INFLUENCE.

Undue influence within a confidential relationship is a moral, social, or domestic force exerted upon a party so as to control the free action of his will. *Hughes v. Hughes*, 1981-NMSC-110, 96 N.M. 719, 634 P.2d 1271.

Presumption of undue influence in a confidential relationship will be applied unless it is determined that defendant's evidence presented in rebuttal is sufficient to overcome the presumption. *Hughes v. Hughes*, 1981-NMSC-110, 96 N.M. 719, 634 P.2d 1271.

Inference of undue influence. — Where deed of conveyance has been made by husband to wife after persistent nagging, followed by threats of divorce and abandonment unless the deed is executed, there is legitimate inference that such deed was made as a result of an undue influence. *Trigg v. Trigg*, 1933-NMSC-040, 37 N.M. 296, 22 P.2d 119.

Influence so used as to confuse judgment and control will. — The affection, confidence and gratitude which inspires the gift from a husband to a wife, being a natural and lawful influence, does not render the gift voidable, unless the influence has been so used as to confuse the judgment and control the will of the donor. *Trigg v. Trigg*, 1933-NMSC-040, 37 N.M. 296, 22 P.2d 119.

Presumption against validity of conveyance from wife to husband. — If conveyance is from wife to husband, there may be a presumption against its validity on account of the confidential relation of husband and wife, and the supposed dominant influence of the husband; but this presumption is overcome by proof that the wife

received adequate consideration; that the conveyance was to her advantage, and was not obtained by duress or undue influence. *Trigg v. Trigg*, 1933-NMSC-040, 37 N.M. 296, 22 P.2d 119.

Construction of duress not same for husband and wife. — The same strictness of construction as to what would constitute legal duress on the part of the husband does not apply against the wife by reason of their peculiar relationship. *Trigg v. Trigg*, 1933-NMSC-040, 37 N.M. 296, 22 P.2d 119.

In case of actual fraud in obtaining separation agreement whereby one spouse obtains an advantage over the other, the confidential relation existing between them may be invoked, and the trust principles of equity become operative. *Curtis v. Curtis*, 1952-NMSC-082, 56 N.M. 695, 248 P.2d 683.

If wife did not know she was signing separation agreement which would be used against her as a permanent division of community property, the fraud practiced on her was a fraud de facto and the agreement was void ab initio. *Curtis v. Curtis*, 1952-NMSC-082, 56 N.M. 695, 248 P.2d 683.

Adequate consideration required in transfer between husband and wife. — Where a husband enters into an agreement with his wife whereby she transfers to the husband her interest in the community property for a grossly inadequate consideration, the husband in regard to the transaction stands in the position of trustee and owes to the wife the duty of a full and fair disclosure as to the value of the property, and he must pay an adequate consideration therefor. *Beals v. Ares*, 1919-NMSC-067, 25 N.M. 459, 185 P. 780.

Burden upon husband to show full disclosure. — Where a husband in contemplation of a divorce, through his attorney, made a property settlement with his wife by which he acquired her interest in the community property, worth approximately $100,000, for $4,000, the burden was upon the husband, in an action by the wife to set aside the contract, to show the payment of adequate consideration, full disclosure by him as to the right of the wife and the value of the property, and that the wife had competent and independent advice. *Beals v. Ares*, 1919-NMSC-067, 25 N.M. 459, 185 P. 780.

III. TRANSMUTATION OF PROPERTY.

"Transmutation" defined. — Transmutation is a general term used to describe arrangements between spouses to convert property from separate property to community property and vice versa. While transmutation is recognized, the party alleging the transmutation must establish the transmutation of property to community property by clear, strong and convincing proof. *Allen v. Allen*, 1982-NMSC-118, 98 N.M. 652, 651 P.2d 1296.

This section authorizes transmutation of community funds into property held in joint tenancy by husband and wife, and contrary decisions are expressly overruled. *Chavez v. Chavez*, 1952-NMSC-050, 56 N.M. 393, 244 P.2d 781, 30 A.L.R.2d 1236.

Transmutation must be supported by clear, strong and convincing proof. — Transmutation of community funds into joint tenancy must be supported by proof which is clear, strong and convincing, and a mere preponderance of the evidence will not suffice to effect it. *Chavez v. Chavez*, 1952-NMSC-050, 56 N.M. 393, 244 P.2d 781, 30 A.L.R.2d 1236.

Constructive fraud in transmutation agreement. — Transactions between spouses in which one spouse secured a decided advantage over the other are presumptively fraudulent. In such transactions, in order to overcome the presumption of fraud, it is the duty of the spouse who has gained the advantage to show the payment of an adequate consideration, full disclosure by him or her as to the rights of the other and the value and extent of the community property, and that the other had competent and independent advice in conferring the benefits upon him or her. Where the advantaged spouse fails to make this showing, the district court is to set aside the agreements in question, to ascertain the value and extent of the community property, and to divide the community property between the parties. *Gabriele v. Gabriele*, 2018-NMCA-042, cert. denied.

Where wife started a limited liability company (LLC) that purchased a residential property out of which to operate an assisted living facility using a portion of her separate funds and a portion of her husband's separate funds, and where husband and wife signed four sole and separate property agreements (SSPAs) designating the LLC and the property as the separate property of wife, and where the SSPAs provided that husband expressly waived all right, title, claim, or interest in and to the real property as well as the LLC, and where, after the dissolution of the marriage, the property and LLC were sold for approximately $260,000, the district court erred in concluding that the SSPAs that husband signed were valid, enforceable contracts, because wife failed to meet her burden to overcome the presumption of constructive fraud by failing to provide evidence that wife disclosed to husband the value of the properties and business to be conveyed or husband's rights therein or that husband received competent and independent advice prior to signing the SSPAs. *Gabriele v. Gabriele*, 2018-NMCA-042, cert. denied.

Where, prior to marriage, husband purchased a house with a $30,000 down payment of his own funds and soon after the marriage transferred the property to himself and wife, and where, during the marriage, husband and wife made the mortgage payments on the house, refinanced the debt on the house, and made approximately $40,000 worth of improvements, the district court erred in concluding that the home was transmuted from husband's separate property to community property, because there was no evidence that husband had the requisite intent to effect transmutation, wife conceded that the home was husband's separate property, and the district court did not find that husband

intended to make a gift to wife or create in her an undivided one-half interest in the property. *Gabriele v. Gabriele*, 2018-NMCA-042, cert. denied.

First wife estopped against second wife to claim agreement not transmutation of property. — Where San Miguel court granted divorce decree in February, 1949, retaining jurisdiction of case upon settlement of community project, and husband remarried in August, 1949, and husband and first wife entered into agreement in September, 1949, disposing of undivided interest in hotel, and second wife subsequently filed for and obtained a divorce in Bernalillo court in November, 1950; the fact that first wife's motion for a hearing in the San Miguel court for further proof concerning community property was not made until six months after the divorce decree in second court, and over two years after divorce decree in first court, she was estopped as against the second wife to claim the agreement was not a transmutation of community property into separate property liable for husband's independent obligations; and until the San Miguel court took some affirmative action, such as a review of the September agreement to determine the equities of the parties therein, the second court could acquire jurisdiction over the sole and separate property of the husband. *Ortiz v. Gonzales*, 1958-NMSC-109, 64 N.M. 445, 329 P.2d 1027.

Evidence not sufficient to show transmutation of wife's separate property. — Evidence that the parties considered the bank account to be their joint property, and made statements that it was their intention to own all that they had jointly, is not sufficient to support a judgment that transmutation of wife's separate property into community property was effected. *Burlingham v. Burlingham*, 1963-NMSC-068, 72 N.M. 433, 384 P.2d 699.

Law reviews. — For comment on Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968), see 9 Nat. Resources J. 101 (1969).

For article, "The Use of Revocable Inter Vivos Trusts in Estate Planning," see 1 N.M.L. Rev. 143 (1971).

For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M.L. Rev. 11 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For article, "Tax Consequences of Divorce in New Mexico," see 5 N.M.L. Rev. 233 (1975).

For note, "Community Property - Transmutation of Community Property: A Preference for Joint Tenancy in New Mexico?" see 11 N.M.L. Rev. 421 (1981).

For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of contract to pay wife for services generally, 14 A.L.R. 1013.

Partnership agreement between husband and wife, validity of, 20 A.L.R. 1304, 38 A.L.R. 1264, 157 A.L.R. 652.

Contract to pay wife for services rendered in carrying on husband's business, validity of, 23 A.L.R. 18.

Services by one spouse to other as consideration for latter's promise, 73 A.L.R. 1518.

Validity, construction and effect of provisions in deed from wife to husband by which title was to revert in event of conditions affecting marital relations, 116 A.L.R. 1400.

Independent advice as essential to validity of transaction between husband and wife, 123 A.L.R. 1505.

Rights and remedies in respect of property accumulated by man and a woman living together in illicit relations or under void marriage, 31 A.L.R.2d 1255.

Authority of husband or wife to borrow money on other's credit, 55 A.L.R.2d 1215.

Wife's liability for necessaries furnished husband, 11 A.L.R.4th 1160.

Modern status of rule that husband is primarily or solely liable for necessaries furnished wife, 20 A.L.R.4th 196.

41 C.J.S. Husband and Wife § 44 et seq.

40-2-3. [Powers of attorney; joinder of spouse unnecessary.]

It shall not be necessary in any case for the husband to join with the wife when she executes a power of attorney for herself; nor shall it be necessary for the wife to join with the husband when he executes a power of attorney for himself.

History: Laws 1901, ch. 62, § 20; Code 1915, § 2751; C.S. 1929, § 68-202; 1941 Comp., § 65-207; 1953 Comp., § 57-2-7.

ANNOTATIONS

Wife aware of transfer made by husband as her attorney-in-fact. — Where husband, acting for himself and as attorney-in-fact for his wife, made and delivered to plaintiff a written assignment and transfer of their mineral interests, the powers so

conferred upon the husband authorized him to convey wife's interests, where he had conveyed other properties owned by them acting under the same powers-of-attorney and evidence indicated wife was aware of business conducted by her husband in her behalf and assented thereto. *Soens v. Riggle*, 1958-NMSC-063, 64 N.M. 121, 325 P.2d 709.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Injured party's release of tortfeasor as barring spouse's action for loss of consortium, 29 A.L.R.4th 1200.

40-2-4. [Execution of marriage settlement and separation contracts.]

All contracts for marriage settlements and contracts for separation, must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

History: Laws 1907, ch. 37, § 22; Code 1915, § 2752; C.S. 1929, § 68-203; 1941 Comp., § 65-208; 1953 Comp., § 57-2-8.

ANNOTATIONS

Cross references. — For signing of real estate conveyances, *see* 47-1-5 NMSA 1978.

Separation agreement. — Husband and wife may mutually consent to a separation without court intervention. *Gilmore v. Gilmore*, 1988-NMCA-004, 106 N.M. 788, 750 P.2d 1114, cert. denied, 107 N.M. 16, 751 P.2d 700.

Contracts made prior to marriage are to be construed under general law, or by this act. *McDonald v. Lambert*, 1938-NMSC-065, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250, *overruled on other grounds by Chavez v. Chavez*, 1952-NMSC-050, 56 N.M. 393, 244 P.2d 781.

All contracts must be in writing. — This statute was adopted in its exact language from California and requires that all contracts for marriage settlements must be in writing. *Tellez v. Tellez*, 1947-NMSC-058, 51 N.M. 416, 186 P.2d 390.

Proof of unacknowledged marriage agreement. — A marriage agreement which has not been acknowledged may be proved by a spouse testifying under oath at trial to the validity of her signature on the agreement. *Christiansen v. Christiansen*, 1983-NMSC-058, 100 N.M. 102, 666 P.2d 781.

Agreement enforceable without signature where assent proven. — Although settlement agreements are subject to the statute of frauds, husband's refusal to sign the agreement did not render it unenforceable, where his own testimony showed that he understood the terms of the agreement and had assented to it. *Herrera v. Herrera*, 1999-NMCA-034, 126 N.M. 705, 974 P.2d 675.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation §§ 1108 to 1153.

Income tax treatment of payment to spouse for relinquishment of inchoate marital rights in other's property, 1 A.L.R.2d 1037.

Provision for post-mortem payment or performance as affecting instrument's character and validity as a contract, 1 A.L.R.2d 1178.

Separation agreement as barring rights of surviving spouse in other's estate, 34 A.L.R.2d 1020.

Marriage as extinguishing contractual indebtedness between parties, 45 A.L.R.2d 722.

Spouse's right to take under other spouse's will as affected by postnuptial agreement or property settlement, 53 A.L.R.2d 475.

Operation and effect of antenuptial agreement to waive or bar surviving spouse's right to probate homestead or surviving family's similar homestead right or exemption, 65 A.L.R.2d 727.

Obligation under property settlement agreement between spouses as dischargeable in bankruptcy, 74 A.L.R.2d 758.

Antenuptial and settlement agreements as affecting right of decedent's spouse to contest will, 78 A.L.R.2d 1060.

Declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor, 80 A.L.R.2d 941.

Waiver of right to widow's allowance by postnuptial agreement, 9 A.L.R.3d 955.

Waiver of right to widow's allowance by antenuptial agreement, 30 A.L.R.3d 858.

Enforcement of antenuptial contract or settlement conditioned upon marriage, where marriage was subsequently declared void, 46 A.L.R.3d 1403.

Spouse's secret intention not to abide by written antenuptial agreement relating to financial matters as a ground for annulment, 66 A.L.R.3d 1282.

What constitutes contract between husband or wife and third person promotive of divorce or separation, 93 A.L.R.3d 523.

Enforceability of premarital agreements governing support or property rights upon divorce as affected by circumstances surrounding execution - modern status, 53 A.L.R.4th 85.

Antenuptial contracts: parties' behavior during marriage as abandonment, estoppel, or waiver regarding contractual rights, 56 A.L.R.4th 998.

Separation agreements: enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce, 67 A.L.R.4th 237.

Failure to disclose extent or value of property owned as ground for avoiding premarital contract, 3 A.L.R.5th 394.

41 C.J.S. Husband and Wife §§ 60 to 75, 220 to 237.

40-2-5. [Recording of marriage settlement or separation contract.]

When such contract is acknowledged or proved it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

History: Laws 1907, ch. 37, § 23; Code 1915, § 2753; C.S. 1929, § 68-204; 1941 Comp., § 65-209; 1953 Comp., § 57-2-9.

ANNOTATIONS

Cross references. — For county recorders, *see* 14-8-1 NMSA 1978.

For recording contracts affecting real property, *see* 14-9-1 to 14-9-9 NMSA 1978.

40-2-6. [Effect of recording or failure to record settlement or separation contract.]

The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a grant of real property.

History: Laws 1907, ch. 37, § 24; Code 1915, § 2754; C.S. 1929, § 68-205; 1941 Comp., § 65-210; 1953 Comp., § 57-2-10.

ANNOTATIONS

Cross references. — For effect of recording or failure to record writings affecting real estate, *see* 14-9-2, 14-9-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Noncompliance with statutory requirements concerning form of execution or acknowledgement as affecting validity or enforceability of written antenuptial agreement, 16 A.L.R.3d 370.

40-2-7. Persons who may make marriage settlements.

Any person capable of contracting marriage may make a valid marriage settlement.

History: Laws 1907, ch. 37, § 25; Code 1915, § 2755; C.S. 1929, § 68-206; 1941 Comp., § 65-211; 1953 Comp., § 57-2-11; Laws 1973, ch. 138, § 23.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes contract between husband or wife and third person promotive of divorce or separation, 93 A.L.R.3d 523.

40-2-8. [Extent of mutual alteration of legal relations.]

A husband and wife cannot by any contract with each other alter their legal relations, except of their property, and except that they may agree in writing, to an immediate separation, and may make provisions for the support of either of them and of their children during their separation.

History: Laws 1907, ch. 37, § 5; Code 1915, § 2782; C.S. 1929, § 68-510; 1941 Comp., § 65-212; 1953 Comp., § 57-2-12.

ANNOTATIONS

Cross references. — For suit for division of property, *see* 40-4-3, 40-4-4 and 40-4-20 NMSA 1978.

Contracts altering legal relations generally void. — Nuptial contract which attempts to alter the legal relations of the parties are generally void for want of consideration, or as against public policy. *Hurley v. Hurley*, 1980-NMSC-067, 94 N.M. 641, 615 P.2d 256, *overruled on other grounds by Ellsworth v. Ellsworth*, 1981-NMSC-132, 97 N.M. 133, 637 P.2d 564.

Section cannot be annulled by antenuptial agreement. — This section states a public policy which cannot be annulled by an antenuptial agreement. *Tellez v. Tellez*, 1947-NMSC-058, 51 N.M. 416, 186 P.2d 390.

Questions relating to construction, operation and effect of separation agreements are, ordinarily, controlled by rules applicable to contracts generally. *Adkins v. Adkins*, 1961-NMSC-149, 69 N.M. 193, 365 P.2d 439.

Separation agreement provision subject to court discretion in divorce case. — A separation agreement in New Mexico, though binding upon the parties during such time as they are separated as husband and wife, when submitted in a divorce case for consideration of the court, is subject to such action as the court in its discretion may take, and the court may disregard any previous agreement for support and make such award as in the discretion of the court may seem just and fair. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

Section inapplicable to marriage settlement agreement. — Where the parties entered into a marital settlement agreement applicable to their relationship after dissolution of their marriage, this section has nothing to do with the agreement. *Edens v. Edens*, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Agreement void where contrary to public policy. — Provisions of a separation contract which would cut the plaintiff off without support from her former spouse in the case of spouse's remarriage though plaintiff remained single, or in the case of spouse's change of occupation, are void as contrary to public policy. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

Alimony provision subject to change. — In a separation agreement the provisions for alimony are entirely severable from the provisions as to property, and where the separation agreement was merged in the decree of divorce and became a part thereof, the provision for alimony is, by reason of the statute authorizing the court to modify provision for alimony at any time, subject to change. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

Contract for husband to pay wife for care void. — A contract whereby the husband agrees to pay his wife for his care, which is a part of her duties as a wife, is without consideration, against public policy and void. *Tellez v. Tellez*, 1947-NMSC-058, 51 N.M. 416, 186 P.2d 390.

Parties cannot object to award based on agreement. — Where awarding the community property in divorce proceeding was but the carrying out of the agreement of the parties, neither can object to such disposition. *Miller v. Miller*, 1928-NMSC-002, 33 N.M. 132, 262 P. 1007.

Law reviews. — For comment on Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968), see 9 Nat. Resources J. 101 (1969).

For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 31 N.M.L. Rev. 11 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For article, "Tax Consequences of Divorce in New Mexico," see 5 N.M.L. Rev. 233 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Injured party's release of tortfeasor as barring spouse's action for loss of consortium, 29 A.L.R.4th 1200.

Separation agreements: enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce, 67 A.L.R.4th 237.

Validity, construction, and application of provision in separation agreement affecting distribution or payment of attorneys' fees, 47 A.L.R.5th 207.

40-2-9. [Consideration in separation contract.]

The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section [40-2-8 NMSA 1978].

History: Laws 1907, ch. 37, § 6; Code 1915, § 2783; C.S. 1929, § 68-511; 1941 Comp., § 65-213; 1953 Comp., § 57-2-13.

ANNOTATIONS

Applicable only to separation agreements. — This section has reference solely to the separation agreement provided for between husband and wife by 40-2-8 NMSA 1978, and has no reference to their authority to contract. *McDonald v. Lambert*, 1938-NMSC-065, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250, *overruled on other grounds by Chavez v. Chavez*, 1952-NMSC-050, 56 N.M. 393, 244 P.2d 781.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Separation agreements: enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce, 67 A.L.R.4th 237.

ARTICLE 3
Property Rights

40-3-1. [Law applicable to property rights.]

The property rights of husband and wife are governed by this chapter unless there is a marriage settlement containing stipulations contrary thereto.

History: Laws 1907, ch. 37, § 21; Code 1915, § 2772; C.S. 1929, § 68-409; 1941 Comp., § 65-301; 1953 Comp., § 57-3-1.

ANNOTATIONS

Cross references. — For abolition of curtesy and dower, *see* 45-2-112 NMSA 1978.

Compiler's notes. — The 1915 Code compilers substituted the words "this chapter" for the words "this act." The latter referred to Laws 1907, ch. 37, the provisions of which are compiled as 40-2-1, 40-2-2, 40-2-4 to 40-2-9, and 40-3-1 to 40-3-3, NMSA 1978, while the former referred to Chapter 55 of the Code, the provisions of which are compiled as

40-4-3, 40-4-4, 40-4-6, 40-4-7, 40-4-20, 40-2-1 to 40-2-9 and 40-3-1 to 40-3-3 NMSA 1978.

Law of Spain and Mexico as basis for interpretation. — Since the civil law of Spain and Mexico served as the model for the statutory law of this state concerning the property rights of husband and wife, that law will be looked to as the basis for interpretation and definition. *McDonald v. Senn*, 1949-NMSC-020, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966.

Dissimilarity of estate by entireties and community estate. — There is no similarity between a community estate and an estate by the entireties, except as to the husband and wife feature, and where it has been found necessary to segregate the husband's or wife's interest in community property the courts have found legal principles to justify it. *McDonald v. Senn*, 1949-NMSC-020, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966.

Ambiguities in antenuptial contract resolved in wife's favor where drawn by husband. — Where antenuptial contract was drawn by the lawyer-husband and the wife had no independent legal advice, the latter relying upon the husband to correctly reduce their agreement to writing, ambiguities in the agreement should be resolved in her favor. *Turley v. Turley*, 1940-NMSC-043, 44 N.M. 382, 103 P.2d 113.

Overruling decision could retroactively alter property rights even after husband's death. — Where deficiencies were assessed because New Mexico law forbade a husband and wife from transmuting community property by mere agreement, and their separate property agreement was invalid, the rights of the parties did not become fixed under controlling New Mexico law, at the death of husband, and such rights could be retroactively altered by an overruling decision after his death, and the separate property agreement, under which the husband and wife held their property as tenants in common, was valid and operative from its inception. *Massaglia v. Comm'r*, 286 F.2d 258 (10th Cir. 1961) (decided under prior law).

Law reviews. — For comment, "Community Property - Power of Testamentary Disposition - Inequality Between Spouses," see 7 Nat. Resources J. 645 (1967).

For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M.L. Rev. 11 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For note, "Clouded Titles in Community Property States: New Mexico Takes a New Step," see 21 Nat. Resources J. 593 (1981).

For article, "Arbitration of Domestic Relations Disputes in New Mexico," see 16 N.M.L. Rev. 321 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Rights and remedies in respect of property accumulated by man and woman living together in illicit relations or under void marriage, 31 A.L.R.2d 1255.

Rights in wedding presents as between spouses, 75 A.L.R.2d 1365.

Recovery of damages for breach of contract to convey homestead where only one spouse signed contract, 5 A.L.R.4th 1310.

Forfeitability of property held in marital estate under uniform controlled substances act or similar statute, 84 A.L.R.4th 620.

Rights in respective of engagement and courtship presents when marriage does not ensue, 44 A.L.R.5th 1.

40-3-2. [Methods for holding property.]

Husband and wife may hold property as joint tenants, tenants in common or as community property.

History: Laws 1907, ch. 37, § 7; Code 1915, § 2756; C.S. 1929, § 68-301; 1941 Comp., § 65-302; 1953 Comp., § 57-3-2.

ANNOTATIONS

Dissimilarity of estate by entireties and community estate. — There is no similarity between a community estate and an estate by the entireties, except as to the husband and wife feature, and where it has been found necessary to segregate the husband's or wife's interest in community property the courts have found legal principles to justify it. *McDonald v. Senn*, 1949-NMSC-020, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966.

When joint tenancy arises. — Joint tenancy arises where two or more persons have any subject of property jointly in which there is a unity of interest, unity of title, unity of time and unity of possession. *Hernandez v. Becker*, 54 F.2d 542 (10th Cir. 1931).

Ultimate effect of transmutation of judgment debtor's property from a community status to a tenancy in common after divorce is that wife's one-half interest is her separate property, and not subject to levy and execution by judgment creditor. *Atlas Corp. v. DeVilliers*, 447 F.2d 799 (10th Cir. 1971), cert. denied, 405 U.S. 933, 92 S. Ct. 939, 30 L. Ed. 2d 809, *reh'g denied*, 405 U.S. 1033, 92 S. Ct. 1288, 31 L. Ed. 2d 491 (1972).

Community estate within meaning of federal estate tax. — Community estate is neither a joint tenancy nor an estate by the entireties, within meaning of federal estate tax statute. *Hernandez v. Becker*, 54 F.2d 542 (10th Cir. 1931).

Wife's interest in community property was not of such a character as to give rise, upon her death, to a federal estate tax measured by the value thereof. *Hernandez v. Becker*, 54 F.2d 542 (10th Cir. 1931).

Community is liable for community debts and there is a presumption that all debts contracted during the marriage are community debts. 1960 Op. Att'y Gen. No. 60-37.

Law reviews. — For comment, "Community Property - Power of Testamentary Disposition - Inequality Between Spouses," see 7 Nat. Resources J. 645 (1967).

For symposium, "Tax Implications of the Equal Rights Amendment," see 3 N.M.L. Rev. 69 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For note, "Community Property - Transmutation of Community Property: A Preference for Joint Tenancy in New Mexico?" see 11 N.M.L. Rev. 421 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Community Property §§ 1 to 115; 41 Am. Jur. 2d Husband and Wife §§ 55 to 79.

Profits from business operating on spouse's capital as community property, 29 A.L.R.2d 530.

Transmutation of community funds or property into property held by spouses in joint tenancy, 30 A.L.R.2d 1241.

Severance or termination of joint tenancy by conveyances of divided interest directly to self, 7 A.L.R.4th 1268.

Proceeds or derivatives of real property held by entirety as themselves held by entirety, 22 A.L.R.4th 459.

Validity and effect of one spouse's conveyance to other spouse of interest in property held as estate by the entireties, 18 A.L.R.5th 230.

41 C.J.S. Husband and Wife §§ 122 to 219.

40-3-3. [Separation of property; admission to dwelling of spouse.]

Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling.

History: Laws 1907, ch. 37, § 3; Code 1915, § 2749; C.S. 1929, § 68-106; 1941 Comp., § 65-303; 1953 Comp., § 57-3-3.

ANNOTATIONS

Entry into separate residence of spouse. — Section 40-3-3 NMSA 1978 does not provide immunity from prosecution for burglary of a spouse's separate residence. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

Where, because of domestic problems, defendant rented a separate apartment for defendant's spouse; the parties agreed that the apartment was the spouse's separate residence, that defendant would not have a key to the apartment, and that defendant did not have the spouse's permission to enter the apartment; and several months later, defendant entered the spouse's apartment through a window, 40-3-3 NMSA 1978 did not preclude defendant's conviction for burglary of the spouse's separate dwelling. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

The plain language of 40-3-3 NMSA 1978 renders inter-spousal burglary an impossibility because the New Mexico burglary statutes protect the possessory right to exclude and 40-3-3 NMSA 1978 dictates that spouses have no such right to exclude the other spouse. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

Entry into residence of estranged spouse. — Where defendant entered defendant's estranged spouse's apartment without permission, kidnapped the victim, and killed the victim, 40-3-3 NMSA 1978 prohibited defendant's spouse form excluding defendant from the spouse's apartment and defendant's entry into the apartment, even with felonious purpose, did not constitute burglary as a matter of law. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

Law reviews. — For comment, "Community Property - Power of Testamentary Disposition - Inequality Between Spouses," see 7 Nat. Resources J. 645 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 A.L.R.2d 294.

Division of community property between spouses into separate property as constituting gift within gift statutes, 19 A.L.R.2d 860.

Divorce and separation: Attorney's contingent fee contracts as marital property subject to distribution, 44 A.L.R.5th 671.

41 C.J.S. Husband and Wife § 128 et seq.

40-3-4. Contracts of indemnity; no obligation of community property unless signed by both husband and wife.

It is against the public policy of this state to allow one spouse to obligate community property by entering into a contract of indemnity whereby he will indemnify a surety

company in case of default of the principal upon a bond or undertaking issued in consideration of the contract of indemnity. No community property shall be liable for any indebtedness incurred as a result of any contract of indemnity made after the effective date of this section, unless both husband and wife sign the contract of indemnity.

History: 1953 Comp., § 57-4-10, enacted by Laws 1965, ch. 74, § 1.

ANNOTATIONS

Cross references. — For requirement of joinder of spouses for purposes of transfer, conveyance, mortgage and lease of community real property, *see* 40-3-13 NMSA 1978.

Applicability of section. — This section did not apply to bar an action on a promissory note brought by the promisee against the wives of the promisors, since the action was a simple suit on a note against the remaining members of the marital community and not a contract of indemnity. *Lubbock Steel & Supply, Inc. v. Gomez*, 1987-NMSC-025, 105 N.M. 516, 734 P.2d 756.

Law reviews. — For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M.L. Rev. 11 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Community Property §§ 77 to 80.

41 C.J.S. Husband and Wife §§ 164 to 166.

40-3-5. Disposition of real property without joinder where spouse is prisoner of war/person missing-in-action.

A. If a spouse is reported by the United States department of defense to be a prisoner of war/person missing-in-action, the other spouse may, not less than six months after such report, file a petition of the facts which make it desirable for the petitioning spouse to engage in a transaction for which joinder of both spouses is required by Section 57-4-3 NMSA 1953.

B. The petition shall be filed in a district court of any county in which real property described in the petition is located.

C. The district court shall appoint a guardian ad litem for the prisoner of war/person missing-in-action and shall allow such guardian a reasonable fee for his services.

D. A notice, stating that the petition has been filed and specifying the date of the hearing, accompanied by a copy of the petition shall be issued and served on the guardian ad litem and shall be published once each week for four successive weeks in a newspaper of general circulation in the county in which the proceeding is pending. The last such publication shall be made at least twenty days before the hearing.

E. After the hearing, the district court may allow the petitioning spouse alone to engage in a transaction for which joinder of both spouses is required by Section 57-4-3 NMSA 1953 upon such terms and conditions as may be appropriated [appropriate] or necessary to protect the interests of the absent spouse.

F. Any sale, lease, conveyance or encumbrance authorized by the district court pursuant to Subsection E of this section shall be confirmed by order of the district court, and that order of confirmation may be recorded in the office of the county clerk of the county where any property affected thereby is situated.

History: 1953 Comp., § 57-4-11, enacted by Laws 1973, ch. 105, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — Section 57-4-3, 1953 Comp., cited in Subsections A and E, was repealed by Laws 1973, ch. 320, § 14. For present provisions, *see* 40-3-13 to 40-3-16 NMSA 1978.

Cross references. — For section concerning disposition and management of real property without joinder and management of community personal property subject to management of one spouse alone where spouse has disappeared, *see* 40-3-16 NMSA 1978.

Law reviews. — For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Power of either spouse, without consent of other, to make gift of community property or funds to third party, 17 A.L.R.2d 1118.

41 C.J.S. Husband and Wife § 168.

40-3-6. Short title.

This act [40-3-6 to 40-3-17 NMSA 1978] may be cited as the "Community Property Act of 1973".

History: 1953 Comp., § 57-4A-1, enacted by Laws 1973, ch. 320, § 1.

ANNOTATIONS

Common-law concepts and community property concepts are distinct. — A common-law rule would not be authority for dismissing a community property claim. *Rodgers v. Ferguson*, 1976-NMCA-098, 89 N.M. 688, 556 P.2d 844, cert. denied, 90 N.M. 7, 558 P.2d 619.

Status of real property is governed in this state by statute. *Hollingsworth v. Hicks*, 1953-NMSC-045, 57 N.M. 336, 258 P.2d 724.

Duty of court to divide equally property of the community. *Fitzgerald v. Fitzgerald*, 1962-NMSC-028, 70 N.M. 11, 369 P.2d 398.

Wife has income equal to one-half of total community income regardless of what proportion of that income is actually paid to her in the form of wages or rents. *Duran v. N.M. Dep't of Human Servs.*, 1980-NMCA-038, 95 N.M. 196, 619 P.2d 1240.

Aid to child denied where claim based on mother's interest in community income. — For purposes of determining aid to families with dependent children benefits, where a wife not only has a technical income resulting from her one-half share in the community income, but that one-half share in the community income provides the legal basis for her daughter's legitimate claim on the one-half interest in the community income, the denial of benefits for the child, on the basis that the mother's income exceeded permissible limits, is upheld. *Duran v. N.M. Dep't of Human Servs.*, 1980-NMCA-038, 95 N.M. 196, 619 P.2d 1240.

Presumption raised against validity of transaction where wife without advice. — Because of the relationship of husband and wife, a presumption is raised against the validity of a transaction in which the wife did not have competent and independent legal advice in conferring benefits upon the husband. *Trujillo v. Padilla*, 1968-NMSC-090, 79 N.M. 245, 442 P.2d 203.

Insurance proceeds are community property even if not divided upon divorce. — Where there is an insured third person (the child) and a spouse (the defendant) as beneficiary and the proceeds were not paid during marriage, but the right to the proceeds was obtained during marriage, this right was not changed and was not divided upon the divorce. *Hickson v. Herrmann*, 1967-NMSC-083, 77 N.M. 683, 427 P.2d 36.

If husband owned right to receive proceeds of policy as community property of the parties, this right, not having been disposed of by divorce, became the right of the parties as tenants in common. *Hickson v. Herrmann*, 1967-NMSC-083, 77 N.M. 683, 427 P.2d 36.

Subsequent marriage no invalidation of decedent's power to designate mother as beneficiary. — In an action by an employee's widow who claimed entitlement to all death benefits under a health benefits plan, although the decedent made his mother the

beneficiary, the decedent's power to designate his mother as beneficiary of all of the death benefits was not invalidated by his subsequent marriage or by the community property law. *Barela v. Barela*, 1980-NMCA-157, 95 N.M. 207, 619 P.2d 1251.

Law reviews. — For article, "Federal Taxation of New Mexico Community Property," see 3 Nat. Resources J. 104 (1963).

For comment, "Community Property - Power of Testamentary Disposition - Inequality Between Spouses," see 7 Nat. Resources J. 645 (1967).

For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M.L. Rev. 11 (1973).

For symposium, "Equal Rights and the Debt Provisions of New Mexico Community Property Law," see 3 N.M.L. Rev. 57 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

40-3-7. Purpose of act.

The purpose of the Community Property Act of 1973 [40-3-6 to 40-3-17 NMSA 1978] is to comply with the provisions of Section 18 of Article 2 of the constitution of New Mexico, as it was amended in 1972 and became effective on July 1, 1973, by making the provisions of the community property law of New Mexico apply equally to all persons regardless of sex.

History: 1953 Comp., § 57-4A-1.1, enacted by Laws 1975, ch. 246, § 2.

ANNOTATIONS

Law reviews. — For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

40-3-8. Classes of property.

A. "Separate property" means:

(1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage;

(2) property acquired after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978, unless the decree provides otherwise;

(3) property designated as separate property by a judgment or decree of any court having jurisdiction;

(4) property acquired by either spouse by gift, bequest, devise or descent; and

(5) property designated as separate property by a written agreement between the spouses, including a deed or other written agreement concerning property held by the spouses as joint tenants or tenants in common in which the property is designated as separate property.

B. Except as provided in Subsection C of this section, "community property" means property acquired by either or both spouses during marriage which is not separate property. Property acquired by a husband and wife by an instrument in writing whether as tenants in common or as joint tenants or otherwise shall be presumed to be held as community property unless such property is separate property within the meaning of Subsection A of this section.

C. "Quasi-community property" means all real or personal property, except separate property as defined in Subsection A of this section, wherever situated, heretofore or hereafter acquired in any 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.

D. For purposes of division of property incident to a dissolution of marriage or a legal separation under Section 40-4-3 NMSA 1978, quasi-community property shall be treated as community property, if both parties are domiciliaries of New Mexico at the time of the dissolution or legal separation proceeding.

E. "Property" includes the rents, issues and profits thereof.

F. The right to hold property as joint tenants or as tenants in common and the legal incidents of so holding, including but not limited to the incident of the right of survivorship of joint tenancy, are not altered by the Community Property Act of 1973 [40-3-6 to 40-3-17 NMSA 1978], except as provided in Sections 40-3-10, 40-3-11 and 40-3-13 NMSA 1978.

G. The provisions of the 1984 amendments to this section shall not affect the right of any creditor, which right accrued prior to the effective date of those amendments.

History: 1953 Comp., § 57-4A-2, enacted by Laws 1973, ch. 320, § 3; 1984, ch. 122, § 1; 1990, ch. 38, § 1.

ANNOTATIONS

Cross references. — For determination of community property upon death of spouse, *see* 45-2-804 NMSA 1978.

Compiler's notes. — The language "1984 amendments to this section," in Subsection G, refers to Laws 1984, ch. 122, § 1.

The 1990 amendment, effective May 16, 1990, in Subsection B, added the exception at the beginning and substituted "shall be presumed" for "will be presumed" in the second sentence; added present Subsections C and D; and redesignated former Subsections C to E as present Subsections E to G.

I. GENERAL CONSIDERATION.

Retroactive application of 1984 amendments. — The 1984 amendments to this section apply retroactively so as to convert property acquired by husband and wife as joint tenants prior to the passage of the amendment, and thus originally held as separate property, into community property which would be included in the bankruptcy estate. Property acquired before 1984 by husband and wife through an instrument designating them as joint tenants is presumed to be held as community property, even though it may also be held as joint tenancy property. *Swink v. Fingado*, 1993-NMSC-013, 115 N.M. 275, 850 P.2d 978.

Section does not deal with how property may be changed to different class; by its terms, it deals with classes of property. *Estate of Fletcher v. Jackson*, 1980-NMCA-054, 94 N.M. 572, 613 P.2d 714, cert. denied, 94 N.M. 674, 615 P.2d 991.

Spouses are permitted to change the property's status. *Nichols v. Nichols*, 1982-NMSC-071, 98 N.M. 322, 648 P.2d 780.

Real estate contract as evidence of intent to transmute. — Although a real estate contract is not conclusive and is not, by itself, substantial evidence on the issue of transmutation of property, it at least constitutes some evidence of intent to transmute. *Nichols v. Nichols*, 1982-NMSC-071, 98 N.M. 322, 648 P.2d 780.

Duty of trial court is to divide equally community property of the spouses and, until the extent of the property of the community has been determined, the trial court is in no position to make a fair and just division. *Otto v. Otto*, 1969-NMSC-074, 80 N.M. 331, 455 P.2d 642.

The trial court has a duty to divide the property of the community as equally as possible. *Mitchell v. Mitchell*, 1986-NMCA-028, 104 N.M. 205, 719 P.2d 432, cert. denied, 104 N.M. 84, 717 P.2d 60.

Relative amounts of separate property and community property which make up the commingled total is an important factor. *Conley v. Quinn*, 1959-NMSC-065, 66 N.M. 242, 346 P.2d 1030.

Property takes status as community or separate at time and manner of acquisition. — Property acquired in New Mexico takes its status as community or separate property at the time and by the manner of its acquisition; and if a part of the purchase money is later paid by other funds than those of the owner of the property, whether of the community or an individual spouse, the owner is indebted to the source of such funds in that amount, but such payment does not affect the title of the purchaser. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638; *Shanafelt v. Holloman*, 1956-NMSC-047, 61 N.M. 147, 296 P.2d 752.

Property in this state takes its status as community or separate property at the time, and by the manner, of its acquisition. *Lucas v. Lucas*, 1980-NMSC-123, 95 N.M. 283, 621 P.2d 500; *Bustos v. Bustos*, 1983-NMSC-074, 100 N.M. 556, 673 P.2d 1289.

Property takes its distinctive legal title, either as community property or as separate property, at the time it is acquired and is fixed by the manner of its acquisition. *English v. Sanchez*, 1990-NMSC-064, 110 N.M. 343, 796 P.2d 236.

The general conflict of laws rule by which an interest in property takes its character at the time and in the manner of its acquisition has not been superseded by the Community Property Act. *Blackwell v. Lurie*, 2003-NMCA-082, 134 N.M. 1, 71 P.3d 509, cert. denied, 134 N.M. 123, 73 P.3d 826.

Subsequent improvements with community funds does not change status. — Property acquired in New Mexico takes its status as community or separate property at the time and by the manner of its acquisition and subsequent improvement of the premises with community funds does not, of itself, change the nature of the premises, but would only create an indebtedness as between the spouses. Thus, the subsequent erection of improvements on the separate property of the husband with community funds was immaterial to the respective rights of the wife and the bonding company seeking indemnification from the husband for certain amounts paid pursuant to its bonds to the state and at most, would merely give rise to an indebtedness as between the spouses, so that the tract was subject to sale under the attachment of the bonding company. *U.S. Fid. & Guar. Co. v. Chavez*, 126 F. Supp. 227 (D.N.M. 1954)(decided under former law).

Apportioning assets between separate and community estates. — It is impossible to lay down hard and fast guidelines in apportioning assets between the separate estate of a conjugal partner and the community; the surrounding circumstances must be

carefully considered as each case will depend upon its own facts, and the ultimate answer will call into play the nicest and most profound judgment of the trial court. Mathematical exactness is not expected or required, but substantial justice can be accomplished by the exercise of reason and judgment in all such cases. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Apportioning assets. — Apportionment is a legal concept that is properly applied to an asset acquired by married people "with mixed monies" - that is, partly with community and partly with separate funds. *Dorbin v. Dorbin*, 1986-NMCA-114, 105 N.M. 263, 731 P.2d 959.

Reimbursement for funds spent for the benefit of separate property. — When community money is spent to the benefit of separate property, without the acquisition of an asset, for example, when money is paid for interest, taxes and insurance, neither New Mexico statute nor case law authorizes reimbursement. *Dorbin v. Dorbin*, 1986-NMCA-114, 105 N.M. 263, 731 P.2d 959.

It was error to reimburse to the community both the principal paydown and the amount of interest paid during the marriage which benefited the wife's sole and separate residence. *Dorbin v. Dorbin*, 1986-NMCA-114, 105 N.M. 263, 731 P.2d 959.

Includes determining what income amounts due to personal efforts on property employed. — In apportioning assets between a spouse's separate estate and the community each case must be determined with reference to its surrounding facts and circumstances to determine what amount of the income is due to personal efforts of the spouses and what is attributable to the separate property employed; dependent upon the nature of the business and the risks involved, it must be reckoned what would be a fair return on the capital investment as well as determined what would be a fair allowance for the personal services rendered. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Interest in property located in foreign domicile determined by law of situs. — Interests in property acquired in a foreign domicile by the parties during marriage, which property still has its situs in the foreign state at the time of the New Mexico divorce proceedings, are to be determined by the trial court pursuant to the statutes and case law of the foreign state in which the property was acquired. *Brenholdt v. Brenholdt*, 1980-NMSC-051, 94 N.M. 489, 612 P.2d 1300.

Character of retirement pay is determined by law of state where it is earned; if earned in a community property state during coverture, it is community property, and if it is earned in a noncommunity property state during coverture, it is separate estate. *Otto v. Otto*, 1969-NMSC-074, 80 N.M. 331, 455 P.2d 642.

Property agreement could be retroactively altered even after husband's death. — Where deficiencies were assessed because New Mexico law forbade a husband and wife from transmuting community property by mere agreement, and their separate

property agreement was invalid, the rights of the parties did not become fixed under controlling New Mexico law, at the death of husband, and such rights could be retroactively altered by an overruling decision after his death, and the separate property agreement, under which the husband and wife held their property as tenants in common, was valid and operative from its inception. *Massaglia v. Commissioner*, 286 F.2d 258 (10th Cir. 1961).

In divorce action, partnership business acquired before marriage, separate property. — In divorce action, supreme court affirmed trial court's division of separate and community property in business partnership acquired by husband prior to marriage, where trial court found that husband's withdrawals from the partnership represented the reasonable value of his services and personal efforts in conduct of the business during the marriage, and thus constituted the total amount attributable to the community, and where such finding was not attacked, wife's contention that trial court erred in certain determinations as to value of the partnership was irrelevant since it had already been established that the business was husband's separate property. *Gillespie v. Gillespie*, 1973-NMSC-019, 84 N.M. 618, 506 P.2d 775.

All interests in property conveyed when wife signed quitclaim deed. — In a quiet title action, appellant's contention that a quitclaim deed executed to appellee by her, her husband and cograntees conveyed only her interest as a spouse in community property, that her individual interest as cotenant in common with her husband and the other cograntees was not conveyed, was found to be erroneous. Appellant conveyed all of her interest in the property by the deed and not two separate and distinct estates in the mining property, to-wit, a community property interest and a separate and distinct interest given to married women by the statute. *Waddell v. Bow Corp.*, 408 F.2d 772 (10th Cir. 1969); *Stephens v. Stephens*, 1979-NMSC-039, 93 N.M. 1, 595 P.2d 1196.

Division of insurance proceeds where claim pending at divorce. — Where premium on disability insurance proceeds was paid from husband's earnings during marriage, insurance proceeds on claim pending against insurance company at time of divorce were community property. *Douglas v. Douglas*, 1984-NMCA-071, 101 N.M. 570, 686 P.2d 260.

Tenancies by the entirety do not violate public policy. — There is no indication in either the statutes or the case law that the abrogation of tenancies by the entirety by the adoption of the community property system represented a determination that tenancies by the entirety violate some deep-rooted public policy. *Blackwell v. Lurie*, 2003-NMCA-082, 134 N.M. 1, 71 P.3d 509, cert. denied, 134 N.M. 123, 73 P.3d 826.

Community rights generally not forfeited by bigamy. — The mere fact of bigamy is insufficient to deprive wife of her share of community property. *Medina v. Medina*, 2006-NMCA-042, 139 N.M. 309, 131 P.3d 696.

Circumstances when community rights are forfeited by bigamy. — A bigamous spouse should be deprived of his or her community property rights only when the

circumstances of the case shock the conscience of the court. *Medina v. Medina*, 2006-NMCA-042, 139 N.M. 309, 131 P.3d 696.

II. SEPARATE PROPERTY.

All property not separate is community. — Property owned by either spouse before marriage or acquired after marriage by gift, bequest, devise or descent, with the rents, issues and profits, is the separate property of that spouse. All other property acquired by either husband or wife or both after marriage is community property. *Hollingsworth v. Hicks*, 1953-NMSC-045, 57 N.M. 336, 258 P.2d 724 (decided under former law).

Deed naming one spouse raises presumption of separate property. — A deed that names only one spouse does not convey the realty absolutely as separate property, but only creates a presumption of separate property that may be rebutted. Overcoming this presumption by a preponderance of the evidence appears to be sufficient. *Sanchez v. Sanchez*, 1987-NMCA-143, 106 N.M. 648, 748 P.2d 21, cert. denied, 106 N.M. 627, 747 P.2d 922.

Burden of proof. — If a party alleging that property held in joint tenancy was meant to be separate, to prevail there must be either a clear designation of that intent, or enough evidence to overcome the presumption of community property. *Swink v. Sunwest Bank (In re Fingado)*, 113 Bankr. 37 (Bankr. D.N.M. 1990).

Burden of proving separate property interests. — In a division of property proceeding that resulted from the parties' dissolution of marriage, where husband claimed the district court failed to address husband's claimed interest in a 1955 Chevrolet that wife had given him as a birthday gift, and where husband claimed that wife sold the vehicle without his consent and that he did not receive compensation for the loss of the vehicle, the district court did not err in effectively concluding, by rejecting husband's proposed findings, that husband failed to meet his burden of claiming and proving that he had separate and community property interests in the 1955 Chevrolet, because there was no testimony that wife appropriated or re-gifted the car, that husband did not consent to removal of the car, or that he had never received compensation for it. *Gabriele v. Gabriele*, 2018-NMCA-042, cert. denied.

Admissibility of parol evidence to show intent. — Parol evidence was properly admitted, not to alter certain deeds, but rather to establish the true consideration behind the deeds, which, in turn, established the lack of intention of the grantors to make a gift to the wife. *Sanchez v. Sanchez*, 1987-NMCA-143, 106 N.M. 648, 748 P.2d 21, cert. denied, 106 N.M. 627, 747 P.2d 922.

Presumption of community property where separate cannot be traced. — If separate property has been so commingled or mixed with property acquired after marriage so that the separate property cannot be clearly traced or identified, then there is a presumption that the property acquired after marriage is community property, and

not held in joint tenancy, unless this presumption can be overcome by proof. *Wiggins v. Rush*, 1971-NMSC-092, 83 N.M. 133, 489 P.2d 641.

Intermingling of property. — When separate property has been so intermingled with community property that the separate property cannot be traced or identified, it falls under the presumption of community property. Ability to trace separate funds prevents the determination of the transmutation of property by operation of law; a trial court still has the ability to consider the commingling, along with other evidence, in deciding whether transmutation of separate into community property took place. *Nichols v. Nichols*, 1982-NMSC-071, 98 N.M. 322, 648 P.2d 780.

Effects of failure to designate separateness. — Since husband and wife acquired dwellings as joint tenants through instruments which did not designate the property as separate property, wife's interest in the proceeds from the properties was included in husband's bankruptcy estate. *Swink v. Sunwest Bank*, 995 F.2d 175 (10th Cir. 1993).

Mere commingling of separate property with community property does not change its character from separate to community property, unless the separate property so commingled cannot be traced and identified. *Burlingham v. Burlingham*, 1963-NMSC-068, 72 N.M. 433, 384 P.2d 699; *Corley v. Corley*, 1979-NMSC-040, 92 N.M. 716, 594 P.2d 1172.

Presumption of community not followed. — When there is a commingling of a negligible amount of community property with a large amount of separate property so that the separate property can no longer be identified, the general rule that such property falls under the presumption of community property is not followed. *Conley v. Quinn*, 1959-NMSC-065, 66 N.M. 242, 346 P.2d 1030.

Property purchased before marriage separate though deed delivered after. — Property purchased by one spouse before marriage is separate property, though the deed therefor is not executed and delivered until after marriage, and this is true though a part of the purchase price is not paid until after the marriage. *Hollingsworth v. Hicks*, 1953-NMSC-045, 57 N.M. 336, 258 P.2d 724.

Purchase of property prior to marriage. — Husband had equitable title to property prior to his marriage and the property was his separate property, where the property was purchased prior to the marriage and the deed was received by the husband during the marriage. *Michaluk v. Burke*, 1987-NMCA-044, 105 N.M. 670, 735 P.2d 1176.

Community contributions to separate property. — The community is entitled to a lien against the separate property of a spouse for the enhanced value of such property attributable to community labor during the marriage. *Jurado v. Jurado*, 1995-NMCA-014, 119 N.M. 522, 892 P.2d 969.

Extent of community lien on separate property. — Under New Mexico law, the community is entitled to an equitable lien against separate property only to the extent

that the community can show that its funds or labor enhanced the value of the property or increased the equity interest in the property. *Martinez v. Block*, 1993-NMCA-093, 115 N.M. 762, 858 P.2d 429.

Formula for determining amount of community lien on separate property that has depreciated in value. — When the value of a separate property asset has decreased during the marriage but positive equity remains in the property and the community has paid contributions toward the principal indebtedness against that property, the formula for calculating a community lien is C-[C/B x D], where D is the depreciation in value of the property during the marriage, B is the value on the date of the marriage, and C is the community contributions to principal or market value. *Ross v. Negron-Ross*, 2017-NMCA-061.

Community contributions and improvements to separate property. — Community contributions and improvements to real property do not affect the title of separate ownership; the right of the community to be reimbursed for the amount of the lien does not change the character of the property from separate to community, and separate property may be conveyed by the owner without the joinder of a spouse. *Hickey v. Griggs*, 1987-NMSC-050, 106 N.M. 27, 738 P.2d 899.

Appreciation equity in separate property. — Where husband, prior to his marriage with wife, purchased a house, and where husband and wife, after marriage, made regular monthly mortgage payments on the property from their joint checking account, and where wife, during the marriage, used her separate funds to pay down the principal on the property, the district court did not err in awarding wife a share in the appreciated equity of the property, because wife was entitled to a share of the increased value of the separate property where she used her separate funds to increase the value the house. *Vanderlugt v. Vanderlugt*, 2018-NMCA-073.

Owner of separate property responsible for proceeds. — When the owner of separate property participates in its operation to an extent that he may be said to be responsible for a portion of the proceeds arising from it, the proceeds shall then be apportioned as separate and community property. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Owner of separate property employs others to manage it for him. — If a husband owning property as his sole and separate estate employs others to manage it and does not himself expend any labor, skill or industry upon it, the proceeds of the property must be held to be his separate property. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Income on investments as valid measure of separateness. — Under this section income is the demonstrated interest on investments which is a valid measure of the separate income to a husband. *Moore v. Moore*, 1963-NMSC-047, 71 N.M. 495, 379 P.2d 784.

Increase in value of separate property produced by natural causes or essentially as a characteristic of the capital investment is separate property. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266; *Portillo v. Shappie*, 1981-NMSC-119, 97 N.M. 59, 636 P.2d 878.

Increase in value by community earnings is community property. — The community owns the earning power of each of the spouses, and when that earning power is used for the benefit of one's separate property the portion of the earnings attributable to his personal activities and talent is community property. *Portillo v. Shappie*, 1981-NMSC-119, 97 N.M. 59, 636 P.2d 878.

The community is not limited to a lien in the amount of its funds and labor expended in making improvements to realty which was the separate property of plaintiff's deceased wife, but it is entitled to the increase in value of the realty which was directly attributable to the community funds and labor. *Portillo v. Shappie*, 1981-NMSC-119, 97 N.M. 59, 636 P.2d 878.

Method of proving value upon apportionment. — Once participation in the operation of separate property is shown, the owner of the separate estate is not limited to its reasonable rental value upon apportionment. Instead, the method of division to be used depends upon what is best under all the proof. It is only when the actual value of the owner's efforts cannot be arrived at that resort may be had to more arbitrary proof of value, such as proof of the value of like services by others, prevailing rental values or interest rates upon investments. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Property separately acquired remains so even where improvements made with community funds. — The character of ownership of property, whether separate or community, is determined at the time of its acquisition; if acquired as separate property, it retains such character even though community funds may later be employed in making improvements or discharging an indebtedness thereon. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Property acquired after marriage exchanged for property owned before marriage. — Property acquired after marriage in exchange for or with the proceeds from property owned before marriage remains separate property. *Conley v. Quinn*, 1959-NMSC-065, 66 N.M. 242, 346 P.2d 1030.

Character of property exchanged for separate property. — Where there is substantial evidence to support the trial court's finding that the husband's interests in certain property were his separate property, and an interest in a company was received in exchange for a portion of such interests, it necessarily follows the interest in the company is likewise his separate property. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Intent to transmute necessary. — Separate property can only be held to have been transmuted into community property during the course of a marriage upon a clear showing of intent by the party originally in possession of the property to effect such transmutation; the mere fact that a joint mortgage was taken on the property and that community funds were used to repay the loan is insufficient to effect transmutation, in the absence of a showing of intent. *Macias v. Macias*, 1998-NMCA-170, 126 N.M. 303, 968 P.2d 814.

Separate property not transmuted into community property. — Property that was transferred exclusively to the wife, because the husband and wife did not want to subject it to a judgment lien if the husband was sued, was the wife's separate property and was not transmuted into community property by its conveyance to the husband for $2,000 just before they separated, where the property was valued at approximately $160,000, and where the wife was emotionally disturbed, was afraid of her husband, and desperately needed money to help their son pay his bills. *Bustos v. Bustos*, 1983-NMSC-074, 100 N.M. 556, 673 P.2d 1289.

Gift from husband to wife presumed separate estate. — Where the husband purchases real estate with his own or community funds and has the title conveyed to his wife alone, the presumption is that he has made a gift to her and that the property so conveyed is her separate estate. However, this presumption is rebuttable. *Overton v. Benton*, 1955-NMSC-109, 60 N.M. 348, 291 P.2d 636.

Land purchased during marriage as separate where separate funds used. — Since the source of the funds with which the land was purchased was clearly and indisputably traced and identified as wife's separate property, the fact that the land was purchased during marriage did not alter its status as her separate property. *Burlingham v. Burlingham*, 1963-NMSC-068, 72 N.M. 433, 384 P.2d 699.

Stock dividends. — Dividends from separately invested stock are generally considered rents, issues and profits of the separate estate. *Zemke v. Zemke*, 1993-NMCA-067, 116 N.M. 114, 860 P.2d 756, cert. denied, 116 N.M. 71, 860 P.2d 201.

Increase in separate property. — Any increase in the value of separate property is presumed to be also separate unless rebutted by direct and positive evidence that the increase was due to community funds or labor. *Zemke v. Zemke*, 1993-NMCA-067, 116 N.M. 114, 860 P.2d 756, cert. denied, 116 N.M. 71, 860 P.2d 201.

Income from husband's investments, owned by him prior to marriage, is his separate property. *Moore v. Moore*, 1963-NMSC-047, 71 N.M. 495, 379 P.2d 784.

Community acquired no investment in husband's business even if money paid during coverture. — Where the husband's interest in business partnership was acquired prior to coverture, it was his separate property, regardless of whether payment was made for it before or after coverture. Even if some portion of the purchase moneys for the interest in the partnership had been paid during coverture, the community would

have had no "investment" in the business, but merely an equitable lien or charge against it. *Gillespie v. Gillespie*, 1973-NMSC-019, 84 N.M. 618, 506 P.2d 775.

Recovery for personal injuries of wife as her separate property. — In New Mexico although all real and personal property acquired after marriage by either spouse other than by gift, descent or devise is community property, the courts have held that the cause of action and recovery for personal injuries to the wife are her separate property, so that she may sue in her own name for pain and suffering and personal injuries without joinder of her husband, and her husband's contributory negligence is not imputed to her. *Roberson v. U-Bar Ranch, Inc.*, 303 F. Supp. 730 (D.N.M. 1968).

A victim's claim for personal injuries belonged to him and he could pursue it independent of any marital community, and therefore his administratrix could pursue the personal injury claim as the representative of his estate. *Rodgers v. Ferguson*, 1976-NMCA-098, 89 N.M. 688, 556 P.2d 844, cert. denied, 90 N.M. 7, 558 P.2d 619.

Written agreement to transmute property to joint tenancy not required. — An agreement between spouses to transmute property from community property to joint tenancy does not have to be in writing in all cases. *Estate of Fletcher v. Jackson*, 1980-NMCA-054, 94 N.M. 572, 613 P.2d 714, cert. denied, 94 N.M. 674, 615 P.2d 991.

Removing wife's name from accounts by husband does not destroy joint tenancy. — Where certain accounts were owned by husband and wife as joint tenants with right of survivorship, and during wife's incompetency the husband, without the wife's consent or knowledge, transferred the accounts into his name alone and had wife's name removed from other accounts, the actions of the husband did not destroy the joint tenancy and did not convert the property into community property; so, when the husband predeceased the wife, the property succeeded to her as the surviving joint tenant. *Bluestein v. Owensby*, 1977-NMSC-085, 91 N.M. 81, 570 P.2d 912.

Wife's separate property after divorce not subject to judgment creditor. — The ultimate effect of the transmutation of judgment debtor's property from a community status to a tenancy in common after divorce is that wife's one-half interest is her separate property, and not subject to levy and execution by judgment creditor. *Atlas Corp. v. DeVilliers*, 447 F.2d 799 (10th Cir. 1971), cert. denied, 405 U.S. 933, 92 S. Ct. 939, 30 L. Ed. 2d 809, *reh'g denied*, 405 U.S. 1033, 92 S. Ct. 1288, 31 L. Ed. 2d 491 (1972).

Ranch owned before marriage is separate property. — Where appellant owns ranch free and clear of all encumbrances prior to the marriage, it belongs to him as his separate property. *Moore v. Moore*, 1963-NMSC-047, 71 N.M. 495, 379 P.2d 784.

Income from separate property not necessarily separate. — Merely because a ranch belongs to a husband as his separate property does not mean that the income therefrom is his separate property. *Moore v. Moore*, 1963-NMSC-047, 71 N.M. 495, 379 P.2d 784.

Veteran's interest in his V.A. disability pension is characterized as his separate property since his entitlement thereto accrued prior to his marriage. Therefore, the community property laws do not give his spouse a protectable property interest in the pension. *Sena v. Roudebush*, 442 F. Supp. 153 (D.N.M. 1977).

Offspring of husband's separately owned horses constitutes "rents, issues and profits thereof" and are separate property. *Corley v. Corley*, 1979-NMSC-040, 92 N.M. 716, 594 P.2d 1172.

Nondisability military retirement pay is separate property. — Nondisability military retirement pay is the separate property of the spouse who is entitled to receive it, and it is not subject to division upon dissolution of marriage. *Espinda v. Espinda*, 1981-NMSC-098, 96 N.M. 712, 634 P.2d 1264, superseded by *Walentwoski v. Walentowski*, 1983-NMSC-097, 100 N.M. 484, 672 P.2d 657.

Burden of proving value of improvements made by community effort. — Real property acquired by a husband prior to marriage, and paid for during the marriage with monies from his retirement disability pension, was separate property. Thus, where the wife failed to show the amount by which community labor or funds enhanced the value of the property, the trial court's decision to apportion some of the proceeds of the sale of the property to the community was not supported by the record. *Bayer v. Bayer*, 1990-NMCA-106, 110 N.M. 782, 800 P.2d 216, cert. denied, 110 N.M. 749, 799 P.2d 1121.

Forgiveness of loan by will of parent. — When a parent has loaned money to a child and the child's spouse for the purchase of real property, and then the parent dies, leaving a will forgiving debts owed by the child to the parent, courts have interpreted the will provision in question to forgive the entire amount of the debt, even though the debt was a joint debt and the spouse was not mentioned in the will. *Martinez v. Block*, 1993-NMCA-093, 115 N.M. 762, 858 P.2d 429.

III. COMMUNITY PROPERTY.

Hybrid community ownership. — The joint tenancy designation on a deed issued to a marital couple establishes a presumption that the marital couple holds the property in hybrid community property ownership. Property held in this manner is distinguishable from pure community property only in that each member of the marital couple has joint tenancy survivorship benefits in the community property. *In re Beery*, 295 B.R. 385 (2003).

Limited purpose for which income considered community property. — New Mexico's community property law only considers a spouse's income as property of the other spouse for the purpose of distributing assets in the case of a divorce or legal separation, not to determine the equality of wages under the federal Equal Pay Act. Consistent with this reasoning is the fact that half of a husband's salary is not attributed to his wife for the purposes of determining his wife's social security, workers'

compensation, or unemployment benefits. *Dean v. United Food Stores, Inc.*, 767 F. Supp. 236 (D.N.M. 1991).

Property held in joint tenancy can be community property. *Swink v. Sunwest Bank (In re Fingado)*, 113 Bankr. 37 (Bankr. D.N.M. 1990).

Rebuttable presumption that income is community. — There is a rebuttable presumption that income received by either party during their marriage is community property. *Moore v. Moore*, 1963-NMSC-047, 71 N.M. 495, 379 P.2d 784.

In divorce action where supreme court is shown no evidence adduced at the trial which will defeat the presumption that income received from a ranch during marriage is community property, the supreme court will treat that income as income of the community. *Moore v. Moore*, 1963-NMSC-047, 71 N.M. 495, 379 P.2d 784.

Property acquired by either or both spouses during their marriage is presumptively community property. The presumption of community property, however, is subject to being rebutted by a preponderance of the evidence. *Stroshine v. Stroshine*, 1982-NMSC-113, 98 N.M. 742, 652 P.2d 1193.

Burden of proof of rebuttal. — Property acquired by either or both spouses during their marriage is presumptively community property. A party asserting that such property is separate has the burden of presenting evidence that would rebut the presumption by a preponderance of the evidence. *Nichols v. Nichols*, 1982-NMSC-071, 98 N.M. 322, 648 P.2d 780.

Wife failed to rebut the presumption that property acquired during the marriage was community property. — In a divorce proceeding, where wife appealed the district court's characterization of assets and debts as separate or community property and the court's division of marital assets and debts between her and husband, the district court did not err in determining that the parties' business was community property and not wife's separate property, because the district court's decision was supported by evidence in the record, including wife's failure to support her testimony with any documentation that gift of $2,000 was used to start the business, that the $2,000 amount was unlikely to have been sufficient to fund the launch of a corporation engaged in heavy earth-moving, and undisputed evidence that husband was involved from the outset in every aspect of creating and running the corporation. Wife failed to rebut the presumption that property acquired during the marriage was community property. *Autrey v. Autrey*, 2022-NMCA-042, cert. granted.

Burden of proving community property interests. — In a division of property proceeding that resulted from the parties' dissolution of marriage, where husband claimed a community interest in a property located in Texas where husband and wife co-signed a note in order for wife's daughter to purchase the Texas property, the down payment of which was paid by the daughter, and where husband and wife eventually deeded the house to the daughter, and where husband testified that he did not know the

source of the funds used for the down payment for the Texas property, there was substantial evidence to support the district court's finding that the parties had no real community interest in the Texas property. *Gabriele v. Gabriele*, 2018-NMCA-042, cert. denied.

Expended earnings not subject to distribution. — In a division of property proceeding that resulted from the parties; dissolution of marriage, where husband claimed that wife converted community assets to her own use and that the community is entitled to reimbursement for the value of those assets, the district court did not err by not distributing wife's income earned during the marriage, because once community earnings are expended, rather than being converted into an asset, there is no community asset to be shared or managed, and the spouse making the expenditure has no duty to reimburse the community absent some special circumstance, and in this case there was no evidence to support husband's theory that wife converted her earnings during the marriage into community assets that would be available for distribution. *Gabriele v. Gabriele*, 2018-NMCA-042, cert. denied.

If the parties remarried after a divorce decree brought an end to the marital community, a new community was created, and military benefits earned during the parties' second marriage came within the purview of Subsection B and were community property. *Pacheco v. Quintana*, 1986-NMCA-007, 105 N.M. 139, 730 P.2d 1, cert. quashed, 105 N.M. 94, 728 P.2d 845.

Transmutation into community property must be proved by clear and convincing evidence. — Once the community property presumption is overcome by a preponderance of the evidence, a party must prove the transmutation of the separate property into community property by clear and convincing evidence. *Nichols v. Nichols*, 1982-NMSC-071, 98 N.M. 322, 648 P.2d 780.

Evidence that property has been transmuted from separate to community property must be by clear, strong and convincing proof. *Mitchell v. Mitchell*, 1986-NMCA-028, 104 N.M. 205, 719 P.2d 432, cert. denied, 104 N.M. 84, 717 P.2d 60.

Interest of each member of community is existing interest, and not merely an expectancy. *U.S. Fid. & Guar. Co. v. Chavez*, 126 F. Supp. 227 (D.N.M. 1954).

When commingling of funds beneficial to community. — In a divorce action if the community's expenditure of funds exceed the income, then any commingling of funds is to the benefit of the community rather than to the detriment of the community. *Corley v. Corley*, 1979-NMSC-040, 92 N.M. 716, 594 P.2d 1172.

Joint tenancy not created where community funds used to purchase. — Because it was not the intention of husband and wife to hold the property as joint tenants, and because community funds were used to purchase the property, the trial court properly concluded that a joint tenancy was not created. *Wiggins v. Rush*, 1971-NMSC-092, 83 N.M. 133, 489 P.2d 641.

Realty purchased after marriage deemed community property. — Where realty, though in the name of the husband, is purchased after marriage, it qualifies as community property, and the wife's interest in the property is equal to one-half of the equity. *Robnett v. N.M. Dep't of Human Servs. Income Support Div.*, 1979-NMCA-099, 93 N.M. 245, 599 P.2d 398.

Proceeds under covenant not to compete are not community property. — The proceeds under a covenant not to compete negotiated as part of the sale of a business are not community property within the community property laws of this state, where the forthcoming payments were not included in the valuation of the stock and were to be received after divorce. *Lucas v. Lucas*, 1980-NMSC-123, 95 N.M. 283, 621 P.2d 500.

Medical license not community property. — For purposes of community property laws, a medical license is not community property because it cannot be the subject of joint ownership. *Muckleroy v. Muckleroy*, 1972-NMSC-051, 84 N.M. 14, 498 P.2d 1357.

Negligence of one spouse will be imputed to other. — New Mexico follows the rule that where a cause of action for negligence belongs to the community, negligence of one spouse will be imputed to and bar recovery by the other spouse. *Roberson v. U-Bar Ranch, Inc.*, 303 F. Supp. 730 (D.N.M. 1968).

Claim of spouse for medical expenses belong to community. — A claim for damages to the community for medical expenses and loss of earnings, if any, of the husband or wife belong to the community since if the injury deprives the marital community of the earnings or services of the spouse, that is an injury to the marital community, and likewise there is a loss to the community where the community funds are expended for hospital and medical expenses, etc. Since the husband is usually the breadwinner, contributing definite earnings, the loss to the marital community resulting from an injury to him is more obvious. *Rodgers v. Ferguson*, 1976-NMCA-098, 89 N.M. 688, 556 P.2d 844, cert. denied, 90 N.M. 7, 558 P.2d 619.

Where medical expenses were community assets, any part of the wife's tort settlement intended to reimburse the community for medical expenses was also community property. It makes no difference whether the debt was paid with cash or with insurance proceeds; in any event, it was paid by the community. *Russell v. Russell*, 1987-NMCA-085, 106 N.M. 133, 740 P.2d 127.

Community does not acquire interest in corporation. — Where the husband was paid for his services to a corporation in which he owned a one-half interest, which salary of course belonged to the community, and there was no proof in the record that the salary was not adequate or reasonable under the circumstances, having started at $7,500 in 1964 when he returned from college and increased to $35,000 in 1972, the trial court erred in concluding that the community had acquired an interest in the corporation. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Interest in spouse's share in professional corporation. — A nonshareholder spouse cannot be awarded an interest, including goodwill, in a professional corporation greatly in excess of the husband's contractual withdrawal rights. The value of goodwill must be determined without dependency upon the professional spouse's potential or continuing income. *Hertz v. Hertz*, 1983-NMSC-004, 99 N.M. 320, 657 P.2d 1169.

Value of professional practice as community property. — Although the individual right to practice a profession is a property right that cannot be classed as a community property, the value of the practice as a business at the time of dissolution of the community is community property. *Mitchell v. Mitchell*, 1986-NMCA-028, 104 N.M. 205, 719 P.2d 432, cert. denied, 104 N.M. 84, 717 P.2d 60.

Community lien not disturbed. — Where the only separate funds of the husband used in the family home was the sum paid for the lot upon which it was constructed, and the evidence showed that the parties expended a considerable sum on the home after its completion (although whether community or separate funds were used for that purpose was unclear), that a few mortgage payments were made from community funds, that refinancing of the mortgage was accomplished by a note and mortgage signed by both the husband and wife and that the community credit was pledged thereby, and that both parties expended considerable time and effort in making improvements, and there was no attempt to trace the separate funds of the husband into the expenditures for the home after completion, the trial court's conclusion that the community had a lien of the one half of the difference between the original land price and the mortgage balance attributable to community expenditures of time, effort and money (as opposed to normal appreciations) would not be disturbed. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Court to know extent of community property in determining alimony and child support. — Trial court should know the extent of the community property in making a determination as to alimony and child support. *Otto v. Otto*, 1969-NMSC-074, 80 N.M. 331, 455 P.2d 642.

Transfer of one-half interest community property upon death subject to federal estate tax. — Certainly by any standard plaintiff's husband had at least a one-half interest in the community property during his lifetime, and it was his free choice and his determination that upon his death such interest should become the property of his widow, the plaintiff; since upon his death his one-half interest in the community estate was transferred to the plaintiff, this property was subject to the federal estate tax. *Hurley v. Hartley*, 255 F. Supp. 459 (D.N.M. 1966), *aff'd*, 379 F.2d 205 (10th Cir. 1967).

Life insurance. — Where a third party is the insured and a spouse the beneficiary, the ownership of the policy proceeds paid to the spouse during marriage is determined by the general community property law. *Hickson v. Herrmann*, 1967-NMSC-083, 77 N.M. 683, 427 P.2d 36.

Insurance settlement proceeds acquired after dissolution of marriage. — Following divorce proceedings, where wife filed a motion to impose a constructive trust on insurance proceeds that husband received after filing a bad faith claim against his insurance company for denying a property damage claim related to his truck, arguing that the insurance proceeds were community property because the truck was community property and the insurance policy covering the truck was paid for with community funds, and where husband argued that the settlement proceeds were not a community asset because the settlement occurred after the dissolution of marriage and that wife was not entitled to any of the insurance proceeds because wife's actions played a significant part in the decision by the insurance company to wrongfully deny husband's property damage claim under his automobile insurance policy, the district court erred in granting husband's motion for summary judgment, because insurance proceeds that are paid as a result of a policy that is community property, where that policy was paid for with community funds, are community property, and there was nothing in the record permitting a reasonable inference that wife acted with tortious intent or motive to deprive the community of a community asset. *Martinez v. Martinez*, 2017-NMCA-032.

Vacation and sick leave. — A spouse's unused vacation leave and unused sick leave are community property and are divisible upon divorce. *Arnold v. Arnold*, 2003-NMCA-114, 134 N.M. 381, 77 P.3d 285.

Military retirement benefits. — Military retirement benefits are community property. *Walentowski v. Walentowski*, 1983-NMSC-097, 100 N.M. 484, 672 P.2d 657, *superseding Espinda v. Espinda*, 1981-NMSC-098, 96 N.M. 712, 713 P.2d 1264, *reinstating LeClert v. LeClert*, 1969-NMSC-049, 80 N.M. 235, 453 P.2d 755.

Military retirement pay. — The rule of *LeClert v. LeClert*, 1969-NMSC-049, 80 N.M. 235, 453 P.2d 755 that military retirement pay is community property has been reinstated in New Mexico, and applies to those final judgments entered prior to the decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). The Uniform Services Former Spouses' Protection Act 10 U.S.C. § 1408 (c)(1) applies retroactively only to judgments which were final after the announcement of the *McCarty* opinion on June 26, 1981. *Norris v. Saueressig*, 1986-NMSC-024, 104 N.M. 76, 717 P.2d 52.

Disability retirement pay is community property for purposes of distribution of property upon dissolution of marriage. *Stroshine v. Stroshine*, 1982-NMSC-113, 98 N.M. 742, 652 P.2d 1193.

Pension plan. — The community's interest in a pension plan that is vested but unmatured is the amount of benefits earned during coverture. *Mattox v. Mattox*, 1987-NMCA-021, 105 N.M. 479, 734 P.2d 259.

Medical benefits. — United States civil service medical retirement benefits are community property. *Luxton v. Luxton*, 1982-NMSC-087, 98 N.M. 276, 648 P.2d 315.

Valuation of pension benefits. — In dividing community property, pension benefits should be valued using monthly benefit which husband received at time of divorce since increases coming after the date of the divorce are the husband's separate property. *Madrid v. Madrid*, 1984-NMCA-066, 101 N.M. 504, 684 P.2d 1169.

Absent an express agreement by the parties to the contrary, the only retirement penalties to be imposed against the nonemployee spouse's share of the pension being distributed pursuant to a pay-as-it-comes-in method are those penalties that were actually applied to calculate the employee spouse's pension benefits, and not any hypothetical penalties. *Franklin v. Franklin*, 1993-NMCA-077, 116 N.M. 11, 859 P.2d 479, cert. denied, 115 N.M. 795, 858 P.2d 1274.

Conveyance to husband and wife presumed as community. — A conveyance of real property to a husband and wife, by deed describing them as husband and wife, gives rise to a presumption that the property is taken by them as community property. 1959 Op. Att'y Gen. No. 59-70 (rendered under former law).

Community property "is not liable for contracts of wife, made after marriage". The statute, as we construe it, means the wife's separate contracts as well as those attempted to be made by her for the community while the husband is the manager of the community, or her separate contracts in the event she would be substituted as head of the community. 1956 Op. Att'y Gen. No. 56-6499 (rendered under former law).

Law reviews. — For article, "Federal Taxation of New Mexico Community Property," see 3 Nat. Resources J. 104 (1963).

For symposium, "Tax Implications of the Equal Rights Amendment," see 3 N.M.L. Rev. 69 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For article, "Tax Consequences of Divorce in New Mexico," see 5 N.M.L. Rev. 233 (1975).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For note, "Clouded Titles in Community Property States: New Mexico Takes a New Step," see 21 Nat. Resources J. 593 (1981).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

For article, "Survey of New Mexico Law, 1979-80: Domestic Relations and Juvenile Law," see 11 N.M.L. Rev. 134 (1981).

For note, "Community Property - Profit Sharing Plans - Approval of Undiscounted Current Actual Value and Distribution by Promissory Note Secured by Lien on Separate Property," see 11 N.M.L. Rev. 409 (1981).

For note, "Community Property - Transmutation of Community Property: A Preference for Joint Tenancy in New Mexico?" see 11 N.M.L. Rev. 421 (1981).

For note, "Community Property - Valuation of Professional Goodwill," see 11 N.M.L. Rev. 435 (1981).

For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

For note, "Community Property - Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: Hughes v. Hughes," see 13 N.M.L. Rev. 193 (1983).

For article, "New Mexico Community Property Law and the Division of Retirement Plan Benefits Pursuant to the Dissolution of Marriage," see 13 N.M.L. Rev. 641 (1983).

For note, "Community Property - Appreciation of Community Interests and Investments in Separate Property in New Mexico: Portillo v. Shappie," see 14 N.M.L. Rev. 227 (1984).

For case note, "Community Property Law - the Apportionment of Marital Community Assets: Dorbin v. Dorbin," see 18 N.M.L. Rev. 613 (1988).

For annual survey of New Mexico family law, 19 N.M.L. Rev. 692 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Profits from business operating on spouse's capital as community property, 29 A.L.R.2d 530.

Transmutation of community funds or property into property held by spouses in joint tenancy, 30 A.L.R.2d 1241.

Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement, 4 A.L.R.4th 1294.

Divorce and separation: appreciation in value of separate property during marriage without contribution by either spouse as separate or community property, 24 A.L.R.4th 453.

Divorce property distribution: real estate or trust property in which interest vested before marriage and was realized during marriage, 60 A.L.R.4th 217.

Divorce and separation: workers' compensation benefits as marital property subject to distribution, 30 A.L.R.5th 139.

41 C.J.S. Husband and Wife § 128 et seq.

40-3-9. Definition of separate and community debts.

A. "Separate debt" means:

(1) a debt contracted or incurred by a spouse before marriage or after entry of a decree of dissolution of marriage;

(2) a debt contracted or incurred by a spouse after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978, unless the decree provides otherwise;

(3) a debt designated as a separate debt of a spouse by a judgment or decree of any court having jurisdiction;

(4) a debt contracted by a spouse during marriage which is identified by a spouse to the creditor in writing at the time of its creation as the separate debt of the contracting spouse;

(5) a debt which arises from a tort committed by a spouse before marriage or after entry of a decree of dissolution of marriage or a separate tort committed during marriage; or

(6) a debt declared to be unreasonable pursuant to Section 2 [40-3-10.1 NMSA 1978] of this act.

B. "Community debt" means a debt contracted or incurred by either or both spouses during marriage which is not a separate debt.

History: 1953 Comp., § 57-4A-3, enacted by Laws 1973, ch. 320, § 4; 1983, ch. 75, § 1.

ANNOTATIONS

Purpose. — Subsection A is directed mainly toward relations between couples and their creditors. The legislature did not intend to restrict the courts' ability to practice fairness as between two spouses. *Fernandez v. Fernandez*, 1991-NMCA-001, 111 N.M. 442, 806 P.2d 582.

Requirement of written notice to creditor. — The main purpose of Subsection A(4), requiring written notice to the creditor, is to protect creditors who might be unaware that spouses do not intend to create a community debt. As between spouses, however, it is not as necessary to require strict compliance with the statute. Where there is evidence

that spouses do not intend the debt to be community and take steps to ensure it is not, a court may find this substantial compliance sufficient to declare the debt separate as between the spouses. *Fernandez v. Fernandez*, 1991-NMCA-001, 111 N.M. 442, 806 P.2d 582.

The fundamental purpose behind the written notice requirement of Subsection A(4) is to protect creditors who might be unaware that the debtor spouse intends to create a separate debt, rather than a community debt. *Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 861 P.2d 935.

Threshold question of whether item is community or separate debt is a legal issue. *Bursum v. Bursum*, 2004-NMCA-133, 136 N.M. 584, 102 P.3d 651, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Remainder of wife's attorney's fees not considered community debt. — The district court could reasonably have ruled that the remainder of wife's attorney fees, while stipulated to be reasonable in amount for the work done, was unreasonably incurred and therefore would not be considered community debt. *Bursum v. Bursum*, 2004-NMCA-133, 136 N.M. 584, 102 P.3d 651, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Fiduciary duty. — Each spouse owes the other a fiduciary duty when managing community property. This fiduciary duty limits a spouse's ability to enter into any transaction in which he or she might wish to engage, without fear of subsequent liability to the other spouse. *Fernandez v. Fernandez*, 1991-NMCA-001, 111 N.M. 442, 806 P.2d 582.

Wife's estate not liable for loss in public office. — Where no attempt was made to show that defendant's wife was in any way responsible for the loss appearing in the records of her husband's public office, her separate estate was not liable for her husband's separate obligations. *U.S. Fid. & Guar. Co. v. Chavez*, 126 F. Supp. 227 (D.N.M. 1954).

Wife's estate exempt from attachment proceedings. — The entire community estate of the defendant and his wife was not subject to his indebtedness, where the wife, so far as the record showed, had no knowledge of any shortage on the part of her husband, nor did she give her consent thereto, or ratify the acts, if any, of her husband, which resulted in the shortage, and neither did the shortage benefit the community estate, so far as was shown; therefore, the vested estate of the wife (intervenor) in and to the community property tracts was exempt from the attachment proceedings instituted by the bonding company, and the community interest of the husband was subject to sale under the attachment, inasmuch as his shortages created a separate liability on his part, resulting in a judgment against him. *U.S. Fid. & Guar. Co. v. Chavez*, 126 F. Supp. 227 (D.N.M. 1954).

Separate debt. — At least as between the parties to a divorce, and under certain circumstances, a debt may be classified as separate even if it was incurred while the parties lived together and even though it may not meet the strict requirements of Subsection A. *Fernandez v. Fernandez*, 1991-NMCA-001, 111 N.M. 442, 806 P.2d 582.

Evidence supported a determination that the parties attempted to arrange a loan as a separate debt instead of a community debt, where the husband knew that the wife would not participate in the transaction and that she did not want any community assets included, the mortgage securing the loan explicitly stated that the husband was a married man dealing in his sole and separate property, and the wife testified that the creditor asked her to sign documents disclaiming any interest in the collateral. *Fernandez v. Fernandez*, 1991-NMCA-001, 111 N.M. 442, 806 P.2d 582.

Underlying obligation represented by a fraudulently executed promissory note was a separate debt of the wife, and the proceeds received did not benefit the community, where the wife committed fraud against her husband by allowing her brother to impersonate her husband and forge his name on financial documents. *Beneficial Fin. Co. v. Alarcon*, 1991-NMSC-074, 112 N.M. 420, 816 P.2d 489.

Husband may have separate credit and debt. — While the credit of the husband belongs presumptively to the community, still he may contract a separate debt based upon his separate credit and assets acquired in that manner are his separate property. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Determination whether tort debt of community or spouse. — This section leaves to the courts the problem of determining whether a tort committed by a spouse during marriage is a "community" or a "separate" tort. Under the rule followed in most community property states, the test to be applied in such cases is an after-the-fact determination of whether the act in which the spouse was engaged at the time of the tort was one which was of actual or potential benefit to the community. If it was of benefit, the tort is a "community" tort, and thus a community debt, to be collected under the provisions of 40-3-11 NMSA 1978. *Dell v. Heard*, 532 F.2d 1330 (10th Cir. 1976).

In determining the issue of whether a tort committed by a spouse is a "community" or a "separate" tort, the test to be applied is an after-the-fact determination of whether the act in which the spouse was engaged at the time of the tort was one which was of actual or potential benefit to the community; if it was of benefit, the tort is a "community" tort, and thus a community debt; if the activity in which the tortfeasor spouse was engaged was of no benefit to the community, the tort is a "separate" tort and thus a separate debt. *Delph v. Potomac Ins. Co.*, 1980-NMSC-140, 95 N.M. 257, 620 P.2d 1282.

It is inappropriate to enter a judgment against one spouse solely because the other spouse has committed a community tort. Such a judgment could readily create confusion, because the judgment ordinarily could not be executed against the separate

property of the spouse who was not the tortfeasor. *Naranjo v. Paull*, 1990-NMCA-111, 111 N.M. 165, 803 P.2d 254.

There is no reason why the same court that hears a tort case could not concurrently decide whether the tort was a community tort, at least when both spouses are defendants. Such a proceeding should not be foreclosed just because the plaintiff may also have the option of waiting until execution on the judgment to litigate whether the tort was a community tort. *Naranjo v. Paull*, 1990-NMCA-111, 111 N.M. 165, 803 P.2d 254.

Husband's breach of listing agreement subjected community to debts without wife's concurrence. — The fact that, upon the breach of a real estate listing agreement by the husband, the listing agent can bring suit, obtain a judgment and levy on the property without the wife's signature on the agreement is not violative of this section, inasmuch as a husband can subject the community to certain debts without the concurrence of his wife. *Execu-Systems v. Corlis*, 1980-NMSC-121, 95 N.M. 145, 619 P.2d 821.

Attorney's fees incurred due to child visitation issues from previous marriage. — Chapter 7 debtor-husband was liable for attorney's fees incurred by spouse in connection with child visitation issues from a previous marriage, as spouse's debt was incurred as a community debt. *In re Strickland*, 153 Bankr. 909 (Bankr. D.N.M. 1993).

Trial court's finding of separate property upheld. — The trial court, upon dissolution of a marriage, has a duty to determine whether debts and obligations incurred by the parties during coverture are community or separate debts; the trial court's finding assigning income tax liability and intervenor's claim as husband's separate debts would not be disturbed where husband had failed to demonstrate on appeal that the trial court's ruling was unsupported by substantial evidence, nor had husband shown that he requested a finding of fact on this issue, and wife's counsel had also failed to provide authority for the merits of her discussion on this issue. *Fenner v. Fenner*, 1987-NMCA-066, 106 N.M. 36, 738 P.2d 908, cert. denied, 106 N.M. 7, 738 P.2d 125.

Presumption that debt of the community. — In New Mexico, there is a presumption that debt incurred by a married person is community debt. *Swink v. Sunwest Bank (In re Fingado)*, 113 Bankr. 37 (Bankr. D.N.M. 1990).

As a general rule, one spouse may incur a community debt even though the other spouse does not participate in the transaction. *Fernandez v. Fernandez*, 1991-NMCA-001, 111 N.M. 442, 806 P.2d 582.

As between a spouse and the other spouse's creditor, Subsection A(4) requires that the debtor spouse expressly communicate the separate nature of a marital debt to a creditor in writing when creating a marital debt intended to be that spouse's separate obligation, and since the defendant debtor was unable to point to any written provision in the note or to any other written agreement between himself and the creditor bank that

identified the debt as his own separate obligation, the debt remained a community debt. *Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 861 P.2d 935.

Presumption that debt of the community. — The community is liable for community debts and there is a presumption that all debts contracted during the marriage are community debts. 1960 Op. Att'y Gen. No. 60-37 (rendered under former law).

Community not obligated for support of spouse's parent. — In terms, at least, no obligation is placed on the child and his or her spouse to support their parents. The ultimate effect of the former statute may be exactly this, but not because the obligation, as created, invests it with this character. Further, it is not an obligation which is incurred for the benefit of the community. It cannot be said that the discharge of this obligation in any direct manner enhances, or is intended to enhance, the interest of the community. 1956 Op. Att'y Gen. No. 56-6499 (rendered under former law).

Only husband's share of community subject to his separate tort. — Upon the question of recovery from the community property for an obligation based on the husband's separate tort, it would seem that not the whole of the community, but only his share therein, could be subjected to payment. 1956 Op. Att'y Gen. No. 56-6499 (rendered under former law).

Law reviews. — For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of community property for antenuptial debts and obligations, 68 A.L.R.4th 877.

41 C.J.S. Husband and Wife § 164 et seq.

40-3-9.1. Gambling debts are separate debts of spouse incurring debt.

A gambling debt incurred by a married person as a result of legal gambling is a separate debt of the spouse incurring the debt.

History: Laws 1997, ch. 190, § 67.

ANNOTATIONS

Cross references. — For Gaming Control Act, *see* Chapter 60, Article 2E NMSA 1978.

Husband's gambling losses did not need to be repaid to the community where wife failed to establish that expenditures constituted waste of community assets.

— In a divorce proceeding, where wife appealed the district court's characterization of assets and debts as separate or community property and the court's division of marital assets and debts between her and husband, the district court did not err in concluding that wife failed to demonstrate that the community was entitled to reimbursement for husband's gambling losses incurred during the marriage, because even assuming the gambling losses were a separate debt, whether the losses must be repaid to the community upon divorce depends on whether there was some special circumstance, such as breach of fiduciary duty to wife by husband or violation of a court order, so that the expenditure constituted waste of community assets. There was no evidence in the record that established the essential elements of a breach of fiduciary duty, a lack of consent by wife, or even the amount of the separate debt, necessary to establish a right of reimbursement. *Autrey v. Autrey*, 2022-NMCA-042, cert. granted.

40-3-10. Priorities for satisfaction of separate debts.

A. The separate debt of a spouse shall be satisfied first from the debtor spouse's separate property, excluding that spouse's interest in property in which each of the spouses owns an undivided equal interest as a joint tenant or tenant in common. Should such property be insufficient, then the debt shall be satisfied from the debtor spouse's one-half interest in the community property or in property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, then the debt shall be satisfied from the debtor spouse's interest in the residence of the spouses, except as provided in Subsection B of this section or Section 42-10-9 NMSA 1978. Neither spouse's interest in community property or separate property shall be liable for the separate debt of the other spouse.

B. Unless both spouses join in writing in the creation of the underlying debt or obligation incurred after the marriage, a judgment or other process arising out of such post-marital debt against one spouse alone or both spouses shall not create a lien or otherwise be subject to execution against the interest of the nonjoining spouse in the marital residence, whether held by the spouses as community property, joint tenants or tenants in common.

C. The priorities or exemptions established in this section for the satisfaction of a separate debt must be claimed by either spouse under the procedure set forth in Section 42-10-13 NMSA 1978, or the right to claim such priorities or exemptions is waived as between a spouse and the creditor.

D. This section shall apply only while both spouses are living and shall not apply to the satisfaction of debts after the death of one or both spouses.

History: 1953 Comp., § 57-4A-4, enacted by Laws 1973, ch. 320, § 5; 1975, ch. 246, § 3; 1995, ch. 184, § 1.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "Subsection B of this section or Section 42-10-9 NMSA 1978" for "Section 24-6-1 NMSA 1953", added Subsection B, redesignated former Subsections B and C as Subsections C and D, and substituted "42-10-13-NMSA 1978" for "24-7-1 NMSA 1953" in Subsection C.

Wife's interest in community can be segregated and subjected to lien. — The public policy of the state of New Mexico on the subject of community property does not preclude a holding that the wife's vested interest in community real property can be segregated and subjected to a statutory judgment lien for a personal tort committed by the wife during the coverture. *U.S. Fid. & Guar. Co. v. Chavez*, 126 F. Supp. 227 (D.N.M. 1954).

Debt satisfied from community property. — A spouse's separate Arizona debt may be satisfied from that spouse's half interest in community funds in New Mexico. *National Bank of Ariz. v. Moore*, 2005-NMCA-122, 138 N.M. 496, 122 P.3d 1265, cert. denied, 2005-NMCERT-010, 138 N.M. 494, 122 P.3d 1263.

Power to manage and control and actual availability of entire community personal property distinguished. — Although 40-3-14 NMSA 1978 gives either spouse alone the full power to manage, control, dispose of and encumber the entire community personal property, there exists a distinction between the power to manage and control and actual availability. Since this section provides that a spouse's one-half interest in the community property is available to satisfy his or her separate debts, it does not necessarily follow that the power given by 40-3-14 NMSA 1978 makes the entire community personal property always available to each spouse. *Herrera v. Health & Soc. Servs.*, 1978-NMCA-118, 92 N.M. 331, 587 P.2d 1342, cert. denied *sub nom. Human Servs. Dep't v. Herrera*, 92 N.M. 353, 588 P.2d 554 (1978).

Separate tort where activity no benefit to community. — If the activity in which the tort-feasor spouse was engaged was of no benefit to the community, the tort is a "separate" tort, collectible only as a separate debt under this section. *Dell v. Heard*, 532 F.2d 1330 (10th Cir. 1976).

Wife's separate estate not liable for loss in husband's public office. — Where no attempt was made to show that defendant's wife was in any way responsible for the loss appearing in the records of her husband's public office, her separate estate was not liable for her husband's separate obligations. *U.S. Fid. & Guar. Co. v. Chavez*, 126 F. Supp. 227 (D.N.M. 1954).

Wife's estate exempt from attachment proceedings. — The entire community estate of the defendant and his wife was not subject to his indebtedness, where the wife, so far as the record showed, had no knowledge of any shortage on the part of her husband, nor did she give her consent thereto, or ratify the acts, if any, of her husband, which resulted in the shortage, and neither did the shortage benefit the community estate, so far as was shown; therefore, the vested estate of the wife (intervenor) in and to the community property tracts was exempt from the attachment proceedings instituted by

the bonding company, and the community interest of the husband was subject to sale under the attachment, inasmuch as his shortages created a separate liability on his part, resulting in a judgment against him. *U.S. Fid. & Guar. Co. v. Chavez*, 126 F. Supp. 227 (D.N.M. 1954).

No cause of action against husband by wife's judgment creditor. — Where judgment creditor of wife who committed tort in family car brought suit against husband and argued his cause of action was for an after-the-fact determination that wife's tort was a community tort which rendered the husband's separate property liable for satisfaction of the judgment debt, the court believed the issues presented by appellant under the community property laws did not set forth a cause of action against husband but would be determined if and when judgment creditor proceeded to execute on property belonging to husband. *Dell v. Heard*, 532 F.2d 1330 (10th Cir. 1976).

One-half of husband's income garnishable for wife's debts. — Considering the wife's vested one-half interest in all of the community property, findings that the creditor had exhausted the possibilities of recovering the debt from wife's separate property, and that husband's income was community property, the trial court correctly concluded that one-half of husband's income from garnishee was available to satisfy wife's debt to creditor. *Central Adjustment Bureau, Inc. v. Thevenet*, 1984-NMSC-083, 101 N.M. 612, 686 P.2d 954.

Joinder of joint payee spouses in garnishment proceeding. — Where husband is judgment debtor and the judgment of the trial court in a garnishment proceeding indicates that garnishee is indebted on a promissory note to husband and wife, if the note is not a community asset, both payees under the note should be joined so as to adjudicate their respective rights under the note, but if the note is a community asset, wife would be considered a proper but not indispensable party. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Aid to child denied where claim based on mother's interest in community income. — For purposes of determining aid to families with dependent children benefits, where a wife not only has a technical income resulting from her one-half share in the community income, but that one-half share in the community income provides the legal basis for her daughter's legitimate claim on the one-half interest in the community income, the denial of benefits for the child, on the basis that the mother's income exceeded permissible limits, is upheld. *Duran v. N.M. Dep't of Human Servs.*, 1980-NMCA-038, 95 N.M. 196, 619 P.2d 1240.

Intentional action of one spouse may not bar insurance recovery by other. — The intentional burning of a community residence by one spouse will not bar recovery by an innocent spouse for her interest under a fire insurance policy issued to the community. *Delph v. Potomac Ins. Co.*, 1980-NMSC-140, 95 N.M. 257, 620 P.2d 1282.

Law reviews. — For article, "Federal Taxation of New Mexico Community Property," see 3 Nat. Resources J. 104 (1963).

For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M.L. Rev. 11 (1973).

For symposium, "Equal Rights and the Debt Provisions of New Mexico Community Property Law," see 3 N.M.L. Rev. 57 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

For note, "Community Property - Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: Hughes v. Hughes," see 13 N.M.L. Rev. 193 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of community property for antenuptial debts and obligations, 68 A.L.R.4th 877.

Spouse's receipt of "substantial benefit" as condition precluding entitlement to "innocent spouse's" relief under 26 USCS § 6013(E), 134 A.L.R. Fed. 415.

40-3-10.1. Unreasonable debt.

The court, at the time of the final decree of dissolution of marriage, may declare, as between the parties, a debt to be unreasonable if it was incurred by a spouse while the spouse was living apart and the debt did not contribute to the benefit of both spouses or their dependents.

History: Laws 1983, ch. 75, § 2.

ANNOTATIONS

Attorney fees. — Trial court's finding and ultimate conclusion that all of the wife's attorney fees were excessive and unreasonable was error, where the fees that the wife incurred by seeking settlement of child custody and visitation constituted community debts under 40-3-9 NMSA 1978 and those fees that the wife incurred as a result of litigating the issue of child support likewise constituted a communal expense. *Bustos v. Gilroy*, 1988-NMCA-012, 106 N.M. 808, 751 P.2d 188.

40-3-11. Priorities for satisfaction of community debts.

A. Community debts shall be satisfied first from all community property and all property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, community debts shall then be satisfied from the residence of the spouses, except as provided in Subsection B of this section or Section 42-10-9 NMSA 1978. Should such property be insufficient, only the separate property of the spouse who contracted or incurred the debt shall be liable for its satisfaction. If both spouses contracted or incurred the debt, the separate property of both spouses is jointly and severally liable for its satisfaction.

B. Unless both spouses join in writing in the creation of the underlying debt or obligation incurred after the marriage, a judgment or other process arising out of such post-marital debt against one spouse alone or both spouses shall not create a lien or otherwise be subject to execution against the interest of the nonjoining spouse in the marital residence, whether held by the spouses as community property, joint tenants or tenants in common.

C. The priorities or exemptions established in this section for the satisfaction of community debts must be claimed by either spouse under the procedure set forth in Section 42-10-13 NMSA 1978, or the right to claim such priorities or exemptions is waived as between a spouse and the creditor.

D. This section shall apply only while both spouses are living and shall not apply to the satisfaction of debts after the death of one or both spouses.

History: 1953 Comp., § 57-4A-5, enacted by Laws 1973, ch. 320, § 6; 1975, ch. 246, § 4; 1995, ch. 184, § 2.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "Subsection B of this section or Section 42-10-9 NMSA 1978" for "Section 24-6-1 NMSA 1953", added Subsection B, redesignated former Subsections B and C as Subsections C and D, and substituted "42-10-13-NMSA 1978" for "24-7-1 NMSA 1953" in Subsection C.

Debt incurred after death of spouse. — This section prohibits the district court from applying the priority and division rules of community debt to a debt that is incurred after the death of a spouse. If the laws governing community debt do not apply to divide debt that accumulates after the death of a spouse, it follows that such debt is not to be treated as community debt. *Karpien v. Karpien*, 2009-NMCA-043, 146 N.M. 188, 207 P.3d 1165.

Determination whether community or separate tort. — Section 40-3-9 NMSA 1978 leaves to the courts the problem of determining whether a tort committed by a spouse during marriage is a "community" or a "separate" tort. Under the rule followed in most community property states, the test to be applied in such cases is an after-the-fact

determination of whether the act in which the spouse was engaged at the time of the tort was one which was of actual or potential benefit to the community. If it was of benefit, the tort is a "community" tort, and thus a community debt, to be collected under the provisions of this section. *Dell v. Heard*, 532 F.2d 1330 (10th Cir. 1976).

It is inappropriate to enter a judgment against one spouse solely because the other spouse has committed a community tort. Such a judgment could readily create confusion, because the judgment ordinarily could not be executed against the separate property of the spouse who was not the tortfeasor. *Naranjo v. Paull*, 1990-NMCA-111, 111 N.M. 165, 803 P.2d 254.

There is no reason why the same court that hears a tort case could not concurrently decide whether the tort was a community tort, at least when both spouses are defendants. Such a proceeding should not be foreclosed just because the plaintiff may also have the option of waiting until execution on the judgment to litigate whether the tort was a community tort. *Naranjo v. Paull*, 1990-NMCA-111, 111 N.M. 165, 803 P.2d 254.

No cause of action against husband by wife's judgment creditor. — Where judgment creditor of wife who committed tort in family car brought suit against husband and argued his cause of action was for an after-the-fact determination that wife's tort was a community tort which rendered the husband's separate property liable for satisfaction of the judgment debt, the court believed the issues presented by appellant under the community property laws did not set forth a cause of action against husband but would be determined if and when judgment creditor proceeded to execute on property belonging to husband. *Dell v. Heard*, 532 F.2d 1330 (10th Cir. 1976).

Joinder of joint payee spouses in garnishment proceeding. — Where husband is judgment debtor and the judgment of the trial court in a garnishment proceeding indicates that garnishee is indebted on a promissory note to husband and wife, if the note is not a community asset, both payees under the note should be joined so as to adjudicate their respective rights under the note, but if the note is a community asset, wife would be considered a proper but not indispensable party. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Use of community property. — New Mexico law permits the satisfaction of a separate debt of husband's from the husband's interest in community funds. *Nat'l Bank of Ariz. v. Moore*, 2005-NMCA-122, 138 N.M. 496, 122 P.3d 126, cert. denied, 2005-NMCERT-010, 138 N.M. 494, 122 P.3d 1263.

Law reviews. — For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

For note, "Community Property - Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: Hughes v. Hughes," see 13 N.M.L. Rev. 193 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Spouse's liability, after divorce, for community debt contracted by other spouse during marriage, 20 A.L.R.4th 211.

40-3-12. Presumption of community property; presumption of separate property where property acquired by married woman prior to July 1, 1973.

A. Property acquired during marriage by either husband or wife, or both, is presumed to be community property.

B. Property or any interest therein acquired during marriage by a woman by an instrument in writing, in her name alone, or in her name and the name of another person not her husband, is presumed to be the separate property of the married woman if the instrument in writing was delivered and accepted prior to July 1, 1973. The date of execution or, in the absence of a date of execution, the date of acknowledgment, is presumed to be the date upon which delivery and acceptance occurred.

C. The presumptions contained in Subsection B of this section are conclusive in favor of any person dealing in good faith and for valuable consideration with a married woman or her legal representative or successor in interest.

History: 1953 Comp., § 57-4A-6, enacted by Laws 1973, ch. 320, § 7.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Property takes status as community or separate at time and by manner of acquisition. — Property acquired in New Mexico takes its status as community or separate property at the time and by the manner of its acquisition; and if a part of the purchase money is later paid by other funds than those of the owner of the property, whether of the community or an individual spouse, the owner is indebted to the source of such funds in that amount, but such payment does not affect the title of the purchaser. *Shanafelt v. Holloman*, 1956-NMSC-047, 61 N.M. 147, 296 P.2d 752.

Judicial estoppel did not apply to prevent spouse from claiming community property where it was not established that she successfully argued or assumed property was separate before the district court. — Where husband died intestate, survived by his wife, and where wife, appointed as sole personal representative of

husband's estate, claimed a community lien against a tract of husband's land (west tract) due to improvements made to the property while wife was married to husband, and where wife also exercised her claim for a spousal allowance and a personal property allowance against the west tract, and where petitioner objected to any allowances against any property identified as separate property, and where wife passed away prior to a trial scheduled to resolve the issues, and where respondent, the personal representative of wife's estate, filed for partial summary judgment to establish that the west tract was held by husband and wife as community property, and where petitioner argued that the district court should judicially estop respondent from claiming the west tract as community property because wife took the position that the west tract was separate property earlier in the probate proceedings, the district court did not abuse its discretion when declining to apply judicial estoppel, because it was not established that respondent or wife successfully argued or assumed that the west tract was separate property in a motion or at a hearing before the district court where the nature of the property was at issue. *In re Estate of Kuchan*, 2024-NMCA-032.

Proof of transmutation. — Transmutation is a general term used to describe arrangements between spouses to convert property from separate property to community property and vice versa. While transmutation is recognized, the party alleging the transmutation must establish the transmutation of property to community property by clear, strong and convincing proof. *Allen v. Allen*, 1982-NMSC-118, 98 N.M. 652, 651 P.2d 1296.

Wife was indispensable party in action brought by husband to quiet title to realty deeded to both husband and wife. *Brown v. Gurley*, 1954-NMSC-025, 58 N.M. 153, 267 P.2d 134.

Deed with no description of marital status created tenancy in common. — A quitclaim deed conveying land to a husband and wife by name and address but with no description of marital status created a tenancy in common; the address appearing after their names was not sufficient to express any other intention. *U.S. Fid. & Guar. Co. v. Chavez*, 126 F. Supp. 227 (D.N.M. 1954).

Admissibility of parol evidence to show intent. — Parol evidence was properly admitted, not to alter certain deeds, but rather to establish the true consideration behind the deeds, which, in turn, established the lack of intention of the grantors to make a gift to the wife. *Sanchez v. Sanchez*, 1987-NMCA-143, 106 N.M. 648, 748 P.2d 21, cert. denied, 106 N.M. 627, 747 P.2d 922.

Requirements for overcoming presumption of fraud in community property conveyance. — The burden was on husband's heirs to overcome the presumption of fraud in action to nullify conveyance of community property for fraud. They were required to show: (a) payment of an adequate consideration; (b) full disclosure to the wife as to her rights and the value and extent of the community property; and (c) that the wife had competent and independent advice in conferring the benefits upon her husband. *Trujillo v. Padilla*, 1968-NMSC-090, 79 N.M. 245, 442 P.2d 203.

Burden upon contestant asserting separate character. — The party seeking to rebut the presumption of community property has the burden of introducing factual evidence that the disputed property meets a criterion of separate property as defined in 40-3-8 NMSA 1978. *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria*, 1990-NMSC-056, 110 N.M. 291, 795 P.2d 502.

Property acquired during marriage is presumed to be community property and if community funds are used to purchase the separate property of either spouse, such property becomes community property. *Marquez v. Marquez*, 1973-NMSC-084, 85 N.M. 470, 513 P.2d 713.

Presumption. — In New Mexico, there is a clearly stated presumption of community property. *Swink v. Sunwest Bank (In re Fingado)*, 113 Bankr. 37 (Bankr. D.N.M. 1990).

The presumption of community property arises from the naked fact that it was acquired during marriage. *Hollingsworth v. Hicks*, 1953-NMSC-045, 57 N.M. 336, 258 P.2d 724.

Property acquired during marriage by either spouse is presumed to be community property. The recitation in a deed not signed by both spouses that the property is the "sole and separate property" of a married man does not affect this presumption. *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria*, 1990-NMSC-056, 110 N.M. 291, 795 P.2d 502.

Property acquired by either or both spouses during their marriage is presumptively community property. The presumption of community property, however, is subject to being rebutted by a preponderance of the evidence. *Stroshine v. Stroshine*, 1982-NMSC-113, 98 N.M. 742, 652 P.2d 1193.

Presumption part of Spanish property law. — The presumption that all property acquired after marriage is community property was part of Spanish community property law and was recognized as an element of the community property system in this state prior to the time of its statutory pronouncement by Laws 1907, ch. 37, § 10 (now repealed and replaced by what are now 40-3-8 and 40-3-12(A) NMSA 1978). *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

II. PRESUMPTION OF COMMUNITY PROPERTY.

Division of insurance proceeds where claim pending at divorce. — Where premium on disability insurance proceeds was paid from husband's earnings during marriage, insurance proceeds on claim pending against insurance company at time of divorce were community property. *Douglas v. Douglas*, 1984-NMCA-071, 101 N.M. 570, 686 P.2d 260.

Insurance proceeds on policy paid for with community funds. — Following divorce proceedings, where wife filed a motion to impose a constructive trust on insurance proceeds that husband received after filing a bad faith claim against his insurance

company for denying a property damage claim related to his truck, arguing that the insurance proceeds were community property because the truck was community property and the insurance policy covering the truck was paid for with community funds, and where husband argued that the settlement proceeds were not a community asset because the settlement occurred after the dissolution of marriage and that wife was not entitled to any of the insurance proceeds because wife's actions played a significant part in the decision by the insurance company to wrongfully deny husband's property damage claim under his automobile insurance policy, the district court erred in granting husband's motion for summary judgment, because insurance proceeds that are paid as a result of a policy that is community property, where that policy was paid for with community funds, are community property. *Martinez v. Martinez*, 2017-NMCA-032.

Vacation and sick leave. — A spouse's unused vacation leave and unused sick leave are community property and are divisible upon divorce. *Arnold v. Arnold*, 2003-NMCA-114, 134 N.M. 381, 77 P.3d 285.

Disability retirement pay is community property for purposes of distribution of property upon dissolution of marriage. *Stroshine v. Stroshine*, 1982-NMSC-113, 98 N.M. 742, 652 P.2d 1193.

Federal civil service disability benefits. — To the extent the community contributed, a husband's future federal civil service disability benefits are community property subject to division upon dissolution of a marriage. *Hughes v. Hughes*, 1981-NMSC-110, 96 N.M. 719, 634 P.2d 1271.

General presumption of community property is certainly not conclusive. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Burden upon contestant asserting separate character. — The contestant asserting the separate character of the property has not only the burden of going forward with his evidence, but of establishing separate ownership by a preponderance of evidence. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

It is settled law in New Mexico that property acquired in this state during coverture is presumptively community property, and one asserting it to be separate estate has the burden of establishing such fact by a preponderance of the evidence. *Mounsey v. Stahl*, 1956-NMSC-110, 62 N.M. 135, 306 P.2d 258.

Presumption does not obtain if intention other than community expressed. — Where property is acquired by husband and wife by an instrument in writing in which they are described as such, the presumption as to community property does not obtain if a different intention is expressed in the instrument. *Shanafelt v. Holloman*, 1956-NMSC-047, 61 N.M. 147, 296 P.2d 752.

Showing that community earning exceeded community expenses, even though the excess be slight, supports a finding of community property. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Relative amounts of separate property and community property which make up commingled total is an important factor. *Conley v. Quinn*, 1959-NMSC-065, 66 N.M. 242, 346 P.2d 1030.

Where commingled with large amount of separate property. — When there is a commingling of a negligible amount of community property with a large amount of separate property so that the separate property can no longer be identified, the general rule that such property falls under the presumption of community property is not followed. *Conley v. Quinn*, 1959-NMSC-065, 66 N.M. 242, 346 P.2d 1030.

Preponderance of evidence needed to overcome presumption. — Proof to overcome the presumption of community ownership need only amount to a preponderance of the evidence. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Where the acquisition of property is involved, the presumption of community property may be overcome by a preponderance of evidence. *Shanafelt v. Holloman*, 1956-NMSC-047, 61 N.M. 147, 296 P.2d 752; *Hughes v. Hughes*, 1981-NMSC-110, 96 N.M. 719, 634 P.2d 1271.

The presumption that property acquired after marriage is community property is rebutted when the separate character of the property in question is proved by a preponderance of the evidence in the trial court. *Conley v. Quinn*, 1959-NMSC-065, 66 N.M. 242, 346 P.2d 1030 (decided under former law).

The presumption that property acquired during marriage is community property may be rebutted by a preponderance of the evidence. *Mitchell v. Mitchell*, 1986-NMCA-028, 104 N.M. 205, 719 P.2d 432, cert. denied, 104 N.M. 84, 717 P.2d 60; *Arch, Ltd. v. Yu*, 1988-NMSC-101, 108 N.M. 67, 766 P.2d 911.

Warranty deeds conveying joint title. — Introduction of warranty deeds conveying title to husband and wife was sufficient to establish prima facie that the real estate was held as community property. *Arch, Ltd. v. Yu*, 1988-NMSC-101, 108 N.M. 67, 766 P.2d 911.

Presumption still has force and effect after testimony to rebut. — It cannot be said that upon the mere introduction of testimony to rebut the presumption of community property that the presumption is no longer to be considered of any force and effect. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Substantial evidence needed to uphold presumption on appeal. — When evidence in the case casts doubt upon the issue, a finding of community ownership will be upheld

as supported by substantial evidence. In counterpart, when the evidence of separate ownership is clear and no evidence aside from the presumption exists to the contrary, circumstantial or otherwise, a finding of community ownership should be overturned upon appeal as not supported by substantial evidence. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Upon appeal the question whether the presumption of community property has been overcome as a matter of law depends upon whether there is substantial evidence to support the finding of the trial court. The cases are numerous which hold the substantial evidence rule applies in such case, as does the usual appellate rule of indulging all presumptions in favor of the judgment. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Presumption not rebutted. — The words and conduct of a disingenuous spouse in misrepresenting that real estate was his separate property were not sufficient to rebut a presumption that property was held as a community interest. *Arch, Ltd. v. Yu*, 1988-NMSC-101, 108 N.M. 67, 766 P.2d 911.

Wife failed to rebut the presumption that property acquired during the marriage was community property. — In a divorce proceeding, where wife appealed the district court's characterization of assets and debts as separate or community property and the court's division of marital assets and debts between her and husband, the district court did not err in determining that the parties' business was community property and not wife's separate property, because the district court's decision was supported by evidence in the record, including wife's failure to support her testimony with any documentation that gift of $2,000 was used to start the business, that the $2,000 amount was unlikely to have been sufficient to fund the launch of a corporation engaged in heavy earth-moving, and undisputed evidence that husband was involved from the outset in every aspect of creating and running the corporation. Wife failed to rebut the presumption that property acquired during the marriage was community property. *Autrey v. Autrey*, 2022-NMCA-042, cert. granted.

III. SEPARATE PROPERTY.

Property acquired with independent funds as separate. — When it is established that community funds equal or fall short of community expenditures, property acquired by the husband, having independent funds at his disposal, should be held, by legitimate inference, to be his separate property. *Campbell v. Campbell*, 1957-NMSC-001, 62 N.M. 330, 310 P.2d 266.

Deed naming one spouse raises presumption of separate property. — A deed that names only one spouse does not convey the realty absolutely as separate property, but only creates a presumption of separate property that may be rebutted. Overcoming this presumption by a preponderance of the evidence appears to be sufficient. *Sanchez v. Sanchez*, 1987-NMCA-143, 106 N.M. 648, 748 P.2d 21, cert. denied, 106 N.M. 627, 747 P.2d 922.

Earnings of wife belong to community where working for husband's partnership. *Dale v. Dale*, 1953-NMSC-081, 57 N.M. 593, 261 P.2d 438.

Burden of proving nature and value of improvements made to separate property. — Real property acquired by a husband prior to marriage, and paid for during the marriage with monies from his retirement disability pension, was separate property. Thus, where the wife failed to show the amount by which community labor or funds enhanced the value of the property, the trial court's decision to apportion some of the proceeds of the sale of the property to the community was not supported by the record. *Bayer v. Bayer*, 1990-NMCA-106, 110 N.M. 782, 800 P.2d 216, cert. denied, 110 N.M. 749, 799 P.2d 1121.

Where origin of property preceded marriage presumption no longer prevails. — When, upon the exhibition of the whole title, it appears that the origin of property preceded the marriage, and that it was separate property, the presumption no longer prevails. *Hollingsworth v. Hicks*, 1953-NMSC-045, 57 N.M. 336, 258 P.2d 724.

Preponderance of evidence needed to overcome presumption. — The contestant asserting the separate character of property has not only the burden of going forward with the evidence, but of establishing separate ownership by a preponderance of the evidence. *White v. White*, 1987-NMCA-032, 105 N.M. 600, 734 P.2d 1283.

Separate property must be traceable and identifiable. — If separate property has been so intermingled with community property that it cannot be traced or identified, the evidence of separate status is insufficient to overcome the presumption of community property. *Mitchell v. Mitchell*, 1986-NMCA-028, 104 N.M. 205, 719 P.2d 432, cert. denied, 104 N.M. 84, 717 P.2d 60.

Law reviews. — For comment on Thaxton v. Thaxton, 75 N.M. 450, 405 P.2d 932 (1965), see 6 Nat. Resources J. 298 (1966).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

For note, "Community Property - Transmutation of Community Property: A Preference for Joint Tenancy in New Mexico?" see 11 N.M.L. Rev. 421 (1981).

For note, "Community Property - Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: Hughes v. Hughes," see 13 N.M.L. Rev. 193 (1983).

For article, "Survey of New Mexico Law, 1982-83: Domestic Relations," see 14 N.M.L. Rev. 135 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Community Property §§ 56 to 65.

What contract, understanding, circumstances, etc., will render a wife's personal earnings separate property, 67 A.L.R.2d 708.

Change of domicil as affecting character of property previously acquired as separate or community property, 14 A.L.R.3d 404.

Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement, 4 A.L.R.4th 1294.

Divorce and separation: appreciation in value of separate property during marriage without contribution by either spouse as separate or community property, 24 A.L.R.4th 453.

Divorce: equitable distribution doctrine, 41 A.L.R.4th 481.

40-3-13. Transfers, conveyances, mortgages and leases of real property; when joinder required.

A. Except for purchase-money mortgages and except as otherwise provided in this subsection, the spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey or mortgage any interest in community real property and separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common. The spouses must join in all leases of community real property or separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common if the initial term of the lease, together with any option or extension contained in the lease or provided for contemporaneously, exceeds five years or if the lease is for an indefinite term.

Any transfer, conveyance, mortgage or lease or contract to transfer, convey, mortgage or lease any interest in the community real property or in separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common attempted to be made by either spouse alone in violation of the provisions of this section shall be void and of no effect, except that either spouse may transfer, convey, mortgage or lease directly to the other without the other joining therein.

Except as provided in this section, either spouse may transfer, convey, mortgage or lease separate real property without the other's joinder.

B. Nothing in this section shall affect the right of one of the spouses to transfer, convey, mortgage or lease or contract to transfer, convey, mortgage or lease any community real property or separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common without the joinder of the other spouse, pursuant to a validly executed and recorded power of attorney as provided in Section 47-1-7

NMSA 1978. Nothing in this section shall affect the right of a spouse not joined in a transfer, conveyance, mortgage, lease or contract to validate an instrument at any time by a ratification in writing.

History: 1953 Comp., § 57-4A-7, enacted by Laws 1973, ch. 320, § 8; 1975, ch. 246, § 5; 1993, ch. 165, § 1.

ANNOTATIONS

Cross references. — For necessity of joinder of spouses in contracts of indemnity, *see* 40-3-4 NMSA 1978.

The 1993 amendment, effective June 18, 1993, made stylistic changes in Subsection A; and in Subsection B, substituted "47-1-7 NMSA 1978" for "70-1-6 NMSA 1953" at the end of the first sentence and added the second sentence.

Effect of transfer to partnership. — Once community property is contributed to a partnership, its status is not transmuted from community to separate or partnership property. Although the community no longer has a right to the specific piece of property the community still has an interest. The community merely trades its interest in the specific asset for a community interest in the partnership. *Dotson v. Grice*, 1982-NMSC-072, 98 N.M. 207, 647 P.2d 409.

Conflict between this section and 14-9-3 NMSA 1978 should be resolved in favor of the latter statute which protects the rights of innocent purchasers for value without notice of unrecorded instruments. *Jeffers v. Martinez*, 1979-NMSC-083, 93 N.M. 508, 601 P.2d 1204; *Jeffers v. Doel*, 1982-NMSC-116, 99 N.M. 351, 658 P.2d 426.

No limit on who may claim benefit. — This section is directed at the conveyance itself and not at the identity of the person claiming the conveyance is void. It contains no limitations regarding for whose benefit it may be used. *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria*, 1990-NMSC-056, 110 N.M. 291, 795 P.2d 502.

Husband and wife must join in all deeds and mortgages affecting community real property. *Pickett v. Miller*, 1966-NMSC-050, 76 N.M. 105, 412 P.2d 400.

"Join in" means "sign". — Under this section a contract for the sale of an interest in community real property, which has not been signed by both husband and wife, is unenforceable, void and of no effect absent a validly executed and recorded power of attorney, because the words "join in" as used in this section mean "sign". *Hannah v. Tennant*, 1979-NMSC-009, 92 N.M. 444, 589 P.2d 1035.

Neither husband nor wife can transfer real property without the other. — As the court construes the section by its plain terms at the present time, neither husband nor wife can make a transfer or conveyance of the real property of the community without the other joining in such conveyance or transfer, and if such transfer or conveyance is

attempted of such real property of the community by either husband or wife alone, such transfer or conveyance is void, and of no effect. *Marquez v. Marquez*, 1973-NMSC-084, 85 N.M. 470, 513 P.2d 713.

Signatures of both spouses required. — Contracts to transfer an interest in community real property are void and of no effect unless signed by both husband and wife. *Hannah v. Tennant*, 1979-NMSC-009, 92 N.M. 444, 589 P.2d 1035.

Federal coal leases are real community property, and a husband cannot effectively convey them without his wife's signature. *Padilla v. Roller*, 1980-NMSC-037, 94 N.M. 234, 608 P.2d 1116.

Joining of both spouses. — If both spouses do not join, an attempt by one spouse to transfer, convey or mortgage community real property is void. *Swink v. Sunwest Bank (In re Fingado)*, 113 Bankr. 37 (Bankr. D.N.M. 1990).

Section not applicable to executory contract to sell community. — The failure of seller's wife to sign does not render agreement void or unenforceable, but was sufficient where she was named in the agreement and was ready, willing and able to convey her community interest. This section, requiring the wife to sign deeds and mortgages affecting community property, has no application to an action for damages on the husband's executory contract for the sale of community realty, and it is immaterial whether the action is by the vendor or the vendee. *Pickett v. Miller*, 1966-NMSC-050, 76 N.M. 105, 412 P.2d 400.

Community contributions and improvements to separate property. — Community contributions and improvements to real property do not affect the title of separate ownership; the right of the community to be reimbursed for the amount of the lien does not change the character of the property from separate to community, and separate property may be conveyed by the owner without the joinder of a spouse. *Hickey v. Griggs*, 1987-NMSC-050, 106 N.M. 27, 738 P.2d 899.

No specific performance where wife not joined. — A contract purporting to sell community real estate would not be ordered to be specifically performed where the wife did not join in the husband's agreement to sell. *Pickett v. Miller*, 1966-NMSC-050, 76 N.M. 105, 412 P.2d 400.

Requirements to overcome presumption of fraud in community conveyance. — The burden was on husband's heirs to overcome the presumption of fraud in action to nullify conveyance of community property for fraud. They were required to show (a) payment of an adequate consideration; (b) full disclosure to the wife as to her rights and the value and extent of the community property; and (c) that the wife had competent and independent advice in conferring the benefits upon her husband. *Trujillo v. Padilla*, 1968-NMSC-090, 79 N.M. 245, 442 P.2d 203.

Invalidity of contract as affirmative defense. — A contract's invalidity under this section, which states that a contract to sell land held in joint tenancy by a husband and wife is void unless the wife either signs the contract or gives the husband a power of attorney to sell the land, is an affirmative defense which the defendant bears the burden of proving by showing that he made some effort to ascertain the existence of the power of attorney. *Otero v. Buslee*, 695 F.2d 1244 (10th Cir. 1982).

Spouse's failure to sign bank note did not preclude subsequent encumbrance. — Subsection A should not be construed to require both spouses to join in creating a community debt merely because a later judgment on the debt might encumber community real property. To the extent that New Mexico common law suggests otherwise, those decisions are overruled. Accordingly, the trial court did not err when it ordered the judicial sale of the spouse's residence to satisfy the creditor bank's judgment on note defaulted on by the husband individually. *Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 861 P.2d 935.

Effect of one spouse's signature on promissory note can do no more than commit his separate property and his share of the community personal property to repayment of the obligation stated in the note because he is without power to encumber the community real property for its repayment without the other spouse's joinder. *Shadden v. Shadden*, 1979-NMCA-078, 93 N.M. 274, 599 P.2d 1071, cert. denied, 93 N.M. 172, 598 P.2d 215; *overruled by Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 861 P.2d 935.

Regardless of the wording of a guaranty contract, unless his wife joins in the execution of the guaranty, a husband can only encumber his own separate property and his share of the community real property. *First State Bank v. Muzio*, 1983-NMSC-057, 100 N.M. 98, 666 P.2d 777, *overruled by Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 861 P.2d 935.

Fraudulently executed promissory note. — Underlying obligation represented by a fraudulently executed promissory note was a separate debt of the wife, and the proceeds received did not benefit the community, where the wife committed fraud against her husband by allowing her brother to impersonate her husband and forge his name on financial documents. *Beneficial Fin. Co. v. Alarcon*, 1991-NMSC-074, 112 N.M. 420, 816 P.2d 489.

Aggrieved party's remedies limited where contract void for lack of spouse's signature. — Where an option contract to convey community property is void for lack of one spouse's signature, the aggrieved party may not obtain specific performance or damages for breach of contract. *Sims v. Craig*, 1981-NMSC-046, 96 N.M. 33, 627 P.2d 875.

Alternative remedies. — Where the aggrieved party may not sue on a contract to convey community property because it is void for failure to join one spouse, an action

for negligent misrepresentation may be maintained. *Sims v. Craig*, 1981-NMSC-046, 96 N.M. 33, 627 P.2d 875.

Although misrepresentation of the legal status of property could be grounds for other theories of recovery than breach of contract, plaintiff could not maintain an action for damages on either a real estate exchange agreement or its addendum because they were void and unenforceable under this section. *Arch, Ltd. v. Yu*, 1988-NMSC-101, 108 N.M. 67, 766 P.2d 911.

Effect on after-acquired property. — An otherwise valid and fully enforceable real estate sales contract, executed by a single spouse, was not rendered wholly void under Subsection A because the asset later was acquired by the community. The contract was void as to after-acquired community property, but was valid as to the after-acquired real estate when it was transmuted and owned by the seller as his separate estate. *English v. Sanchez*, 1990-NMSC-064, 110 N.M. 343, 796 P.2d 236.

Section is inapplicable to conveyance of separate property. — Where husband and wife, prior to husband's death, entered into a sole and separate property agreement that transmuted the couple's community property to husband's separate property, and where husband then executed a reverse mortgage transaction on this separate property, which was assigned to plaintiff mortgage company, and where husband subsequently re-conveyed the property back to husband and wife, and where, after husband's death, plaintiff filed a complaint seeking a judgment foreclosing on its security interest in wife's property pursuant to the reverse mortgage, the district court erred in granting wife's motion for summary judgment on the basis that the reverse mortgage executed by husband was void because wife did not execute it as well, because the sole and separate property agreement transmuted the property into husband's separate property and he had authority to unilaterally grant a mortgage. The reverse mortgage was not void pursuant to this section. *Nationstar Mort. LLC v. O'Malley*, 2018-NMCA-029, cert. denied.

Community debt to be paid from community funds even after divorce. — A community debt incurred prior to the dissolution of the marital community, and for the benefit thereof, would properly be payable out of "community" funds notwithstanding the fact that such community property had been transmuted into separate property by virtue of a decree of divorce. *Moucka v. Windham*, 483 F.2d 914 (10th Cir. 1973).

Signatures on loan commitment, not on contract. — Without more, the signature of both spouses on a loan commitment is insufficient to overcome the affirmative defense that both spouses did not execute the actual contract conveying real property. *Arch, Ltd. v. Yu*, 1988-NMSC-101, 108 N.M. 67, 766 P.2d 911.

Where wife did not join mineral deed and evidence did not show separate purchase. — Where plaintiff claimed predecessor's prior mineral deed to another was void for failure of predecessor's wife to join in deed, the burden of the prior grantee of showing by preponderance of evidence that interest in question was purchased with

separate funds and not community property was not met and deed was void. *Mounsey v. Stahl*, 1956-NMSC-110, 62 N.M. 135, 306 P.2d 258.

Easement agreement void where wives not joined. — Where 1918 agreement between married men purports to establish easement rights in community property without having their respective wives join therein is void under this section, use of such easement until 1959 is permissive. *Batts v. Greer*, 1963-NMSC-037, 71 N.M. 454, 379 P.2d 443.

Quitclaim deeds not proper where wife did not join agreement to sell. — Proposed agreement to shift the property lines of the parties executed by quitclaim deeds is clearly improper since both the husband and the wife must join in all deeds and mortgages affecting community real property and a contract purporting to sell community real estate will not be ordered specifically performed where the wife did not join the husband's agreement to sell. *Sanchez v. Scott*, 1973-NMSC-115, 85 N.M. 695, 516 P.2d 666.

Real estate listing agreement not transfer of community property. — A real estate listing agreement is not a transfer, conveyance, mortgage or contract to transfer, convey or mortgage community property within the meaning of this section. *Execu-Systems v. Corlis*, 1980-NMSC-121, 95 N.M. 145, 619 P.2d 821.

Husband's breach of listing agreement subjected community to debts without wife's concurrence. — The fact that, upon the breach of a real estate listing agreement by the husband, the listing agent can bring suit, obtain a judgment and levy on the property without the wife's signature on the agreement is not violative of this section, inasmuch as a husband can subject the community to certain debts without the concurrence of his wife. *Execu-Systems v. Corlis*, 1980-NMSC-121, 95 N.M. 145, 619 P.2d 821.

Presumption not rebutted. — The words and conduct of a disingenuous spouse in misrepresenting that real estate was his separate property were not sufficient to rebut a presumption that property was held as a community interest. *Arch, Ltd. v. Yu*, 1988-NMSC-101, 108 N.M. 67, 766 P.2d 911.

Law reviews. — For comment on Thaxton v. Thaxton, 75 N.M. 450, 405 P.2d 932 (1965), see 6 Nat. Resources J. 298 (1966).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For note, "Coal Leases Held Real Property," see 21 Nat. Resources J. 415 (1981).

For note, "Clouded Titles in Community Property States: New Mexico Takes a New Step," see 21 Nat. Resources J. 593 (1981).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

For article, "Survey of New Mexico Law, 1979-80: Estates and Trusts," see 11 N.M.L. Rev. 151 (1981).

For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

For note, "Community Property - Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: Hughes v. Hughes," see 13 N.M.L. Rev. 193 (1983).

For survey of 1990-91 commercial law, see 22 N.M.L. Rev. 661 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Husband and Wife § 49 et seq.

Recovery of damages for breach of contract to convey homestead where only one spouse signed contract, 5 A.L.R.4th 1310.

Proceeds or derivatives of real property held by entirety as themselves held by entirety, 22 A.L.R.4th 459.

41 C.J.S. Husband and Wife § 168.

40-3-14. Management and control of other community personal property.

A. Except as provided in Subsections B and C of this section, either spouse alone has full power to manage, control, dispose of and encumber the entire community personal property.

B. Where only one spouse is:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement between that spouse and a third party as having sole authority to manage, control, dispose of or encumber the community personal property which is described in or which is the subject of the agreement, whether the agreement was executed prior to or after July 1, 1973; only the spouse so named may manage, control, dispose of or encumber the community

personal property described in such a document evidencing ownership or in such a written agreement.

C. Where both spouses are:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement with a third party as having joint authority to dispose of or encumber the community personal property which is described in or the subject of the agreement, whether the agreement was executed prior to or after July 1, 1973; both spouses must join to dispose of or encumber such community personal property where the names of the spouses are joined by the word "and." Where the names of the spouses are joined by the word "or," or by the words "and/or," either spouse alone may dispose of or encumber such community personal property.

History: 1953 Comp., § 57-4A-8, enacted by Laws 1973, ch. 320, § 10; 1975, ch. 246, § 6.

ANNOTATIONS

Power to manage community property. — Either spouse may dispose of community property unless the disposition violates the spouse's fiduciary duty to the other spouse; the fiduciary duty in question involves the assessment of the equities of the particular circumstances, and in assessing the equities, a court should consider whether the disposition furthers both spouses' common benefit and whether the disposition amounted to a substantial portion of the community property. *Khalsa v. Puri*, 2015-NMCA-027, cert. denied, 2015-NMCERT-001.

Where wife requested reallocation of her late husband's half of community property due to his alleged excess expenditure of community funds prior to his death, the challenged expenditures, consisting of expenses for family trips, payments to family members, expenses incurred during visits with guests, medical expenses, and payments for religious services, were properly held to be beneficial to the community, in part because wife failed to provide evidence that she lacked knowledge of or did not consent to such expenditures; other charitable contributions were held to be reasonable because they were not excessive compared to the value of the entire community estate. *Khalsa v. Puri*, 2015-NMCA-027, cert. denied, 2015-NMCERT-001.

Power to manage and control and actual availability of entire community personal property distinguished. — Although this section gives either spouse alone the full power to manage, control, dispose of and encumber the entire community personal property, there exists a distinction between the power to manage and control and actual availability. Since 40-3-10 NMSA 1978 provides that a spouse's one-half interest in the community property is available to satisfy his or her separate debts, it does not

necessarily follow that the power given by this section makes the entire community personal property always available to each spouse. *Herrera v. Health & Soc. Servs.*, 1978-NMCA-118, 92 N.M. 331, 587 P.2d 1342, cert. denied *sub nom. Human Servs. Dep't v. Herrera*, 92 N.M. 353, 588 P.2d 554.

Spouse's signature is effective to create community obligation payable from the community's personal property. *Shadden v. Shadden*, 1979-NMCA-078, 93 N.M. 274, 599 P.2d 1071, cert. denied, 93 N.M. 172, 598 P.2d 215, *overruled on other grounds by Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 861 P.2d 935.

Ability of each spouse to manage and control business partnership. — Where the income tax returns are filed as a partnership and where the wife occasionally accompanies her husband and assists him with job-related demonstrations although the wife is not employed by her husband's company, they are engaged in business as a marital partnership in which each has full power alone to manage and control the business. *Amador v. Lara*, 1979-NMCA-129, 93 N.M. 571, 603 P.2d 310.

Community loss recovered by wife as "head of the household." — Where a wife brings an action to recover for personal injuries and other damages sustained in an automobile accident, she alone may recover damages for her physical injury, pain and suffering, and she has the right to recover the entire community loss as the "head of the household" with full power to manage and control personal community property. *Amador v. Lara*, 1979-NMCA-129, 93 N.M. 571, 603 P.2d 310.

Testator's separate and community personal estate as obligor to promissory note. — Where a testator included in his will a promissory note payable to himself from himself, his separate and community personal estate became substituted as the obligor on the note and his beneficiary became the obligee. *In re Estate of Shadden*, 1979-NMCA-078, 93 N.M. 274, 599 P.2d 1071, cert. denied, 93 N.M. 172, 598 P.2d 215, *overruled on other grounds by Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 861 P.2d 935.

Subsequent marriage no invalidation of decedent's power to designate mother as beneficiary. — In an action by an employee's widow who claims entitlement to all death benefits under a health benefits plan, although the decedent made his mother the beneficiary, the decedent's power to designate his mother as beneficiary of all of the death benefits was not invalidated by his subsequent marriage or by the community property law. *Barela v. Barela*, 1980-NMCA-157, 95 N.M. 207, 619 P.2d 1251.

Revocation of gift. — Each spouse has the power to manage and dispose of the community's personal property, subject to a fiduciary duty to the other spouse, and absent intervening equities, a gift of substantial community property to a third person without the other spouse's consent may be revoked and set aside for the benefit of the aggrieved spouse. *Roselli v. Rio Cmtys. Serv. Station, Inc.*, 1990-NMSC-018, 109 N.M. 509, 787 P.2d 428.

Where the husband had consented to neither the wife's removal of community funds from a joint account prior to the parties' separation nor to the wife's gift of the funds to their two daughters, the husband was entitled to recover his share of the gifts from the wife's property. *Fernandez v. Fernandez*, 1991-NMCA-001, 111 N.M. 442, 806 P.2d 582.

Payment of life insurance policy premiums with community funds results in a community property interest in policy proceeds. *Roselli v. Rio Cmtys. Serv. Station, Inc.*, 1990-NMSC-018, 109 N.M. 509, 787 P.2d 428.

Expended earnings not subject to distribution. — Since the expenditures of the spouses' earnings and other community funds during a period of separation were not shown to be contrary to any court order or in violation of a fiduciary duty owed by one party to the other, the trial court erred in making its apportionment of community assets by awarding the husband funds which no longer existed and then allowing the wife an offsetting award out of other existing community property. *Irwin v. Irwin*, 1996-NMCA-007, 121 N.M. 266, 910 P.2d 342.

Law reviews. — For comment on Thaxton v. Thaxton, 75 N.M. 450, 405 P.2d 932 (1965), see 6 Nat. Resources J. 298 (1966).

For note, "Coal Leases Held Real Property," see 21 Nat. Resources J. 415 (1981).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For article, "Tax Consequences of Divorce in New Mexico," see 5 N.M.L. Rev. 233 (1975).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

For note, "Community Property - Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: Hughes v. Hughes," see 13 N.M.L. Rev. 193 (1983).

For annual survey of New Mexico commercial law, see 13 N.M.L. Rev. 293 (1983).

For article, "Survey of New Mexico Law, 1982-83: Domestic Relations," see 14 N.M.L. Rev. 135 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Community Property §§ 17, 19 to 48, 60 to 80, 102, 103; 41 Am. Jur. 2d Husband and Wife § 12 et seq.

Power of either spouse, without consent of other, to make gift of community property or funds to third party, 17 A.L.R.2d 1118.

Insurable interest of husband or wife in other's property, 27 A.L.R.2d 1059.

41 C.J.S. Husband and Wife § 158.

40-3-15. Joinder of minor spouse in conveyances, mortgages and leases.

A married person under the age of majority may join with his or her spouse in all transactions for which joinder is required by Section 40-3-13 NMSA 1978 and such joinder shall have the same force and effect as if the minor spouse had attained his or her majority at the time of the execution of the instrument.

History: 1953 Comp., § 57-4A-9, enacted by Laws 1973, ch. 320, § 11.

ANNOTATIONS

Cross references. — For age of majority, *see* 28-6-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 43 C.J.S. Infants § 141.

40-3-16. Disposition and management of real property without joinder and management of community personal property subject to management of one spouse alone where spouse has disappeared.

A. If a spouse disappears and his location is unknown to the other spouse, the other spouse may, not less than thirty days after such disappearance, file a petition setting forth the facts which make it desirable for the petitioning spouse to engage in a transaction for which joinder of both spouses is required by Section 40-3-13 NMSA 1978 or to manage, control, dispose of or encumber community personal property which the disappearing spouse alone has sole authority to manage, control, dispose of or encumber under Section 40-3-14 NMSA 1978.

B. The petition shall be filed in a district court of any county in which real property described in the petition is located or, if only community personal property is involved, in the district court of the county where the disappearing spouse resided.

C. The district court shall appoint a guardian ad litem for the spouse who has disappeared and shall allow a reasonable fee for his services.

D. A notice, stating that the petition has been filed and specifying the date of the hearing, accompanied by a copy of the petition, shall be issued and served on the

guardian ad litem and shall be published once each week for four successive weeks in a newspaper of general circulation in the county in which the proceeding is pending. The last such publication shall be made at least twenty days before the hearing.

E. After the hearing, and upon determination of the fact of disappearance by one spouse, the district court may allow the petitioning spouse alone to engage in the transaction for which joinder of both spouses is required by Section 40-3-13 NMSA 1978 or to manage, control, dispose of or encumber community personal property which the disappearing spouse alone has authority to manage, control, dispose of or encumber under Section 40-3-14 NMSA 1978.

F. Any transfer, conveyance, mortgage or lease authorized by the district court pursuant to Subsection E of this section shall be confirmed by order of the district court, and that order of confirmation may be recorded in the office of the county clerk of the county where any real property affected thereby is situated.

History: 1953 Comp., § 57-4A-10, enacted by Laws 1973, ch. 320, § 12.

ANNOTATIONS

Cross references. — For provision concerning disposition of real property without joinder where spouse is prisoner of war/person missing-in-action, *see* 40-3-5 NMSA 1978.

Section provides a statutory procedure allowing married individuals to sell marital property when their spouses disappear. — Where defendant was convicted on federal drug charges, and where the district court imposed a fine of approximately $13,000, reasoning that defendant could pay this amount by selling a house which she co-owned with her estranged husband, the district did not clearly err in finding that defendant could sell the house, because this section provides a statutory procedure allowing married individuals to sell marital property when their spouses disappear. Moreover, the district court's finding that defendant could obtain a loan by providing her unencumbered house as collateral was supported by the record, the district court complied with the statute and guidelines by considering hardship in determining whether to impose a fine, and the district court did not rely on clearly erroneous facts in finding that defendant's family had known about her drug activity and that defendant's house was connected to her drug activity. *United States v. Basurto*, 834 F.3d 1109 (10th Cir. 2016).

Law reviews. — For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

40-3-17. Judgments to be recorded.

All orders rendered pursuant to Section 32-2-7 NMSA 1953 authorizing the transfer, conveyance, mortgage or lease of community real property or other real property owned

by the spouses as co-tenants in joint tenancy or tenancy in common may be recorded in the office of the county clerk of the county where any real property affected thereby is situated.

History: 1953 Comp., § 57-4A-11, enacted by Laws 1973, ch. 320, § 13.

ANNOTATIONS

Severability. — Laws 1973, ch. 320, § 15, provided for the severability of the act if any part or application thereof is held invalid.

Compiler's notes. — Section 32-2-7, 1953 Comp., referred to in this section, was repealed by Laws 1975, ch. 257, § 9-101. For similar provisions, *see* 45-5-409 and 45-5-424 NMSA 1978.

ARTICLE 3A
Uniform Premarital Agreement

40-3A-1. Short title.

This act [40-3A-1 to 40-3A-10 NMSA 1978] may be cited as the "Uniform Premarital Agreement Act".

History: Laws 1995, ch. 61, § 1.

40-3A-2. Definitions.

As used in the Uniform Premarital Agreement Act:

A. "premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage; and

B. "property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

History: Laws 1995, ch. 61, § 2.

40-3A-3. Formalities.

A premarital agreement must be in writing, signed by both parties and acknowledged. It is enforceable without consideration.

History: Laws 1995, ch. 61, § 3.

40-3A-4. Content.

A. Parties to a premarital agreement may contract with respect to:

(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;

(5) the ownership rights in and disposition of the death benefit from a life insurance policy;

(6) the choice of law governing the construction of the agreement; and

(7) any other matter not in violation of public policy.

B. A premarital agreement may not adversely affect the right of a child or spouse to support, a party's right to child custody or visitation, a party's choice of abode or a party's freedom to pursue career opportunities.

History: Laws 1995, ch. 61, § 4.

40-3A-5. Effect of marriage.

A premarital agreement becomes effective upon marriage.

History: Laws 1995, ch. 61, § 5.

40-3A-6. Amendment; revocation.

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed and acknowledged by the parties or by a consistent and mutual course of conduct, which evidences an amendment to or revocation of the premarital agreement. The amended agreement or the revocation is enforceable without consideration.

History: Laws 1995, ch. 61, § 6.

40-3A-7. Enforcement.

A. A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) that party did not execute the agreement voluntarily; or

(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(b) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(c) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

B. An issue of unconscionability or voluntariness of a premarital agreement shall be decided by the court as a matter of law.

History: Laws 1995, ch. 61, § 7.

ANNOTATIONS

Prenuptial agreement was unconscionable. — Where the parties signed a prenuptial agreement which provided that each party waived any right to be supported by the other party from the other party's property and that the parties had no claims for support, the agreement was unconscionable because it violated the public policy expressed in Subsection B of 40-3A-4 NMSA 1978. *Rivera v. Rivera*, 2010-NMCA-106, 149 N.M. 66, 243 P.3d 1148, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

40-3A-8. Enforcement; void marriage.

If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

History: Laws 1995, ch. 61, § 8.

40-3A-9. Limitation of actions.

Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement.

However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

History: Laws 1995, ch. 61, § 9.

40-3A-10. Application and construction.

The Uniform Premarital Agreement Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act among states enacting it.

History: Laws 1995, ch. 61, § 10.

ANNOTATIONS

Severability. — Laws 1995, ch. 61, § 11 provided that if any provision of the Uniform Premarital Agreement Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act which can be given effect without the invalid provision or application, and to this end the provisions of that act are severable.

ARTICLE 4
Dissolution of Marriage

40-4-1. Dissolution of marriage.

On the petition of either party to a marriage, a district court may decree a dissolution of marriage on any of the following grounds:

A. incompatibility;

B. cruel and inhuman treatment;

C. adultery; or

D. abandonment.

History: 1953 Comp., § 22-7-1, enacted by Laws 1973, ch. 319, § 1.

ANNOTATIONS

Cross references. — For annulment, *see* 40-1-9 NMSA 1978.

For provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, *see* 40-10A-101 to 40-10A-403 NMSA 1978.

I. GENERAL CONSIDERATION.

Forum non conveniens. — Where jurisdiction, residence, and incompatibility are shown to exist, a New Mexico trial court has no discretionary right to deny a divorce. The plaintiff's choice of forum should not be disturbed except for weighty reasons. *Spruyt v. Spruyt*, 1993-NMSC-020, 115 N.M. 405, 851 P.2d 1072.

Court not to deny divorce where ground shown. — The legislature has power to prescribe the causes affording grounds for divorce, and where a statutory ground is shown to exist, the court has no discretionary right to deny a divorce. *State ex rel. DuBois v. Ryan*, 1973-NMSC-097, 85 N.M. 575, 514 P.2d 851; *Buckner v. Buckner*, 1981-NMSC-007, 95 N.M. 337, 622 P.2d 242.

II. INCOMPATIBILITY.

Court must decree divorce upon finding of incompatibility. — The legislature, acting properly within its powers, has established "incompatibility" as a ground for divorce and once such a finding is made that it exists, a divorce decree must be entered. *Garner v. Garner*, 1973-NMSC-067, 85 N.M. 324, 512 P.2d 84.

Court not vacating incompatibility finding cannot vacate divorce award. — The trial court, having found husband and wife to be incompatible, having awarded a divorce on that ground, and not having vacated that finding, lacked discretion and power to vacate the award. *State ex rel. DuBois v. Ryan*, 1973-NMSC-097, 85 N.M. 575, 514 P.2d 851.

Irreconcilableness important factor in incompatibility. — Although incompatibility is difficult, if not impossible, to define with exactness, irreconcilableness is an important factor to be considered in deciding incompatibility. *State ex rel. DuBois v. Ryan*, 1973-NMSC-097, 85 N.M. 575, 514 P.2d 851.

Misconduct, fault or blame not significant if incompatibility exists. — Either husband or wife may secure a divorce on the ground of incompatibility regardless of whether either, both or neither has been guilty of misconduct, and regardless of whether either, both or neither is at fault or to blame. Misconduct, fault or blame is of no significance, if in fact incompatibility exists. *State ex rel. DuBois v. Ryan*, 1973-NMSC-097, 85 N.M. 575, 514 P.2d 851.

Doctrine of recrimination as defense is abolished in proceedings where a divorce is sought on the grounds of incompatibility. Henceforth, evidence of any recriminatory act is only admissible to the extent that such act may have weight as proof on the issue of incompatibility as a ground for divorce. *Garner v. Garner*, 1973-NMSC-067, 85 N.M. 324, 512 P.2d 84; *State ex rel. DuBois v. Ryan*, 1973-NMSC-097, 85 N.M. 575, 514 P.2d 851.

Wife may establish separate residence where incompatibility exists. — Where incompatibility exists a wife is justified, under this act, in establishing a separate residence and domicile from that of her husband even though a divorce decree has not been granted or a divorce proceeding instituted. *Bassett v. Bassett*, 1952-NMSC-100, 56 N.M. 739, 250 P.2d 487.

III. CRUEL AND INHUMAN TREATMENT.

Physical cruelty not essential to support decree. — A finding that a plaintiff established physical cruelty, as for instance, an impairment of health by reason of acts found to constitute cruelty, is not essential to support a decree on the ground of cruelty. *Holloman v. Holloman*, 1945-NMSC-036, 49 N.M. 288, 162 P.2d 782.

IV. ABANDONMENT.

Adultery subsequent to abandonment as bar to divorce suit. — Adultery by a wife subsequent to abandonment by her husband is bar to the wife's suit for divorce. *Chavez v. Chavez*, 1935-NMSC-077, 39 N.M. 480, 50 P.2d 264 (decided under prior law).

V. GROUNDS UNDER PRIOR LAWS.

Husband's failure to support. — Where it appeared that a husband had the mental and physical ability to provide for the support of his family, and neglected to do so, or was indifferent, the wife was entitled to a divorce. *Taylor v. Taylor*, 1915-NMSC-002, 20 N.M. 13, 145 P. 1075 (decided under prior law).

Wife convicted of felony and imprisoned. — Where a wife was convicted of a felony, and was legally committed to the warden of the penitentiary, who sent her to the governor who issued to her a conditional pardon, she was "imprisoned" within the meaning of this section. *Klasner v. Klasner*, 1918-NMSC-021, 23 N.M. 627, 170 P. 745 (decided under prior law).

Law reviews. — For article, "Annulment of Marriages in New Mexico: Part II - Proposed Statute," see 2 Nat. Resources J. 270 (1962).

For article, "New Mexico Community Property Law and the Division of Retirement Plan Benefits Pursuant to the Dissolution of Marriage," see 13 N.M.L. Rev. 641 (1983).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For symposium, "Equal Rights in Divorce and Separation," see 3 N.M.L. Rev. 118 (1973).

For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

For article, "Arbitration of Domestic Relations Disputes in New Mexico," see 16 N.M.L. Rev. 321 (1986).

For note, "Tort Law - Intentional Infliction of Emotional Distress in the Marital Context: Hakkila v. Hakkila," see 23 N.M.L. Rev. 387 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation §§ 12, 19, 20 to 128.

Refusal of sexual intercourse as ground for divorce, 82 A.L.R.3d 660.

Avoidance of procreation of children as ground for divorce or separation, 4 A.L.R.2d 227.

What constitutes duress sufficient to warrant divorce, 16 A.L.R.2d 1430.

Insanity as affecting right to divorce or separation on other grounds, 19 A.L.R.2d 144.

Conviction in another jurisdiction as within statute making conviction of crime a ground of divorce, 19 A.L.R.2d 1047.

Acts or omissions of spouse causing other spouse to leave home as desertion by former, 19 A.L.R.2d 1428.

Recrimination as defense to divorce sought on ground of incompatibility, 21 A.L.R.2d 1267.

Pension of husband as resource which court may consider in determining amount of alimony, 22 A.L.R.2d 1421.

Insanity as substantive ground of divorce or separation, 24 A.L.R.2d 873.

Racial, religious or political differences as ground for divorce, separation or annulment, 25 A.L.R.2d 928.

Wife's failure to follow husband to new domicil as constituting desertion or abandonment as ground for divorce, 29 A.L.R.2d 474.

What amounts to habitual intemperance, drunkenness and the like, within statute relating to substantive grounds for divorce, 29 A.L.R.2d 925.

Charge of insanity, or attempt to have spouse committed to mental institutions, as ground for divorce, 33 A.L.R.2d 1230.

Concealed premarital unchastity or parenthood as ground of divorce, 64 A.L.R.2d 742.

Homosexuality as a ground for divorce, 78 A.L.R.2d 807.

Divorce: time of pendency of former suit as part of period of desertion, 80 A.L.R.2d 855.

Acts occurring after commencement of suit for divorce as ground for decree under original complaint, 98 A.L.R.2d 1264.

Single act as basis of divorce or separation on ground of cruelty, 7 A.L.R.3d 761.

Right of one spouse, over objection, to voluntarily dismiss claim for divorce, 16 A.L.R.3d 283.

Retrospective effect of statute prescribing grounds of divorce, 23 A.L.R.3d 626.

Separation within the statute making separation a substantive ground of divorce, 35 A.L.R.3d 1238.

Transvestism or transsexualism of spouse as justifying divorce, 82 A.L.R.3d 725.

Adulterous wife's right to permanent alimony, 86 A.L.R.3d 97.

What constitutes "incompatibility" within statute specifying it as substantive ground for divorce, 97 A.L.R.3d 989.

Right of incarcerated mother to retain custody of infant in penal institution, 14 A.L.R.4th 748.

Excessiveness or adequacy of amount of money awarded as permanent alimony following divorce, 28 A.L.R.4th 786.

Enforceability of agreement requiring spouse's co-operation in obtaining religious bill of divorce, 29 A.L.R.4th 746.

Effect of death of party to divorce proceeding pending appeal or time allowed for appeal, 33 A.L.R.4th 47.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Lis pendens as applicable to suit for separation or dissolution of marriage, 65 A.L.R.4th 522.

Insanity as defense to divorce or separation suit - post-1950 cases, 67 A.L.R.4th 277.

Homosexuality, transvestism, and similar sexual practices as grounds for annulment of marriage, 68 A.L.R.4th 1069.

Joinder of tort actions between spouses with proceeding for dissolution of marriage, 4 A.L.R.5th 972.

Homosexuality as ground for divorce, 96 A.L.R.5th 83.

27A C.J.S. Divorce §§ 13-70.

40-4-2. Incompatibility.

Incompatibility exists when, because of discord or conflict of personalities, the legitimate ends of the marriage relationship are destroyed preventing any reasonable expectation of reconciliation.

History: 1953 Comp., § 22-7-1.1, enacted by Laws 1973, ch. 319, § 2.

ANNOTATIONS

Divorce must be decreed where incompatibility exists. — The legislature, acting properly within its powers, has established "incompatibility" as a ground for divorce and once such a finding is made that it exists, a divorce decree must be entered. *Garner v. Garner*, 1973-NMSC-067, 85 N.M. 324, 512 P.2d 84.

Irreconcilableness important factor in incompatibility. — Although incompatibility is difficult, if not impossible, to define with exactness, irreconcilableness is an important factor to be considered in deciding incompatibility. *State ex rel. DuBois v. Ryan*, 1973-NMSC-097, 85 N.M. 575, 514 P.2d 851.

Doctrine of recrimination as defense is abolished in proceedings where a divorce is sought on the grounds of incompatibility. Henceforth, evidence of any recriminatory act is only admissible to the extent that such act may have weight as proof on the issue of incompatibility as a ground for divorce. *Garner v. Garner*, 1973-NMSC-067, 85 N.M. 324, 512 P.2d 84.

No deprivation of jurisdiction by cohabitation. — Evidence of cohabitation by the parties after filing a petition for divorce based on incompatibility did not deprive the court of jurisdiction, where the wife did not file an answer to the husband's complaint nor contest his allegation that the parties were in fact incompatible. *Joy v. Joy*, 1987-NMCA-031, 105 N.M. 571, 734 P.2d 811.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Recrimination as defense to divorce sought on ground of incompatibility, 21 A.L.R.2d 1267.

What constitutes "incompatibility" within statute specifying it as substantive ground for divorce, 97 A.L.R.3d 989.

27A C.J.S. Divorce § 19.

40-4-3. Proceeding for division of property, disposition of children or alimony without the dissolution of marriage.

Whenever the husband and wife have permanently separated and no longer live or cohabit together as husband and wife, either may institute proceedings in the district court for a division of property, disposition of children or alimony, without asking for or obtaining in the proceedings, a dissolution of marriage.

History: Laws 1901, ch. 62, § 23; Code 1915, § 2774; C.S. 1929, § 68-502; 1941 Comp., § 25-702; 1953 Comp., § 22-7-2; Laws 1973, ch. 319, § 3.

ANNOTATIONS

Cross references. — For separation contracts, *see* 40-2-4 to 40-2-9 NMSA 1978.

Law of Spain and Mexico as basis for interpretation. — Since the civil law of Spain and Mexico served as the model for the statutory law of this state concerning the property rights of husband and wife, that law will be looked to as the basis for interpretation and definition. *McDonald v. Senn*, 1949-NMSC-020, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966.

Civil action rather than special proceeding. — This section creates a "civil action" rather than a special proceeding, and adds to the equitable jurisdiction of the district courts. *Ex parte Sedillo*, 1929-NMSC-038, 34 N.M. 98, 278 P. 202.

Court-sanctioned separations. — New Mexico recognizes court-sanctioned separations. Although this section does not expressly state that the court can grant a legal separation, the outcome is the same. *Gilmore v. Gilmore*, 1988-NMCA-004, 106 N.M. 788, 750 P.2d 1114, cert. denied. 107 N.M. 16, 751 P.2d 700.

Husband and wife may separate but not divorce by consent. — Husband and wife may permanently separate by consent but may not secure absolute divorce by consent. *Poteet v. Poteet*, 1941-NMSC-025, 45 N.M. 214, 114 P.2d 91.

Existing present interest of wife in community. — This section recognizes an existing present interest of the wife in the community property during the existence of the matrimonial status. *Beals v. Ares*, 1919-NMSC-067, 25 N.M. 459, 185 P. 780.

This section clearly recognizes an existing present interest of the wife in community property during the existence of the matrimonial status. *In re Miller's Estate*, 1940-NMSC-021, 44 N.M. 214, 100 P.2d 908.

Community rights not forfeited by adultery. — This statute does not forfeit the wife's interest in the community property by her adultery, and her rights therein are not affected by any of her wrongs. *Beals v. Ares*, 1919-NMSC-067, 25 N.M. 459, 185 P. 780.

Community rights generally not forfeited by bigamy. — The mere fact of bigamy is insufficient to deprive wife of her share of community property. *Medina v. Medina*, 2006-NMCA-042, 139 N.M. 309, 131 P.3d 696.

Circumstances when community rights are forfeited by bigamy. — A bigamous spouse should be deprived of his or her community property rights only when the circumstances of the case shock the conscience of the court. *Medina v. Medina*, 2006-NMCA-042, 139 N.M. 309, 131 P.3d 696.

Contempt for failure to pay where separation regarded permanent. — In action under this section where a permanent separation was not expressly alleged, father adjudged in contempt for failure to pay for support of children will not be released on habeas corpus for lack of jurisdiction where the record shows that both parties regarded the separation as permanent. *Ex parte Sedillo*, 1929-NMSC-038, 34 N.M. 98, 278 P. 202.

Agreement not automatically vacated because only one attorney employed. — The mere fact that attorney was employed by both wife and husband and did advise, to some extent, both of them did not automatically entitle wife to have vacated a predivorce agreement adopted by the trial court as its own division of community property. *Hensley v. Zarges*, 1971-NMSC-075, 82 N.M. 779, 487 P.2d 481.

Error to admit evidence of divorce proceeding where property not considered. — At proceeding to determine property rights of divorced spouses, trial court erred in admitting into evidence an oral statement by the court in the divorce proceedings that the agreement of the parties as to the distribution of their property was ratified and approved, and further erred in making a finding to this effect, where the trial court in the divorce proceeding did not pass upon the property rights of the parties, but such error was harmless where admission of such evidence did not affect the result. *Hensley v. Zarges*, 1971-NMSC-075, 82 N.M. 779, 487 P.2d 481.

Continuing jurisdiction over custody matters. — As long as a court continues to have jurisdiction over either the children or both parents, it has continuing jurisdiction to hear all matters relating to custody. *Murphy v. Murphy*, 1981-NMSC-069, 96 N.M. 401, 631 P.2d 307.

This section gives a court subject matter jurisdiction over matters of custody and visitation whether a dissolution of marriage is requested or not, as long as the parties are personally subject to the jurisdiction of the court. *Murphy v. Murphy*, 1981-NMSC-069, 96 N.M. 401, 631 P.2d 307.

Habeas corpus as means of determining custodial rights of children. — Under appropriate circumstances, habeas corpus is an available remedy by which to consider controversies involving the issue of custody of infants. *Roberts v. Staples*, 1968-NMSC-109, 79 N.M. 298, 442 P.2d 788.

Law reviews. — For article, "Annulment of Marriages in New Mexico: Part II - Proposed Statute," see 2 Nat. Resources J. 270 (1962).

For article, "Federal Taxation of New Mexico Community Property," see 3 Nat. Resources J. 104 (1963).

For comment on Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968), see 9 Nat. Resources J. 101 (1969).

For symposium, "Equal Rights in Divorce and Separation," see 3 N.M.L. Rev. 118 (1973).

For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

For article, "New Mexico Community Property Law and the Division of Retirement Plan Benefits Pursuant to the Dissolution of Marriage," see 13 N.M.L. Rev. 641 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Effect of reconciliation on separation agreement or decree, 35 A.L.R.2d 707, 36 A.L.R.4th 502.

Retrospective modification of, or refusal to enforce, decree for alimony, separate maintenance, or support, 6 A.L.R.2d 1277, 52 A.L.R.3d 156.

Defenses available to husband in civil suit by wife for support, 10 A.L.R.2d 466, 36 A.L.R.4th 502.

Trial court's jurisdiction as to alimony or maintenance pending appeal of matrimonial action, 19 A.L.R.2d 703.

Reconciliation as affecting separation agreement or decree, 35 A.L.R.2d 707, 36 A.L.R.4th 502.

Nonresident wife, right to maintain action for separate maintenance alone against resident husband, 36 A.L.R.2d 1369.

Specific performance of provisions of separation agreement other than those for support or alimony, 44 A.L.R.2d 1091.

Property rights of spouses adjudicated in action for separate maintenance without divorce, 74 A.L.R.2d 316.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses, 94 A.L.R.3d 176.

Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation, 94 A.L.R.3d 552.

Validity, construction, and application of Uniform Child Custody Jurisdiction Act, 96 A.L.R.3d 968, 78 A.L.R.4th 1028, 16 A.L.R.5th 650, 20 A.L.R.5th 700, 21 A.L.R.5th 396, 40 A.L.R.5th 227.

Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement, 4 A.L.R.4th 1294.

Initial award or denial of child custody to homosexual or lesbian parent, 6 A.L.R.4th 1297.

Excessiveness or adequacy of amount of money awarded as separate maintenance, alimony, or support for spouse without absolute divorce, 26 A.L.R.4th 1190.

Court's authority to award temporary alimony or suit money in action for divorce, separate maintenance, or alimony where the existence of a valid marriage is contested, 34 A.L.R.4th 814.

Reconciliation as affecting decree for limited divorce, separation, alimony, separate maintenance, or spousal support, 36 A.L.R.4th 502.

Spouse's right to discovery of closely held corporation records during divorce proceeding, 38 A.L.R.4th 145.

Spouse's dissipation of marital assets prior to divorce as factor in divorce court's determination of property division, 41 A.L.R.4th 416.

Divorce: equitable distribution doctrine, 41 A.L.R.4th 481.

Primary caretaker role of respective parents as factor in awarding custody of child, 41 A.L.R.4th 1129.

Divorce and separation: treatment of stock options for purposes of dividing marital property, 46 A.L.R.4th 640.

Valuation of stock options for purposes of divorce court's property distribution, 46 A.L.R.4th 689.

Divorced or separated spouse's living with member of opposite sex as affecting other spouse's obligation of alimony or support under separation agreement, 47 A.L.R.4th 38.

Modern status of views as to validity of premarital agreements contemplating divorce or separation, 53 A.L.R.4th 22.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by circumstances surrounding execution - modern status, 53 A.L.R.4th 85.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms - modern status, 53 A.L.R.4th 161.

Divorce and separation: method of valuation of life insurance policies in connection with trial court's division of property, 54 A.L.R.4th 1203.

Divorce: excessiveness or adequacy of trial court's property award - modern cases, 56 A.L.R.4th 12.

Divorce: propriety of property distribution leaving both parties with substantial ownership interest in same business, 56 A.L.R.4th 862.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Lis pendens as applicable to suit for separation or dissolution of marriage, 65 A.L.R.4th 522.

Insanity as defense to divorce or separation suit - post-1950 cases, 67 A.L.R.4th 277.

Divorce and separation: effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R.4th 173.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 A.L.R.4th 786.

Valuation of goodwill in medical or dental practice for purposes of divorce court's property distribution, 78 A.L.R.4th 853.

What constitutes order made pursuant to state domestic relations law for purposes of qualified domestic relations order exception to antialienation provision of Employee Retirement Income Security Act of 1974 (29 USCS § 1056(d)), 79 A.L.R.4th 1081.

Divorce and separation: consideration of tax consequences in distribution of marital property, 9 A.L.R.5th 568.

Divorce and separation: award of interest on deferred installment payments of marital asset distribution, 10 A.L.R.5th 191.

Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(a), 40 A.L.R.5th 227.

Divorce and separation: Attorney's contingent fee contracts as marital property subject to distribution, 44 A.L.R.5th 671.

Consideration of obligor's personal-injury recovery or settlement infixing alimony or child support, 59 A.L.R.5th 489.

Initial award or denial of child custody to homosexual or lesbian parent, 62 A.L.R.5th 591.

Custodial parent's homosexual or lesbian relationship with third person as justifying modification of child custody order, 65 A.L.R.5th 591.

Spouse's cause of action for negligent personal injury, or proceeds therefrom, as separate or community property, 80 A.L.R.5th 533.

Determination of whether proceeds from personal injury settlement or recovery constitute marital property, 109 A.L.R.5th 1.

Division of lottery proceeds in divorce proceedings, 125 A.L.R. 3d 537.

40-4-4. Venue; jurisdiction over property.

Any proceeding for the dissolution of marriage, division of property, disposition of children or alimony, as provided for in this chapter, may be instituted in the county where either of the parties resides. In such proceedings, the court shall have jurisdiction of all property of the parties, wherever located or situated in the state.

History: Laws 1901, ch. 62, § 24; Code 1915, § 2775; C.S. 1929, § 68-503; 1941 Comp., § 25-703; 1953 Comp., § 22-7-3; Laws 1967, ch. 112, § 1; 1973, ch. 319, § 4.

ANNOTATIONS

Compiler's notes. — "This chapter" refers to Laws 1973, ch. 319, §§ 1 to 14, compiled as 40-4-1 to 40-4-7, 40-4-10, 40-4-12 to 40-4-14, 40-4-19 and 40-4-20 NMSA 1978.

Section defines powers of court in regard to division of community property. *Cauthen v. Cauthen*, 1949-NMSC-057, 53 N.M. 458, 210 P.2d 942.

Authority to void attorneys' charging lien. — In a domestic relations suit, the trial court had authority to void notice of attorneys' charging lien recorded on the parties' residence and to allocate the proceeds, giving priority to the claims of court-appointed

experts if the facts and circumstances justified it. *Philipbar v. Philipbar*, 1999-NMCA-063, 127 N.M. 341, 980 P.2d 1075.

Venue determined from complaint and character of judgment. — Under this section venue is generally determined from the complaint and character of the judgment which may be rendered thereon. *Davey v. Davey*, 1967-NMSC-002, 77 N.M. 303, 422 P.2d 38.

Exclusive jurisdiction over property not indefinite jurisdiction. — A court acquires exclusive jurisdiction over the property involved for purposes of a division of the property, or a modification of the decree as to payments for alimony, maintenance and education of the minor children, but this does not mean that such court may retain such jurisdiction indefinitely or that another court of concurrent jurisdiction may not acquire jurisdiction over the property at a time when the proceeding is apparently settled. *Ortiz v. Gonzales*, 1958-NMSC-109, 64 N.M. 445, 329 P.2d 1027.

Jurisdiction over marital property where stock not disclosed. — Where divorced wife made motion in one division of district court to vacate divorce decree because husband had failed to disclose corporate stock, issuance of order restraining disposition of such stock conferred jurisdiction of the res on the divorce court and subjected stock to the jurisdiction of the court having jurisdiction of the marital status of the parties even though the court did not take actual possession of the res, although execution had issued from another division of district court to be levied on stock to satisfy a judgment against husband. *Greathouse v. Greathouse*, 1958-NMSC-032, 64 N.M. 21, 322 P.2d 1075.

Jurisdiction over separate property. — In proceedings for dissolution of marriage, the trial court has complete jurisdiction over all separate as well as community property located in New Mexico. *Trego v. Scott*, 1998-NMCA-080, 125 N.M. 323, 961 P.2d 168, cert. denied, 125 N.M. 322, 961 P.2d 167.

Waiver of change of venue right where no objection made. — Where appellant at no time prior to the date and time the cause was set for trial objected to its being held in Bernalillo county, and her participation in the hearings in the cause in Bernalillo county without objection together with her action in setting motions filed by her for hearing in Bernalillo county led opposing counsel and the court to believe that she had no objection to trial in Bernalillo county, and no reason was given why appellant did not promptly after receiving notice of hearing on the merits insist that the trial be held in Valencia county, and no prejudice was shown, appellant waived her right to insist upon the trial being held in Valencia county. *Davey v. Davey*, 1967-NMSC-002, 77 N.M. 303, 422 P.2d 38.

No adjudication of property where not sought. — Where plaintiff could have sought a division of the property of the parties in the divorce case but did not do so, and the court did not consider the issue of the property, there was no adjudication thereon. *Zarges v. Zarges*, 1968-NMSC-151, 79 N.M. 494, 445 P.2d 97.

Advisory proceeding not necessary in property division. — In seeking an equal division of the community property, advisory proceedings are not necessary but may be employed by the court if they are deemed helpful, since any reasonable means to that end may be used. *Cauthen v. Cauthen*, 1949-NMSC-057, 53 N.M. 458, 210 P.2d 942.

First wife estopped from claiming husband's property in second divorce where jurisdiction acquired. — Where San Miguel court granted divorce decree in February, 1949, retaining jurisdiction of case upon settlement of community property, and husband remarried in August, 1949, and husband and first wife entered into agreement in September, 1949, disposing of undivided interest in hotel, and second wife subsequently filed for and obtained a divorce in Bernalillo court in November, 1950; the fact that first wife's motion for a hearing in the San Miguel court for further proof concerning community property was not made until six months after the divorce decree in second court, and over two years after divorce in first court, she was estopped as against the second wife to claim the agreement was not a transmutation of community property into separate property liable for husband's independent obligations; and until the San Miguel court took some affirmative action, such as a review of the September agreement to determine the equities of the parties therein, the second court could acquire jurisdiction over the sole and separate property of the husband. *Ortiz v. Gonzales*, 1958-NMSC-109, 64 N.M. 445, 329 P.2d 1027.

Law reviews. — For symposium, "Equal Rights in Divorce and Separation," see 3 N.M.L. Rev. 118 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation §§ 218, 219, 587.

Change of residence pendente lite, jurisdiction as affected by, 7 A.L.R.2d 1414.

Trial court's jurisdiction as to alimony or maintenance pending appeal of matrimonial action, 19 A.L.R.2d 703.

Jurisdiction on constructive or substituted service, in divorce or alimony action, to reach property within state, 10 A.L.R.3d 212.

Power of divorce court to deal with real property located in another state, 34 A.L.R.3d 962.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses, 94 A.L.R.3d 176.

Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement, 4 A.L.R.4th 1294.

Divorce: order requiring that party not compete with former marital business, 59 A.L.R.4th 1075.

Divorce property distribution: real estate or trust property in which interest vested before marriage and was realized during marriage, 60 A.L.R.4th 217.

Divorce and separation: effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

Divorce: propriety of using contempt proceeding to enforce property settlement award or order, 72 A.L.R.4th 298.

Valuation of goodwill in accounting practice for purposes of divorce court's property distribution, 77 A.L.R.4th 609.

Divorce and separation: goodwill in accounting practice as property subject to distribution on dissolution of marriage, 77 A.L.R.4th 645.

Valuation of goodwill in law practice for purposes of divorce court's property distribution, 77 A.L.R.4th 683.

Accrued vacation, holiday time, and sick leave as marital or separate property, 78 A.L.R.4th 1107.

Divorce and separation: goodwill in law practice as property subject to distribution on dissolution of marriage, 79 A.L.R.4th 171.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of action involving matrimonial dispute, 55 A.L.R.5th 647.

27A C.J.S. Divorce §§ 99, 111; 27B C.J.S. Divorce § 511.

40-4-5. Dissolution of marriage; jurisdiction; domicile.

The district court has jurisdiction to decree a dissolution of marriage when at the time of filing the petition either party has resided in this state for at least six months immediately preceding the date of the filing and has a domicile in New Mexico. As used in this section, "domicile" means that the person to whom it applies:

A. is physically present in this state and has a place of residence in this state;

B. has a present intention in good faith to reside in this state permanently or indefinitely;

C. provided further, persons serving in any military branch of the United States government who have been continuously stationed in any military base or installation in New Mexico for such period of six months shall, for the purposes hereof, be deemed to have a domicile of the state and county where such military base or installation is located; and

D. provided further, any person who had resided continuously in New Mexico for at least six months immediately prior to his or his spouse's entry into any military branch of the United States government, who is stationed or whose spouse is stationed at any military base or installation outside of New Mexico and who has a present intention in good faith to return and to reside in this state permanently or indefinitely, shall for the purposes hereof, be deemed to have a domicile of the state and county of his residence immediately prior to his or his spouse's entry into the military branch.

History: 1953 Comp., § 22-7-4, enacted by Laws 1971, ch. 273, § 1; 1973, ch. 319, § 5; 1977, ch. 101, § 1.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Purpose of requiring domicile within the state for a specified period of time as a jurisdictional prerequisite to obtaining a divorce is to prevent divorce-minded couples from shopping for favorable residence requirements. *Hagan v. Hardwick*, 1981-NMSC-002, 95 N.M. 517, 624 P.2d 26.

The public policy of protecting innocent parties in divorce action cannot give substance to a nullity. The policy of New Mexico is that marriage bonds shall be severed only on the basis set forth in the statute. *Heckathorn v. Heckathorn*, 1967-NMSC-017, 77 N.M. 369, 423 P.2d 410.

This section is not an attempt to convert divorce into transitory, in personam action, nor is its objective the luring of divorce-shopping couples to this state. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

This section addresses subject matter jurisdiction and is not concerned with personal jurisdiction over an absent spouse. *Worland v. Worland*, 1976-NMSC-027, 89 N.M. 291, 551 P.2d 981.

There are three jurisdictional essentials necessary to validity of every judgment: jurisdiction of parties, jurisdiction of subject matter and power or authority to decide the particular matter presented. *Heckathorn v. Heckathorn*, 1967-NMSC-017, 77 N.M. 369, 423 P.2d 410.

This statute grounds jurisdiction on strength of facts connecting the parties to the state of the forum. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

Right to apply for or obtain divorce is accorded only by statute. *Heckathorn v. Heckathorn*, 1967-NMSC-017, 77 N.M. 369, 423 P.2d 410.

Right to obtain divorce is purely statutory and it follows that the state may determine who may use its courts for such purpose. *Chaney v. Chaney*, 1949-NMSC-005, 53 N.M. 66, 201 P.2d 782.

Domicile is prerequisite to divorce jurisdiction necessary for recognition under the full faith and credit clause. *Crownover v. Crownover*, 1954-NMSC-092, 58 N.M. 597, 274 P.2d 127.

Since statute's residence requirement not met, the trial court lacked jurisdiction and the decree of divorce was void. *Heckathorn v. Heckathorn*, 1967-NMSC-017, 77 N.M. 369, 423 P.2d 410.

Residence for required period of time is necessary jurisdictional prerequisite of divorce in New Mexico, and this jurisdictional prerequisite being absent, the decree of divorce was a nullity. *Heckathorn v. Heckathorn*, 1967-NMSC-017, 77 N.M. 369, 423 P.2d 410.

Six-month continuous physical presence not required. — There is nothing in the terms of this section indicating a legislative intent to require continuous physical presence within the state for six months prior to initiation of proceedings. *Hagan v. Hardwick*, 1981-NMSC-002, 95 N.M. 517, 624 P.2d 26.

Divorce jurisdiction can be founded on circumstances other than domicile. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

Holding that a domiciliary intent could be conclusively presumed from a period of residence was tantamount to a repudiation of the theory that domicile is the only jurisdictional basis for divorce. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

It is within the power of the legislature to establish reasonable bases of jurisdiction for divorce other than domicile. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

Court has no discretionary right to deny divorce where statutory ground is shown to exist. *Buckner v. Buckner*, 1981-NMSC-007, 95 N.M. 337, 622 P.2d 242.

Orders regarding child custody, etc., effective though court without jurisdiction to grant divorce. — Although the parties are not divorced due to the trial court's lack of jurisdiction as required in this section, it does not follow that the provisions pertaining to custody, child support and visitation are void. Where the trial court had jurisdiction over these issues, and no issue on the appeal involved the court's orders concerning the children, the orders of the court pertaining to custody, support and maintenance and visitation remain in effect and are binding on the parties unless modified by further order of the trial court. *Heckathorn v. Heckathorn*, 1967-NMSC-017, 77 N.M. 369, 423 P.2d 410.

No deprivation of jurisdiction by cohabitation. — Evidence of cohabitation by the parties after filing a petition for divorce based on incompatibility did not deprive the court of jurisdiction, where the wife did not file an answer to the husband's complaint nor contest his allegation that the parties were in fact incompatible. *Joy v. Joy*, 1987-NMCA-031, 105 N.M. 571, 734 P.2d 811.

Allegation of residence implies good faith. — An allegation of residence for the required time, in a divorce complaint, necessarily implies residence "in good faith." *Klasner v. Klasner*, 1918-NMSC-021, 23 N.M. 627, 170 P. 745.

Resident of Los Alamos project does not meet residence requirement. — A person who lives within condemned area of Los Alamos project does not meet the residence requirements of this section of the divorce laws. *Chaney v. Chaney*, 1949-NMSC-005, 53 N.M. 66, 201 P.2d 782.

Residence as question of fact. — The residence requirement specified by this section, although jurisdictional, presents a question of fact for determination by the trial court, and where the trial court makes an affirmative finding of the jurisdictional fact of residence upon evidence which is substantial, the finding will not be overturned. *Davey v. Davey*, 1967-NMSC-002, 77 N.M. 303, 422 P.2d 38.

More than mere physical presence of divorcing couple within state should underlie divorce jurisdiction. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

Existence of residence with domiciliary intent for divorce purposes is centered upon the "integrity" of the intent of the parties concerned. *Crownover v. Crownover*, 1954-NMSC-092, 58 N.M. 597, 274 P.2d 127.

Decree not subject to collateral attack in sister state. — Divorce decree, wherein the defendant appeared and had an opportunity to question the jurisdiction of the court, may not be attacked by a third party in a sister state since it is not subject to collateral attack in this state. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

Party cannot repudiate court's jurisdiction after obtaining desired relief. — A party cannot invoke the jurisdiction of a court for the purpose of securing important rights from his adversary through its judgment, and, after having obtained the relief desired, repudiate the action of the court on the ground that the court was without jurisdiction. *Heckathorn v. Heckathorn*, 1967-NMSC-017, 77 N.M. 369, 423 P.2d 410.

Amendment of pleadings to show residence. — Where the required residence of the plaintiff in a divorce suit was omitted from the allegations of the complaint, but was fully litigated, without objection, it may be supplied by amendment of the pleadings on appeal. *Canavan v. Canavan*, 1913-NMSC-013, 17 N.M. 503, 131 P. 493.

Judgment as coram non judice where plaintiff not resident. — Entry of judgment is coram non judice where the plaintiff is not a bona fide resident of the state since the trial

court is without jurisdiction to enter a judgment in such a case. *Allen v. Allen*, 1948-NMSC-024, 52 N.M. 174, 194 P.2d 270.

Jurisdiction over community personalty located on Indian reservation. — A district court has jurisdiction to determine the disposition of community personal property located on an Indian reservation when one of the parties is an Indian, but has submitted to the jurisdiction of the court to dissolve his marriage. *Lonewolf v. Lonewolf*, 1982-NMSC-152, 99 N.M. 300, 657 P.2d 627, appeal dismissed, 467 U.S. 1223, 104 S. Ct. 2672, 81 L. Ed. 2d 869 (1984).

Evidence sufficient to support jurisdiction. — Where the evidence showed that wife lived in New Mexico for six months by the time she filed her second petition for divorce, and she opened bank accounts here, registered to vote, registered her car, and lived here, such acts demonstrated both her physical presence here and her concurrent intention to make New Mexico her home, and absent any evidence that she established a domicile in some other state when she filed her divorce action, there was no error in the trial court's determination of jurisdiction over wife. *Fenner v. Fenner*, 1987-NMCA-066, 106 N.M. 36, 738 P.2d 908, cert. denied, 106 N.M. 7, 738 P.2d 125.

II. MILITARY PERSONNEL.

Military residence proviso not unconstitutional. — Subsection three of this act (Laws 1951, ch. 107, § 1, now repealed, adding the military residence proviso) is not violative of N.M. Const., art. IV, § 24, prohibiting local or special laws and guaranteeing equal protection of the laws. *Crownover v. Crownover*, 1954-NMSC-092, 58 N.M. 597, 274 P.2d 127.

Legislature may constitutionally confer status of resident for divorce purposes upon those continuously stationed within this state by reason of military assignment. *Wilson v. Wilson*, 1954-NMSC-069, 58 N.M. 411, 272 P.2d 319.

Provisions for servicemen not unlawful encroachment on federal jurisdiction. — This section in providing for jurisdiction in New Mexico state courts over divorce proceedings involving servicemen is not an unlawful encroachment on federal jurisdiction. *Crownover v. Crownover*, 1954-NMSC-092, 58 N.M. 597, 274 P.2d 127.

Presumption of domicile where continuously stationed. — Upon proof of continuous station pursuant to this section, the presumption of domicile is conclusive; however, evidence directed to the issue of continuous station can destroy this presumption. *Crownover v. Crownover*, 1954-NMSC-092, 58 N.M. 597, 274 P.2d 127.

Upon proof of continuous station pursuant to this section, a conclusive presumption of domicile arises. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

State has substantial interest in service families stationed in the state. — When service families have resided in this jurisdiction for one year (now six months), the state

has a substantial interest in their domestic relations. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

Continuously stationed deemed resident with domiciliary intent. — A member of the military "continuously stationed" at a base in New Mexico for one year (now six months), for the purposes of this act (Laws 1951, ch. 107, § 1, now repealed), shall be deemed a resident of New Mexico with domiciliary intent, a necessary jurisdictional prerequisite of divorce in New Mexico. *Crownover v. Crownover*, 1954-NMSC-092, 58 N.M. 597, 274 P.2d 127.

Good faith presumed where continuously stationed. — When a member of the military is here under orders, his "good faith" cannot be questioned and will be presumed upon showing that he has been "continuously stationed" in the state for the year next preceding the filing of his complaint. *Crownover v. Crownover*, 1954-NMSC-092, 58 N.M. 597, 274 P.2d 127.

Residency requirements met where individual absent several months. — Where individual has 13 months of permanent station in New Mexico with physical presence during the first seven months, physical absence during the next six months, and then a physical return to New Mexico, he is considered continuously stationed in the military base or installation in the state of New Mexico for one year (now six months) next preceding the filing of his complaint sufficient to satisfy residency requirement of Subsection C to give New Mexico courts jurisdiction in divorce proceedings. *Crownover v. Crownover*, 1954-NMSC-092, 58 N.M. 597, 274 P.2d 127.

Military retirement separate property where no residence established. — Subsection C of this section relates only to the jurisdictional requirement of residence for the maintenance of an action for the dissolution of the bonds of matrimony. Where plaintiff claimed that defendant became domiciled in New Mexico pursuant to the provisions of what is now Subsection C, by reason of being stationed here on two occasions, and that the portion of his military retirement income earned while stationed in this state was thus community property under New Mexico law, although defendant at no time during his many years of military service intended to establish or did establish his domicile or residence in New Mexico, the trial court's holding that defendant's retirement income was his separate property was affirmed. *Roebuck v. Roebuck*, 1974-NMSC-099, 87 N.M. 96, 529 P.2d 762.

Law reviews. — For article, "Annulment of Marriages in New Mexico," see 1 Nat. Resources J. 146 (1961).

For article, "Annulment of Marriages in New Mexico: Part II - Proposed Statute," see 2 Nat. Resources J. 270 (1962).

For symposium, "Equal Rights in Divorce and Separation," see 3 N.M.L. Rev. 118 (1973).

For article, "Child Support Enforcement: The New Mexico Experience," see 9 N.M.L. Rev. 25 (1978-79).

For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation §§ 201 to 220.

Extra-territorial recognition and effect, as regards marital status, of a decree of divorce or separation rendered in a state or country in which neither of the parties was domiciled, 1 A.L.R.2d 1385, 28 A.L.R.2d 1303.

Duty to recognize and give effect to decrees of divorce rendered in other states, or in foreign country, as affected by lack of domicil at divorce forum, 1 A.L.R.2d 1385, 28 A.L.R.2d 1303.

Length or duration of domicil, as distinguished from fact of domicil, as a jurisdictional matter in divorce action, 2 A.L.R.2d 291.

False allegation of plaintiff's domicil or residence in the state as a ground for vacation of default decree of divorce, 6 A.L.R.2d 596.

Residence or domicile, for purpose of divorce action, of one in armed forces, 21 A.L.R.2d 1163.

Nature and location of one's business or calling as element in determining domicil in divorce cases, 36 A.L.R.2d 756.

Validity of statute imposing durational residency requirements for divorce applicants, 57 A.L.R.3d 221.

Validity and construction of statutory provision relating to jurisdiction of court for purpose of divorce of servicemen, 73 A.L.R.3d 431.

Vacating or setting aside divorce decree after remarriage of party, 17 A.L.R.4th 1153.

27A C.J.S. Divorce §§ 99 to 105.

40-4-6. Verification of petition.

The petition in all proceedings for the dissolution of marriage, division of property, disposition of children or alimony, must be verified by the affidavit of the petitioner.

History: Laws 1901, ch. 62, § 26; Code 1915, § 2777; C.S. 1929, § 68-505; 1941 Comp., § 25-705; 1953 Comp., § 22-7-5; Laws 1973, ch. 319, § 6.

40-4-7. Proceedings; spousal support; support of children; division of property.

A. In 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.

B. On final hearing, the court:

(1) may allow either party such a reasonable portion of the spouse's property or such a reasonable sum of money to be paid by either spouse either in a single sum or in installments, as spousal support as under the circumstances of the case may seem just and proper, including a court award of:

(a) rehabilitative spousal support that provides the receiving spouse with education, training, work experience or other forms of rehabilitation that increases the receiving spouse's ability to earn income and become self-supporting. The court may include a specific rehabilitation plan with its award of rehabilitative spousal support and may condition continuation of the support upon compliance with that plan;

(b) transitional spousal support to supplement the income of the receiving spouse for a limited period of time; provided that the period shall be clearly stated in the court's final order;

(c) spousal support for an indefinite duration;

(d) a single sum to be paid in one or more installments that specifies definite amounts, subject only to the death of the receiving spouse; or

(e) a single sum to be paid in one or more installments that specifies definite amounts, not subject to any contingencies, including the death of the receiving spouse;

(2) may:

(a) modify and change any order in respect to spousal support awarded pursuant to the provisions of Subparagraph (a), (b) or (c) of Paragraph (1) of this subsection whenever the circumstances render such change proper; or

(b) designate spousal support awarded pursuant to the provisions of Subparagraph (a) or (b) of Paragraph (1) of this subsection as nonmodifiable with respect to the amount or duration of the support payments;

(3) may set apart out of the property or income of the respective parties such portion for the maintenance and education of:

(a) their unemancipated minor children as may seem just and proper; or

(b) their children until the children's graduation from high school if the children are emancipated only by age, are under nineteen and are attending high school; and

(4) may make such an order for the guardianship, care, custody, maintenance and education of the minor children, or with reference to the control of the property of the respective parties to the proceeding, or with reference to the control of the property decreed or fund created by the court for the maintenance and education of the minor children, as may seem just and proper.

C. The 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.

D. An award of spousal support made pursuant to the provisions of Subparagraph (a), (b), (c) or (d) of Paragraph (1) of Subsection B of this section shall terminate upon the death of the receiving spouse, unless the court order of spousal support provides otherwise.

E. When making determinations concerning spousal support to be awarded pursuant to the provisions of Paragraph (1) or (2) of Subsection B of this section, the court shall consider:

(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 to be 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.

F. 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.

G. The court may modify and change any order or agreement merged into an order in respect to the guardianship, care, custody, maintenance or education of the children whenever circumstances render such change proper. The district court shall have exclusive jurisdiction of all matters pertaining to the guardianship, care, custody, maintenance and education of the children until the parents' obligation of support for their children terminates. The district court shall also have exclusive, continuing jurisdiction with reference to the property decreed or funds created for the children's maintenance and education.

History: Laws 1901, ch. 62, § 27; Code 1915, § 2778; C.S. 1929, § 68-506; 1941 Comp., § 25-706; Laws 1943, ch. 46, § 1; 1953 Comp., § 22-7-6; Laws 1973, ch. 319, § 7; 1993, ch. 144, § 1; 1997, ch. 56, § 1.

ANNOTATIONS

Cross references. — For provisions pertaining to a supervised visitation program, *see* 40-12-5.1 NMSA 1978.

For determination of award of child support, *see* 40-4-11 NMSA 1978.

For mandatory Medical Support Act, *see* 40-4C-1 to 40-4C-14 NMSA 1978.

The 1997 amendment, effective June 20, 1997, added Subparagraphs B(3)(a) and B(3)(b) and made related stylistic changes; added Subsection C and redesignated former Subsections C through F as D through G; and in Subsection G, substituted "until the parents' obligation of support for their children terminates" for "so long as the children remain minors".

The 1993 amendment, effective July 1, 1993, in Subsection A, substituted "spousal support" for "alimony" in the first sentence; in Subsection B, rewrote Paragraphs (1) and (2); added present Subsections C through E, redesignating former Subsection C as Subsection F; in Subsection F, rewrote the second sentence as the present third and fourth sentences and deleted the former third sentence, which concerned the disposition of funds remaining when the children reach the age of majority; and made stylistic changes in the second sentence of subsection A and in Paragraph (3) of Subsection B.

I. GENERAL CONSIDERATION.

Inherent powers of court. — A New Mexico district court has the power to sanction a parent for misconduct that occurred before a South Dakota court where the parent pursued an action in the South Dakota court in an attempt to improperly gain custody of a child, while concealing the New Mexico proceedings from the South Dakota court and for wilful disobedience of a court order for failing to return the child after the South Dakota visitation, as mediated by the parties under an order of the New Mexico district court. *Seipert v. Johnson*, 2003-NMCA-119, 134 N.M. 394, 77 P.3d 298, cert. denied, 2003-NMCERT-009, 134 N.M. 374, 77 P.3d 278.

Construing divorce decrees. — Divorce decrees are to be construed as other written instruments. A district court determination that a written instrument is unambiguous as a matter of law is therefore not binding on the appellate court which may consider the legal effect of the document itself. *Schueller v. Schueller*, 1994-NMCA-014, 117 N.M. 197, 870 P.2d 159.

This section does not apply to annulment actions. *Panzer v. Panzer*, 1974-NMSC-092, 87 N.M. 29, 528 P.2d 888.

This section has no reference to actions to annul an invalid marriage. *Prince v. Freeman*, 1941-NMSC-006, 45 N.M. 143, 112 P.2d 821.

This section does not apply to a nonmodifiable lump sum alimony agreement. *Edens v. Edens*, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Conflict between decree and statute. — Where there is a conflict between provisions of the divorce decree and a statute of the state of New Mexico, the statute is controlling. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

"Either party" as used in Subsection A of this section can logically only refer to the parties to the underlying domestic relations proceeding, that is, husband and wife. *Garcia v. Jeantette*, 2004-NMCA-004, 134 N.M. 776, 82 P.3d 947.

Exclusive jurisdiction not indefinite jurisdiction. — A court acquires exclusive jurisdiction over the property involved for purposes of a division of the property, or a modification of the decree as to payments for alimony, maintenance and education of the minor children, but this does not mean that such court may retain such jurisdiction indefinitely or that another court of concurrent jurisdiction may not acquire jurisdiction over the property at a time when the proceeding is apparently settled. *Ortiz v. Gonzales*, 1958-NMSC-109, 64 N.M. 445, 329 P.2d 1027.

Finality of judgment not destroyed by reservation of continuing jurisdiction. — A reservation of continuing jurisdiction by the trial court in divorce proceedings does not destroy the finality of a final judgment, once the judgment is entered. Like any other final award or decision, they are subject to attack only upon a showing of relief provided for under Rules 59 and 60(b), N.M.R. Civ. P. (now 1-059 and 1-060 NMRA). *Smith v. Smith*, 1982-NMSC-088, 98 N.M. 468, 649 P.2d 1381.

Doctrine of res judicata does not preclude decision from first court. — Where the New Mexico district court entered its final decree and custody award on April 10, more than a week before the Colorado district court entered its decision that the former court lacked jurisdiction, the New Mexico district court could not be precluded by the doctrine of res judicata from entering a decision in the matter. *Worland v. Worland*, 1976-NMSC-027, 89 N.M. 291, 551 P.2d 981.

Jurisdiction of federal courts in bankruptcy proceedings. — Although the Bankruptcy Act of 1978 greatly expanded the jurisdiction of federal courts, jurisdiction over such matters as marriage, divorce, child custody, alimony and child support, remains in state courts. *Dirks v. Dirks*, 15 Bankr. 775 (Bankr. D.N.M. 1981).

Despite the fact that federal courts do not have jurisdiction to determine domestic relations matters, congress did intend that the bankruptcy courts should be able to determine whether characterizations of alimony or support made by state courts meet the meaning of such terms as they arise in the bankruptcy context. *Dirks v. Dirks*, 15 Bankr. 775 (Bankr. D.N.M. 1981).

Alimony, child support and maintenance nondischargeable in bankruptcy. — Amounts due a former spouse of the debtor constituting alimony, child support or maintenance are nondischargeable debts so long as such sums are payable directly to the former spouse and actually represent alimony, child support or maintenance. *Lekvold v. Henderson*, 18 Bankr. 663 (Bankr. D.N.M. 1982).

If decree is clear and unambiguous, neither pleadings, findings nor matters dehors the record may be used to change its meaning or even to construe it. *Chavez v. Chavez*, 1971-NMSC-062, 82 N.M. 624, 485 P.2d 735.

Modification of divorce decree is not required except upon a showing of material change of circumstances, but upon a showing of such change of circumstances or new facts it may be done. *Tuttle v. Tuttle*, 1959-NMSC-063, 66 N.M. 134, 343 P.2d 838.

Attempt to convert divorce suit into action for debt unauthorized. — The attempt of an attorney to convert a divorce suit into an action by him against the wife for debt was wholly unauthorized, and the resulting judgment rendered against her is void. *Lloyd v. Lloyd*, 1956-NMSC-007, 60 N.M. 441, 292 P.2d 121.

Trial court may order the husband in a divorce action to make a suitable allowance to the wife to the end her case may be adequately presented, but this does not give her attorney the right to recover a judgment against the husband in an independent action. *Lloyd v. Lloyd*, 1956-NMSC-007, 60 N.M. 441, 292 P.2d 121.

Language of section became part of agreement and decree. — The language from this section as it existed at the time the separation agreement was made became a part of the agreement when it became a part of the decree of divorce, even though the parties may not have had knowledge of the existence of the statute. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

No presumption that separation agreements fraudulent. — While it is true that if a fiduciary relationship is shown and that as a result of confidence reposed by the one, dominion and influence resulting from such confidence can be exercised by the other, fraud and undue influence may be presumed to exist when an advantage is gained by the dominant party at the expense of the confiding party; nevertheless, the modern trend holds that when a husband and wife have separated or are about to separate and seek by agreement to settle their respective rights and obligations, they deal at arm's length. There is no presumption that separation agreements are fraudulent, and that one who asserts the invalidity of such agreement has the burden of proving that it is tainted by fraud, duress or overreaching. *Unser v. Unser*, 1974-NMSC-063, 86 N.M. 648, 526 P.2d 790.

Separation agreement subject to change by court. — A separation agreement in New Mexico, though binding upon the parties during such time as they are separated as husband and wife, when submitted in a divorce case for consideration of the court, is subject to such action as the court in its discretion may take, and the court may disregard any previous agreement for support and make such award as in the discretion of the court may seem just and fair. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

Authority to modify child custody or support order. — Trial courts, in proceedings for dissolution of a marriage, have the power and authority to execute, modify or vacate any order involving the guardianship, care, custody, maintenance and education of minor children. *Rhinehart v. Nowlin*, 1990-NMCA-136, 111 N.M. 319, 805 P.2d 88.

Court had discretion to fashion installment payment plan. — In a contempt counterclaim by the wife, the trial court had the discretion to fashion an installment payment plan of the husband's debt of child support and alimony arrearages. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Judgment final despite continuing jurisdiction of court. — The court's reservation of continuing jurisdiction over the parties to modify such matters as alimony, support or custody does not destroy the finality of a judgment. *Thornton v. Gamble*, 1984-NMCA-093, 101 N.M. 764, 688 P.2d 1268.

Awarding of alimony or child support rests within sound discretion of court. *Muckleroy v. Muckleroy*, 1972-NMSC-051, 84 N.M. 14, 498 P.2d 1357; *Hurley v. Hurley*, 1980-NMSC-067, 94 N.M. 641, 615 P.2d 256.

The decision to grant or deny alimony is within the sound discretion of the trial court, and its decision will be altered only upon a showing of an abuse of that discretion. *Ellsworth v. Ellsworth*, 1981-NMSC-132, 97 N.M. 133, 637 P.2d 564.

Power to grant alimony and attorney fees. — District court has jurisdiction and power to grant the wife temporary allowance and solicitors' fees, and to enforce payment of them against the husband or his property in the absence of sufficient separate estate belonging to the wife, or to charge them against any common property belonging to both husband and wife, whether such property is in the control of the husband or wife; and where the wife has ample estate of her own she may charge it with necessary solicitors' fees to enable her to prosecute or defend a divorce action to which she is a party, which the court will allow when they are necessary and reasonable. *Lamy v. Catron*, 1890-NMSC-003, 5 N.M. 373, 23 P. 773 (decided under former law).

Adjustment of property division on remand. — Where, although the wife requested alimony, the trial court found she had failed to show need, and that finding was not challenged on appeal, on remand, the court in its discretion was limited to reconsidering the fairness and equity of the balance of the property division, and making whatever adjustments were necessary to achieve a fair and equitable division and disposition of the parties' property and other interests. *Bayer v. Bayer*, 1990-NMCA-106, 110 N.M. 782, 800 P.2d 216.

Supreme court has inherent power to make allowance of counsel's fees on appeal of $750 to wife, taxed as costs to defendant-husband, when on appeal the court finds an error in the judgment of the trial court in a suit brought by wife to divide property. *Jones v. Jones*, 1960-NMSC-106, 67 N.M. 415, 356 P.2d 231.

An award of attorney's fees was appropriate. — Award of $2,500 in attorney fees to petitioner was warranted on appeal. *Rhinehart v. Nowlin*, 1990-NMCA-136, 111 N.M. 319, 805 P.2d 88.

Evidence of economic disparity. — The evidence of economic disparity between husband and wife supported the trial court's award of $20,000 in attorney's fees to the wife. *Monsanto v. Monsanto*, 1995-NMCA-048, 119 N.M. 678, 894 P.2d 1034.

An award of attorney's fees to the mother was appropriate since the trial court considered the economic disparity between the parties, and considered the father's financial circumstances in reaching its findings regarding his gross monthly income and in allowing him to make installment payments on the award. *Alverson v. Harris*, 1997-NMCA-024, 123 N.M. 153, 935 P.2d 1165.

An award of attorneys' fees was inappropriate since the matter of attorneys' fees had been covered by the original decree, and the present effort to set aside that decree on ill-founded grounds had been unsuccessful. *Unser v. Unser*, 1974-NMSC-063, 86 N.M. 648, 526 P.2d 790.

Judgment for attorney's fees, costs and travel expenses was a personal judgment against the husband, and in order to enter such a judgment the trial court must have had personal jurisdiction over the husband for that purpose. Since none of these items are included in the long-arm statute by virtue of which the court had jurisdiction over the nonresident husband to decree a divorce on the issue of custody jurisdiction, the judgment as to attorney's fees, costs and travel expenses was beyond the jurisdiction of the court and was null and void in that respect. *Worland v. Worland*, 1976-NMSC-027, 89 N.M. 291, 551 P.2d 981.

Excessive attorneys' fees. — In a contested divorce action in which more than one full day was spent in trying the case, which necessitated considerable preparation by appellee's counsel, the court does not feel that an award of $500 for attorneys' fees is so excessive as to require reversal as being an abuse of discretion by the trial court. *Moore v. Moore*, 1963-NMSC-047, 71 N.M. 495, 379 P.2d 784.

A fee fixed by trial court is a finding not to be disturbed unless patently erroneous as reflecting an abuse of discretion; the reasons which would call for a disturbance of the amount so fixed by a trial court must be very persuasive since the trial court which fixes the fee supposedly has a superior knowledge of the actual services rendered and the charges usually prevailing in the particular locality for such services. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Since fees may be allowed by court husband not liable in independent suit. — Where counsel and suit fees may be allowed by court, the husband is not liable in an independent suit by the wife's attorney for necessary disbursements in the case. *LaFollette v. Romero*, 1931-NMSC-037, 35 N.M. 509, 2 P.2d 310.

Section broad enough to authorize order to pay appeal costs. — Where decree of divorce has been granted a husband, and the wife appeals, the husband's appeal from an order requiring him to pay the costs of her appeal will be denied, this section being

sufficiently broad to authorize such order. *Oldham v. Oldham*, 1922-NMSC-050, 28 N.M. 163, 208 P. 886, *aff'd*, 1923-NMSC-064, 28 N.M. 619, 216 P. 497.

Attorney fees at appellate level. — Where husband appeals from a judgment concerning alimony award and where court finds a need for the wife to receive assistance with her lawyer's fees at the appellate level, this section is applicable to provide for an award for attorney's fees incurred on appeal. *Miller v. Miller*, 1981-NMSC-078, 96 N.M. 497, 632 P.2d 732.

Award reversed absent findings to support it. — Award of costs to father in the amount of $3,000 was reversed, where there were no findings on the factors necessary to support the award. *Newhouse v. Chavez*, 1988-NMCA-110, 108 N.M. 319, 772 P.2d 353, cert. denied, 108 N.M. 197, 769 P.2d 731 (1989).

Considerations in awarding attorney fees. — While the award of attorney fees to one spouse is discretionary, the trial court should consider the relative financial status of the parties and the ability of the parties to employ and pay counsel. *Foutz v. Foutz*, 1990-NMCA-093, 110 N.M. 642, 798 P.2d 592.

When denying award is error. — Where a party lacks sufficient funds to pay attorney fees for representation incident to dissolution of marriage or rights incident thereto, and the financial situation of the parties is disparate, it is error to deny an award of reasonable attorney's fees. *Sheets v. Sheets*, 1987-NMCA-128, 106 N.M. 451, 744 P.2d 924.

II. DIVISION OF PROPERTY.

A. IN GENERAL.

Stock options. — Unvested stock options that provided a spouse with a valuable right in a contingent benefit were community property. *Garcia v. Mayer*, 1996-NMCA-61, 122 N.M. 57, 920 P.2d 522.

Irrevocable trust. — When an irrevocable trust is set up for the benefit of third parties and neither spouse is a trustee or has a beneficial interest, a trial court may not dispose of it, even if one or both of the spouses created or funded the trust. *Vanderlugt v. Vanderlugt*, 2018-NMCA-073.

Where husband, prior to his marriage to wife, created an irrevocable life insurance trust for the benefit of his children, and where neither spouse was a trustee or had a beneficial interest in the trust, the district court erred in determining that there was a community lien interest in the corpus of the irrevocable trust, because the trust was not owned or controlled by either spouse, husband was not able to access the assets of the trust, was not a beneficiary or a trustee and did not have a property interest in the trust, and wife was also not a beneficiary or a trustee and had no property interest in the trust. *Vanderlugt v. Vanderlugt*, 2018-NMCA-073.

The district court did not err in limiting discovery into business interests. — In dissolution of marriage proceedings, where husband claimed that the district court erred in restricting husband's discovery into wife's business interests, the district court did not abuse its discretion in limiting discovery where all relevant financial information was already produced by wife. *Vanderlugt v. Vanderlugt*, 2018-NMCA-073.

Expiration of statutory time. — A final decree of dissolution of marriage, which incorporates a property settlement agreement entered into by the parties, may not be modified under N.M.R. Civ.P. 60(b), NMSA 1978 (now Rule 1-060B NMRA) after the expiration of the statutory time for doing so. *Wehrle v. Robison*, 1979-NMSC-016, 92 N.M. 485, 590 P.2d 633.

Forfeiture unenforceable. — Where a marital settlement agreement provided that the marital residence was awarded to the petitioner, that the petitioner was required to pay the mortgage on the residence, that if the respondent cured the petitioner's failure to pay the mortgage, the respondent could take title to the residence, and that the petitioner had the right to redeem the residence by paying the delinquent amounts to the respondent within thirty days; the agreement did not contain any express language regarding the method of making the redemption payment; the parties had not established a pattern for making the redemption payment; the forfeiture clause did not expressly require actual receipt of the redemption payment by the last day of the redemption period and it did not prohibit payment by mail; the petitioner mailed the redemption payment to the respondent on the last day of the redemption period; the redemption payment was delivered to the respondent after the expiration of the redemption period; the marital residence constituted the major portion of the petitioner's share of the marital assets; there was no indication that the petitioner's failure to pay the mortgage caused the respondent to suffer any prejudice to the respondent's credit; and the parties contemplated that the petitioner would move out of New Mexico after the divorce, the agreement did not contain the clear and unequivocal language required before a forfeiture will be enforced and the mailing of the redemption payment on the last day of the redemption period to the respondent constituted a timely redemption payment. *Cortez v. Cortez*, 2009-NMSC-008, 145 N.M. 642, 203 P.3d 857, *rev'g* 2007-NMCA-154, 143 N.M. 66, 172 P.3d 615.

Payment by mail. — Depositing a check in the mail on the due date does not constitute payment on that date where the terms of the stipulated judgment did not authorize payment by mail and there was no course of dealing between the parties reflecting an agreement that depositing the payment in the mail constituted payment. *Cortez v. Cortez*, 2007-NMCA-154, 143 N.M. 66, 172 P.3d 615, cert. granted, 2007-NMCERT-011, *rev'd*, 2009-NMSC-008, 145 N.M. 642, 203 P.3d 857.

Standard of review. — The district court's decisions in making an equitable division of community property and debts are reviewed for abuses of discretion, but the threshold question of whether a particular asset is community property is a question of law to be reviewed de novo. *Arnold v. Arnold*, 2003-NMCA-114, 134 N.M. 381, 77 P.3d 285.

Jurisdiction over community personalty located on Indian reservation. — A district court has jurisdiction to determine the disposition of community personal property located on an Indian reservation when one of the parties is an Indian, but has submitted to the jurisdiction of the court to dissolve his marriage. *Lonewolf v. Lonewolf*, 1982-NMSC-152, 99 N.M. 300, 657 P.2d 627, appeal dismissed, 467 U.S. 1223, 104 S. Ct. 2672, 81 L. Ed. 2d 869 (1984).

Reviewing court indulges in all inferences in favor of successful party. — In determining whether trial court's findings of fact in dispute over division of property are supported by substantial evidence, reviewing court resolves all disputed facts and indulges in all reasonable inferences in favor of the successful party and disregards inferences to the contrary. *Lahr v. Lahr*, 1970-NMSC-165, 82 N.M. 223, 478 P.2d 551.

Court should consider tax consequences when deciding a property settlement upon dissolution of marriage. *Cunningham v. Cunningham*, 1981-NMSC-087, 96 N.M. 529, 632 P.2d 1167; *Schueller v. Schueller*, 1994-NMCA-014, 117 N.M. 197, 870 P.2d 159.

It is the duty of court to divide equally property of community. *Michelson v. Michelson*, 1974-NMSC-022, 86 N.M. 107, 520 P.2d 263; *Fitzgerald v. Fitzgerald*, 1962-NMSC-028, 70 N.M. 11, 369 P.2d 398; *Ellsworth v. Ellsworth*, 1981-NMSC-132, 97 N.M. 133, 637 P.2d 564.

Burden to show property was separate. — The burden was on appellant to show what portion of the property before the court resulted from his separate property. *Krattiger v. Krattiger*, 1969-NMSC-170, 81 N.M. 59, 463 P.2d 35.

Authority to apportion or set apart property. — This section does not authorize the court to apportion the community property between the spouses in its discretion, but authorized the court to set apart out of the property such portion of the property of the parties as may be required for the support, maintenance and education of the children, and to set apart such part of the husband's property as alimony as may be necessary for the support and maintenance of the wife. *Beals v. Ares*, 1919-NMSC-067, 25 N.M. 459, 185 P. 780.

Award of property to wife. — In a divorce action, the court has the right to award to the wife a suitable portion of the common property of the community, or the separate property of the husband. *Oberg v. Oberg*, 1931-NMSC-051, 35 N.M. 601, 4 P.2d 918; *Hodges v. Hodges*, 1916-NMSC-064, 22 N.M. 192, 159 P. 1007.

Property takes status as community or separate at time and by manner of acquisition. — Property acquired in New Mexico takes its status as community or separate property at the time and by the manner of its acquisition; and if a part of the purchase money is later paid by other funds than those of the owner of the property, whether of the community or an individual spouse, the owner is indebted to the source of such funds in that amount, but such payment does not effect the title of the purchaser. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Wife's share of separate property. — The wife's rights to share in the husband's separate property invested in New Mexico, but which was accumulated from his earnings during their marriage while domiciled in a noncommunity property state, necessitates the characterization of the property as separate, to be made under the applicable laws of the noncommunity property state. *Hughes v. Hughes*, 1978-NMSC-002, 91 N.M. 339, 573 P.2d 1194.

Determining interest in property. — The general conflict of laws rule by which an interest in property takes its character at the time and in the manner of its acquisition has not been superseded by the Community Property Act. *Blackwell v. Lurie*, 2003-NMCA-082, 134 N.M. 1, 71 P.3d 509, cert. denied, 134 N.M. 123, 73 P.3d 826.

If any doubt court may hold property as community. — When entertaining an ultimate doubt as to whether property is separate or community, the trial court may resolve the doubt by holding the property to be community, if acquired after marriage and the trial court may, subject to review, set over real estate to the wife in lieu of alimony. *Loveridge v. Loveridge*, 1948-NMSC-044, 52 N.M. 353, 198 P.2d 444.

Community property becomes separate property when divided by divorce. — When community property is divided incident to divorce, the property which previously was community estate, becomes thenceforth separate property of the respective parties. *Harper v. Harper*, 1950-NMSC-024, 54 N.M. 194, 217 P.2d 857.

Judgment creditor may look to community property for satisfaction of judgment. — Either party to a divorce action may bring in third parties who claim an interest in the property alleged to be community, or third parties themselves may intervene and have their rights therein determined. *Greathouse v. Greathouse*, 1958-NMSC-032, 64 N.M. 21, 322 P.2d 1075.

When creditor intervenes in divorce proceeding to assert interest in property, the court in the interest of protecting the children may not negative or disregard legal obligations, or relieve property from a valid claim presented against it. *Malcolm v. Malcolm*, 1965-NMSC-138, 75 N.M. 566, 408 P.2d 143.

Predivorce creditor unaffected by marital settlement agreement. — While a marital settlement agreement affects the rights and liabilities of husband and wife between themselves, it has no effect upon the rights of a predivorce creditor who was not a party to the agreement; therefore, a wife who joined her husband on a share-draft account and open-end account remains obligated under the terms of those contracts. *N.M. Educators Fed. Credit Union v. Woods*, 1984-NMSC-101, 102 N.M. 16, 690 P.2d 1010.

Apportioning assets and liabilities between parties. — In apportioning a husband and wife's assets and liabilities, the trial court must attempt to perform an allocation that is fair under all the circumstances. *Fernandez v. Fernandez*, 1991-NMCA-001, 111 N.M. 442, 806 P.2d 582.

The court's power to apportion assets in an equitable manner should also include the ability to give effect to the parties' intentions, whether or not the parties strictly comply with the community property or debt statutes. *Fernandez v. Fernandez*, 1991-NMCA-001, 111 N.M. 442, 806 P.2d 582.

Social Security benefits. — Social Security benefits are considered separate property and cannot be used to set off an equal distribution of community property upon divorce. *English v. English*, 1994-NMCA-090, 118 N.M. 170, 879 P.2d 802, cert. denied, 118 N.M. 256, 880 P.2d 867.

Separate property value enhanced due to community labor. — The community is entitled to a lien against the separate property of a spouse for the enhanced value of such property attributable to community labor during marriage. *Smith v. Smith*, 1992-NMCA-080, 114 N.M. 276, 837 P.2d 869.

Where there has been an increase during marriage in the value of a business held as the separate property of a spouse, due in part to community efforts and labor, any undercompensation of one or both spouses employed by the business is a factor which may properly be considered in determining whether a community lien should be imposed against such property; ascertaining the amount of comparable wages for the value of community labor performed on behalf of such business is an appropriate method of determining whether the value of such labor has been fairly compensated. *Smith v. Smith*, 1992-NMCA-080, 114 N.M. 276, 837 P.2d 869.

Apportioning income between personal efforts and separate property. — In apportioning assets between a spouse's separate estate and the community, each case must be determined with reference to its surrounding facts and circumstances to determine what amount of the income is due to personal efforts of the spouses and what is attributable to the separate property employed; dependent upon the nature of the business and the risks involved, it must be reckoned what would be a fair return on the capital investment as well as determined what would be a fair allowance for the personal services rendered. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Apportionment does not require mathematical exactness but all circumstances considered. — It is impossible to lay down hard and fast guidelines in apportioning assets between the separate estate of a conjugal partner and the community; the surrounding circumstances must be carefully considered as each case will depend upon its own facts, and the ultimate answer will call into play the nicest and most profound judgment of the trial court. Mathematical exactness is not expected or required, but substantial justice can be accomplished by the exercise of reason and judgment in all such cases. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Even if the dollar amount of the property distribution is unequal, there is no requirement that each party receive exactly the same dollar value as long as the community property is equally apportioned by a method of division best suited under the circumstances.

Ridgway v. Ridgway, 1980-NMSC-055, 94 N.M. 345, 610 P.2d 749; *Cunningham v. Cunningham*, 1981-NMSC-087, 96 N.M. 529, 632 P.2d 1167.

Community lien not disturbed. — Where the only separate funds of the husband used in the family home was the sum paid for the lot upon which it was constructed, and the evidence showed that the parties expended a considerable sum on the home after its completion (although whether community or separate funds were used for that purpose was unclear), that a few mortgage payments were made from community funds, that refinancing of the mortgage was accomplished by a note and mortgage signed by both the husband and wife and that the community credit was pledged thereby, and that both parties expended considerable time and effort in making improvements, and there was no attempt to trace the separate funds of the husband into the expenditures for the home after completion, the trial court's conclusion that the community had a lien of one half of the difference between the original land price and the mortgage balance attributable to community expenditures of time, effort and money (as opposed to normal appreciations) would not be disturbed. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Community does not acquire interest in corporation. — Where the husband was paid for his services to a corporation in which he owned a one-half interest which salary of course belonged to the community, and there was no proof in the record that the salary was not adequate or reasonable under the circumstances, having started at $7,500 in 1964 when he returned from college and increased to $35,000 in 1972, the trial court erred in concluding that the community had acquired an interest in the corporation. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Modification of judgment. — The only way an unmodifiable judgment of property settlement may be modified or set aside is by appeal or pursuant to a motion for relief from judgment. *Russell v. Russell*, 1987-NMCA-085, 106 N.M. 133, 740 P.2d 127.

Wife's interest in community property not forfeited by adultery. — This section does not forfeit the wife's interest in the community property by her adultery, and her rights therein are not affected by any of her wrongs. *Beals v. Ares*, 1919-NMSC-067, 25 N.M. 459, 185 P. 780.

First wife estopped against claiming husband's property in second divorce. — Where San Miguel court granted divorce decree in February, 1949, retaining jurisdiction of case upon settlement of community property, and husband remarried in August, 1949, and husband and first wife entered into agreement in September, 1949, disposing of undivided interest in hotel, and second wife subsequently filed for and obtained a divorce in Bernalillo court in November, 1950; the fact that first wife's motion for a hearing in the San Miguel court for further proof concerning community property was not made until six months after the divorce decree in second court, and over two years after divorce in first court, she was estopped as against the second wife to claim the agreement was not a transmutation of community property into separate property liable for husband's independent obligations; and until the San Miguel court took some

affirmative action, such as a review of the September agreement to determine the equities of the parties therein, the second court could acquire jurisdiction over the sole and separate property of the husband. *Ortiz v. Gonzales*, 1958-NMSC-109, 64 N.M. 445, 329 P.2d 1027.

Providing for husband's share where house left to wife. — Where the net effect of leaving the home to the wife until she remarries or dies or decides to sell it is to divest the husband of his equity in the property, the trial court should order the house sold and the net proceeds distributed to the parties within a reasonable time, or make such other disposition of the home as will result in the husband receiving, within a reasonable time, his share of the value of the home. *Chrane v. Chrane*, 1982-NMSC-089, 98 N.M. 471, 649 P.2d 1384.

Modification of original property division. — Apart from the exceptions to the general rule contained in this section and Rule 60(b), N.M.R. Civ. P., once the time has lapsed within which an appeal may be taken from a divorce decree, a court cannot change the original division of the property as an exercise of its continuing jurisdiction. *Higginbotham v. Higginbotham*, 1979-NMSC-003, 92 N.M. 412, 589 P.2d 196.

Property division not supported where court did not pass on question of property. — In divorce proceeding where the court was neither requested nor did it pass upon any question of the property rights of the parties, neither can the action of the trial court in adjudicating the right to community property be supported as an exercise of its continuing jurisdiction under this section. *Zarges v. Zarges*, 1968-NMSC-151, 79 N.M. 494, 445 P.2d 97.

B. VALUATION.

Opinion of owner as to value. — In divorce proceedings, an owner is entitled to give opinion as to value of community property. *Lahr v. Lahr*, 1970-NMSC-165, 82 N.M. 223, 478 P.2d 551.

Prior to enactment of rules of evidence, where spouse did not testify as to value of certain community property in divorce action, an accountant's deposition statements as to what were claimed to be the spouse's personal opinion as that value were improperly admitted, because even if those values were those of the defendant, the accountant's deposition testimony was hearsay, being the testimony of a witness as to out-of-court statements of a declarant who was not a witness as to that specific subject matter. *Lahr v. Lahr*, 1970-NMSC-165, 82 N.M. 223, 478 P.2d 551.

Court to accept valuation of property by one spouse. — Where the only admissible evidence as to the value of certain community property was the valuation of one spouse, the trial court was required to accept this valuation in making its allocation of the community property since there was no direct evidence of spouse's lack of veracity or bad moral character, testimony contained no inherent improbabilities, nor was it surrounded by suspicious circumstances, so that legitimate inferences could be drawn

therefrom to cast doubt on the accuracy of that testimony. *Lahr v. Lahr*, 1970-NMSC-165, 82 N.M. 223, 478 P.2d 551.

Apportionment of separate property. — Apportionment is appropriate whenever community labor or community funds have enhanced the value of separate property. No one method of apportionment is favored above all others. The trial court may use whatever method will achieve substantial justice and is supported by substantial evidence in the record. *Trego v. Scott*, 1998-NMCA-080, 125 N.M. 323, 961 P.2d 168, cert. denied, 125 N.M. 322, 961 P.2d 167.

Review of value of community property. — Where supreme court examined the record and found substantial support for the value of certain community property fixed by the court, as well as for the amount offered by the appellee, both in appellee's testimony and that of an expert appraiser who testified on her behalf, it would not disturb the court's findings. *Krattiger v. Krattiger*, 1969-NMSC-170, 81 N.M. 59, 463 P.2d 35.

Determination of present value of profit-sharing plan as community asset. — Where evidence failed to show an ascertainable future benefit from which the trial court could make a determination of the present value of a noncontributory profit-sharing plan, the court correctly used the undiscounted current, actual value of the plan at the date of the divorce in determining its division as a community asset upon divorce. *Ridgway v. Ridgway*, 1980-NMSC-055, 94 N.M. 345, 610 P.2d 749.

Value of community interest in separate property. — A method of apportionment to give the separate property owner a fair return on the owner’s investment is to determine the value of the separate property at the date of marriage, add interest that a well-secured, long-term investment would have earned to the pre-marriage value of the separate property, the resulting sum is the separate property interest, determine the fair market value of the separate property as of the date of divorce, and apportion the fair market value of the separate property as of the date of divorce by giving the separate property owner an interest equal to the separate property interest and giving the community the balance of the fair market value. *Dorbin v. Dorbin*, 1986-NMCA-114, 105 N.M. 263, 731 P.2d 959; *Trego v. Scott*, 1998-NMCA-080, 125 N.M. 323, 961 P.2d 168, cert. denied 125 N.M. 322, 961 P.2d 167.

Apportionment of separate and community interests. — In the apportionment of separate and community interests in separate property that has been enhanced by community efforts, the court may consider fair market value or equity and use a rate of return on the fair market value or on the equity, in its discretion, recognizing that the two rates would be different and considering appropriate data to determine what the applicable percentage would be. *Trego v. Scott*, 1998-NMCA-080, 125 N.M. 323, 961 P.2d 168, cert. denied 125 N.M. 322, 961 P.2d 167.

C. RETIREMENT BENEFITS.

Contingent retirement benefits. — A spouse's entitlement to half of the community interest in a pension plan earned during coverture does not rest upon whether the employee's interest was vested at the time of divorce, but whether the employee's rights in the pension constitute a property interest or right obtained with community funds or labor, while rights to benefits under the retirement plan may never vest or mature due to circumstances and unforeseeable occurrences, the spouse is entitled to have the spouse's portion of the contingent interest valued and divided. *Berry v. Meadows*, 1986-NMCA-002, 103 N.M. 761, 713 P.2d 1017.

Division of future disability benefits. — To the extent the community contributed, a husband's future federal civil service disability benefits are community property subject to division upon dissolution of a marriage. *Hughes v. Hughes*, 1981-NMSC-110, 96 N.M. 719, 634 P.2d 1271, superseded by statute, *Koppenhaver v. Koppenhaver*, 1984-NMCA-017, 101 N.M. 105, 678 P.2d 1180.

Retirement benefits. — The rule for distribution of a nonemployee spouse's interest in a retirement plan, whatever the rule is, should be applied only in the absence of an agreement between the spouses on the subject. *Ruggles v. Ruggles*, 1993-NMSC-043, 116 N.M. 52, 860 P.2d 182.

The "lump sum" method is the preferable one for satisfying the nonemployee spouse's claim to her community interest in her spouse's retirement plan, and the trial court should have discretion in implementing that method, alone or in combination with other methods, including (in an appropriate case) the "reserved jurisdiction" method, in distributing the nonemployee spouse's interest upon dissolution. *Ruggles v. Ruggles*, 1993-NMSC-043, 116 N.M. 52, 860 P.2d 182.

Applying retirement penalties. — Absent an express agreement by the parties to the contrary, the only retirement penalties to be imposed against the nonemployee spouse's share of the pension being distributed pursuant to a "pay-as-it-comes in" method are those penalties that were actually applied to calculate the employee spouse's pension benefits, not any hypothetical penalties. *Franklin v. Franklin*, 1993-NMCA-077, 116 N.M. 11, 859 P.2d 479, cert. denied, 115 N.M. 795, 858 P.2d 1274.

Value of fully vested pension. — When the community interest in a pension is fully vested and matured, the trial court should value the retirement benefits as a whole, including the value of the survivor's benefit provision of the retirement plan, and consider such value in apportioning each party's share of the total retirement benefits. *Irwin v. Irwin*, 1996-NMCA-007, 121 N.M. 266, 910 P.2d 342.

Effect of timing of receipt of retirement benefits. — Where the parties entered into a marital settlement agreement which provided for the payment of a share of respondent’s retirement benefits to petitioner; the marital settlement agreement was silent as to when petitioner was entitled to receive retirement benefits; respondent, who was employed by the United States Post Office, became eligible for retirement under federal retirement law in December 2005; the district court found that the parties knew and anticipated that

respondent would be eligible for retirement in December 2005, that if petitioner were entitled to receive retirement benefits only when respondent actually retired, respondent would be in absolute control of when petitioner would receive petitioner's share of the retirement benefits, and that respondent failed to show that there was any discussion, negotiation, or agreement that petitioner would be paid a share of the retirement benefits only when respondent actually retired, the district court's determination that petitioner was entitled to receive a share of retirement benefits beginning in December 2005 was supported by substantial evidence. *Garcia v. Garcia*, 2010-NMCA-014, 147 N.M. 652, 227 P.3d 621, cert. quashed, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

Retirement benefits calculation. — Where the parties entered into a marital settlement agreement which provided for the payment of a share of respondent's retirement benefits to petitioner; the parties were divorced in 1994 and respondent became eligible for retirement in 2005; the marital settlement agreement provided for a pay-as-it-comes-in approach to distribution; the marital settlement agreement was ambiguous as to the point in time when petitioner's benefits were to be valued; the marital settlement agreement provided a formula to determine petitioner's share of the retirement benefits; the formula consisted of a fraction, the denominator of which was the total number of months of credited service at respondent's retirement, instead of the total number of months of credited service as of the date of divorce; the marital settlement agreement also provided that respondent was to receive one-half of the community interest in respondent's retirement plan through the date of August 31, 1994, and that respondent was to receive one-half of the community interest in respondent's retirement plan and all of the interest respondent accrued in the retirement plan prior to the party's marriage and subsequent to August 31, 1994, the district court did not err by determining that the benefits payable to petitioner should be calculated based on respondent's average salaries at the time of retirement eligibility, as opposed to at the time of divorce, because the formula was consistent with the time rule which is customarily applied for distribution of benefits in a manner that calls for benefits valuation at the time of retirement eligibility. *Garcia v. Garcia*, 2010-NMCA-014, 147 N.M. 652, 227 P.3d 621, cert. quashed, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

Present value of retirement benefits. — The value of a spouse's vested right in a defined benefit pension plan was correctly determined to be the actuarial present value of the benefit the spouse would be entitled to receive upon the plan's maturity date, taking into account monetary contributions and current pension entitlement accrued during coverture and based on the employee's current salary. *Mattox v. Mattox*, 1987-NMCA-021, 105 N.M. 479, 734 P.2d 259.

Military retirement benefits are community property for purposes of distribution of property upon divorce. *Walentowski v. Walentowski*, 1983-NMSC-097, 100 N.M. 484, 672 P.2d 657.

The federal Uniformed Services Former Spouses' Protection Act, which allows each state to determine the marital property status of military retirement benefits, should be given retroactive application to the date of the decision in *McCarty v. McCarty*, 453 U.S. 210 (June 25, 1980). *Walentowski v. Walentowski*, 1983-NMSC-097, 100 N.M. 484, 672 P.2d 657.

Waived military retirement pay may not be treated as property divisible upon divorce. — Federal law preempts any state from treating as "property divisible upon divorce" military retirement pay that has been waived in order to receive veteran's disability benefits. *Russ v. Russ*, 2021-NMSC-014, *rev'g* 2020-NMCA-008.

New Mexico courts must apply federal law, not state law, to determine the retroactivity of a federal rule related to military retirement. — Where husband's and wife's 2006 marriage settlement agreement provided that husband had an interest in his retired military pay, which is divisible in divorce proceedings, and stipulated that wife shall receive fifty percent of husband's disposable retired pay which was earned during the term of the parties' marriage, and where eight years later, husband waived his entitlement to retired military pay in order to instead receive Combat Related Special Compensation (CRSC), a disability benefit, thereby eliminating wife's monthly percentage of husband's retirement pay, and where the New Mexico court of appeals determined that the United States supreme court's decision in Howell v. Howell, 137 S.Ct. 1400 (2017), permitted husband's unilateral election to receive CRSC in lieu of retired pay and prohibited a district court from treating as "property divisible upon divorce" military retirement pay that has been waived to receive veterans' disability, but further determined that Howell announced a new rule of federal law that does not apply retroactively in New Mexico, the court of appeals erred in denying retroactive application of Howell because when a new federal rule of law is announced by the United States supreme court in a civil case, it always applies retroactively; federal law does not allow states to apply their own law to supplant a rule of federal law. *Russ v. Russ*, 2021-NMSC-014, *rev'g* 2020-NMCA-008.

New principle of law related to military retirement pay not applied retroactively. — Where, upon husband and wife's divorce, the parties entered into a marital settlement agreement (MSA) providing wife with fifty percent of husband's disposable retirement pay which was earned during the term of their marriage, and where, eight years after the divorce, husband waived his retirement pay in order to receive disability-based combat related special compensation, thereby eliminating wife's monthly percentage of husband's retirement pay, the district court's order requiring husband to pay wife what they agreed to in the MSA was inconsistent with the United States supreme court's recent decision in *Howell v. Howell*, 137 S.Ct. 1400 (2017), which held that a state court's capacity to order reimbursement or indemnification of post-divorce waived retirement pay in an effort to restore past marital settlement agreements or its own past order dividing marital assets is expressly preempted, and therefore, impermissible in New Mexico. *Howell*, however, establishes a new principle of law by abrogating established New Mexico precedent that protects a wife's interest, awarded by decree, in her husband's military retirement benefits, and retroactive application of *Howell* would

unjustly and inequitably undo significant provisions of marital settlement agreements that were based on New Mexico precedent. *Russ v. Russ*, 2020-NMCA-008, cert. granted.

Indemnity provision. — Federal law does not prohibit state courts from enforcing indemnity provisions which ensure the payment of a minimum sum to a non-military spouse as the spouse's share of a community pension, provided that veteran's disability benefits are not specified as the source of such payments. *Scheidel v. Scheidel*, 2000-NMCA-059, 129 N.M. 223, 4 P.3d 670.

Nondisability military retirement pay is separate property of the spouse who is entitled to receive it, and it is not subject to division upon dissolution of marriage. *Espinda v. Espinda*, 1981-NMSC-098, 96 N.M. 712, 634 P.2d 1264, superseded by statute, *Ruggles v. Ruggles*, 1993-NMSC-043, 116 N.M. 52, 860 P.2d 182.

Nondisability military retirement pay. — That part of *Espinda v. Espinda*, 1981-NMSC-098, 96 N.M. 712, 634 P.2d 1264, holding that the character of nondisability military retirement benefits is separate property is superseded to the extent authorized by 10 U.S.C. § 1408. *Walentowski v. Walentowski*, 1983-NMSC-097, 100 N.M. 484, 672 P.2d 657.

Disposition of retirement or pension benefits. — To dispose of retirement or pension benefits in a divorce proceeding, the trial court should make a determination of the present value of the unmatured pension benefits with a division of assets which includes this amount, or divide the pension on a "pay as it comes in" system. This way, if the community has sufficient assets to cover the value of the pension, an immediate division would make a final disposition; but if the pension is the only valuable asset of the community and the employee spouse could not afford to deliver either goods or property worth the other spouse's interest, then the trial court may award the nonemployee spouse his/her portion as the benefits are paid. *Copeland v. Copeland*, 1978-NMSC-011, 91 N.M. 409, 575 P.2d 99.

III. RESTRAINING PROPERTY USE.

Restraining order application confers jurisdiction over property. — Application for a restraining order to prevent husband or wife from disposing of community property effectively confers jurisdiction over the property on the court, while mere institution of divorce proceedings will not. *Lohbeck v. Lohbeck*, 1963-NMSC-071, 72 N.M. 78, 380 P.2d 825.

Order restraining disposition of stock conferred jurisdiction. — Where divorced wife made motion in one division of district court to vacate divorce decree because husband had failed to disclose corporate stock, issuance of order restraining disposition of such stock conferred jurisdiction of the res on the divorce court and subjected stock to the jurisdiction of the court having jurisdiction of the marital status of the parties even though the court did not take actual possession of the res, although execution had

issued from another division of district court to be levied on stock to satisfy a judgment against husband. *Greathouse v. Greathouse*, 1958-NMSC-032, 64 N.M. 21, 322 P.2d 1075.

Transferring community property during pendency of divorce. — Action by husband of transferring certain community property of which he was principal stockholder, during pendency of a divorce action, does not constitute actionable contempt. *Lohbeck v. Lohbeck*, 1963-NMSC-071, 72 N.M. 78, 380 P.2d 825.

IV. ALLOWING AND MODIFYING ALIMONY.

A. IN GENERAL.

Purpose of alimony. — Alimony is not intended to constitute a penalty imposed upon a husband, but that it is a personal right intended for the purpose of one spouse supporting the other after losing sustenance and the support of coverture, although alimony is not to be condoned when it amounts to one spouse abdicating that spouse's responsibility to support and maintain themselves. *Lovato v. Lovato*, 1982-NMSC-052, 98 N.M. 11, 644 P.2d 525.

Subsection F of this section is construed to mean what it says. — In cases in which the marriage lasted twenty or more years, the court must retain jurisdiction to consider spousal support when the final decree was silent as to such support. *Rhoades v. Rhoades*, 2004-NMCA-020, 135 N.M. 122, 85 P.3d 246.

Subsection F provides express authority for a district court to award spousal support. *Rhoades v. Rhoades*, 2004-NMCA-020, 135 N.M. 122, 85 P.3d 246.

Reduction in spouse's share of military retirement benefits. — Subsection F of this section is read to permit the award of spousal support where the cause for the award develops from financial inequity resulting from a reduction in a spouse's share of military retirement benefits due to an increase in disability benefits. *Rhoades v. Rhoades*, 2004-NMCA-020, 135 N.M. 122, 85 P.3d 246.

Effect of bankruptcy court's action. — Where the district court had independent statutory authority on which to award spousal support, a bankruptcy court's factual findings, legal conclusions, and judgment had no preclusive effect. *Rhoades v. Rhoades*, 2004-NMCA-020, 135 N.M. 122, 85 P.3d 246.

Need is first criteria in determining alimony. *Weaver v. Weaver*, 1983-NMSC-063, 100 N.M. 165, 667 P.2d 970; Lebeck v. Lebeck, 1994-NMCA-103, 118 N.M. 367, 881 P.2d 727.

Alimony is personal right and not a property right, and as such, it would not continue without end if the circumstances have changed due to the passage of time, and the recipient is able to support herself. *McClure v. McClure*, 1976-NMSC-042, 90

N.M. 23, 559 P.2d 400; *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

The right of alimony is a continuation of the right to support, and is a personal and not a property right. *Hazelwood v. Hazelwood*, 1976-NMSC-074, 89 N.M. 659, 556 P.2d 345; *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Right to alimony under New Mexico case law is a continuation of the right to support and is personal and not a property right. *Cain v. Cain*, 1978-NMSC-014, 91 N.M. 423, 575 P.2d 607.

Right to alimony is continuation of right to support. — It is a personal and not a property right. In New Mexico this right is recognized, but it is not an absolute right. The award or denial of alimony rests within the sound discretion of the trial court in making a determination as to what is just and proper under the circumstances. *Burnside v. Burnside*, 1973-NMSC-091, 85 N.M. 517, 514 P.2d 36.

Purpose of alimony. — Alimony is the support which a court decrees in favor of either party as a substitute for, and in lieu of, the common-law or statutory right to marital support during coverture. *Chavez v. Chavez*, 1971-NMSC-062, 82 N.M. 624, 485 P.2d 735.

Alimony provisions severable from property settlement provisions. — The provisions of a divorce decree regarding alimony are entirely severable from the provisions as to property settlement. *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Appellate court only examines evidence to determine abuse of discretion. — The court in a divorce action is authorized by the statutes to allow the wife such a reasonable portion of the husband's separate property, or such a reasonable sum of money to be paid by the husband, either in a single sum, or in installments, as alimony, as under the circumstances of the case may seem just and proper; and may modify and change any order in respect to alimony allowed the wife, whenever circumstances render such change proper; therefore, on appeal, an appellate court will only examine the evidence to determine whether there was an abuse of discretion in fixing an amount which was contrary to all reason. *Michelson v. Michelson*, 1974-NMSC-022, 86 N.M. 107, 520 P.2d 263; *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

The district court acted within its discretion in denying interim support. — In a divorce proceeding, where wife appealed the district court's characterization of assets and debts as separate or community property and the court's division of marital assets and debts between her and husband, and where wife claimed that she was entitled to interim support and that the district court's decision to deny her those funds was without support in the record, the district court did not abuse its discretion in choosing to equitably divide the parties' community debts and assets rather than awarding wife

interim support, based on findings that wife's calculation of her expenses during the course of the litigation, and her list of the community debts she had allegedly paid, were not credible and lacked supporting evidence and that wife's income was substantial and was going to continue after the decree was entered. Wife failed to show that the district court's reasons for denying interim spousal support were either unreasonable or unsupported by the evidence. *Autrey v. Autrey*, 2022-NMCA-042, cert. granted.

Review of alimony award. — In considering an award of alimony, the supreme court examines the record only to determine if the trial court abused its discretion by fixing an amount that was contrary to all reason. *Psomas v. Psomas*, 1982-NMSC-154, 99 N.M. 606, 661 P.2d 884; *Howard v. Howard*, 1983-NMSC-050, 100 N.M. 105, 666 P.2d 1252; *overruled in part by Walentowski v. Walentowski*, 1983-NMSC-097, 100 N.M. 484, 672 P.2d 657; Gallemore v. Gallemore, 1967-NMSC-225, 78 N.M. 434, 432 P.2d 399; *Sloan v. Sloan*, 1967-NMSC-080, 77 N.M. 632, 426 P.2d 780; *Chrane v. Chrane*, 1982-NMSC-089, 98 N.M. 471, 649 P.2d 1384.

Award altered only if abuse of discretion shown. — It is within the sound discretion of the district court to determine whether to award alimony. An alimony award will be altered only upon a showing of an abuse of discretion. *Hertz v. Hertz*, 1983-NMSC-004, 99 N.M. 320, 657 P.2d 1169.

Factors to consider in awarding temporary or permanent alimony. — When a district court finds that a spouse is entitled to periodic spousal support for normal living expenses, but may become self-sufficient in the future, the court ordinarily should not order that periodic support terminate automatically at a future date when the recipient spouse may become self-sufficient. The proper course is to order such support for an indefinite time, with the payor spouse bearing the burden to move for reduction or termination of support when the recipient spouse has become more self-sufficient. *Rabie v. Ogaki*, 1993-NMCA-096, 116 N.M. 143, 860 P.2d 785.

Separation contract cutting off support contrary to public policy. — Provisions of a separation contract which would cut the plaintiff off without support from her former spouse in the case of spouse's remarriage though plaintiff remained single, or in the case of spouse's change of occupation, are void as contrary to public policy. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

Missouri decree entitled to full faith and credit. — A Missouri divorce decree which was a final and proper judgment of the Missouri court concerning alimony, child support and custody fully litigated and agreed to by all parties was entitled to full faith and credit under U.S. Const., art. IV, § 1. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Allowance of alimony as due process violation disfavored. — The contention that an allowance of alimony is in violation of the due process clause of the federal and state constitutions is looked upon with disfavor. *Bardin v. Bardin*, 1947-NMSC-003, 51 N.M. 2, 177 P.2d 167.

Alimony is not intended as penalty against husband. *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Alimony is intended to fulfill husband's obligation to provide support needed by the wife in accordance with the husband's ability to pay. *Hurley v. Hurley*, 1980-NMSC-067, 94 N.M. 641, 615 P.2d 256.

If alimony issue raised, parties entitled to present evidence. — Where plaintiff contended a need on her part for a continuation of her right to support and defendant denied this need, the issue of alimony was raised, and a proper disposition of this factual issue entitled plaintiff to introduce evidence and be fully heard in support of her contention. The trial court, by disposing of the issue on the basis of the colloquy between it and counsel, denied plaintiff her right. *Burnside v. Burnside*, 1973-NMSC-091, 85 N.M. 517, 514 P.2d 36.

This section does not authorize award of alimony subsequent to entry of final decree, when that decree did not initially award any alimony, unless the claimant is entitled to relief under Rule 1-059 or 1-060 NMRA. *Gruber v. Gruber*, 1974-NMSC-055, 86 N.M. 327, 523 P.2d 1353; *Benavidez v. Benavidez*, 1983-NMSC-032, 99 N.M. 535, 660 P.2d 1017.

Alimony justified even though spouse receives property. — Alimony may be justified even though the wife eventually receives a large amount of property. *Mitchell v. Mitchell*, 1986-NMCA-028, 104 N.M. 205, 719 P.2d 432, cert. denied, 104 N.M. 84, 717 P.2d 60.

In a separation agreement provisions for alimony are severable from provisions as to property, and where the separation agreement was merged in the decree of divorce and became a part thereof, the provision for alimony is, by reason of the statute authorizing the court to modify provision for alimony at any time, subject to change. *Scanlon v. Scanlon*, 1955-NMSC-035, 60 N.M. 43, 287 P.2d 238.

Award of wife's share of community property not alimony. — An award to a wife of her share of the community property, the payment of which the court properly secured with a lien on the husband's separate property, was not tantamount to an award of alimony. *Ridgway v. Ridgway*, 1980-NMSC-055, 94 N.M. 345, 610 P.2d 749.

Court may order community residence sold where spouse needs immediate, regular income. — Despite a husband's offer to give the wife his share in the community residence in lieu of alimony, the trial court's decision to award alimony and order the sale of the residence is proper where the wife demonstrates a need for immediate, regular income for her necessities. *Psomas v. Psomas*, 1982-NMSC-154, 99 N.M. 606, 661 P.2d 884, *overruled in part by Walentowski v. Walentowski*, 1983-NMSC-097, 100 N.M. 484, 672 P.2d 657.

Court may order husband to sign note for wife's residence. — Court may order ex-husband to cosign a note or enforce that order by appointing a special master to sign a note on the husband's behalf subsequent to entry of a marital settlement agreement between parties, in light of a previous order setting out the obligations of the husband regarding a new residence for his ex-wife and children. *Wolcott v. Wolcott*, 1984-NMCA-089, 101 N.M. 665, 687 P.2d 100.

Settlement contracts which provide for payments in lieu of alimony are subject to inquiry and modification by the trial court. *Ferret v. Ferret*, 1951-NMSC-076, 55 N.M. 565, 237 P.2d 594.

Defenses available against payment of support. — In a proceeding for the enforcement of a support order, any valid defense against payment may be raised, including the defense of payment from some other source. *Mask v. Mask*, 1980-NMSC-134, 95 N.M. 229, 620 P.2d 883.

Power to award alimony independent of being guilty. — This section constitutes a clear and unequivocal grant of power to district courts to award the wife, in divorce actions, reasonable alimony, in installments or lump sums, independent of which spouse may have been the guilty party. The power is limited only to the grant of a reasonable sum, as that factor is limited by the facts of the particular case. *Redman v. Redman*, 1958-NMSC-096, 64 N.M. 339, 328 P.2d 595.

Alimony may be awarded independent of guilt. — District courts are empowered to award to the wife, in divorce actions, reasonable alimony, in installments or lump sum, independent of which spouse may have been the guilty party, and, on appeal in such case, the matter for review was whether the trial court abused its discretion in fixing the amount of the award under the circumstances of the case. *Cassan v. Cassan*, 1921-NMSC-060, 27 N.M. 256, 199 P. 1010.

Granting alimony where not demanded. — A divorce decree granting the wife as alimony the difference between the value of the community property which she received and the value of the community property which the husband received was affirmed despite the fact that alimony was not demanded in the wife's petition as required by Rule 1-054(c) NMRA in judgment by default, since the essential nature of the decree was an equitable division of the community property of the parties for which the wife had petitioned. *Worland v. Worland*, 1976-NMSC-027, 89 N.M. 291, 551 P.2d 981.

Even though not specifically requested, the court may, in an effort to equitably divide the community property, grant an award of alimony. *Ridgway v. Ridgway*, 1980-NMSC-055, 94 N.M. 345, 610 P.2d 749.

Since divorce decree is silent on any award of alimony to wife, that judgment is res judicata on the question of alimony and precludes a later alimony award. Furthermore, a general reservation of jurisdiction in the decree is ineffective to uphold an award of

alimony allowed after the entry of a final decree of divorce. *Unser v. Unser*, 1974-NMSC-063, 86 N.M. 648, 526 P.2d 790.

Lump sum in lieu of alimony. — It is within the power of the trial court to award and to set over to the wife a lump sum in lieu of alimony out of the husband's interest in the community. *Harper v. Harper*, 1950-NMSC-024, 54 N.M. 194, 217 P.2d 857.

Continuing jurisdiction. — When Subsection F refers to court's continuing jurisdiction "over proceedings involving periodic spousal support payments," it is referencing the support payment provisions in Subsection B(1)(a), (b), and (c) of this section. *Edens v. Edens*, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Alimony installments as absolute and vested. — Where a decree is rendered for alimony and is made payable in future installments the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, unless by the law of the state in which a judgment for future alimony was rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive installments ordered by the decree to be paid. This principle has also been applied to child support. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070).

Accrued alimony. — Once a foreign court awards alimony and the installments become due, and where, under the law of that state, accrued, alimony cannot be cancelled; it therefore vests when due. The right to those accrued installments of alimony becomes a fixed property right. The judgment, insofar as the accrued alimony is concerned, becomes a nonmodifiable judgment and is enforceable and entitled to full faith and credit in all states under the U.S. Const., art. IV, § 1. *Cain v. Cain*, 1978-NMSC-014, 91 N.M. 423, 575 P.2d 607.

Court may disregard original alimony agreement and make own award. — Under Subsection B(2), the court may disregard a stipulated agreement for alimony incorporated in an original divorce decree and make an award that the court deems fair. *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Mental health of recipient. — The provision requiring the trial court to consider the health of a spouse seeking spousal support implicitly requires that the court also consider the mental health of a spouse where a prima facie showing has been made concerning the recipient spouse's alleged current mental condition. *Martinez v. Martinez*, 1997-NMCA-125, 124 N.M. 313, 950 P.2d 286.

B. AMOUNT OF ALIMONY.

No fixed rule by which amount of permanent alimony can be determined, since each case must be decided upon its own relevant facts, in the light of what is fair and

reasonable. *Sloan v. Sloan*, 1967-NMSC-080, 77 N.M. 632, 426 P.2d 780; *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Important factors to consider in determining permanent alimony. — There is no fixed rule by which the amount of permanent alimony can be determined, since each case must be decided upon its relevant facts in the light of what is fair and reasonable; however, some of the important factors to be considered in a determination of the amount of alimony to be awarded are the needs of the wife, her age, health and the means to support herself, the earning capacity and the future earnings of the husband, the duration of the marriage and the amount of property owned by the parties. *Michelson v. Michelson*, 1974-NMSC-022, 86 N.M. 107, 520 P.2d 263; *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167; *Hurley v. Hurley*, 1980-NMSC-067, 94 N.M. 641, 615 P.2d 256; *Ellsworth v. Ellsworth*, 1981-NMSC-132, 97 N.M. 133, 637 P.2d 564.

Factors to be considered by a district court in determining whether an alimony award is just and proper include the duration of the marriage, the wife's needs, her age, her health, the means she has available to support herself, the husband's earning capacity and the amount of property owned by each of the parties. *Hertz v. Hertz*, 1983-NMSC-004, 99 N.M. 320, 657 P.2d 1169; *Rabie v. Ogaki*, 1993-NMCA-096, 116 N.M. 143, 860 P.2d 785.

Circumstances of both spouses considered. — The total circumstances of the supporting spouse as well as those of the recipient spouse must be considered in determining the amount of alimony, in order to avoid hardship on the supporting spouse and not to permit the recipient spouse to abdicate the responsibility for his or her own support and maintenance. *Mitchell v. Mitchell*, 1986-NMCA-028, 104 N.M. 205, 719 P.2d 432, cert. denied, 104 N.M. 84, 717 P.2d 60.

Factors to be excluded in determining alimony. — A wife is not entitled to alimony in order to afford herself an opportunity to achieve an earning capacity reasonably comparable to that of her husband, nor in order to support herself in a style reasonably comparable to that enjoyed by the parties during the marriage. These are not factors upon which alimony is determined. *Hertz v. Hertz*, 1983-NMSC-004, 99 N.M. 320, 657 P.2d 1169.

Subchapter-S corporation income. — Distributions from a Subchapter-S corporation that exceed the amount necessary to pay corporate business expenses or the shareholder-spouse’s tax obligations are considered income for purposes of calculating family support obligations. All Subchapter-S corporation funds distributed to the shareholder-spouse must be attributed to the shareholder-spouse as income for spousal support purposes unless and until the shareholder-spouse can demonstrate what portion of the corporate distribution was used for business purposes or to offset the payment of income taxes resulting from any K-1 allocations. *Clark v. Clark*, 2014-NMCA-030, cert. denied, 2013-NMCERT-012.

Where respondent was the sole owner and operator of a Subchapter-S corporation; during the marriage of the parties, respondent received both a regular salary from the corporation as W-2 income and additional cash distributions as non-W-2 income; because the non-W-2 income distributed by the corporation did not match the K-1 allocations from the corporation that were reported on the parties's income tax returns, the district court found that it could not determine how much income respondent actually received from the non-W-2 income distributions, disregarded the non-W-2 income distributions in its calculation of respondent's income, and calculated respondent's income on the W-2 income alone, it was an abuse of discretion for the district court to exclude all of respondent's non-W-2 income for purposes of calculating family support obligations. *Clark v. Clark*, 2014-NMCA-030, cert. denied, 2013-NMCERT-012.

Duration of spousal support. — Where petitioner did not work outside the home during the parties' marriage; respondent was the owner and operator of a Subchapter-S corporation, which was respondent's separate property; petitioner was 60 years of age and had no known prospects for any future earning capacity; the parties did not introduce any evidence of petitioner's earning capacity and did not anticipate petitioner's return to work as a viable reality; respondent was 66 years of age and due to respondent's age and health, respondent wanted to retire; and the district court awarded petitioner transitional support for an eighteen-month period without any evidence addressing petitioner's' future employability or potential income, the district court abused its discretion when it limited the duration of spousal support to eighteen months. *Clark v. Clark*, 2014-NMCA-030, cert. denied, 2013-NMCERT-012.

Nature of community assets awarded to be considered in alimony determination. — The trial court must look to the nature of the community assets given to each of the parties upon division in determining alimony. *Ellsworth v. Ellsworth*, 1981-NMSC-132, 97 N.M. 133, 637 P.2d 564.

Where the record does not reflect that the trial court considered the contrasting nature of the assets awarded to each party in evaluating the relative needs of the parties and reaching the amount of alimony to be awarded, the appellate court may remand to the trial court for further proceedings to reconsider the award of alimony. *Ellsworth v. Ellsworth*, 1981-NMSC-132, 97 N.M. 133, 637 P.2d 564.

Wife may testify on own medical condition. — In divorce and alimony action, trial court did not err in permitting wife to testify as to her present medical condition. *Russell v. Russell*, 1984-NMSC-010, 101 N.M. 648, 687 P.2d 83.

Proceeds from sale of property generally not considered. — While income (rental, interest, lease, etc.) produced by property may normally be considered in setting alimony, proceeds from selling the property itself should not be considered except in such rare cases where fairness requires. *Ellsworth v. Ellsworth*, 1981-NMSC-132, 97 N.M. 133, 637 P.2d 564.

Trial court did not abuse its discretion in awarding wife $2,500 in alimony, payable in monthly installments of $125, when granting her a divorce, where husband owned $40,000 tourist court as separate property, and where record showed that whatever money was made from the tourist court operation was due in fact to the work of the wife, and at the time of trial she was making $30 per week as a waitress. *Redman v. Redman*, 1958-NMSC-096, 64 N.M. 339, 328 P.2d 595.

Award not abuse of discretion. — An award of alimony of $4,000 in a lump sum out of an estate of $8,000, part of which is community property, and out of which sum appellee has to pay attorney fees, costs of the suit and support herself in ill health and destitute circumstances is not an abuse of discretion. *Golden v. Golden*, 1937-NMSC-021, 41 N.M. 356, 68 P.2d 928.

Award not abuse of discretion. — An award of $75 per month for 12 months to a 31-year-old, able-bodied wife capable of working as she had done before and during her married life is not so little as to be an abuse of discretion by the trial court. *Jones v. Jones*, 1960-NMSC-106, 67 N.M. 415, 356 P.2d 231.

C. MODIFICATION OF AWARD.

Automatic alimony increases. — It is not proper to include provisions in divorce decrees which provide for automatic alimony increases, whether they are expressed as escalator clauses, in terms of a percentage of a supporting spouse's income, or based upon a sliding-scale formula. *Dunning v. Dunning*, 1986-NMSC-036, 104 N.M. 295, 720 P.2d 1236.

Reopening support decrees. — The public policy of this state discourages repeated attempts to reopen support decrees. This policy places a burden upon the movant to show not just a substantial factual change, but also that, all things considered, the change justifies a new support order. Placing the burden of persuasion on the moving party implements public policy by making it more difficult to reopen the prior support order and easier to defend it. *Cherpelis v. Cherpelis*, 1996-NMCA-037, 121 N.M. 500, 914 P.2d 637, cert. denied, 121 N.M. 444, 913 P.2d 251.

Lump sum alimony, once awarded, cannot be modified. *Michaluk v. Burke*, 1987-NMCA-044, 105 N.M. 670, 735 P.2d 1176.

This section's provision permitting modification does not apply to lump sum awards under Subsection B(1)(d) of this section and Subsection B(1)(e) of this section. *Edens v. Edens*, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Single sum payment. — Where the parties entered into a marital settlement agreement which provided that the husband would pay the wife monthly support in the amount of one-twelfth of $31,375 per year for the years 2005-2009, $39,000 per year for the years 2010-2014, and $23,000 per year for the years 2015-2019, and which

provided that the support would end if the wife dies, the spousal support was a single sum and the district court did not have jurisdiction to modify it. *Pruyn v. Lam*, 2009-NMCA-103, 147 N.M. 39, 216 P.3d 804, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940.

Estate entitled to unpaid lump sum award. — Where a wife dies before actual receipt to a lump sum alimony award, her estate is entitled to collect it. *Michaluk v. Burke*, 1987-NMCA-044, 105 N.M. 670, 735 P.2d 1176.

Changes in circumstances of divorced parties may warrant reducing or terminating alimony obligations. *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Eligibility for federal benefits not change of circumstances. — Absent findings that the husband was unable to continue to provide alimony, that the wife was no longer in financial need, or that she was capable of self support, the wife's eligibility for or receipt of federal Supplemental Security Income benefits did not amount to a change of circumstances justifying termination of alimony. *Sheets v. Sheets*, 1987-NMCA-128, 106 N.M. 451, 744 P.2d 924.

Contract for alimony incorporated in divorce decree becomes merged into decree and the decree is subject to modification even when it contains a provision that the agreement cannot be amended without the consent of both parties. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Authority to modify alimony award depends on law of jurisdiction which granted the award. *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Due process necessary to modify alimony judgment. — Notice and a fair hearing must be afforded both parties to meet the requirements of due process, and therefore a court cannot modify a judgment when neither party has sought such relief and the issue has not been implicitly or explicitly consented to by the parties. Where the husband did not seek a modification of alimony, and neither party consented to a modification, the trial court's improper modification of future alimony was reversible error. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Alimony awards which provide for automatic increases result in alimony modifications without requiring evidence of changed circumstances and ignore the basic criteria of the recipient's need and the supporting spouse's ability to pay which must be established by the party seeking to demonstrate need. *Dunning v. Dunning*, 1986-NMSC-036, 104 N.M. 295, 720 P.2d 1236.

Public policy on modification of alimony awards is established by Subsection B(2) which gives the district court the authority to change any order with respect to alimony allowed to either spouse "whenever the circumstances render such change proper." *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Subsection B(2) becomes part of any agreement for alimony and the contract for alimony that is incorporated in a decree becomes merged and thus subject to equitable modification, even when it contains a provision that the agreement cannot be amended without the consent of both parties. *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Continuing jurisdiction to modify and enforce. — A court having jurisdiction of a divorce proceeding has continuing jurisdiction to modify and enforce its decrees. *Zarges v. Zarges*, 1968-NMSC-151, 79 N.M. 494, 445 P.2d 97.

Effect of expiration of obligation. — When the obligation to pay alimony expires, there is no longer any provision for alimony remaining. Under these circumstances, the court has no power to alter or amend alimony. Because however, the wife filed the motion before the alimony expired, the court had jurisdiction to modify the award. *Deeds v. Deeds*, 1993-NMCA-023, 115 N.M. 192, 848 P.2d 1119.

Since district court reserved jurisdiction to modify alimony provision, it could modify it by increasing, diminishing, or abating it entirely. *Mindlin v. Mindlin*, 1937-NMSC-012, 41 N.M. 155, 66 P.2d 260; *Lord v. Lord*, 1932-NMSC-072, 37 N.M. 24, 16 P.2d 933, *modified*, 1933-NMSC-055, 37 N.M. 454, 24 P.2d 292.

Reservation of alimony. — So long as some alimony is reserved by the trial judge, the trial judge has continuing power to alter or amend the alimony award either upwards or downwards, as changing circumstances warrant. *In re Danley*, 14 Bankr. 493 (Bankr. D.N.M. 1981).

No authority to make retroactive modification of accrued and vested payments. — The authority to modify an alimony decree does not include the authority to make a retroactive modification of accrued and vested payments, unless the foreign state which entered the alimony decree had authority to do so or had done so prior to the maturity of the payments. *Hazelwood v. Hazelwood*, 1976-NMSC-074, 89 N.M. 659, 556 P.2d 345.

Generally a court cannot retroactively modify a support order that has accrued and become vested. *Mask v. Mask*, 1980-NMSC-134, 95 N.M. 229, 620 P.2d 883; *Chrane v. Chrane*, 1982-NMSC-089, 98 N.M. 471, 649 P.2d 1384.

De facto marriage not ground for retroactive modification of alimony. — A "de facto marriage," whatever may be required to constitute such, does not constitute grounds for retroactively modifying or abating accrued alimony payments; however, the district court does have discretion to modify prospectively or terminate an alimony award, if the circumstances so warrant, and since the termination of alimony was largely predicated on its finding of a de facto marriage, the judgment of the trial court was reversed and the cause remanded. *Hazelwood v. Hazelwood*, 1976-NMSC-074, 89 N.M. 659, 556 P.2d 345.

Improper basis for alimony reduction. — Voluntary assumption of excessive financial burdens is not a proper basis for alimony reduction. *Russell v. Russell*, 1984-NMSC-010, 101 N.M. 648, 687 P.2d 83.

Change in wife's knowledge of husband's retirement plan not changed circumstances. — Where the only change of circumstances with respect to a provision for alimony in a divorce decree is a change in the knowledge of the wife as to the nature of the husband's retirement plan and neither the retirement plan nor the financial condition of the parties has changed at all, the strict test for changed circumstances is not met and the original order may not be modified. *Parker v. Parker*, 1979-NMSC-037, 92 N.M. 710, 594 P.2d 1166.

Ability of alimony recipient to support self constitutes change. — If the recipient of alimony becomes able to support herself after the passage of a period of time, this constitutes a change in circumstances that has been held to warrant termination of the husband's alimony obligation. *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Bankruptcy discharge is changed circumstance. — Where payment by the debtor of debts later discharged in bankruptcy is a significant factor in the initial support award, a bankruptcy discharge is a changed circumstance permitting modification of the award. *In re Danley*, 14 Bankr. 493 (Bankr. D.N.M. 1981).

Effect of bankruptcy proceedings on debts ordered to be paid in lieu of alimony. *Dirks v. Dirks*, 15 Bankr. 775 (Bankr. D.N.M. 1981).

No change in alimony payments absent support from recipient's paramour. — Where alimony recipient is not presently receiving any part of her support from a paramour and there is no showing that she will receive any support from him in the future because the couple has separated, no grounds exist for prospective reduction or cancellation of alimony payments. *Brister v. Brister*, 1979-NMSC-038, 92 N.M. 711, 594 P.2d 1167.

Increase in child support while reducing alimony payments. — Where husband asked for relief from alimony payments due to substantial change in circumstances, trial judge did not err in his unilateral decision to increase child support award in light of reduction in alimony award even though wife did not request modification of future child support payments. *Altman v. Altman*, 1984-NMCA-060, 101 N.M. 380, 683 P.2d 62.

D. TERMINATION OF ALIMONY.

Remarriage of spouse. — Spousal support designated as non-modifiable under 40-4-7 NMSA 1978 is not subject to the presumption of termination upon the remarriage of the receiving spouse. *Galassi v. Galassi*, 2009-NMCA-026, 145 N.M. 630, 203 P.3d 161.

Where the plaintiff and the defendant entered into a marital settlement agreement which was approved by the court in the final decree of dissolution of marriage; the agreement provided for the payment of spousal support by the plaintiff to the defendant; the agreement provided that the spousal support would be non-modifiable for five years; neither the agreement nor the final decree of dissolution of marriage mentioned the effect of the defendant's remarriage on the obligation to pay spousal support; the defendant remarried within the five year period; and there were no exceptional circumstances necessitating the continuation of spousal support, the obligation of the plaintiff to pay spousal support to the defendant did not terminate upon the remarriage of the defendant. *Galassi v. Galassi*, 2009-NMCA-026, 145 N.M. 630, 203 P.3d 161.

Cessation of alimony upon remarriage. — Where the provisions of the decree concerning alimony seem perfectly clear and unambiguous, providing, as they do, that "in the event of her remarriage said payments shall cease," the cessation of alimony did not turn on the status of the remarriage as being valid, and when the event occurred the obligation to pay alimony ceased. *Chavez v. Chavez*, 1971-NMSC-062, 82 N.M. 624, 485 P.2d 735.

In New Mexico, men are not legally obliged to support the wives of others, and instances in which alimony should be continued after remarriage have been characterized as being "extremely rare and exceptional." *Chavez v. Chavez*, 1971-NMSC-062, 82 N.M. 624, 485 P.2d 735.

When the wife contracts a subsequent marriage with another, thus creating a duty of support in him, good public policy does not demand that she continue to receive support from her first husband unless she prove exceptional circumstances. *Kuert v. Kuert*, 1956-NMSC-002, 60 N.M. 432, 292 P.2d 115, superseded by statute, *Galassi v. Galassi*, 2009-NMCA-026, 145 N.M. 630, 203 P.3d 161.

Alimony ends as of date of remarriage unless conditions extraordinary. — On the application of the divorced husband to abate support payment to the divorced wife on the ground of her remarriage, such application should be granted as of the date of her remarriage unless she proves extraordinary conditions justifying continuance of the former husband's duty to support his former wife after she has become the wife of another man, and the evaluation and effect to be given these conditions rests in the sound discretion of the trial court. *Kuert v. Kuert*, 1956-NMSC-002, 60 N.M. 432, 292 P.2d 115, superseded by statute, *Galassi v. Galassi*, 2009-NMCA-026, 145 N.M. 630, 203 P.3d 161.

Proof of remarriage establishes prima facie case for modification. — Proof of his former wife's remarriage establishes the divorced husband's prima facie case for modification of alimony payments coming due subsequent to such remarriage. *Kuert v. Kuert*, 1956-NMSC-002, 60 N.M. 432, 292 P.2d 115, superseded by statute, *Galassi v. Galassi*, 2009-NMCA-026, 145 N.M. 630, 203 P.3d 161.

Since divorced wife admitted her remarriage and no proof of such exceptional circumstances as would justify a continuance of the husband's duty to support his ex-wife subsequent to her remarriage, it appeared trial court erred in awarding wife alimony accruing subsequent to her remarriage. *Kuert v. Kuert*, 1956-NMSC-002, 60 N.M. 432, 292 P.2d 115, superseded by statute, *Galassi v. Galassi*, 2009-NMCA-026, 145 N.M. 630, 203 P.3d 161.

Some court action is necessary to abate alimony if wife marries. *Mindlin v. Mindlin*, 1937-NMSC-012, 41 N.M. 155, 66 P.2d 260.

Wife's impending remarriage considered in fixing alimony. — In fixing the amount of alimony, some consideration should be given to the impending remarriage of the wife, bearing in mind that alimony is intended as a method of fulfilling the husband's obligation to provide the support needed by the wife in accordance with the husband's ability to pay. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Remarriage of husband does not warrant abrogation of alimony. — Remarriage of husband, unaccompanied by showing of inability to support present wife suitably, does not warrant abrogation of alimony. *Lord v. Lord*, 1932-NMSC-072, 37 N.M. 24, 16 P.2d 933, modified, 1933-NMSC-055, 37 N.M. 454, 24 P.2d 292.

Alimony not revived following annulment of remarriage. — Under the facts of this case alimony was not revived following annulment of wife's remarriage as the first husband is entitled to rely on the wife's remarriage and reorder his personal and financial affairs accordingly. *Chavez v. Chavez*, 1971-NMSC-062, 82 N.M. 624, 485 P.2d 735.

Live-in relationship. — Although a live-in relationship is not, by itself, grounds for terminating alimony, even where parties hold themselves out as husband and wife, the economic factors of the relationship must be examined to determine whether they alter the need of the recipient spouse. *Cherpelis v. Cherpelis*, 1996-NMCA-037, 121 N.M. 500, 914 P.2d 637, cert. denied, 121 N.M. 444, 913 P.2d 251.

Power to abate alimony payments retroactively from date of remarriage. — Changed circumstances may justify a prospective modification, or even termination, of a prior award of alimony made by a foreign state where the courts of that state have authority to make such changes in the award, and the New Mexico courts have the power to abate retroactively accrued alimony payments from the date of the remarriage of the former spouse to whom alimony has previously been awarded in this situation as well as in the case of a New Mexico award. *Hazelwood v. Hazelwood*, 1976-NMSC-074, 89 N.M. 659, 556 P.2d 345.

V. GRANTING AND MODIFYING CHILD CUSTODY AND SUPPORT.

A. IN GENERAL.

Granting and modifying child custody and support. — The Indian Child Welfare Act, 25 U.S.C. §1901 does not apply to give a tribal court exclusive jurisdiction over custody disputes in divorce proceedings. *Cherino v. Cherino*, 2008-NMCA-024, 143 N.M. 452, 176 P.3d 1184.

Trial court exclusive jurisdiction. — Trial courts are given exclusive jurisdiction of all matters relating to the guardianship, care, custody, maintenance, and education of the children. *Rhinehart v. Nowlin*, 1990-NMCA-136, 111 N.M. 319, 805 P.2d 88.

District court has jurisdiction to modify and change existing orders regarding visitation rights and support obligations. *Barela v. Barela*, 1978-NMSC-047, 91 N.M. 686, 579 P.2d 1253.

Restrictions religious practices. — In determining whether a parent should be restricted from practicing or encouraging a child in a religious belief or practice, the trial court must consider whether there exists detailed factual evidence demonstrating that the conflicting beliefs or practices of the parents pose substantial physical or emotional harm to the child, whether restricting the religious interaction between a parent and the child will necessarily alleviate the harm, and whether such restrictions are narrowly tailored so as to minimize interference with the parent's religious freedom. *Khalsa v. Khalsa*, 1988-NMCA-013, 107 N.M. 31, 751 P.2d 715, cert. denied, 107 N.M. 16, 751 P.2d 700.

Agreements between parents and third parties regarding the guardianship, care, custody, maintenance or education of children are subject to judicial modification. Implicit in every such agreement is the right of the parties and the court to amend or abrogate such agreements when circumstances necessitate and the best interests and welfare of the child so require. *In re Doe*, 1982-NMCA-094, 98 N.M. 340, 648 P.2d 798, cert. denied *sub nom. Cook v. Brownfield*, 98 N.M. 336, 648 P.2d 794.

Domicile of minor is same as domicile of parent with whom he lives, and the ultimate facts necessary to sustain a conclusion of domicile are physical presence in the state at some time in the past and concurrent intention to make the state one's home. The lower court found physical presence in the state, but it failed to find that the requisite intent existed, and accordingly jurisdiction based on domicile of the child was lacking. *Worland v. Worland*, 1976-NMSC-027, 89 N.M. 291, 551 P.2d 981.

Custody orders remain effective though court without jurisdiction to grant divorce. — Although the parties are not divorced due to the trial court's lack of jurisdiction as required in 40-4-5 NMSA 1978, it does not follow that the provisions pertaining to custody, child support and visitation are void. Where the trial court had jurisdiction over these issues, and no issue on the appeal involved the court's orders concerning the children, the orders of the court pertaining to custody, support and maintenance and visitation remain in effect and are binding on the parties unless modified by further order of the trial court. *Heckathorn v. Heckathorn*, 1967-NMSC-017, 77 N.M. 369, 423 P.2d 410.

Judicial immunity from personal liability where court had jurisdiction to order commitment. — The court has wide discretion in respect to the guardianship, care and custody of minor children whose parents are parties to a divorce action in which custody of the children is involved. Here the parents were the natural guardians, were parties to the divorce action, and custody of the children was involved. The parents were before the court, and at one juncture in the proceedings a child was personally present in court. It may be that the order committing the child to the state hospital was improvident and erroneous, but it was entered in a cause over which the court had jurisdiction of the subject matter and the parties, and therefore, the rule of judicial immunity from personal liability in damages arising out of the entry of such order applies. *Ryan v. Scoggin*, 245 F.2d 54 (10th Cir. 1957).

No abuse of discretion if law and procedure followed. — Where trial court temporarily reduced support payments and made custodial changes and in doing so followed both the applicable principles of law and regular procedure in making its findings of fact, and where its findings were supported by substantial evidence, the results were pursuant to judicial discretion; not in its abuse. *Fox v. Doak*, 1968-NMSC-031, 78 N.M. 743, 438 P.2d 153.

Court required to give full force and effect to Missouri decree. — Where the trial court found that $3,900 was owed in delinquent alimony based on the $150 per month provided by the parties' Missouri decree, but ordered the husband to pay $100 per month up to $1,500 and deferred payment on the remaining $2,400, and made no finding on child support arrearages, which totalled $8297.65 through June, 1974, its actions constituted reversible error; since New Mexico gives the Missouri divorce decree full faith and credit, the trial court was obliged to give full force and effect to the accrued alimony and child support at the time of the district court hearing. The Missouri court granting the divorce had no power to modify accrued alimony and child support, and therefore, the district court in New Mexico had no such power either, and should have awarded a judgment in favor of the wife for $3,900 in delinquent alimony and made a finding on delinquent child support. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Court has discretion where counterclaim in form of contempt action. — In a suit for a money judgment very little discretion is allowed, the court merely examining the validity of the prior judgment and entering a money judgment, but since the wife counterclaimed against the husband in his change of custody action in the form of a contempt action, as opposed to seeking a money judgment for arrearages, her action invoked the equitable powers of the court in which the trial court has discretion. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Consideration of support related to change of custody. — The husband's action for a change of custody implicitly involved the consideration of future child support if a change of custody were made, and although it would have been better practice to plead for modification of child support when seeking a change of custody, failure to do so did not preclude consideration of the issue on due process grounds since the questions of

change of custody and child support are so inextricably related. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

B. CUSTODY.

Continuing jurisdiction. — As long as a court continues to have jurisdiction over either the children or both parents, it has continuing jurisdiction to hear all matters relating to custody. *Murphy v. Murphy*, 1981-NMSC-069, 96 N.M. 401, 631 P.2d 307.

Abuse of discretion required before reversal of child custody. — Although placing restraints upon a person's free movements is a questionable practice generally, nevertheless where a court in its discretion and in the best interests of the children concludes that they should be reared where guidance can be had from the father while living with the mother, the court cannot reverse unless the conclusion is a manifest abuse of discretion under the evidence in the case. *Jones v. Jones*, 1960-NMSC-106, 67 N.M. 415, 356 P.2d 231.

Trial court cannot be reversed. — The trial court is vested with great discretion in awarding the custody of young children and the court cannot reverse unless the court's conclusion about the best interests of the children is a manifest abuse of discretion under the evidence in the case. *Kotrola v. Kotrola*, 1968-NMSC-104, 79 N.M. 258, 442 P.2d 570.

Judgment of sister state awarding custody is entitled to full faith and credit on the state of facts then existing, but if subsequent thereto a substantial change of conditions has occurred calculated to affect the child's welfare, the court may in a later hearing render such decree as the child's welfare requires. The discretion of the trial court in child custody matters is wide. *Terry v. Terry*, 1970-NMSC-135, 82 N.M. 113, 476 P.2d 772; *Murphy v. Murphy*, 1981-NMSC-069, 96 N.M. 401, 631 P.2d 307.

In personam jurisdiction over parents sufficient to determine custody. — Where the district court had in personam jurisdiction over both parents in divorce action, it had jurisdiction to determine child custody. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

Alternative bases and concurrent jurisdiction. — Not only may there be alternative bases of jurisdiction over custody in a single state, but several states may have concurrent jurisdiction. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

Court's jurisdiction not expanded from one type proceeding to another. — Under this section the power of the court to make a final order of custody is predicated on the existence of a proceeding for the disposition of children; the section does not expand the court's jurisdiction established for one type of proceeding to the other types enumerated therein, nor does it address the initial subject matter jurisdiction of the court to hear the types of proceedings enumerated, but only determines the power of the

court once jurisdiction is established. *Worland v. Worland*, 1976-NMSC-027, 89 N.M. 291, 551 P.2d 981.

Trial court has wide discretion in matter of awarding custody of children in divorce actions; and the welfare of the child is the primary consideration in making the award. *Urzua v. Urzua*, 1960-NMSC-094, 67 N.M. 304, 355 P.2d 123.

Determination of custody by trial judge entitled to great weight. — The determination of custody by the trial judge who saw the parties, observed their demeanor and heard the testimony, is entitled to great weight. *Kotrola v. Kotrola*, 1968-NMSC-104, 79 N.M. 258, 442 P.2d 570.

No violation of due process where both parties given opportunity to be heard. — There was no violation of due process at a change of custody hearing where the trial court first heard the husband's evidence regarding custody, including the testimony of the wife as a hostile witness, the wife's attorney extensively cross-examined the husband, and although the wife's attorney had waived his right to cross-examine the wife when she was called as a hostile witness by the husband, her testimony as to custody surfaced in her counterclaim for contempt; a full and fair opportunity to be heard was afforded both parties in this case. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

In custody cases, two distinct elements are always present: (1) the child-state relationship, sometimes referred to as status and (2) the respective claims of the parents to the child's custody. *Wallace v. Wallace*, 1958-NMSC-014, 63 N.M. 414, 320 P.2d 1020.

Court may make independent investigation in child custody hearing. — Where the court is not satisfied with the evidence presented with reference to custody of minor children, he may make independent investigation, but any witnesses called should appear at a hearing before the court or before a master appointed by him for the purpose. *Martinez v. Martinez*, 1946-NMSC-003, 49 N.M. 405, 165 P.2d 125.

Controlling influence welfare and best interests of child. — The trial court had a wide discretion in determining whether a custodial decree should be modified. In making that determination, the controlling influence should be the welfare and best interests of the child. *Fox v. Doak*, 1968-NMSC-031, 78 N.M. 743, 438 P.2d 153.

The best interests of the child is the principal consideration in determining custody, as well as in procedures seeking change in custody orders. *Stone v. Stone*, 1968-NMSC-116, 79 N.M. 351, 443 P.2d 741.

The best interest of the children is of paramount consideration in determining the custody of minor children, and the same considerations form the basis for modifying a custodial decree. *Kotrola v. Kotrola*, 1968-NMSC-104, 79 N.M. 258, 442 P.2d 570.

The principal guide to a decision under this section to modify a divorce decree is the welfare and best interests of the children. *Tuttle v. Tuttle*, 1959-NMSC-063, 66 N.M. 134, 343 P.2d 838.

Controlling inquiry of the trial court in settling any custody dispute is the best interests of the child. *Schuermann v. Schuermann*, 1980-NMSC-027, 94 N.M. 81, 607 P.2d 619.

In removing restraining order against visitation. — Where at a contempt hearing the trial court found and concluded that restraining order against the appellee from visiting the stepson should be dissolved, the court exercised proper discretion in refusing to hold appellee in contempt, and in removing the previous restraining order. The paramount consideration was the welfare of the minor. *Nesbit v. Nesbit*, 1969-NMSC-064, 80 N.M. 294, 454 P.2d 776.

Best interests not measured altogether by material and economic factors. — When considering the right to custody, the welfare and best interest of the child is not measured altogether by material and economic factors - parental love and affection must find some place in the scheme and we all know this covers a multitude of weaknesses. *Shorty v. Scott*, 1975-NMSC-030, 87 N.M. 490, 535 P.2d 1341.

Racial consideration alone not proper determination of best interests. — In suit to change custody of minor children, racial considerations alone cannot properly determine what is in the best interests of children, or what is most consonant with their welfare or physical and mental well being, and where lower courts found that divorced wife had shown instability in her attitude toward the moral training of her children by the way she has lived with a black man, and that the children would be better reared with members of their own race, such finding was an abuse of that court's discretion. *Boone v. Boone*, 1977-NMSC-042, 90 N.M. 466, 565 P.2d 337.

Parents have natural and legal right to custody of their children. — This right, a prima facie and not an absolute right, creates a presumption that the welfare and best interests of the minor child will best be served in the custody of the natural parents and casts the burden of proving the contrary on the nonparent. *Shorty v. Scott*, 1975-NMSC-030, 87 N.M. 490, 535 P.2d 1341.

Parental right doctrine given prominent consideration. — In a custody dispute where the opposing parties are the natural parents, or one of them, versus grandparents or other persons having no permanent or legal right to custody of the minor child, "parental right" doctrine which holds that a parent who is able to care for his children and desires to do so, and who has not been found to be an unfit person to have their custody in an action or proceeding where that question is in issue, is entitled to custody as against grandparents or others who have no permanent or legal right to custody, is to be given prominent, though not controlling, consideration. *Shorty v. Scott*, 1975-NMSC-030, 87 N.M. 490, 535 P.2d 1341.

Both parents on equal footing. — In a custody case in which the parents are opposed or in a case between parents for modification of a custody decree, the welfare and best interests of the minor child is the paramount consideration. A consideration of parental rights is unnecessary because both parties are on equal footing in the eyes of the law, and though a specific finding of unfitness on the part of the parent to be denied custody is not necessary in all such cases, parental unfitness would be consideration in determining the welfare and best interest of the minor child. *Shorty v. Scott*, 1975-NMSC-030, 87 N.M. 490, 535 P.2d 1341.

Express findings supported by substantial evidence necessary where natural parent denied custody. — As against a third person, a natural parent would be entitled as a matter of law to custody of the minor child unless there has been established on the parent's part neglect, abandonment, incapacity, moral delinquency, instability of character or inability to furnish the child with needed care, or unless it has been established that such custody otherwise would not be in the best welfare and interest of the child, and the trial court must make express findings supported by substantial evidence if the natural parent is to be denied custody, not only that the parent is unfit, but that the third person seeking to obtain or retain custody is fit and the welfare and best interests of the child would best be served by giving custody to that third person. In a custody dispute between a natural mother and the children's grandmother where there were no express findings concerning the fitness of the parties and the evidence adduced at trial was meager, the case was reversed and remanded for a new proceeding to be held consistently with the proper presumption and burden of proof. *Shorty v. Scott*, 1975-NMSC-030, 87 N.M. 490, 535 P.2d 1341.

Expressed wish of minor as to custody as considered factor. — The prevailing and correct rule concerning the proper weight to be given to the expressed wish of a minor whose custody is at issue is that in cases of children of sufficient age, discretion and intelligence to exercise an enlightened judgment, their wishes concerning their own custody are a factor which should be considered by the court in arriving at its conclusion on the issue, but is in no sense controlling. *Stone v. Stone,* 1968-NMSC-116, 79 N.M. 351, 443 P.2d 741.

Proof of desire, fitness and ability of guardian. — There must be proof of the desire, fitness and ability of the persons in whom custody is placed and there shall be opportunity to bring before the court matters in rebuttal of such proof, if any there be. *Bell v. Odil*, 1956-NMSC-005, 60 N.M. 404, 292 P.2d 96.

Child custody award not to be based on confidential report. — A trial court may not award custody of minor children in a divorce suit on the basis of confidential report of a public welfare office employee which is based on unsworn testimony and the contents of which are not evidence in the case and have not been disclosed to the parties. *Martinez v. Martinez*, 1946-NMSC-003, 49 N.M. 405, 165 P.2d 125.

Erroneous awarding of custody based on confidential report waived. — Even though it was error for court to determine issue of awarding custody of minor on the

basis of a confidential report from a welfare employee which did not constitute evidence in the case, where the party did not call the court's attention to the error, such party could not make an issue of it for the first time on appeal. *Martinez v. Martinez*, 1946-NMSC-003, 49 N.M. 405, 165 P.2d 125.

Custody of minor child should not be granted to nonresident unless it is shown that the welfare of the child will be greatly benefited. *Urzua v. Urzua*, 1960-NMSC-094, 67 N.M. 304, 355 P.2d 123.

Court authority to grant visitation rights. — The granting of visitation rights to a person or persons who the trial court determines are significant and important to the welfare of the children is a part of the trial court's grant of power. *Rhinehart v. Nowlin*, 1990-NMCA-136, 111 N.M. 319, 805 P.2d 88.

Trial court has the power and discretion to grant visitation rights to a stepmother, where visitation is in the best interests and welfare of the children. *Rhinehart v. Nowlin*, 1990-NMCA-136, 111 N.M. 319, 805 P.2d 88.

Effect of custodial order on right to travel or relocate. — An order continuing child custody with the mother, contingent upon her returning to New Mexico from California with the child and complying with visitation rights granted to the father, did not unlawfully infringe on the mother's right to travel or to relocate. *Alfieri v. Alfieri*, 1987-NMCA-003, 105 N.M. 373, 733 P.2d 4.

As a general rule, the noncustodial parent's right to visitation should not prevent the custodial parent from moving when the reasons for the move are legitimate and the best interest of the children will be served by accompanying the custodial parent. *Newhouse v. Chavez*, 1988-NMCA-110, 108 N.M. 319, 772 P.2d 353, cert. denied, 108 N.M. 197, 769 P.2d 731 (1989).

Mother could not be deprived of her right, as sole custodian, to move herself and her children, where there was no evidence of bad faith in the mother's conduct in relocating to another city, and the trial court made no findings addressing the interest of the children in their relationship with mother, their younger sibling or their stepfather, or as to the independent relationships within the family. *Newhouse v. Chavez*, 1988-NMCA-110, 108 N.M. 319, 772 P.2d 353, cert. denied, 108 N.M. 197, 769 P.2d 731 (1989).

Order alternating custody annually within court's discretion. — An order which placed custody of girl of nine years with the father for one year, then with the mother for one year, alternating annually, was within the wide discretion of the court. *Edington v. Edington*, 1947-NMSC-002, 50 N.M. 349, 176 P.2d 915.

Evidence of child's school attendance found substantial. — Evidence, which showed that the child had not been able to function properly while in school in California due to various emotional problems precipitated from the environment in which he had been living and that these problems were alleviated to a great extent when the boy was

with the appellee and had begun attending school in Albuquerque on a regular basis, with special assistance, found to be substantial. *Cole v. Adler*, 1971-NMSC-053, 82 N.M. 599, 485 P.2d 355.

C. MODIFICATION OF CUSTODY.

Trust for maintenance and support authorized. — This section and 40-4-14 NMSA 1978 authorize the setting apart of a portion of each spouse's property and the creation of a custodial trust for the maintenance and support of minor children in a divorce and support proceeding. *Blake v. Blake*, 1985-NMCA-009, 102 N.M. 354, 695 P.2d 838.

No abuse of discretion if finding supported by substantial evidence. — The rule applicable in cases seeking a change of custody is to the effect that the trial court has discretion in its determination of custody and that appellate court will not interfere or reverse unless there is not substantial evidence to support the court's findings and conclusions, or there has been a manifest abuse of discretion. *Stone v. Stone*, 1968-NMSC-116, 79 N.M. 351, 443 P.2d 741.

Modification of joint custody by awarding primary physical custody to father. — Where father filed for a change of custody of his two children, requesting that he be awarded sole legal custody and that he be permitted to relocate to another state with his children, the district court's order, awarding primary physical custody to father and permitting father to relocate children to another state, intended only to modify, not terminate, joint custody, and the district court did not abuse its discretion in modifying joint custody because it considered all of the factors necessary in determining whether relocation was in the best interests of the children. *Hopkins v. Wollaber*, 2019-NMCA-024.

Court's power and authority to modify custody award. — Where in a child custody case a court finds a change of circumstances and conditions, the court's hands are not tied and it has power and authority to modify its previous custody award as it deemed best for the child. *Terry v. Terry*, 1970-NMSC-135, 82 N.M. 113, 476 P.2d 772.

Trial courts are vested with wide discretion in determining whether a custodial decree should be modified. *Cole v. Adler*, 1971-NMSC-053, 82 N.M. 599, 485 P.2d 355.

Court not to modify order without hearing. — The provision of this section that the court "may modify and change any order in respect to the guardianship, care, custody, maintenance or education of said children, whenever circumstances render such change proper" does not mean that the court can act without a hearing, after notice to all necessary parties, and after giving them an opportunity to present evidence in connection therewith. *Tuttle v. Tuttle*, 1959-NMSC-063, 66 N.M. 134, 343 P.2d 838.

Usual and ordinary procedures to be adhered to. — Before any parent or other person having legal custody is deprived of the same, or any change made therein, the

usual and ordinary procedures must be adhered to. *Tuttle v. Tuttle*, 1959-NMSC-063, 66 N.M. 134, 343 P.2d 838.

Before any parent or other person having legal custody is deprived of the same, or any change made therein, the usual and ordinary procedures requiring pleadings and notice must be adhered to. *Padgett v. Padgett*, 1960-NMSC-123, 68 N.M. 1, 357 P.2d 335.

Pleadings and procedure upon modification of custody award are, and because of their nature should be, far more elastic than is the case with usual adversary proceedings. The discretion of the court in these matters is far-reaching. *Terry v. Terry*, 1970-NMSC-135, 82 N.M. 113, 476 P.2d 772; *Bell v. Odil*, 1956-NMSC-005, 60 N.M. 404, 292 P.2d 96.

Custody may be reopened upon showing of mistake. — A divorce case may be reopened at any time when a party to the case files an application showing that the court made a mistake in its award of custody of a minor child. *Martinez v. Martinez*, 1946-NMSC-003, 49 N.M. 405, 165 P.2d 125.

Must show change of circumstances for change of custody. — Change of custody is impermissible except upon showing of change of circumstances. *Stone v. Stone*, 1968-NMSC-116, 79 N.M. 351, 443 P.2d 741.

The child's best interests is the principal consideration of the court in initially determining a child's custody, as well as in effecting a change in custody, and a change of custody is permissible only upon a showing of a change of circumstances, even if decree provided otherwise. *Specter v. Specter*, 1973-NMSC-047, 85 N.M. 112, 509 P.2d 879.

Every presumption in favor of reasonableness of original decree. — When modification of divorce decree is sought with respect to provisions for custody of a minor child, the moving party is visited with the burden of showing that circumstances have so changed as to merit the change, every presumption being, however, in favor of the reasonableness of the original decree. *Edington v. Edington*, 1947-NMSC-002, 50 N.M. 349, 176 P.2d 915.

Custody not changed where conditions essentially same. — Where the evidence discloses that other than the fact of the remarriage of the mother, the stability of the mother's situation, and an improved change in the nature of the residences of both parents, essentially the same conditions existed at the time of the modification hearing as existed at the time of the divorce there were insufficient grounds to support the change of the child custody arrangement. *Seeley v. Jaramillo*, 1986-NMCA-100, 104 N.M. 783, 727 P.2d 91.

Though there is no statutory requirement that a change of circumstances must be shown before a custody decree will be modified or changed, it is well settled in this jurisdiction that a showing of changed circumstances is a prerequisite to modification or change of custody. The change of circumstance must be shown to be of a material

nature before a modification or change is justified, and the burden of showing a material change of circumstances rests upon the moving party. *Davis v. Davis*, 1972-NMSC-045, 83 N.M. 787, 498 P.2d 674.

Change in visitation rights. — The language of the court in reviewing an order modifying alimony payments and determining that no change in circumstances had been shown is equally applicable where visitation rights are involved and where plaintiff makes no claim of changed circumstances, the trial court's order should not be disturbed. *Kerley v. Kerley*, 1961-NMSC-159, 69 N.M. 291, 366 P.2d 141.

Change of circumstances necessary where foreign decree presumed reasonable. — In a change of custody action between two parties whose original divorce and custody decree was entered in a foreign state, the moving party must show a change of circumstances in light of the presumption of reasonableness of the foreign divorce decree; where the change of custody was based upon substantial evidence it did not constitute an abuse of discretion by the trial court. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Modification reversed. — Judgment changing sole custody in the mother to joint legal custody, unless and until the mother was able to comply with a parenting plan agreed to by the parties, was reversed, where the trial court's findings failed to resolve basic issues material and necessary to a determination that modification of the initial custody agreement to joint custody was in the best interests of the children. *Newhouse v. Chavez*, 1988-NMCA-110, 108 N.M. 319, 772 P.2d 353, cert. denied, 108 N.M. 197, 769 P.2d 731 (1989).

Awarding of child support rests within sound discretion of court. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Support obligations are for benefit of children, and the court should not punish the children for the wrongdoing of the mother. *Barela v. Barela*, 1978-NMSC-047, 91 N.M. 686, 579 P.2d 1253.

Support obligations are for the benefit of the children, and if the custodial parent does not have the financial ability to support the children, the support obligation should not be reduced. *Barela v. Barela*, 1978-NMSC-047, 91 N.M. 686, 579 P.2d 1253.

Undivided support award directed at more than one child is presumed to continue in force for the full amount until the youngest child reaches majority. *Britton v. Britton*, 1983-NMSC-084, 100 N.M. 424, 671 P.2d 1135.

Accrued and unpaid periodic child support installments mandated in a divorce decree are each considered final judgments on the date they become due. *Britton v. Britton*, 1983-NMSC-084, 100 N.M. 424, 671 P.2d 1135.

Statute of limitations. — Because each monthly child support installment mandated in the final decree is a final judgment, the statute of limitations period found in 37-1-2 NMSA 1978 applies. *Britton v. Britton*, 1983-NMSC-084, 100 N.M. 424, 671 P.2d 1135.

D. CHILD SUPPORT.

Court unauthorized to withhold support until visitation allowed. — The trial court acted beyond its statutory authority in establishing the payment of child support into a trust which provided for the parties' children's post-minority education, until the mother allowed reasonable visitation rights. *Dillard v. Dillard*, 1986-NMCA-088, 104 N.M. 763, 727 P.2d 71.

Judicial district's child support guidelines are taken into consideration by the trial court with the other circumstances of a case when awarding child support; these guidelines are not mandatory amounts that the trial court must use in setting child support payments. *Chavez v. Chavez*, 1982-NMSC-104, 98 N.M. 678, 652 P.2d 228.

Present ability to pay essential in contempt sentence. — Present ability to pay arrears of monthly sums allowed for support of children is essential to validity of a contempt sentence to continue until payment, and, where record shows that such sentence was imposed in absence of ability to pay, the sentence will not be sustained on habeas corpus. *Ex parte Sedillo*, 1929-NMSC-038, 34 N.M. 98, 278 P. 202.

Children not to be denied trust benefits as punishment of delinquent mother. — Where the court has set aside a portion of the common property of divorced parents for the support of their children and placed it in the hands of a trustee, the children should not be deprived of the benefits of such provision by way of punishment of the delinquent mother. *Fullen v. Fullen*, 1915-NMSC-091, 21 N.M. 212, 153 P. 294, superseded by statute *Fairchild v. United Serv. Corp.*, 1948-NMSC-048, 52 N.M. 289, 197 P.2d 875.

Parent not entitled to carry-back credit against delinquent support payments. — While a parent is entitled to credit against support payments falling due after social security payments to his child, which resulted from his contribution to the social security fund and his retirement, he is not entitled to a carry-back credit against support payments that were delinquent when the social security payments began. *Mask v. Mask*, 1980-NMSC-134, 95 N.M. 229, 620 P.2d 883.

Both parents on equal footing. — Although a trial court should consider the various circumstances that bear on both parents' ability to provide needed support, both parents still have the duty to support their minor children. *Henderson v. Lekvold*, 1980-NMSC-133, 95 N.M. 288, 621 P.2d 505.

Consideration, for support, of disability benefits. — Trial court was not precluded from considering the husband's disability benefits as part of his financial resources in determining a reasonable amount of child support, where the parties had previously agreed not to consider the disability benefits and the court made this agreement explicit

in a subsequent order. *Hopkins v. Guin*, 1986-NMCA-097, 105 N.M. 459, 734 P.2d 237, cert. quashed, 105 N.M. 395, 733 P.2d 364 (1987).

Father in contempt not released on habeas corpus where separation regarded permanent. — A father adjudged in contempt for failure to pay monthly sums decreed for support of children will not be discharged on habeas corpus on the ground that court had no jurisdiction to render the decree, where it appears that both parties and the court regarded the separation as permanent, although not expressly alleged in the complaint. *Ex parte Sedillo*, 1929-NMSC-038, 34 N.M. 98, 278 P. 202.

Child support enforceable by attachment. — Court may enforce by attachment as for contempt its decree for monthly payments for support of children. *Ex parte Sedillo*, 1929-NMSC-038, 34 N.M. 98, 278 P. 202.

Scope of review on appeal of child support award is limited to examining the record only to determine if the trial court abused its discretion by fixing an amount contrary to all reason. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

E. MODIFICATION OF CHILD SUPPORT.

Construed with 40-4-11.1 NMSA 1978. — The legislature intended 40-4-11.1 NMSA 1978 to update and make uniform throughout the state the amount of the child support obligation based on the income of the parents, but did not intend to abolish the requirement that the party seeking modification make the traditional showing of a substantial change in circumstances, harmonizing 40-4-11.1 NMSA 1978 with 40-4-7 NMSA 1978 and giving effect to both. *Perkins v. Rowson*, 1990-NMCA-089, 110 N.M. 671, 798 P.2d 1057, cert. denied, 110 N.M. 641, 798 P.2d 591.

Applicable date for modification of child support payments is date of filing of petition or pleading rather than the date of hearing, unless there is an unreasonable delay in bringing the case to trial by a party or unless there are unusual circumstances. *Montoya v. Montoya*, 1980-NMSC-122, 95 N.M. 189, 619 P.2d 1233.

Modification of child support payments discretionary. — Whether to modify an award of support payments is in the discretion of the trial judge. *Barela v. Barela*, 1978-NMSC-047, 91 N.M. 686, 579 P.2d 1253.

Local district court guidelines should be consulted in determining modifications of child support payments. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958 (decided under prior law).

Role of appellate court. — Any change in child support is a matter within the discretion of the trial court and appellate review is limited to examining the record only to determine if the trial court abused its discretion by fixing an amount contrary to all reason. *Henderson v. Lekvold*, 1980-NMSC-133, 95 N.M. 288, 621 P.2d 505; *Henderson v. Lekvold*, 1983-NMSC-001, 99 N.M. 269, 657 P.2d 125.

Credit for pre-order payments invalid modification. — The trial court erred in crediting the husband with child support "prepayments." Parties may not, by private agreement, modify future child support obligations; rather, modification of future child support is a matter to be determined by the courts. *Ingalls v. Ingalls*, 1994-NMCA-148, 119 N.M. 85, 888 P.2d 967.

A husband who made unauthorized "prepayments" of child support need not lose credit for his prepayments; the husband could file a petition to modify his future child support obligations and, in such a case, an agreement between the parties to the effect that the husband would "prepay" child support in exchange for a reduction in such payments in the future, coupled with actual payment in this manner, should receive serious consideration by the trial court in weighing prospective modification. *Ingalls v. Ingalls*, 1994-NMCA-148, 119 N.M. 85, 888 P.2d 967.

Stipulated agreements setting child support amounts modifiable. — Because the rights of the children, as innocent third parties, are involved in stipulated agreements setting child support amounts, to make such agreements nonmodifiable would not be in the best interests of the children and is therefore against the strong public policy of this state. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Past child support payments not modifiable. — Under former 22-7-6(C) (now 40-4-7G) NMSA 1978, a court does not have discretion to modify past, as distinguished from future, child support payments and arrearages once accrued cannot be forgiven. *Gomez v. Gomez*, 1978-NMSC-093, 92 N.M. 310, 587 P.2d 963, *overruled on other grounds Montoya v. Montoya*, 1980-NMSC-122, 95 N.M. 189, 619 P.2d 1233.

Burden on party seeking to modify child support. — In a petition to modify the amount of child support, the burden of proof is on the moving party to satisfy the court that the circumstances have so changed as to justify the modification. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958; *Schuermann v. Schuermann*, 1980-NMSC-027, 94 N.M. 81, 607 P.2d 619.

Presumption favors reasonableness of original decree. — Every presumption is in favor of the reasonableness of the original decree in a proceeding to modify a provision for the custody of minor children. *Schuermann v. Schuermann*, 1980-NMSC-027, 94 N.M. 81, 607 P.2d 619.

Issue presented by petition to modify. — The issue before any trial court on a petition to modify the amount of child support payments is whether there has been a showing of a change in circumstances that is substantial. *Smith v. Smith*, 1982-NMSC-088, 98 N.M. 468, 649 P.2d 1381.

Burden of proof is on the petitioner to satisfy the trial court that the circumstances have substantially changed, thereby justifying the requested modification. *Smith v. Smith*, 1982-NMSC-088, 98 N.M. 468, 649 P.2d 1381.

Retroactive application of increase. — A child support increase should not apply retroactively where the trial court is dealing with present needs. *Chavez v. Chavez*, 1982-NMSC-104, 98 N.M. 678, 652 P.2d 228.

Change must be substantial. — There must be a substantial change of circumstances to warrant a modification of child support occurring subsequent to the adjudication of the previous award. *Chavez v. Chavez*, 1982-NMSC-104, 98 N.M. 678, 652 P.2d 228.

If decree modified then changes measured from modification. — A trial court should not go back to the date a divorce decree was originally entered to determine a material change in circumstances, where a modified decree was entered for ascertaining the amount of child support. The doctrine of res judicata prevents the trial court from considering any matters prior to the modified decree. *Smith v. Smith*, 1982-NMSC-088, 98 N.M. 468, 649 P.2d 1381).

Requirements for change of circumstances. — For a change in the amount of child support ordered, this section requires a showing of changed circumstances; the change must be substantial, materially affecting the existing welfare of the child, and must have occurred since the prior adjudication where child support was originally awarded. *Unser v. Unser*, 1974-NMSC-063, 86 N.M. 648, 526 P.2d 790.

The issue before a trial court on a petition to modify the amount of child support is whether there has been a showing of a change in circumstances; the change must be substantial, materially affecting the existing welfare of the child, and must have occurred since the prior adjudication where child support was originally awarded. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958; *Henderson v. Lekvold*, 1980-NMSC-133, 95 N.M. 288, 621 P.2d 505.

Totality of circumstances needs considered in modifying child support award. *Henderson v. Lekvold*, 1980-NMSC-133, 95 N.M. 288, 621 P.2d 505.

Effect on support of bad faith reduction in income. — Trial court's refusal to reduce the husband's child support obligation was not an abuse of discretion, where he was found not to have acted in good faith when he voluntarily made a career change which resulted in a major reduction of his income. *Wolcott v. Wolcott*, 1987-NMCA-038, 105 N.M. 608, 735 P.2d 326, cert. denied, 105 N.M. 618, 735 P.2d 535.

Dramatic increase in father's income as substantial change in circumstances. — A trial court's adamant refusal to consider a dramatic increase in a father's income as a substantial change in circumstances was arbitrary, capricious and beyond the bounds of reason. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Prospective changes in financial condition not ground for modification. — Prospective changes in a parent's financial condition are not grounds for modification of a child support decree. *Henderson v. Lekvold*, 1980-NMSC-133, 95 N.M. 288, 621 P.2d 505.

No decrease in support upon voluntary assumption of excessive financial burdens. — A parent's duty to support his children is not decreased when a parent voluntarily assumes an excessive financial burden only for his convenience and investment. *Henderson v. Lekvold*, 1980-NMSC-133, 95 N.M. 288, 621 P.2d 505.

Changes in total number of dependents being supported considered. — Evidence of changes in the total number of dependents being supported by both parties demands the attention of the court. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Whether custodial parent fostering good relations between noncustodial parent and children considered. — On a motion to modify child support payments, it is proper for the trial court to inquire as to whether the custodial parent is fulfilling the duty to foster good relations between the noncustodial parent and the children, as this may be considered as a factor bearing on the amount of child support that is granted over and above the normal necessities. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Where a custodial parent is financially able to support the children and the children refuse to visit their other parent due to the emotional influence of the custodial parent, the court in its discretion has the power to terminate future support obligations of the noncustodial parent. *Gomez v. Gomez*, 1978-NMSC-093, 92 N.M. 310, 587 P.2d 963, *overruled on other grounds by Montoya v. Montoya*, 1980-NMSC-122, 95 N.M. 189, 619 P.2d 1233.

Impact of subsequent remarriage on support obligation. — A subsequent remarriage by either or both of the parties may have some effect upon the financial resources available to support and maintain the children of divorced parents. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958; *Henderson v. Lekvold*, 1980-NMSC-133, 95 N.M. 288, 621 P.2d 505.

Military allowances considered in determining change of circumstances. — Military allowances are proper sources of income that a state trial court can constitutionally consider in determining whether there has been a financial change of circumstances sufficient to warrant an increase of child support payments. So long as the action of the state court does not frustrate a substantial interest by preventing the military payments from reaching the designated beneficiary, the federal supremacy clause does not demand that state law be overridden. *Peterson v. Peterson*, 1982-NMSC-098, 98 N.M. 744, 652 P.2d 1195.

Relief from child support where new facts. — Court may relieve defendant of the payment of future installments for child support, if new facts make such a change proper. *Quintana v. Quintana*, 1941-NMSC-038, 45 N.M. 429, 115 P.2d 1011; *Lord v. Lord*, 1932-NMSC-072, 37 N.M. 24, 16 P.2d 933, modified, 1933-NMSC-055, 37 N.M. 454, 24 P.2d 292.

Principal issue on request for increased child support is whether husband's circumstances have so changed as to warrant the increase requested. In order to determine whether such a change has occurred, it is necessary to examine into and consider his prior circumstances. *Horcasitas v. House*, 1965-NMSC-074, 75 N.M. 317, 404 P.2d 140.

On appeal from denial of petition to modify child support the reviewing court should decide whether the findings of the trial court are supported by substantial evidence, whether any refused findings should have been made and whether there was an abuse of discretion by the trial court. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

F. POST-MAJORITY CHILD SUPPORT.

Legislative intent behind Subsection C of this section is that post-minority education agreements in marital settlements may now merge into the divorce decree and the court has jurisdiction to enforce the agreement. *Weddington v. Weddington*, 2004-NMCA-034, 135 N.M. 198, 86 P.3d 623.

Once the parties have voluntarily agreed to provide for post-secondary education of their children, there exists an agreement that the district court can interpret, if it is ambiguous, and also enforce. *Weddington v. Weddington*, 2004-NMCA-034, 135 N.M. 198, 86 P.3d 623.

Enforcement of parties' agreement regarding post-minority education is now governed by this section and the district court has jurisdiction to enforce the agreement after employing contract construction tools. *Weddington v. Weddington*, 2004-NMCA-034, 135 N.M. 198, 86 P.3d 623.

Post-emancipation child support. — A parent's support obligation will continue past a child's emancipation only if the child is emancipated by age and still attending high school or if the parties to a marriage dissolution agree in writing to continue support. *Diamond v. Diamond*, 2011-NMCA-002, 149 N.M. 133, 245 P.3d 578, cert. granted, 2010-NMCERT-012, 150 N.M. 492, 263 P.3d 269.

Court cannot provide for children who have passed the age of majority. *Psomas v. Psomas*, 1982-NMSC-154, 99 N.M. 606, 661 P.2d 884, *overruled in part by Walentwoski v. Walentowski*, 1983-NMSC-097, 100 N.M. 484, 672 P.2d 657.

Trial court does not have jurisdiction over post-minority education for children. *Christiansen v. Christiansen*, 1983-NMSC-058, 100 N.M. 102, 666 P.2d 781.

Agreement for post-minority child support. — The district court has the power, arising from its original jurisdiction over matters sounding in contract, to enforce valid agreements for post-minority support. *Ottino v. Ottino*, 2001-NMCA-012, 130 N.M. 168, 21 P.3d 37, cert. quashed, 131 N.M. 363, 36 P.3d 953.

A marriage settlement agreement covering post-minority support was not rendered unenforceable by its inclusion in the final divorce decree. *Ottino v. Ottino*, 2001-NMCA-012, 130 N.M. 168, 21 P.3d 37, cert. quashed, 131 N.M. 363, 36 P.3d 953.

Application of new age of majority to decree not unconstitutional. — Although trial court had continuing jurisdiction to modify divorce decree containing child custody provisions under the provisions of this section, that decree was considered final and not within the meaning of a "pending case" in N.M. Const., art. IV, § 34. Therefore, application of 28-6-1 NMSA 1978, which by its operation freed divorced father from making support payments to daughter who had reached age of 18, and thus, under the new section, was no longer a minor, was not unconstitutional. *Phelps v. Phelps*, 1973-NMSC-044, 85 N.M. 62, 509 P.2d 254.

Disposition of property or funds for children upon reaching majority. — This statute only confers power on district court to provide for the children during their minority, and when they reach the age of 21 (now 18) years all power over them ceases and the district court must at this latter time make disposition of any property or funds created for the maintenance and education of such children. *In re Coe's Estate*, 1952-NMSC-078, 56 N.M. 578, 247 P.2d 162.

This section precludes the court from retaining control of any provision in decrees providing funds for post-minority education. When the children reach majority, the court must dispose of and relinquish control over any of the remaining funds created for their education. *Spingola v. Spingola*, 1979-NMSC-079, 93 N.M. 598, 603 P.2d 708 (decided under prior law).

Duty of support for disabled child. — Parents have a common law continuing duty to support a severely disabled child if the child was disabled before reaching the age of majority, and the court had authority to enforce such duty. *Cohn v. Cohn*, 1997-NMCA-011, 123 N.M. 85, 934 P.2d 279.

Substantial evidence of disability and need for continued child support. — Where petitioner filed a motion to establish child support for her nineteen-year-old disabled son, evidence presented at trial that son was born with a genetic disorder and a clubbed foot, had an IQ in the severely impaired range, tested in the mildly to moderately impaired level in learning and memory skills, language functioning, visual, and motor skills, and was limited in all adaptive functioning areas, which include motor skills, social communication, personal living skills, and community living skills, provided a substantial evidentiary basis for the district court to conclude that son was disabled upon reaching majority and was an adult entitled to continuing child support. *Gonzales v. Shaw*, 2018-NMCA-059.

Trial court did not abuse its discretion in refusing to offset social security benefit. — Where petitioner filed a motion to establish child support for her nineteen-year-old disabled son, and where respondent argued that the district court erred in not deducting son’s receipt of social security disability funds in making the court’s child support

calculation, the district court did not abuse its discretion in its child support calculation, because the social security funds received by son were the result of son's personal disability and did not come through either parent. *Gonzales v. Shaw*, 2018-NMCA-059.

Trial court did not abuse its discretion in awarding attorney fees and costs. — Where petitioner filed a motion to establish child support for her nineteen-year-old disabled son, and where respondent argued that the facts of the case did not rise to the level of an incapacitated adult child, despite son's defined disabilities, the trial court did not err in awarding petitioner her attorney fees and costs, where the evidence established that respondent ignored the medical expert's report and findings that son was disabled, declined to settle the case despite encouragement from the court to do so, and caused petitioner to incur additional costs and unnecessary attorney fees. *Gonzales v. Shaw*, 2018-NMCA-059.

Court's jurisdiction not extended by parties' agreements. — The jurisdiction of the court to enforce child support provisions in a divorce decree after the children have reached majority cannot be extended by agreement of the parties. *Spingola v. Spingola*, 1979-NMSC-079, 93 N.M. 598, 603 P.2d 708.

VI. EXPENSES OF PROCEEDING.

Implementation of Subsection A — Rules 1-054(E) and 1-127 NMRA appear to implement Subsection A of this section. *Bursum v. Bursum*, 2004-NMCA-133, 136 N.M. 584, 102 P.3d 651, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

California attorney fees. — With personal jurisdiction over both the wife and husband and subject matter jurisdiction over the division of their property, a New Mexico court could consider California attorney fees. *Bursum v. Bursum*, 2004-NMCA-133, 136 N.M. 584, 102 P.3d 651, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Request for attorney fees. — By presenting the court with an affidavit, mother sufficiently alerted the court's attention to her request for attorney fees and preserved this issue for appeal. *Grant v. Cumiford*, 2005-NMCA-058, 137 N.M. 485, 112 P.3d 1142.

Central purpose of attorney fees award under this section is to remedy any financial disparity between the divorcing parties so that each may make an efficient and effective presentation of his or her claims in the underlying divorce case. *Garcia v. Jeantette*, 2004-NMCA-004, 134 N.M. 776, 82 P.3d 947.

Award of attorney fees to intervening third party not authorized. – Subsection A of this section does not authorize the district court to order an intervening third party to pay attorney fees incurred by a divorcing party who was required to bring a separate action to collect on a judgment entered in the divorce proceeding. *Garcia v. Jeantette*, 2004-NMCA-004, 134 N.M. 776, 82 P.3d 947.

Consideration of parties' economic disparity. — In making its award of attorneys' fees, the trial court properly considered the economic disparity between husband and wife and the husband's access to financial resources through his family. *Monsanto v. Monsanto*, 1995-NMCA-048, 119 N.M. 678, 894 P.2d 1034; *Bustos v. Bustos*, 2000-NMCA-040, 128 N.M. 842, 999 P.2d 1074.

Attorneys' and witnesses' fees as community debts. — A trial court does not abuse its discretion when it includes attorneys' fees and wife's expert witness fees as community debts to be paid out of community assets. *Christiansen v. Christiansen*, 1983-NMSC-058, 100 N.M. 102, 666 P.2d 781.

Trial court has authority to award wife attorneys' fees in divorce action, but such award is discretionary and will be reviewed only as to whether there has been an abuse of discretion. *Fitzgerald v. Fitzgerald*, 1962-NMSC-028, 70 N.M. 11, 369 P.2d 398.

Amount of award for attorney fees rests within sound discretion of court; however, discretion in this regard must have been exercised with the purpose in mind of insuring the plaintiff an efficient preparation and presentation of her case. The facts upon which the trial court apparently relied for its conclusion that plaintiff was entitled to no further award of attorney fees can hardly be considered as demonstrating an exercise of sound discretion in determining that the money previously awarded was sufficient to insure her an efficient preparation and presentation of her case where she was precluded at the outset of the final hearing, and at every point thereafter, from citing any law or giving any testimony on the question of attorney fees. *Burnside v. Burnside*, 1973-NMSC-091, 85 N.M. 517, 514 P.2d 36.

Many considerations enter into matter of fixing attorney fees, not the least important of which are: the ability, standing, skill and experience of the attorney; the nature and character of the controversy; the amount involved, the importance of the litigation and the benefits derived therefrom. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Discretion of the trial court in the award of attorney fees is not unrestrained and it should consider various factors, including the most important one of economic disparity. *Gomez v. Gomez*, 1995-NMCA-049, 119 N.M. 755, 895 P.2d 277, superseded by statute on other grounds, *Erickson v. Erickson*, 1999-NMCA-056, 127 N.M. 140, 978 P.2d 347.

Fees allowed even if husband relieved of alimony payments. — Where a divorced husband was relieved from further payment of alimony, the court might still award the wife counsel fees. *Lord v. Lord*, 1933-NMSC-055, 37 N.M. 454, 24 P.2d 292.

Discretion of court in awarding attorney fees. — The matter of attorney's fees lies within the discretion of the trial court, and its decision on this subject will not be disturbed unless an abuse of discretion is shown. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Consideration of obstructive behavior. — So long as an award of attorney fees under Subsection A of this section does not duplicate a sanction imposed for discovery abuse, obstructive behavior of a party during litigation is an appropriate factor for consideration in making such an award. *Hakkila v. Hakkila*, 1991-NMCA-029, 112 N.M. 172, 812 P.2d 1320, cert. denied, 112 N.M. 77, 811 P.2d 575.

Where nonmoving party refused to sign settlement agreement. — Attorney's fees, which are permitted by this section and were authorized under marital settlement agreement (MSA), were improperly denied by trial court, where nonmoving party's refusal to sign MSA was the cause of the action and required the fees to be incurred. *Herrera v. Herrera*, 1999-NMCA-034, 126 N.M. 705, 974 P.2d 675.

Attorney's fees to be paid to spouse, not attorney. — An order directing the payment of attorney's fees by the husband in a divorce case direct to the wife's attorney is void. The wife is the party to the action, not the attorney, and the order must provide it be paid to her or to the clerk of the court for her benefit. *Lloyd v. Lloyd*, 1956-NMSC-007, 60 N.M. 441, 292 P.2d 121.

Awards of attorney's fees in divorce actions are to the wife, not the attorney. *Dunne v. Dunne*, 1972-NMSC-002, 83 N.M. 377, 492 P.2d 994.

Award not disturbed because attorney dissatisfied. — Trial court's award of attorney's fees approved by wife would not be disturbed because attorney was dissatisfied. *Dunne v. Dunne*, 1972-NMSC-002, 83 N.M. 377, 492 P.2d 994.

Law reviews. — For article, "Federal Taxation of New Mexico Community Property," see 3 Nat. Resources J. 104 (1963).

For note, "Family Law — Custody Dispute Between Biological Mother and Non-Biological, Non-Adoptive Party: A.C. v. C.B.," see 23 N.M.L. Rev. 331 (1993).

For comment on Hill v. Matthews, 76 N.M. 474, 416 P.2d 144 (1966), see 7 Nat. Resources J. 129 (1967).

For comment on Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968), see 9 Nat. Resources J. 101 (1969).

For symposium, "Equal Rights in Divorce and Separation," see 3 N.M.L. Rev. 118 (1973).

For article, "Child Support Enforcement: The New Mexico Experience," see 9 N.M.L. Rev. 25 (1978-79).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For note, "Guidelines for Modification of Child Support Awards: Spingola v. Spingola," see 9 N.M.L. Rev. 201 (1978-79).

For article, "Survey of New Mexico Law, 1979-80: Domestic Relations and Juvenile Law," see 11 N.M.L. Rev. 134 (1981).

For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

For article, "Strange Bedfellows: The Uneasy Alliance Between Bankruptcy and Family Law," see 17 N.M.L. Rev. 1 (1987).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

For annual survey of New Mexico family law, 19 N.M.L. Rev. 692 (1990).

For note, "New Mexico Changes the Method of Allocating Future Pension Benefits Between Divorcing Spouses: *Ruggles v. Ruggles,*" see 25 N.M.L. Rev. 249 (1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation §§ 477, 607, 608, 1001, 1005.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance, 18 A.L.R.2d 10.

Trial court's jurisdiction as to alimony or maintenance pending appeal of matrimonial action, 19 A.L.R.2d 703.

Divorce decree as res judicata or estoppel as to previous marital status, against or in favor of third person, 20 A.L.R.2d 1163.

Default decree in divorce action as estoppel or res judicata with respect of marital property rights, 22 A.L.R.2d 724.

Power of court, in absence of express authority, to grant relief from judgment by default in divorce action, 22 A.L.R.2d 1312.

Pension of husband as resource which court may consider in determining amount of alimony, 22 A.L.R.2d 1421.

Condonation of cruel treatment as defense in divorce action, 32 A.L.R.2d 107.

Reconciliation as affecting separation agreement or decree, 35 A.L.R.2d 707, 36 A.L.R.4th 502.

Husband's right to alimony, maintenance, suit money, or attorney's fees, 66 A.L.R.2d 880.

Propriety of reference in connection with fixing amount of alimony, 85 A.L.R.2d 801.

Credit for payments on temporary alimony pending appeal, against liability for permanent alimony, 86 A.L.R.2d 696.

Right of attorney to continue divorce or separation suit against client's wishes, 92 A.L.R.2d 1009.

Propriety and effect of undivided award for support of more than one person, 2 A.L.R.3d 596.

Consideration of tax liability or consequences in determining alimony or property settlement provisions of divorce or separation, 51 A.L.R.3d 461, 9 A.L.R.5th 568.

Effect of remarriage of spouses to each other on permanent alimony provisions in final divorce decree, 52 A.L.R.3d 1334.

Provision in divorce decree that one party obtain or maintain life insurance for benefit of other party or child, 59 A.L.R.3d 9.

Right, in custody proceedings, to cross-examine investigating officer whose report is used by the court in its decision, 59 A.L.R.3d 1337.

Wife's possession of independent means as affecting her right to temporary alimony or allowance for support of children, 60 A.L.R.3d 728.

Divorce: power of court to modify decree for support, alimony, or the like, based on agreement of the parties, 61 A.L.R.3d 520.

Effect in subsequent proceedings of paternity findings or implications in divorce decree or in support or custody order made incidental thereto, 78 A.L.R.3d 846.

Adulterous wife's right to permanent alimony, 86 A.L.R.3d 97.

Grandparents' visitation rights after dissolution of marriage, 90 A.L.R.3d 217.

Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support, 91 A.L.R.3d 530.

Propriety in divorce proceedings of awarding rehabilitative alimony, 97 A.L.R.3d 740.

Parent's obligation to support unmarried minor child who refuses to live with parent, 98 A.L.R.3d 334.

Divorced woman's subsequent sexual relations or misconduct as warranting, alone or with other circumstances, modification of alimony decree, 98 A.L.R.3d 453.

Propriety of decree in proceeding between divorced parents to determine mother's duty to pay support for children in custody of father, 98 A.L.R.3d 1146.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child, 99 A.L.R.3d 268.

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education, 99 A.L.R.3d 322.

Action based upon reconveyance, upon promise of reconciliation, of property realized from divorce award or settlement, 99 A.L.R.3d 1248.

Custodial parent's sexual relations with third person as justifying modification of child custody order, 100 A.L.R.3d 625.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 A.L.R.3d 1129.

Visitation rights of persons other than natural parents or grandparents, 1 A.L.R.4th 1270.

Removal by custodial parents of child from jurisdiction in violation of court order as justifying termination, suspension, or reduction of child support payments, 8 A.L.R.4th 1231.

Right of incarcerated mother to retain custody of infant in penal institution, 14 A.L.R.4th 748.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation, 15 A.L.R.4th 224.

Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 A.L.R.4th 864.

Propriety of awarding joint custody of children, 17 A.L.R.4th 1013.

Divorce and separation: effect of trial court giving consideration to needs of children in making property division - modern status, 19 A.L.R.4th 239.

Validity and enforceability of escalation clause in divorce decree relating to alimony and child support, 19 A.L.R.4th 830.

Spouse's liability, after divorce, for community debt contracted by other spouse during marriage, 20 A.L.R.4th 211.

Authority of divorce court to award prospective or anticipated attorneys' fees to enable parties to maintain or defend divorce suit, 22 A.L.R.4th 407.

Divorce and separation: appreciation in value of separate property during marriage without contribution by either spouse as separate or community property, 24 A.L.R.4th 453.

Effect of remarriage of spouses to each other on child custody and support provisions of prior divorce decree, 26 A.L.R.4th 325.

Excessiveness or adequacy of amount of money awarded as separate maintenance, alimony, or support for spouse without absolute divorce, 26 A.L.R.4th 1190.

Excessiveness or adequacy of money awarded as temporary alimony, 26 A.L.R.4th 1218.

Excessiveness or adequacy of amount of money awarded for alimony and child support combined, 27 A.L.R.4th 1038.

Excessiveness or adequacy of amount of money awarded as permanent alimony following divorce, 28 A.L.R.4th 786.

Court-authorized permanent or temporary removal of child by parent to foreign country, 30 A.L.R.4th 548.

Property settlement agreement as affecting divorced spouse's right to recover as named beneficiary under former spouse's life insurance policy, 31 A.L.R.4th 59.

Proper date for valuation of property being distributed pursuant to divorce, 34 A.L.R.4th 63.

Court's authority to award temporary alimony or suit money in action for divorce, separate maintenance, or alimony where the existence of a valid marriage is contested, 34 A.L.R.4th 814.

Order awarding temporary support or living expenses upon separation of unmarried partners pending contract action based on services relating to personal relationship, 35 A.L.R.4th 409.

Visitation rights of homosexual or lesbian parent, 36 A.L.R.4th 997.

Validity and application of statute allowing endangered child to be temporarily removed from parental custody, 38 A.L.R.4th 756.

Propriety of provision of custody or visitation order designed to insulate child from parent's extramarital sexual relationships, 40 A.L.R.4th 812.

Spouse's dissipation of marital assets prior to divorce as factor in divorce court's determination of property division, 41 A.L.R.4th 416.

Divorce: equitable distribution doctrine, 41 A.L.R.4th 481.

Primary caretaker role of respective parents as factor in awarding custody of child, 41 A.L.R.4th 1129.

Stepparent's postdivorce duty to support stepchild, 44 A.L.R.4th 520.

Divorce and separation: treatment of stock options for purposes of dividing marital property, 46 A.L.R.4th 640.

Valuation of stock options for purposes of divorce court's property distribution, 46 A.L.R.4th 689.

Divorced or separated spouse's living with member of opposite sex as affecting other spouse's obligation of alimony or support under separation agreement, 47 A.L.R.4th 38.

Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

Child support: court's authority to reinstitute parent's support obligation after terms of prior decree have been fulfilled, 48 A.L.R.4th 952.

Necessity that divorce court value property before distributing it, 51 A.L.R.4th 11.

Modern status of views as to validity of premarital agreements contemplating divorce or separation, 53 A.L.R.4th 22.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by circumstances surrounding execution - modern status, 53 A.L.R.4th 85.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms - modern status, 53 A.L.R.4th 161.

Divorce: excessiveness or adequacy of combined property division and spousal support awards - modern cases, 55 A.L.R.4th 14.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order, 57 A.L.R.4th 710.

Divorce property distribution: real estate or trust property in which interest vested before marriage and was realized during marriage, 60 A.L.R.4th 217.

Divorce property distribution: treatment and method of valuation of future interest in real estate or trust property not realized during marriage, 62 A.L.R.4th 107.

Prejudgment interest awards in divorce cases, 62 A.L.R.4th 156.

Power to modify spousal support award for a limited term, issued in conjunction with divorce, so as to extend the term or make the award permanent, 62 A.L.R.4th 180.

Divorce: voluntary contributions to child's education expenses as factor justifying modification of spousal support award, 63 A.L.R.4th 436.

Child custody: separating children by custody awards to different parents - post-1975 cases, 67 A.L.R.4th 354.

Divorce and separation: effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R.4th 173.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 A.L.R.4th 786.

Valuation of goodwill in medical or dental practice for purposes of divorce court's property distribution, 78 A.L.R.4th 853.

Accrued vacation, holiday time, and sick leave as marital or separate property, 78 A.L.R.4th 1107.

Death of obligor spouse as affecting alimony, 79 A.L.R.4th 10.

Divorce and separation: goodwill in law practice as property subject to distribution on dissolution of marriage, 79 A.L.R.4th 171.

What constitutes order made pursuant to state domestic relations law for purposes of qualified domestic relations order exception to antialienation provision of Employee Retirement Income Security Act of 1974 (29 USCS § 1056(d)), 79 A.L.R.4th 1081.

Child custody and visitation rights of person infected with AIDS, 86 A.L.R.4th 211.

Divorce: court's authority to institute or increase spousal support award after discharge of prior property award in bankruptcy, 87 A.L.R.4th 353.

Denial or restriction of visitation rights to parent charged with sexually abusing child, 1 A.L.R.5th 776.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 A.L.R.5th 337.

Divorce: spouse's right to order that other spouse pay expert witness fees, 4 A.L.R.5th 403.

Divorce and separation: consideration of tax consequences in distribution of marital property, 9 A.L.R.5th 568.

Divorce and separation: award of interest on deferred installment payments of marital asset distribution, 10 A.L.R.5th 191.

Spouse's right to set off debt owed by other spouse against accrued spousal or child support payments, 11 A.L.R.5th 259.

Consideration of obligated spouse's earnings from overtime or "second job" held in addition to regular full-time employment in fixing alimony or child support awards, 17 A.L.R.5th 143.

Excessiveness of adequacy of attorneys' fees in domestic relations cases, 17 A.L.R.5th 366.

Parent's use of drugs as factor in award of custody of children, visitation rights, or termination of parental rights, 20 A.L.R.5th 534.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child, 34 A.L.R.5th 447.

Smoking as factor in child custody and visitation cases, 36 A.L.R.5th 377.

Alimony as affected by recipient spouse's remarriage in absence of controlling specific statue, 47 A.L.R.5th 129.

Excessiveness or inadequacy of lump-sum alimony award, 49 A.L.R.5th 441.

Alimony or child-support awards as subject to attorneys' liens, 49 A.L.R. 5th 595.

Consideration of obligor's personal-injury recovery or settlement infixing alimony or child support, 59 A.L.R.5th 489.

Custodial parent's homosexual or lesbian relationship with third person as justifying modification of child custody order, 65 A.L.R.5th 591.

Effect of same-sex relationship on right to spousal support, 73 A.L.R.5th 599.

Copyright, patent, or other intellectual property as marital property for purposes of alimony, support, or divorce settlement, 80 A.L.R.5th 487.

Spouse's cause of action for negligent personal injury, or proceeds therefrom, as separate or community property, 80 A.L.R.5th 533.

Divorce decree or settlement agreement as affecting divorced spouse's right to recover as named beneficiary on former spouse's individual retirement account, 99 A.L.R.5th 637.

Propriety of equalizing income of spouses through alimony awards, 102 A.L.R.5th 395.

Debts for alimony, maintenance, and support as exceptions to bankruptcy discharge, under § 523(a)(5) of Bankruptcy Code of 1978 (11 USCS § 523(a)(5)), 69 A.L.R. Fed. 403.

Pre-emptive effect of Employee Retirement Income Security Act (ERISA) provisions (29 USCS §§ 1056(d)(3), 1144(a), 1144(b)(7)) with respect to orders entered in domestic relations proceedings, 116 A.L.R. Fed. 503.

27B C.J.S. Divorce §§ 306 et seq., 508 et seq.; 27C C.J.S. Divorce, § 611 et seq.

40-4-7.1. Use of life insurance policy as security.

In any proceeding brought pursuant to the provisions of Section 40-4-7 NMSA 1978 or in any other proceeding for the division of property or spousal or child support brought pursuant to the provisions of Chapter 40 NMSA 1978, the court may require either party or both parties to the proceeding to maintain the minor children of the parties or a spouse or former spouse as beneficiaries on a life insurance policy as security for the payment of:

(1) support for the benefit of the minor children;

(2) spousal support; or

(3) the cost to equalize a property division in the event of the death of the insured on the life insurance policy.

The court may also allocate the cost of the premiums of the life insurance policy between the parties.

History: 1978 Comp., § 40-4-7.1, enacted by Laws 1993, ch. 110, § 1.

40-4-7.2. Binding arbitration option; procedure.

A. Parties to an action for divorce, separation, custody or time-sharing, child support, spousal support, marital property and debt division or attorney fees related to such matters, including any post-judgment proceeding, may stipulate to binding arbitration by a signed agreement that provides for an award with respect to one or more of the following issues:

(1) valuation and division of real and personal property;

(2) child support, custody, time-sharing or visitation;

(3) spousal support;

(4) costs, expenses and attorney fees;

(5) enforceability of prenuptial and post-nuptial agreements;

(6) determination and allocation of responsibility for debt as between the parties;

(7) any civil tort claims related to any of the foregoing; or

(8) other contested domestic relations matters.

B. A court may not order a party to participate in arbitration except to the extent a party has agreed to participate pursuant to a written arbitration agreement. When the party involved is a minor, then his parent must consent to arbitration. When the party involved is a minor with a guardian ad litem, the guardian ad litem must provide written consent. When the party involved is a minor without a guardian ad litem, then in order for arbitration to proceed the court must find that arbitration is in the best interest of the minor.

C. Arbitration pursuant to this section shall be heard by one or more arbitrator. The court shall appoint an arbitrator agreed to by the parties if the arbitrator consents to the appointment.

D. If the parties have not agreed to an arbitrator, the court shall appoint an arbitrator who:

(1) is an attorney in good standing with the state bar of New Mexico;

(2) has practiced as an attorney for not less than five years immediately preceding the appointment and actively practiced in the area of domestic relations

during three of those five years. Any period of time during which a person serves as a judge, special master or child support hearing officer is considered as actively practicing in the area of domestic relations; or

(3) is another professional licensed and experienced in the subject matter that is the area of the dispute.

E. An arbitrator appointed pursuant to this section is immune from liability in regard to the arbitration proceeding to the same extent as the judge who has jurisdiction of the action that is submitted to arbitration.

F. Objections to the qualifications of an arbitrator must be raised in connection with the appointment by the court or they are waived. The court will permit parties to raise objections based on qualifications within ten days of appointment of an arbitrator. Parties who agree on an arbitrator waive objections to his qualifications.

G. An arbitrator appointed pursuant to this section:

(1) shall hear and make an award on each issue submitted for arbitration pursuant to the arbitration agreement subject to the provisions of the agreement; and

(2) has all of the following powers and duties:

(a) to administer an oath or issue a subpoena as provided by court rule;

(b) to issue orders regarding discovery proceedings relative to the issues being arbitrated, including appointment of experts; and

(c) to allocate arbitration fees and expenses between the parties, including imposing a fee or expense on a party or attorney as a sanction for failure to provide information, subject to provisions of the arbitration agreement.

H. An arbitrator, attorney or party in an arbitration proceeding pursuant to this section shall disclose in writing any circumstances that may affect an arbitrator's impartiality, including, bias, financial interests, personal interests or family relationships. Upon disclosure of such a circumstance, a party may request disqualification of the arbitrator. If the arbitrator does not withdraw within seven days after a request for disqualification, the party may file a motion for disqualification with the court.

I. If the court finds that the arbitrator is disqualified, the court may appoint another arbitrator, subject to the provisions of the arbitration agreement.

J. As soon as practicable after the appointment of the arbitrator, the parties and attorneys shall confer with the arbitrator to consider all of the following:

(1) scope of the issues submitted;

(2) date, time and place of the hearing;

(3) witnesses, including experts, who may testify;

(4) appointment of experts and a schedule for exchange of expert reports or summary of expert testimony; and

(5) subject to the provisions of Subsection K of this section, exhibits, documents or other information each party considers material to the case and a schedule for production or exchange of the information. An objection not made before the hearing to production or lack of production of information is waived.

K. The arbitrator shall order reasonable access to information for each party that is material to the arbitration issues prior to the hearing, including the following:

(1) a current complete sworn financial disclosure statement, when financial matters are at issue;

(2) if a court has issued an order concerning an issue subject to arbitration, a copy of the order;

(3) any relevant documents related to the arbitration issues defined by the arbitrator;

(4) proposed award by each party for each issue subject to arbitration; and

(5) expert opinions of experts to be used by either party or appointed by the arbitrator.

L. Except as provided by this section, court rule or the arbitration agreement, a record shall not ordinarily be made of an arbitration hearing pursuant to this section unless either party requests it. If a record is not required, an arbitrator may make a record to be used only by the arbitrator to aid in reaching the decision.

M. Unless waived by the parties, a record shall be made of that portion of the hearing that concerns child custody, visitation or time-sharing.

N. The arbitration agreement may set forth any standards on which an award should be based, including the law to be applied. An arbitration agreement shall provide that in deciding child support issues, the arbitrator shall apply Section 40-4-11.1 NMSA 1978 when setting or modifying a child support order.

O. Unless otherwise agreed to by the parties and arbitrator in writing or on the record, the arbitrator shall issue the written award on each issue within sixty days after the end of the hearing and after receipt of proposed findings of fact and conclusions of law if requested by the arbitrator.

P. If the parties reach an agreement regarding child custody, time-sharing or visitation, the agreement shall be placed on the record by the parties under oath and shall be included in the arbitrator's written award.

Q. The arbitrator retains jurisdiction to correct errors or omissions in an award upon motion by a party to the arbitrator within twenty days after the award is issued or upon the arbitrator's own motion. Another party to the arbitration may respond to the motion within seven days after the motion is made. The arbitrator shall make a decision on the motion within seven days after the expiration of the response time period.

R. The court shall enforce an arbitrator's award or other order issued pursuant to this section in the same manner as an order issued by the court. A party may make a motion to the court to enforce an arbitrator's award or order.

S. Any party in an action that was submitted to arbitration pursuant to this section shall file with the court a stipulated order, or a motion to enforce the award within twenty-one days after the arbitrator's award is issued unless otherwise agreed to by the parties in writing or unless the arbitrator or court grants an extension.

T. If a party applies to the court for vacation of an arbitrator's award in binding arbitration issued pursuant to this section that concerns child custody, time-sharing or visitation, the court shall review the award based only upon the record of the arbitration hearing and factual matters that have arisen since the arbitration hearing that are relevant to the claim. The court may vacate an award of custody, time-sharing or visitation made in binding arbitration if the court finds that circumstances have changed since issuance of the award that are adverse to the best interests of the child, upon a finding that the award will cause harm or be detrimental to a child, or pursuant to Subsections U and V of this section. An arbitration agreement may provide a broader scope of review of custody, time-sharing or visitation issues by the court, and such review will apply if broader than this section.

U. If a party applies to the court for vacation or modification of an arbitrator's award issued pursuant to this section, the court shall review the award only as provided in Subsections T and V of this section.

V. If a party applies under this section, the court may vacate, modify or correct an award under any of the following circumstances:

(1) the award was procured by corruption, fraud or other undue means;

(2) there was evident partiality by an arbitrator, or misconduct prejudicing a party's rights;

(3) the arbitrator exceeded his powers; or

(4) the arbitrator refused to postpone the hearing on a showing of sufficient cause or refused to hear evidence substantial and material to the controversy.

W. An application to vacate an award on grounds stated in Subsections U and V of this section shall be decided by the court. If an award is vacated on grounds stated in Paragraph (3) or (4) of Subsection V of this section, the court may order a rehearing before the arbitrator who made the award when both parties consent to the rehearing before the arbitrator who made the award.

X. An appeal from an arbitration award pursuant to this section that the court confirms, vacates, modifies or corrects shall be taken in this same manner as from an order or judgment in other domestic relations actions.

Y. No arbitrator may decide issues of a criminal nature or make decisions on petitions pursuant to the Family Violence Protection Act [Chapter 40, Article 13, NMSA 1978].

History: Laws 1999, ch. 123, § 1.

ANNOTATIONS

40-4-7.3. Accrual of interest; delinquent child and spousal support.

A. Interest shall accrue on delinquent child support at the rate of four percent and spousal support at the rate set forth in Section 56-8-4 NMSA 1978 in effect when the support payment becomes due and shall accrue from the date the support is delinquent until the date the support is paid.

B. Interest shall accrue on a consolidated judgment for delinquent child support at the rate of four percent when the consolidated judgment is entered until the judgment is satisfied.

C. Unless the order, judgment, decree or wage withholding order specifies a due date other than the first day of the month, support shall be due on the first day of each month and, if not paid by that date, shall be delinquent.

D. In calculation of support arrears, payments of support shall be first applied to the current support obligation, next to any delinquent support, next to any consolidated judgment of delinquent support, next to any accrued interest on delinquent support and next to any interest accrued on a consolidated judgment of delinquent support.

E. The human services department [health care authority department] shall have the authority to forgive accrued interest on delinquent child support assigned to the state not otherwise specified in an order, judgment, decree or income withholding order if, in the judgment of the secretary of human services, forgiveness will likely result in the collection of more child support, spousal support or other support and will likely result in

the satisfaction of the judgment, decree or wage withholding order. This authority shall include the ability to authorize the return of suspended licenses.

History: Laws 1999, ch. 299, § 1; 2004, ch. 41, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 2004 amendment, effective May 19, 2004, amended Subsection A to delete "or consolidated in a judgment" at the end of the subsection, amended Subsection B to delete a reference to 59-8-4 NMSA 1978 and insert a four percent rate of interest and added a new Subsection E.

40-4-8. Contested custody; appointment of guardian ad litem.

A. In any proceeding for the disposition of children when custody of minor children is contested by any party, the court may appoint an attorney at law as guardian ad litem on the court's motion or upon application of any party to appear for and represent the minor children. Expenses, costs and attorneys' fees for the guardian ad litem may be allocated among the parties as determined by the court.

B. When custody is contested, the court:

(1) shall refer that issue to mediation if feasible unless a party asserts or it appears to the court that domestic violence or child abuse has occurred, in which event the court shall halt or suspend mediation unless the court specifically finds that:

(a) the following three conditions are satisfied: 1) the mediator has substantial training concerning the effects of domestic violence or child abuse on victims; 2) a party who is or alleges to be the victim of domestic violence is capable of negotiating with the other party in mediation, either alone or with assistance, without suffering from an imbalance of power as a result of the alleged domestic violence; and 3) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between the parties resulting from the alleged domestic violence or child abuse; or

(b) in the case of domestic violence involving parents, the parent who is or alleges to be the victim requests mediation and the mediator is informed of the alleged domestic violence;

(2) may order, in addition to or in lieu of the provisions of Paragraph (1) of this subsection, that each of the parties undergo individual counseling in a manner that the

court deems appropriate, if the court finds that the parties can afford the counseling; and

(3) may use, in addition to or in lieu of the provisions of Paragraph (1) of this subsection, auxiliary services such as professional evaluation by application of Rule 11-706 of the New Mexico Rules of Evidence or Rule 1-053 of the Rules of Civil Procedure for the District Courts.

C. As used in this section:

(1) "child abuse" means:

(a) that a child has been physically, emotionally or psychologically abused by a parent;

(b) that a child has been: 1) sexually abused by a parent through criminal sexual penetration, incest or criminal sexual contact of a minor as those acts are defined by state law; or 2) sexually exploited by a parent through allowing, permitting or encouraging the child to engage in prostitution and allowing, permitting, encouraging or engaging the child in obscene or pornographic photographing or filming or depicting a child for commercial purposes as those acts are defined by state law;

(c) that a child has been knowingly, intentionally or negligently placed in a situation that may endanger the child's life or health; or

(d) that a child has been knowingly or intentionally tortured, cruelly confined or cruelly punished; provided that nothing in this paragraph shall be construed to imply that a child who is or has been provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner of the church or denomination, is for that reason alone a victim of child abuse within the meaning of this paragraph; and

(2) "domestic violence" means one parent causing or threatening physical harm or assault or inciting imminent fear of physical, emotional or psychological harm to the other parent.

History: 1953 Comp., § 22-7-7, enacted by Laws 1977, ch. 286, § 1; 1993, ch. 241, § 1.

ANNOTATIONS

Cross references. — For guardian ad litem for infant defendant, *see* 38-4-10 NMSA 1978.

For failure to apply for appointment of guardian ad litem, *see* 38-4-11 NMSA 1978.

For liability of guardian ad litem for costs, *see* 38-4-12 NMSA 1978.

For appointment of guardian ad litem to defend suit, *see* 38-4-15 NMSA 1978.

For compromise by guardian ad litem, *see* 38-4-16 NMSA 1978.

For costs paid by guardian ad litem, *see* 38-4-17 NMSA 1978.

For guardians of minors, *see* 45-5-201 to 45-5-212 NMSA 1978.

For guardians of incapacitated persons, *see* 45-5-301 to 45-5-315 NMSA 1978.

For protection of property of persons under disability and minors, *see* 45-5-401 to 45-5-431 NMSA 1978.

Compiler's notes. — The section heading of this section in Laws 1977, ch. 286, § 1, designated this section as "2277." The section number has been corrected in the history as set out above.

The 1993 amendment, effective July 1, 1993, designated the provisions of this section as Subsection A and added Subsections B and C.

Standing of a parent to sue a guardian ad litem. — A parent does not have standing to sue a guardian ad litem appointed in a custody proceeding on behalf of the child because the parent has been found to be unable to act in the best interests of the child and such a lawsuit would create a conflict of interest in the custody case. *Kimbrell v. Kimbrell*, 2014-NMSC-027, *rev'g* 2013-NMCA-070, 306 P.3d 495.

Immunity of a guardian ad litem. — A guardian ad litem appointed pursuant to Rule 1-053.3 NMRA is protected by absolute quasi-judicial immunity from suit arising from the performance of the guardian ad litem's duties unless the guardian ad litem's alleged tortuous conduct is clearly and completely outside the scope of the guardian ad litem's appointment. The custody court that appointed the guardian ad litem is the appropriate court to determine whether the guardian ad litem's alleged misconduct arose from acts clearly and completely outside the scope of the appointment and, if so, the custody court should appoint a guardian ad litem, other than a parent, pursuant to Rule 1-017(C) NMRA to represent the child in any necessary litigation. *Kimbrell v. Kimbrell*, 2014-NMSC-027, *rev'g* 2013-NMCA-070, 306 P.3d 495.

Where the guardian ad litem was appointed as an arm of the district court pursuant to Rule 1-053 NMRA; one parent, who obstructed the guardian ad litem's efforts to interview one of the children, filed a tort action against the guardian ad litem alleging that the guardian ad litem blocked the child's contact with the child's siblings; and the guardian ad litem was ordered by the district court to interview the children outside the presence of the parents and the attorneys, the guardian ad litem had the discretion to control communications between the children until the guardian ad litem completed the investigation and the guardian ad litem was absolutely immune from being sued for

controlling communications between the siblings. *Kimbrell v. Kimbrell*, 2014-NMSC-027, *rev'g* 2013-NMCA-070, 306 P.3d 495.

Parent's standing to sue guardian on behalf of the child. — Parents may sue their child's guardian ad litem for injuries caused by the guardian to the child if the guardian acts as a private advocate or exceeds the scope of the guardian's appointment as an arm of the court. *Kimbrell v. Kimbrell*, 2013-NMCA-070, 306 P.3d 495, *rev'd*, 2014-NMSC-027.

Guardian ad litem liability for conspiracy. — Where, in a contentious divorce and child custody proceeding, plaintiff filed a tort action against defendant and the child's guardian ad litem alleging that they colluded to block telephone calls from the child to the child's siblings and plaintiff and defendant entered into a settlement agreement that released defendant from liability, although the action against defendant was moot, the action against the guardian was not moot because, as alleged conspirators, defendant and the guardian were jointly and severally liable. *Kimbrell v. Kimbrell*, 2013-NMCA-070, 306 P.3d 495, *rev'd*, 2014-NMSC-027.

Guardian ad litem exceeded scope of appointment. — Where, in a contentious divorce and child custody proceeding, plaintiff filed a tort action against the child's guardian ad litem alleging that the guardian published the child's medical records to the court, defendant and defendant's counsel; increased conflict between the parties by rejecting settlement offers; failed to correct defendant's behavior when defendant ignored the child; failed to report defendant's efforts to block contact between the child and the child's siblings; and colluded with defendant to block telephone calls from the child to the child's siblings, the guardian was immune from suit for all of the guardian's acts except for the alleged act of colluding with defendant to block the child's telephone calls, which would exceed the scope of the guardian's appointment. *Kimbrell v. Kimbrell*, 2013-NMCA-070, 306 P.3d 495, *rev'd*, 2014-NMSC-027.

Discretion of court. — This section clearly makes it discretionary with the court as to whether an appointment of a guardian ad litem should be made. *Lopez v. Lopez*, 1981-NMSC-138, 97 N.M. 332, 639 P.2d 1186.

Deduction of guardian fees from child support. — Nowhere in either the child support guidelines or the guardian ad litem statute is any specialized procedure outlined to insure the payment of guardian ad litem fees by deducting them from child support. *Grant v. Cumiford*, 2005-NMCA-058, 137 N.M. 485, 112 P.3d 1142.

Nature of guardian fees. — Guardian ad litem fees should not be treated any differently from any other attorney fees. *Grant v. Cumiford*, 2005-NMCA-058, 137 N.M. 485, 112 P.3d 1142.

Mediation not required. — The language of Subsection B(1) of this section and 40-4-9.1G NMSA 1978 permits the court to bypass mediation if it does not appear to be

feasible, even in non-domestic violence or abuse situations. *Thomas v. Thomas*, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7, cert. denied, 128 N.M. 150, 990 P.2d 824.

Remand of custody decision for representation of child. — When father waits to request findings of fact and conclusions of law until after court files custody judgment and he himself files his notice of appeal, lack of any findings in record precludes review of the evidence by appellate court on behalf of father; however, where child had no legal representative, disposition on behalf of child requires remand to district court for issuance of findings as to mental health of mother. *Martinez v. Martinez*, 1984-NMCA-026, 101 N.M. 493, 684 P.2d 1158.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Infants §§ 155 to 194.

Attorneys' fees awards in parent-nonparent child custody case, 45 A.L.R.4th 212.

40-4-9. Standards for the determination of child custody; hearing.

A. In any case in which a judgment or decree will be entered awarding the custody of a minor, the district court shall, if the minor is under the age of fourteen, determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including, but not limited to:

(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.

B. If the minor is fourteen years of age or older, the court shall consider the desires of the minor as to with whom he wishes to live before awarding custody of such minor.

C. Whenever testimony is taken from the minor concerning his choice of custodian, the court shall hold a private hearing in his chambers. The judge shall have a court reporter in his chambers who shall transcribe the hearing; however, the court reporter shall not file a transcript unless an appeal is taken.

History: 1953 Comp., § 22-7-7.1, enacted by Laws 1977, ch. 172, § 1.

ANNOTATIONS

Cross references. — For notes regarding determination of child custody, *see* "V. GRANTING AND MODIFYING CHILD CUSTODY AND SUPPORT." in notes following 40-4-7 NMSA 1978.

For provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, *see* 40-10A-101 to 40-10A-403 NMSA 1978.

Modifying custody. — The rule articulated in *Schuermann v. Schuermann*, 1980-NMSC-027, 94 N.M. 81, 607 P.2d 619, reflects an underlying policy favoring the continuation of child custody judgments in order to promote stability and continuity in the child's custodial and environmental relationships, absent a showing of a material change of conditions affecting the interests of the child. *Seeley v. Jaramillo*, 1986-NMCA-100, 104 N.M. 783, 727 P.2d 91.

Inapplicability. — The custody modification factors described in 40-4-9A NMSA 1978 are to be applied in the context of divorce proceedings not child abuse and neglect proceedings. *State ex rel. Children, Youth and Families Dep't v. Lisa A.*, 2008-NMCA-087, 144 N.M. 324, 187 P.3d 189.

Indian children. — The Indian Child Welfare Act, 25 U.S.C. §1901, does not apply in divorce proceedings when the custody of children remain with the biological parents. *Cherino v. Cherino*, 2008-NMCA-024, 143 N.M. 452, 176 P.3d 1184.

Discretion of court to hold in-camera hearing. — The holding of an in-camera hearing under Subsection C is a matter entrusted to the sound discretion of the trial court. *Normand v. Ray*, 1990-NMSC-006, 109 N.M. 403, 785 P.2d 743.

Trial court's denial of an in-camera hearing to determine a child's preferences as to where she wanted to live was not error, where the court was otherwise adequately apprised of the child's wishes and there was evidence in the record otherwise supporting the ruling of the court. *Jeantete v. Jeantete*, 1990-NMCA-138, 111 N.M. 417, 806 P.2d 66.

Older child's preference not controlling. — Although the provisions of this section direct that the trial court shall consider the desires of a minor over 14 years of age concerning custody, under the statute, the trial court is not conclusively bound to award custody according to such preference. Instead, the controlling inquiry of the court in any child custody dispute involves a balancing of all relevant factors and determining the best interests of the child. *Normand v. Ray*, 1990-NMSC-006, 109 N.M. 403, 785 P.2d 743.

Best interest of child controlling. — Trial court's decision to change primary physical custody of the parties' son from mother to father, was reasonable, where the child had reached the age at which the court was statutorily required to consider his desires, and the court clinic's advisory consultation report approved the change as being in the best interests of the child. *Clayton v. Trotter*, 1990-NMCA-078, 110 N.M. 369, 796 P.2d 262.

Joint custody order requires a "best interest" analysis. — Where the district court changed a stipulated interim custody order that allowed mother to relocate with her four children from Ruidoso, New Mexico to Phoenix, Arizona, ordering that the children move back to Ruidoso to live with father during the school year, the district court abused its discretion in granting joint custody to mother and father and in awarding primary physical custody to father without making any specific findings related to any of the statutorily mandated factors relevant to a determination of the children's best interests that it was required to consider when making a custody determination. *Hough v. Brooks*, 2017-NMCA-050, cert. denied.

Effect of custodial parent's subsequent incestuous marriage. — New Mexico's public policy against incest did not preclude the district court from awarding a mother primary physical custody of her children, after taking into account her plans to marry her uncle, where that choice was in the best interests of the children, and mother and uncle intended to reside in California. *Leszinske v. Poole*, 1990-NMCA-088, 110 N.M. 663, 798 P.2d 1049, cert. denied, 110 N.M. 533, 797 P.2d 983.

Sexual orientation not sufficient to deny visitation. — Sexual orientation, standing alone, is not a permissible basis for the denial of shared custody or visitation. Evidence of sexual and associational conduct may be relevant to determining the best interests of the child, but is not, by itself, sufficient to make that determination. *A.C. v. C.B.*, 1992-NMCA-012, 113 N.M. 581, 829 P.2d 660, cert. denied, 113 N.M. 449, 827 P.2d 837.

Modification of award. — Because a final order was not entered until the custody-review hearing, a change in circumstances was not necessary to modify the court's joint custody award. Rather, the court was required to consider the standards for custody under this section and to comply with the requirements of Rule 1-052(B) NMRA. *Fitzsimmons v. Fitzsimmons*, 1986-NMCA-029, 104 N.M. 420, 722 P.2d 671, cert. quashed, 104 N.M. 378, 721 P.2d 1309.

Presumption that child born in wedlock is legitimate is not conclusive. — The presumption may be rebutted where the evidence is clear, cogent and convincing that the husband is not the father of the child. *Torres v. Gonzales*, 1969-NMSC-020, 80 N.M. 35, 450 P.2d 921.

Remand of custody decision for representation of child. — When father waits to request findings of fact and conclusions of law until after court files custody judgment and he himself files his notice of appeal, lack of any findings in record precludes review of the evidence by appellate court on behalf of father; however, where child had no legal representative, disposition on behalf of child requires remand to district court for issuance of findings as to mental health of mother. *Martinez v. Martinez*, 1984-NMCA-026, 101 N.M. 493, 684 P.2d 1158.

Father awarded physical custody. — Where a mother, in the Marine Corps, had lived in six different locales in five years, and the father, because of his work schedule, allowed the parties' minor child to live with his sister, the court did not err in awarding

father physical custody, but requiring him to maintain the child's present residence with her aunt, while maintaining joint legal custody. *Brito v. Brito*, 1990-NMCA-062, 110 N.M. 276, 794 P.2d 1205.

Order reversed for lack of evidence. — Trial court's order changing custody, apparently based on an allegation that the mother did not send the children to the father for a Christmas visit, was reversed, in the absence of the existence of any evidence in the record and the adoption of findings concerning the best interests and welfare of the children. *Campbell v. Alpers*, 1990-NMCA-037, 110 N.M. 21, 791 P.2d 472.

Law reviews. — For note, "Domestic Relations - Racial Factors in Change of Custody Determinations: Palmore v. Sidoti," see 15 N.M.L. Rev. 511 (1985).

For note, "Family Law - Custody Dispute between Biological Mother and Nonbiological, Nonadoptive Party: A.C. v. C.B.," see 23 N.M.L. Rev. 331 (1993).

For comment, "Custody Standards in New Mexico: Between Third Parties and Biological Parents, What Is the Trend?" see 27 N.M.L. Rev. 547 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Infants §§ 28 to 57; 59 Am. Jur. 2d Parent and Child §§ 23 to 36.

Jurisdiction to award custody of child having legal domicil in another state, 4 A.L.R.2d 7.

Jurisdiction to award custody of child domiciled in state but physically outside of it, 9 A.L.R.2d 434.

Nonresidence as affecting one's right to custody of child, 15 A.L.R.2d 432.

Power of court, on its own motion, to modify provisions of divorce decree as to custody of children, upon application for other relief, 16 A.L.R.2d 664.

Alienation of child's affections as affecting custody award, 32 A.L.R.2d 1005.

Consideration of investigation by welfare agency or the like in modifying award as between parents of custody of children, 35 A.L.R.2d 629.

Education: purview of charge for "college education," 36 A.L.R.2d 1323.

Right to custody of child as affected by death of custodian appointed by divorce decree, 39 A.L.R.2d 258.

Court's power as to custody and visitation of children in marriage annulment proceedings, 63 A.L.R.2d 1008.

Opening or modification of divorce decree as to custody or support of child not provided for in the decree, 71 A.L.R.2d 1370.

Court's power to modify child custody order as affected by agreement which was incorporated in divorce decree, 73 A.L.R.2d 1444.

Mental health of contesting parent as factor in award of child custody, 74 A.L.R.2d 1073.

Violation of custody provision of agreement or decree as affecting child support payment provision, and vice versa, 95 A.L.R.2d 118.

Propriety of court conducting private interview with child in determining custody, 99 A.L.R.2d 954.

Child's wishes as factor in awarding custody, 4 A.L.R.3d 1396.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support, 17 A.L.R.3d 764.

Award of custody of child where contest is between child's mother and grandparent, 29 A.L.R.3d 366.

Award of custody of child where contest is between child's parents and grandparents, 31 A.L.R.3d 1187.

Divorce: necessity of notice of application for temporary custody of child, 31 A.L.R.3d 1378.

Noncustodial parent's rights as respects education of child, 36 A.L.R.3d 1093.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 A.L.R.3d 605.

Sexual abuse of child by parent as ground for termination of parent's right to child, 58 A.L.R.3d 1074.

Right, in custody proceedings, to cross-examine investigating officer whose report is used by the court in its decision, 59 A.L.R.3d 1337.

Modern status of maternal preference rule or presumption in child custody cases, 70 A.L.R.3d 262.

Effect in subsequent proceedings of paternity findings or implications in divorce decree or in support or custody order made incidental, 78 A.L.R.3d 846.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding, 79 A.L.R.3d 417.

Validity, construction, and application of Uniform Child Custody Jurisdiction Act, 96 A.L.R.3d 968, 78 A.L.R.4th 1028, 16 A.L.R.5th 650, 20 A.L.R.5th 700, 21 A.L.R.5th 396, 40 A.L.R.5th 227.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child, 99 A.L.R.3d 268.

Custodial parent's sexual relations with third person as justifying modification of child custody order, 100 A.L.R.3d 625.

Parent's physical disability or handicap as factor in custody award or proceedings, 3 A.L.R.4th 1044.

Initial award or denial of child custody to homosexual or lesbian parent, 6 A.L.R.4th 1297.

Award of custody of child where contest is between natural parent and stepparent, 10 A.L.R.4th 767.

Race as factor in custody award or proceedings, 10 A.L.R.4th 796.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights, 10 A.L.R.4th 827.

Propriety of awarding custody of child to parent residing or intending to reside in foreign country, 20 A.L.R.4th 677.

Religion as factor in child custody and visitation cases, 22 A.L.R.4th 971.

Effect of remarriage of spouses to each other on child custody and support provisions of prior divorce decree, 26 A.L.R.4th 325.

Interference by custodian of child with noncustodial parent's visitation rights as ground for change of custody, 28 A.L.R.4th 9.

Parent's or relative's rights of visitation of adult against latter's wishes, 40 A.L.R.4th 846.

Primary caretaker role of respective parents as factor in awarding custody of child, 41 A.L.R.4th 1129.

Attorneys' fees awards in parent-nonparent child custody case, 45 A.L.R.4th 212.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 A.L.R.4th 1170.

Mother's status as "working mother" as factor in awarding child custody, 62 A.L.R.4th 259.

Withholding visitation rights for failure to make alimony or support payments, 65 A.L.R.4th 1155.

Child custody: separating children by custody awards to different parents - post-1975 cases, 67 A.L.R.4th 354.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 A.L.R.4th 742.

Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically requested in pleadings of prevailing party, 5 A.L.R.5th 863.

Continuity of residence as factor in contest between parent and nonparent for custody of child who has been residing with nonparent - modern status, 15 A.L.R.5th 692.

Parties' misconduct as ground for declining jurisdiction under § 8 of the Uniform Child Custody Jurisdiction Act (UCCJA), 16 A.L.R.5th 650.

Age of parent as factor in awarding custody, 34 A.L.R.5th 57.

Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(a), 40 A.L.R.5th 227.

Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic violence in awarding custody of children, 51 A.L.R.5th 241.

Mental health of contesting parent as factor in award of child custody, 53 A.L.R.5th 375.

Initial award or denial of child custody to homosexual or lesbian parent, 62 A.L.R.5th 591.

Custodial parent's homosexual or lesbian relationship with third person as justifying modification of child custody order, 65 A.L.R.5th 591.

Custodial parent's relocation as grounds for change of custody, 70 A.L.R.5th 377.

Child custody and visitation rights arising from same-sex relationship, 80 A.L.R.5th 1.

Religion as factor in visitation cases, 95 A.L.R.5th 533.

Restrictions on parent's child visitation rights based on parent's sexual conduct, 99 A.L.R.5th 475.

Religion as factor in child custody cases, 124 A.L.R. 5th 203.

27C C.J.S. Divorce §§ 620 to 631, 639.

40-4-9.1. Joint custody; standards for determination; parenting plan.

A. There shall be a presumption that joint custody is in the best interests of a child in an initial custody determination. An award of joint custody does not imply an equal division of financial responsibility for the child. Joint custody shall not be awarded as a substitute for an existing custody arrangement unless there has been a substantial and material change in circumstances since the entry of the prior custody order or decree, which change affects the welfare of the child such that joint custody is presently in the best interests of the child. With respect to any proceeding in which it is proposed that joint custody be terminated, the court shall not terminate joint custody unless there has been a substantial and material change in circumstances affecting the welfare of the child, since entry of the joint custody order, such that joint custody is no longer in the best interests of the child.

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, one arrived at through parental agreement;

(7) geographic distance 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 proceeding 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.

C. In any proceeding in which the custody of a child is at issue, the court shall not prefer one parent as a custodian solely because of gender.

D. In any case in which the parents agree to a form of custody, the court should award custody consistent with the agreement unless the court determines that such agreement is not in the best interests of the child.

E. In making an order of joint custody, the court may specify the circumstances, if any, under which the consent of both legal custodians is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent.

F. When joint custody is awarded, the court shall approve a parenting plan for the implementation of the prospective custody arrangement prior to the award of joint custody. The parenting plan shall include a division of a child's time and care into periods of responsibility for each parent. It may also include:

(1) statements regarding the child's religion, education, child care, recreational activities and medical and dental care;

(2) designation of specific decision-making responsibilities;

(3) methods of communicating information about the child, transporting the child, exchanging care for the child and maintaining telephone and mail contact between parent and child;

(4) procedures for future decision making, including procedures for dispute resolution; and

(5) other statements regarding the welfare of the child or designed to clarify and facilitate parenting under joint custody arrangements.

In a case where joint custody is not agreed to or necessary aspects of the parenting plan are contested, the parties shall each submit parenting plans. The court may accept the plan proposed by either party or it may combine or revise these plans as it deems necessary in the child's best interests. The time of filing of parenting plans shall be set by local rule. A plan adopted by the court shall be entered as an order of the court.

G. Where custody is contested, the court shall refer that issue to mediation if feasible. The court may also use auxiliary services such as professional evaluation by application of Rule 706 [Rule 11-706 NMRA] of the New Mexico Rules of Evidence or Rule 53 [Rule 1-053 NMRA] of the Rules of Civil Procedure for the District Courts.

H. Notwithstanding any other provisions of law, access to records and information pertaining to a minor child, including medical, dental and school records, shall not be denied to a parent because that parent is not the child's physical custodial parent or because that parent is not a joint custodial parent.

I. Whenever a request for joint custody is granted or denied, the court shall state in its decision its basis for granting or denying the request for joint custody. A statement that joint custody is or is not in the best interests of the child is not sufficient to meet the requirements of this subsection.

J. An award of joint custody means that:

(1) each parent shall have significant, well-defined periods of responsibility for the child;

(2) 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;

(3) the parents shall consult with each other on major decisions involving the child before implementing those decisions; that is, 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, after discussion, cannot agree and if one parent wishes to effect a major change while the other does not wish the major change to occur, then no change shall occur until the issue has been resolved as provided in this subsection;

(4) the following guidelines apply to major changes in a child's life:

(a) if either parent plans to change his home city or state of residence, he shall provide to the other parent thirty days' notice in writing stating the date and destination of move;

(b) the religious denomination and religious activities, or lack thereof, which were being practiced during the marriage should not be changed unless the parties agree or it has been otherwise resolved as provided in this subsection;

(c) both parents shall have access to school records, teachers and activities. The type of education, public or private, which was in place during the marriage should continue, whenever possible, and school districts should not be changed unless the parties agree or it has been otherwise resolved as provided in this subsection;

(d) both parents shall have access to medical and dental treatment providers and records. Each parent has authority to make emergency medical decisions. Neither parent may contract for major elective medical or dental treatment unless both parents agree or it has been otherwise resolved as provided in this subsection; and

(e) both parents may attend the child's public activities and both parents should know the necessary schedules. Whatever recreational activities the child participated in during the marriage should continue with the child's agreement, regardless of which of the parents has physical custody. Also, neither parent may enroll the child in a new recreational activity unless the parties agree or it has been otherwise resolved as provided in this subsection; and

(5) decisions regarding major changes in a child's life may be decided by:

(a) agreement between the joint custodial parents;

(b) requiring that the parents seek family counseling, conciliation or mediation service to assist in resolving their differences;

(c) agreement by the parents to submit the dispute to binding arbitration;

(d) allocating ultimate responsibility for a particular major decision area to one legal custodian;

(e) terminating joint custody and awarding sole custody to one person;

(f) reference to a master pursuant to Rule 53 [Rule 1-053 NMRA] of the Rules of Civil Procedure for the District Courts; or

(g) the district court.

K. When any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent.

L. As used in this section:

(1) "child" means a person under the age of eighteen;

(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) "domestic abuse" means any incident by a household member against another household member resulting in:

(a) physical harm;

(b) severe emotional distress;

(c) a threat causing imminent fear of physical harm by any household member;

(d) criminal trespass;

(e) criminal damage to property;

(f) stalking or aggravated stalking, as provided in Sections 30-3A-3 and 30-3A-3.1 NMSA 1978; or

(g) harassment, as provided in Section 30-3A-2 NMSA 1978;

(4) "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;

(5) "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;

(6) "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;

(7) "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. Specified periods of

responsibility shall not be changed in an instance or more permanently except by the methods of decision making described under Subsection L [Subsection J] of this section;

(8) "sole custody" means an order of the court awarding custody of a child to one parent; and

(9) "visitation" means a period of time available to a noncustodial parent, under a sole custody arrangement, during which a child resides with or is under the care and control of the noncustodial parent.

History: 1978 Comp., § 40-4-9.1, enacted by Laws 1981, ch. 112, § 1; reenacted by Laws 1986, ch. 41, § 1; 1999, ch. 242, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The reference in Subsection L(7) to Subsection L appears to be erroneous. The apparent intended reference is to Subsection J.

The 1999 amendment, effective June 18, 1999, added Subsection B(9); in Subsection L, added Paragraph (3), redesignated the subsequent paragraphs accordingly, and substituted "decision making described under Subsection L of this section" for "decision making described under the definition of joint custody" in Paragraph (7); and made stylistic changes throughout the section.

The "holding out" provision with regard to paternity applies to women. — Where petitioner alleged that petitioner and respondent, who both were women, had a committed, long-term domestic relationship; they agreed to bring a child into their relationship; respondent adopted a child; petitioner never adopted the child; and petitioner supported respondent and the child financially, lived in the family home, held the child out as petitioner's natural child, and co-parented the child for a number of years before the parties dissolved their relationship; petitioner had standing to file an action under 40-11-12 NMSA 1978 (repealed, *see* 40-11A-601 and 40-11A-602 NMSA 1978) because petitioner alleged sufficient facts to satisfy the hold out provision of Subsection A(4) of 40-11-5 NMSA 1978 (repealed, *see* 40-11A-204 NMSA 1978) and if petitioner were able to establish a parent child relationship under the Uniform Parentage Act (repealed, *see* New Mexico Uniform Parentage Act, Chapter 40, Article 11A NMSA 1978), then petitioner would have standing to seek joint custody of the child under 40-4-9.1 NMSA 1978. *Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283, *rev'g* 2011-NMCA-012,149 N.M. 625, 253 P.3d 915.

Recreational expenses. — The requirement for including recreational expenses is implicit in the statutory provision governing joint custody. Section 40-4-9.1(J)(4)(e) NMSA 1978 states that when joint custody is awarded, "whatever recreational activities the child participated in during the marriage should continue with the child's agreement,

regardless of which of the parents has physical custody." This provision represents a legislative recognition of the importance of recreational activities to children. But the importance of an activity is not in itself a reason for separate inclusion of the expense for that activity in the child support guidelines. All ordinary expenses are presumably taken into consideration in establishing the guidelines for basic child support. The child support awarded under the guidelines should be adequate to feed and shelter the children, and to provide for recreational activities. *Rosen v. Lantis*, 1997-NMCA-033, 123 N.M. 231, 938 P.2d 729.

Standing of non-parent to bring a custody claim. — Absent a showing of unfitness of the natural or adoptive parent, a person who is not the natural or adoptive parent does not have standing to bring a claim for custody. *Chatterjee v. King*, 2011-NMCA-012, 149 N.M. 625, 253 P.3d 915, cert. granted, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where petitioner and respondent were in a committed relationship for several years; respondent adopted a child; petitioner did not adopt the child; petitioner and respondent lived as a family, jointly raised the child, and held themselves out as parents; petitioner provided financial and emotional support for the child, cared for the child, and formed a parental relationship with the child; and respondent ended the relationship and moved out with the child, petitioner did not have standing to bring a claim for custody of the child. *Chatterjee v. King*, 2011-NMCA-012, 149 N.M. 625, 253 P.3d 915, cert. granted, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Standing of non-parent to bring claim for visitation. — The requirement that a non-parent show unfitness of a natural or adoptive parent before a court can consider a non-parent for custody is not relevant to a determination of visitation and a non-parent who establishes a prima facie case for a parent and child relationship may assert a claim for visitation. *Chatterjee v. King*, 2011-NMCA-012, 149 N.M. 625, 253 P.3d 915, cert. granted, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where petitioner and respondent were in a committed relationship for several years; respondent adopted a child; petitioner did not adopt the child; petitioner and respondent lived as a family, jointly raised the child, and held themselves out as parents; and petitioner provided financial and emotional support for the child, cared for the child, and formed a parental relationship with the child, petitioner had a colorable claim for standing to bring a claim for visitation. *Chatterjee v. King*, 2011-NMCA-012, 149 N.M. 625, 253 P.3d 915, cert. granted, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Joint custody not infringement on right to travel or relocate. — An order providing for joint custody and requiring the mother to give physical custody of her child to the father unless she returned to New Mexico did not unlawfully infringe upon her right to travel or to relocate. *Alfieri v. Alfieri*, 1987-NMCA-003, 105 N.M. 373, 733 P.2d 4.

Presumption regarding joint custody. — There is a presumption that joint custody is in the best interests of the child. *Grant v. Cumiford*, 2005-NMCA-058, 137 N.M. 485, 112 P.3d 1142.

Court, in determining support, should consider all relevant factors. — Where primary custody of children is split between the parties and issues of child support are involved, the court in its broad discretion should consider all of the relevant factors and circumstances in order to achieve a fair balancing of the equities in light of the best interests and welfare of the children and the financial resources of the parents. *DeTevis v. Aragon*, 1986-NMCA-105, 104 N.M. 793, 727 P.2d 558.

Factors considered. — In considering whether joint custody would promote the best interests of a child, the trial court must determine: (1) whether the child has established such relationships with both parents that he or she would benefit from joint custody; (2) that both parents are fit; (3) that both parents desire continuing involvement with the child; and (4) that both parents are able to communicate and cooperate in promoting the child's best interests. The ability to cooperate concerning joint child custody does not require the parents to have a totally amicable relationship, however: a successful joint custody arrangement requires that the parents be able to isolate their personal conflicts from their roles as parents and that the children be spared whatever resentments and rancor the parents may harbor. *Sanchez v. Sanchez*, 1988-NMCA-028, 107 N.M. 159, 754 P.2d 536, cert. denied, 107 N.M. 151, 754 P.2d 528.

Discretion of trial court. — A trial court has wide discretion in awarding custody of a child in a divorce case, and the welfare of the child is of primary importance in making the award. *Creusere v. Creusere*, 1982-NMSC-126, 98 N.M. 788, 653 P.2d 164.

Modification is discretionary. — Whether modification of the initial agreement is appropriate is a matter entrusted to the sound discretion of the trial court, based upon the evidence submitted by the parties. *Jeantete v. Jeantete*, 1990-NMCA-138, 111 N.M. 417, 806 P.2d 66.

Scope of statement required in court's order. — The requirement, under the provisions of former Subsection B which are similar to those in present Subsection I, that the court must state its reasons for modifying a joint custody order is not satisfied by a simple statement that the circumstances of the parties and their minor child have materially changed since the entry of the final decree. *Jaramillo v. Jaramillo*, 1985-NMCA-062, 103 N.M. 145, 703 P.2d 922.

Requirement of statement in the custody order. — The plain language of this section requires the court to set forth in its decision the basis for its determination either granting or denying joint custody. *Jeantete v. Jeantete*, 1990-NMCA-138, 111 N.M. 417, 806 P.2d 66.

Adequacy of statement in court order. — Trial court adequately articulated the basis for its denial of a motion for modification of visitation, where the motion did not

specifically seek the granting or denial of joint custody, and the court's order denying modification recited in applicable part: "the motion is denied because the father failed to allege or prove the existence of a material change of circumstances relating to the child." *Jeantete v. Jeantete*, 1990-NMCA-138, 111 N.M. 417, 806 P.2d 66.

Joint custody award. — As specified by Subsection J(1), an award of joint custody means that "each parent shall have significant, well-defined periods of responsibility for the child"; however, joint custody awards need not equally divide the time period relating to the child's physical custody. *Jeantete v. Jeantete*, 1990-NMCA-138, 111 N.M. 417, 806 P.2d 66.

When joint custody parents fail to accommodate one another and cannot reach agreement, even with the assistance of counselors, conciliators, mediators or arbitrators, the court has few options available; it may make the controverted decision itself and enforce its determination without changing the legal status of the parents, or it may reevaluate the best interests of the children in light of either or both parents' failure to fulfill joint custody responsibilities, and modify their custody. *Strosnider v. Strosnider*, 1984-NMCA-082, 101 N.M. 639, 686 P.2d 981.

Discretion of court in making award. — Where a mother, in the Marine Corps, had lived in six different locales in five years, and the father, because of his work schedule, allowed the parties' minor child to live with his sister, the court did not err in awarding father physical custody, but requiring him to maintain the child's present residence with her aunt, while maintaining joint legal custody. *Brito v. Brito*, 1990-NMCA-062, 110 N.M. 276, 794 P.2d 1205.

Determination not overturned absent abuse of discretion. — The determination of the trial judge in a joint custody decision who saw the parties, observed their demeanor and heard their testimony will not be overturned absent a manifest abuse of discretion. *Creusere v. Creusere*, 1982-NMSC-126, 98 N.M. 788, 653 P.2d 164.

Denial of joint custody for incompatibility. — The trial court did not abuse its discretion in denying joint custody and in granting sole custody to the wife when the level of incompatibility between the husband and wife was not in the child's best interest and, thus, did not support joint custody of the child. *Creusere v. Creusere*, 1982-NMSC-126, 98 N.M. 788, 653 P.2d 164.

Burden on party seeking to modify joint custody decree. — A party seeking to modify a decree of joint custody must overcome the presumption of the reasonableness of the original decree. *Jeantete v. Jeantete*, 1990-NMCA-138, 111 N.M. 417, 806 P.2d 66.

Burden of proof in modification of joint custody arrangements. — In a joint custody arrangement, when one party initiates a proceeding to alter an existing custody arrangement, the party seeking such change has the burden to show that the existing arrangement is no longer workable. Each party will then have the burden to persuade

the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court, but that party's failure to carry this burden will only mean that the court remains free to adopt the arrangement or plan that it determines best promotes the child's interests. *Jaramillo v. Jaramillo*, 1991-NMSC-101, 113 N.M. 57, 823 P.2d 299.

Notice and hearing required. — Joint custody cannot be terminated except after a hearing following specific notice that continuation of joint custody will be at issue. *Taylor v. Tittman*, 1995-NMCA-034, 120 N.M. 22, 896 P.2d 1171.

Modification of joint custody warranted. — Whether or not there was proof of "emotional damage" per se, the observation that the parties' continuing inability to cooperate was affecting the children was a sufficient change in circumstance to support the modification of joint custody. *Thomas v. Thomas*, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7, cert. denied, 128 N.M. 150, 990 P.2d 824.

Modification to joint custody reversed. — Judgment changing sole custody in the mother to joint legal custody, unless and until the mother was able to comply with a parenting plan agreed to by the parties, was reversed, where the trial court's findings failed to resolve basic issues material and necessary to a determination that modification of the initial custody agreement to joint custody was in the best interests of the children. *Newhouse v. Chavez*, 1988-NMCA-110, 108 N.M. 319, 772 P.2d 353, cert. denied, 108 N.M. 197, 769 P.2d 731 (1989).

Modification of existing custody arrangement requires a showing of substantial and material change in circumstances. — Where the district court changed a stipulated interim custody order that allowed mother to relocate with her four children from Ruidoso, New Mexico to Phoenix, Arizona, ordering that the children move back to Ruidoso to live with father during the school year, the district court abused its discretion in ordering joint custody without making a finding that there was a substantial and material change in circumstances, because although the interim order was not a final order, the plain language of this section states that joint custody shall not be awarded as a substitute for any existing custody arrangement that is instituted by court order or decree, unless there has been a substantial and material change in circumstances, and there was nothing in the stipulated interim order establishing that the custody arrangement was temporary or subject to change. *Hough v. Brooks*, 2017-NMCA-050, cert. denied.

Joint custody order requires a "best interest" analysis. — Where the district court changed a stipulated interim custody order that allowed mother to relocate with her four children from Ruidoso, New Mexico to Phoenix, Arizona, ordering that the children move back to Ruidoso to live with father during the school year, the district court abused its discretion in granting joint custody to mother and father and in awarding primary physical custody to father without making any specific findings related to any of the statutorily mandated factors relevant to a determination of the children’s best interests

that it was required to consider when making a custody determination. *Hough v. Brooks*, 2017-NMCA-050, cert. denied.

Relocation of custodial parent. — In situations in which one parent has sole custody of the child, the custodian seeking to relocate with a child is entitled to a presumption that the move is in the best interests of the child, and the burden is on the noncustodial parent to show that the move is against those interests or motivated by bad faith on the part of the custodial parent. However, the designation of one parent as "primary physical custodian" under a court-approved parenting plan in a joint custody situation simply means that the child resides with that parent more than half the time. Consequently, one parent's status as primary physical custodian has no particular significance and should not entitle that parent to the benefit of any presumption. *Jaramillo v. Jaramillo*, 1991-NMSC-101, 113 N.M. 57, 823 P.2d 299.

Burden on relocating party impermissible. — In joint custody cases, placing the burden on the party seeking to relocate to show that the relocation is in the best interests of the child unconstitutionally impairs the relocating parent's right to travel. *Jaramillo v. Jaramillo*, 1991-NMSC-101, 113 N.M. 57, 823 P.2d 299.

Modification of joint custody by awarding primary physical custody to father. — Where father filed for a change of custody of his two children, requesting that he be awarded sole legal custody and that he be permitted to relocate to another state with his children, the district court's order, awarding primary physical custody to father and permitting father to relocate children to another state, intended only to modify, not terminate, joint custody, and the district court did not abuse its discretion in modifying joint custody because it considered all of the factors necessary in determining whether relocation was in the best interests of the children. *Hopkins v. Wollaber*, 2019-NMCA-024.

Mediation not required. — The language of Subsection G of this section and 40-4-8B(1) NMSA 1978 permits the court to bypass mediation if it does not appear to be feasible, even in non-domestic violence or abuse situations. *Thomas v. Thomas*, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7, cert. denied, 128 N.M. 150, 990 P.2d 824.

Law reviews. — For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

For article, "Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum," see 29 N.M.L. Rev. 245 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 A.L.R.4th 864.

Propriety of awarding joint custody of children, 17 A.L.R.4th 1013.

Religion as factor in child custody and visitation cases, 22 A.L.R.4th 971.

Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 A.L.R.4th 1170.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 A.L.R.4th 786.

Child custody and visitation rights of person infected with AIDS, 86 A.L.R.4th 211.

Application of child-support guidelines to cases of joint-, split-, or similar shared-custody arrangements, 57 A.L.R.5th 389.

40-4-10. Appointment of guardian ad litem.

After service of summons and copy of petition on any insane spouse and on the guardian of his or her estate, the court shall appoint an attorney at law as guardian ad litem to appear for and represent the insane spouse.

History: Laws 1933, ch. 27, § 2; 1941 Comp., § 25-711; 1953 Comp., § 22-7-8; Laws 1973, ch. 319, § 8.

ANNOTATIONS

Cross references. — For appointment of guardian ad litem to defend suit for incapacitated person, *see* 38-4-15 NMSA 1978.

For guardians of incapacitated person, *see* 45-5-301 to 45-5-315 NMSA 1978.

For protection of property of persons under disability and minors, *see* 45-5-401 to 45-5-431 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Infants §§ 155 to 194.

40-4-11. Determination of award of child support; notice to withhold income.

In any proceeding before a court in which the court has the duty or authority to determine liability of a parent for the support of minor children or the amount of that support, the court:

A. shall make a specific determination and finding of the amount of support to be paid by a parent in accordance with the provisions of Section 40-4-11.1 NMSA 1978;

B. shall not consider present or future welfare financial assistance payments to or on behalf of the children in making its determination under Subsection A of this section; and

C. for good cause may order the parent liable for support of a minor child to assign to the person or public office entitled to receive the child support that portion of the parent's periodic income or other periodic entitlements to money. The assignment of that portion of the parent's periodic income or other periodic entitlements to money may be ordered by the court by the issuance of a notice to withhold income against the income of the parent. The procedures for the issuance of the notice to withhold income, the content of the notice to withhold income, the duties of the parent liable for child support and the duties of the employer responsible for withholding income shall be the same as provided for in the Support Enforcement Act [40-4A-1 to 40-4A-20 NMSA 1978], except that delinquency in payment under an order for support need not be a pre-existing condition to effectuate the procedures of the Support Enforcement Act for purpose of withholding income under this section.

History: 1953 Comp., § 22-7-11.1, enacted by Laws 1971, ch. 185, § 1; 1987, ch. 340, § 1; 1988, ch. 87, § 1.

ANNOTATIONS

Compiler's notes. — Laws 1988, ch. 87, § 1 amended 40-4-11 NMSA 1978 as amended by Laws 1987, ch. 340, § 1, and Laws 1988, ch. 87, § 3 repealed and reenacted the same section, both effective March 8, 1988. Pursuant to instructions of the New Mexico compilation commission, both versions of the section have been set out.

In Leeder v. Leeder, 118 N.M. 603, 884 P.2d 494 (Ct. App. 1994), the court discussed the interpretation of these two sections and concluded that reading the second version of this section, Subsection A of 40-4-11.1 and 40-4-11.2 NMSA 1978 together, the guidelines are presumed to provide the proper amount of child support and that the second version of this section is ordinarily satisfied if the court sets forth the computations made under the guidelines. The second version of this section requires additional findings only when the children's needs for care, maintenance, and education, in light of the parents' financial resources, justify a departure from the guidelines. Although under this interpretation there is substantial overlap in what is required by Subsection A of the second version of this section, Subsection A of 40-4-11.1 and 40-4-11.2 NMSA 1978, there is no way to avoid the overlap without distorting the meaning of

the statutory language for no discernible purpose. Statutes which relate to the same subject matter should, if possible, be construed to give effect to every provision of each.

The 1988 amendment, effective March 8, 1988, deleted "disregard of welfare payment" preceding "notice to withhold" in the catchline; in Subsection A, substituted "in accordance with the provisions of Section 40-4-11.1 NMSA 1978" for "to provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent"; corrected a misspelling in Subsection C; merged present Subsection C and former Subsection D by deleting "and" between the subsections and the designation of former Subsection D; and substituted "this section" for "this act" at the end of present Subsection C.

40-4-11. Determination of award of child support; disregard of welfare payments; notice to withhold income.

In any proceeding before a court in which the court has the duty or authority to determine liability of a parent for the support of minor children or the amount of that support, the court:

A. shall make a specific determination and finding of the amount of support to be paid by a parent to provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent;

B. shall not consider present or future welfare financial assistance payments to or on behalf of the children in making its determination under Subsection A of this section; and

C. for good cause may order the parent liable for support of a minor child to assign to the person or public office entitled to receive the child support that portion of the parent's periodic income or other periodic entitlements to money. The assignment of that portion of the parent's periodic income or other periodic entitlements to money may be ordered by the court by the issuance of a notice to withhold income against the income of the parent. The procedures for the issuance of the notice to withhold income, the content of the notice to withhold income, the duties of the parent liable for child support and the duties of the employer responsible for withholding income shall be the same as provided for in the Support Enforcement Act [40-4A-1 to 40-4A-20 NMSA 1978], except that delinquency in payment under an order for support need not be a pre-existing condition to effectuate the procedures of the Support Enforcement Act for purpose of withholding income under this section.

History: 1978 Comp., § 40-4-11, enacted by Laws 1988, ch. 87, § 3.

ANNOTATIONS

Repeals and reenactments. — Laws 1988, ch. 87, § 3 repealed former 40-4-11 NMSA 1978, as amended by Laws 1987, ch. 340, § 1, and enacted a new section, effective March 8, 1988.

Cross references. — For the Parental Responsibility Act, *see* 40-5A-1 NMSA 1978 et seq.

Compiler's notes. — Laws 1988, ch. 87, § 1 amended 40-4-11 NMSA 1978 as amended by Laws 1987, ch. 340, § 1, and Laws 1988, ch. 87, § 3 repealed and reenacted the same section, both effective March 8, 1988. Pursuant to instructions of the New Mexico compilation commission, both versions of the section have been set out. The notes below are applicable to both versions of this section.

In Leeder v. Leeder, 118 N.M. 603, 884 P.2d 494 (Ct. App. 1994), the court discussed the interpretation of these two sections and concluded that reading the second version of this section, Subsection A of 40-4-11.1 and 40-4-11.2 NMSA 1978 together, the guidelines are presumed to provide the proper amount of child support and that the second version of this section is ordinarily satisfied if the court sets forth the computations made under the guidelines. The second version of this section requires additional findings only when the children's needs for care, maintenance, and education, in light of the parents' financial resources, justify a departure from the guidelines. Although under this interpretation there is substantial overlap in what is required by Subsection A of the second version of this section, Subsection A of 40-4-11.1 and 40-4-11.2 NMSA 1978, there is no way to avoid the overlap without distorting the meaning of the statutory language for no discernible purpose. Statutes which relate to the same subject matter should, if possible, be construed to give effect to every provision of each.

Recreational expenses. — The requirement for including recreational expenses is implicit in the statutory provision governing joint custody. Section 40-4-9.1(J)(4)(e) NMSA 1978 states that when joint custody is awarded, "whatever recreational activities the child participated in during the marriage should continue with the child's agreement, regardless of which of the parents has physical custody." This provision represents a legislative recognition of the importance of recreational activities to children. But the importance of an activity is not in itself a reason for separate inclusion of the expense for that activity in the child support guidelines. All ordinary expenses are presumably taken into consideration in establishing the guidelines for basic child support. The child support awarded under the guidelines should be adequate to feed and shelter the children, and to provide for recreational activities. *Rosen v. Lantis*, 1997-NMCA-033, 123 N.M. 231, 938 P.2d 729.

Provisions of section are mandatory and require that evidence of the father's current financial resources be fully considered by the court and a finding be made based on that evidence. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958; *Blake v. Blake*, 1985-NMCA-009, 102 N.M. 354, 695 P.2d 838.

Finding required as to proper amount payable, or basis for denial. — When an issue is directly raised involving a demand for payment of child support, it is error to refuse to adopt a finding as to the amount of child support properly payable from the noncustodial parent to the custodial parent, or to refuse to adopt a finding indicating the basis for denial of the request for child support. *DeTevis v. Aragon*, 1986-NMCA-105, 104 N.M. 793, 727 P.2d 558.

Total financial resources of both parents considered. — In providing for the welfare of a child of divorced parents the trial court should consider the total financial resources of both parents, including their monetary obligations, income and net worth. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Effect of number of children. — Although the number of children involved is a factor for consideration in the amount of a child support award, experience indicates that the support level for one child must be considerably higher than that necessary for the additional children. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Children's ages considered. — In determining amounts of child support payments, the court must look at the ages, physical condition and health of the parents and the children. It must consider whether the children have advanced into an age bracket where the expenses of caring for and maintaining them are substantially greater. Likewise the attainment of majority by a child will affect the amount of support to be paid. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Educational needs considered. — One of the paramount concerns of the courts in child support cases is that a high level of education and training be afforded children, and the finest education that the parents can reasonably afford should be the criterion. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Additional advantages to children above their actual needs. — Where the income, surrounding financial circumstances and station in life of the father demonstrate an ability on his part to furnish additional advantages to his children above their actual needs, the trial court should provide such advantages within reason. *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958.

Specific findings by the court. — The child support guidelines are presumed to provide the proper amount of child support and Subsection A is ordinarily satisfied if the court sets forth the computations made under the guidelines. Additional findings are required only when the children's needs for care, maintenance, and education, in light of the parents' financial resources, justify a departure from the guidelines. *Leeder v. Leeder*, 1994-NMCA-105, 118 N.M. 603, 884 P.2d 494.

Undivided support award directed at more than one child is presumed to continue in force for the full amount until the youngest child reaches majority. *Britton v. Britton*, 1983-NMSC-084, 100 N.M. 424, 671 P.2d 1135.

Court may not on own motion reduce support. — Where there is no evidence before the trial court as to the salaries or financial resources of the husband or the wife in an action to collect delinquent child support, the court may not on its own motion reduce the support payments. *Pitcher v. Pitcher*, 1978-NMSC-029, 91 N.M. 504, 576 P.2d 1135.

Principal issue on request for increased child support is whether husband's circumstances have so changed as to warrant the increase requested. In order to determine whether such a change has occurred, it is necessary to examine into and consider his prior circumstances. *Horcasitas v. House*, 1965-NMSC-074, 75 N.M. 317, 404 P.2d 140.

Trial court erred in refusing to consider community earnings of husband's new wife in determining whether the husband's child support obligations should be increased. *DeTevis v. Aragon*, 1986-NMCA-105, 104 N.M. 793, 727 P.2d 558.

Biological father cannot relinquish duties. — In the absence of a formal adoption under the Adoption Act, the biological father cannot voluntarily effect a relinquishment of his parental obligation to pay child support. *Poncho v. Bowdoin*, 2006-NMCA-013, 138 N.M. 857, 126 P.3d 1221.

Equitable adoption. — Doctrine of equitable adoption cannot be asserted by biological father to avoid payment of child support. *Poncho v. Bowdoin*, 2006-NMCA-013, 138 N.M. 857, 126 P.3d 1221.

Law reviews. — For article, "Child Support Enforcement: The New Mexico Experience," see 9 N.M.L. Rev. 25 (1978-79).

For note, "Guidelines for Modification of Child Support Awards: Spingola v. Spingola," see 9 N.M.L. Rev. 201 (1978-79).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Parent and Child §§ 41 to 74.

Parent's obligation to support adult child, 1 A.L.R.2d 910, 48 A.L.R.4th 919.

Support provisions of judicial decree or order as limit of father's liability for expenses of child, 7 A.L.R.2d 491.

Father's duty under divorce or separation decree to support child as affected by the latter's induction into military service, 20 A.L.R.2d 1414.

Contract to support, maintain, or educate a child as within provision of statute of frauds relating to contracts not to be performed within a year, 49 A.L.R.2d 1293.

Education as element in allowance for benefit of child in decree of divorce or separation, 56 A.L.R.2d 1207.

Marriage of minor child as terminating support provisions in divorce or similar decree, 58 A.L.R.2d 355.

Father's liability for support of child furnished after entry of decree of divorce not providing for support, 69 A.L.R.2d 203, 91 A.L.R.3d 530.

Opening or modification of divorce decree as to custody or support of child not provided for in the decree, 71 A.L.R.2d 1370.

Right of wife to allowance for expense money in action by or against husband, without divorce, for child custody, 82 A.L.R.2d 1088.

What law governs validity and enforceability of contract made for support of illegitimate child, 87 A.L.R.2d 1306.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments, 89 A.L.R.2d 7.

Violation of custody or visitation provision of agreement or decree as affecting child support payment provision, and vice versa, 95 A.L.R.2d 118.

Court's establishment of trust to secure alimony or child support in divorce proceedings, 3 A.L.R.3d 1170.

Statutory family allowance to minor children as affected by previous agreement or judgment for their support, 6 A.L.R.3d 1387.

Power of court which denied divorce, legal separation or annulment, to award custody or make provisions for support of child, 7 A.L.R.3d 1096.

What voluntary acts of child, other than marriage or entry into military service, terminate parent's obligation to support, 32 A.L.R.3d 1055.

Income of child from other source as excusing parent's compliance with support provisions of divorce decree, 39 A.L.R.3d 1292.

Right to credit on accrued support payments for time child is in father's custody or for other voluntary expenditures, 47 A.L.R.3d 1031.

Retrospective increase in allowance for alimony, separate maintenance, or support, 52 A.L.R.3d 156.

Provision in divorce decree that one party obtain or maintain life insurance for benefit of child, 59 A.L.R.3d 9.

Liability of parent for support of child institutionalized by juvenile court, 59 A.L.R.3d 636.

Effect in subsequent proceedings of paternity findings or implications in divorce decree or in support or custody order made incidental, 78 A.L.R.3d 846.

Propriety of decree in proceeding between divorced parents to determine mother's duty to pay support for children in custody of father, 98 A.L.R.3d 1146.

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education, 99 A.L.R.3d 322.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 A.L.R.3d 1129.

Visitation rights of persons other than natural parents or grandparents, 1 A.L.R.4th 1270.

Validity and enforceability of escalation clause in divorce decree relating to alimony and child support, 19 A.L.R.4th 830.

Effect of remarriage of spouses to each other on child custody and support provisions of prior divorce decree, 26 A.L.R.4th 325.

Excessiveness or adequacy of money awarded as child support, 27 A.L.R.4th 864.

Excessiveness or adequacy of amount of money awarded for alimony and child support combined, 27 A.L.R.4th 1038.

What constitutes "extraordinary" or similar medical or dental expenses for purposes of divorce decree requiring one parent to pay such expenses for child in custody of other parent, 39 A.L.R.4th 502.

Stepparent's postdivorce duty to support stepchild, 44 A.L.R.4th 520.

Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

Divorce: excessiveness or adequacy of combined property division and spousal support awards - modern cases, 55 A.L.R.4th 14.

Withholding visitation rights for failure to make alimony or support payments, 65 A.L.R.4th 1155.

Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R.4th 173.

Death of obligor parent as affecting decree for support of child, 14 A.L.R.5th 557.

Loss of income due to incarceration as affecting child support obligation, 27 A.L.R.5th 540.

What voluntary acts of child, other than marriage or entry into military service, terminate parent's obligation to support, 55 A.L.R.5th 557.

Application of child-support guidelines to cases of joint-, split-, or similar shared-custody arrangements, 57 A.L.R.5th 389.

Right of putative father to visitation with child born out of wedlock, 58 A.L.R.5th 669.

Consideration of obligor's personal-injury recovery or settlement in fixing alimony or child support, 59 A.L.R.5th 489.

Right to credit on child support arrearages for time parties resided together after separation or divorce, 104 A.L.R.5th 605.

Validity, construction, and application of Child Support Recovery Act of 1992 (18 USCA § 228), 147 A.L.R. Fed. 1

40-4-11.1. Child support; guidelines.

A. In any action to establish or modify child support, the child support guidelines as set forth in this section and the child support schedule promulgated by the department shall be applied to determine the child support due and shall be a rebuttable presumption for the amount of such child support. Every decree or judgment or stipulation of child support that deviates from the guideline amount shall contain a statement of the reasons for the deviation.

B. The purposes of the child support guidelines are to:

(1) establish as state policy an adequate standard of support for children, subject to the ability of parents to pay;

(2) make awards more equitable by ensuring more consistent treatment of persons in similar circumstances; and

(3) improve the efficiency of the court process by promoting settlements and giving courts and the parties guidance in establishing levels of awards.

C. For purposes of the guidelines specified in this section:

(1) "income" means actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed. 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

(2) "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, provided:

(a) "gross income" shall not include benefits received from: 1) means-tested public assistance programs, including but not limited to temporary assistance for needy families, supplemental security income and general assistance; 2) the earnings or public assistance benefits of a child who is the subject of a child support award; or 3) child support received by a parent for the support of other children;

(b) for 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;

(c) "gross income" shall not include the amount of alimony payments actually paid in compliance with a court order;

(d) "gross income" shall not include the amount of child support actually paid by a parent in compliance with a court order for the support of prior children; and

(e) "gross income" shall not include a reasonable amount for a parent's obligation to support prior children who are in that parent's custody. A duty to support subsequent children is not ordinarily a basis for reducing support owed to children of the parties but may be a defense to a child support increase for the children of the parties. In raising such a defense, a party may use Table A as set forth in Subsection M of this section to calculate the support for the subsequent children.

D. If a court finds that a parent has willfully failed to obtain or maintain appropriate employment or is willfully underemployed, the court may impute to that parent an income equal to that parent's earning and employment potential.

(1) The following criteria shall be used:

(a) availability of employment opportunities for the parent;

(b) the parent's employment history;

(c) the parent's income history;

(d) the parent's job skills;

(e) the parent's education;

(f) the parent's age and health;

(g) the parent's history of convictions and incarceration; and

(h) the parent's ability to obtain or maintain employment due to providing care for a child of the parties who is under the age of six or is disabled.

(2) Minimum wage may be imputed if a parent has no recent employment or earnings history and that parent has the capacity to earn minimum wage. The minimum wage to be imputed to that parent is the prevailing minimum wage in the locality where that parent resides.

E. Income may not be imputed to a parent if the parent is incarcerated for a period of one hundred eighty days or longer. Incarceration is not considered a voluntary unemployment.

F. As used in this section:

(1) "department" means the human services department [health care authority department];

(2) "children of the parties" means the natural or adopted child or children of the parties to the action before the court but shall not include the natural or adopted child or children of only one of the parties;

(3) "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;

(4) "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; and

(5) "schedule" means the child support schedule promulgated by the department.

G. 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 Subsection L of this section.

H. Physical custody adjustments shall be made as follows:

(1) for basic visitation situations, the basic child support obligation shall be calculated using the basic child support schedule promulgated by the department, Worksheet A and instructions contained in Subsection M of this section. The court may provide for a partial abatement of child support for visitations of one month or longer; and

(2) for shared responsibility arrangements, the basic child support obligation shall be calculated using the basic child support schedule promulgated by the department, Worksheet B and instructions contained in Subsection M of this section.

I. In shared responsibility situations, each parent retains the percentage of the basic support obligation equal to the number of twenty-four-hour days of responsibility spent by each child with each respective parent divided by three hundred sixty-five.

J. The cost of providing medical and dental insurance for the children of the parties and the net reasonable child-care costs incurred on behalf of these children due to employment or job search of either parent shall be paid by each parent in proportion to that parent's income, in addition to the basic obligation.

K. The child support 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. Such extraordinary expenses are 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) transportation and communication expenses necessary for long distance visitation or time sharing.

L. Whenever application of the child support guidelines set forth in this section requires a person to pay to another person more than forty percent of the paying person's gross income for a single child support obligation for current support, there shall be a presumption of a substantial hardship, justifying a deviation from the guidelines.

M. The department shall:

(1) establish the basic child support schedule by rule, using the recommendations of the child support guidelines review commission as the initial proposed rules; and

(2) update and adjust the basic child support schedule when such a change is necessary to ensure that the child support schedule complies with the child support guidelines set forth in this section. The basic child support schedule shall be promulgated pursuant to the State Rules Act and shall be published and available to the public through the New Mexico Administrative Code, the New Mexico supreme court's website and the department's website. When the department is developing or updating the child support schedule, it shall consider:

(a) all of the earnings and income of the noncustodial and custodial parent;

(b) the basic subsistence needs of a noncustodial parent who may have a limited ability to pay by incorporating a mechanism that adjusts the basic support obligation for low-income parents;

(c) economic data on the costs of raising children;

(d) state and local labor market data; and

(e) regional and national trends in child support schedule adjustments.

WORKSHEET A - BASIC VISITATION

_____ JUDICIAL DISTRICT COURT

COUNTY OF _____

STATE OF NEW MEXICO

NO. _____

_____,
Petitioner,

vs.

_____,
Respondent.

MONTHLY CHILD SUPPORT OBLIGATION

	Custodial	Other	Combined

		Parent		Parent		
1.	Gross Monthly Income	$_____	+	$_____	=	$_____
2.	Percentage of Combined Income (Each parent's income divided by combined income)	_____%	+	_____%	=	100%
3.	Number of Children _____					
4.	Basic Support from Schedule (Use combined income from Line 1)			=	_____	
5.	Children's Health and Dental Insurance Premium	_____	+	_____	=	_____
6.	Work-Related Child Care	_____	+	_____	=	_____
7.	Additional Expenses	_____	+	_____	=	_____
8.	Total Support (Add Lines 5, 6 and 7 for each parent and Lines 4, 5, 6 and 7 for combined column)	_____	=	_____	=	_____
9.	Each Parent's Obligation (Combined Column Line 8 x each parent's Line 2)	_____		_____		
10.	Enter amount for each parent from Line 8	-_____	-_____			
11.	Each Parent's Net Obligation (Subtract Line 10 from Line 9 for each parent).	_____		_____ Other Parent pays Custodial Parent this Amount		

_____PAYS_____ EACH MONTH $_____

_____ _____

Petitioner's Signature Respondent's Signature

Date: _____

BASIC VISITATION
INSTRUCTIONS FOR WORKSHEET A

Line 1. Gross monthly income:

Includes all income, except temporary assistance for needy families, food stamps and supplemental security income. If a parent pays child support by court order to other children, subtract from gross income. Use current income if steady. If income varies a lot from month to month, use an average of the last twelve months, if available, or last year's income tax return. Add both parents' gross incomes and put total under the combined column.

Line 2. Percentage of Combined Income:

Divide each parent's income by combined income to get that parent's percentage of combined income.

Lines 3 and 4. Basic Support:

Fill in number of children on worksheet (Line 3). Round combined income to nearest fifty dollars ($50.00). Look at the basic child support schedule. In the far left-hand column of the basic child support schedule, find the rounded combined income figure. Read across to the column with the correct number of children. Enter that amount on Line 4.

Line 5. Children's Health and Dental Insurance Premium:

Enter the cost paid by a parent for covering these children with medical and dental insurance under that parent's column on Line 5. Add costs paid by each parent and enter under the combined column on Line 5.

Line 6. Work-Related Child Care:

Enter the cost paid by each parent for work-related child care. If the cost varies (for example, between school year and summer), take the total yearly cost and divide by twelve. Enter each parent's figure in that parent's column on Line 6. Add the cost for both parents and enter in the combined column on Line 6.

Line 7. Additional Expenses:

Enter the amounts paid by each parent for additional expenses provided by Subsection J of this section on Line 7. Add the cost for both parents and enter in the combined column on Line 7.

Line 8. Total Support:

Total the basic support amount from Line 4 in the combined column with the combined column on Lines 5, 6 and 7 and enter the totals in the combined column on Line 8.

Line 9. Each Parent's Obligation:

Multiply the total child support amount on Line 8 by each parent's percentage share on Line 2, and enter each parent's dollar share under that parent's column on Line 9.

Line 10. Total Support:

Enter the total amount shown for each parent on Line 8 beside the "minus" marks on Line 10.

Line 11. Each Parent's Net Obligation:

For each parent, subtract the amount on Line 10 from the amount on Line 9. Enter the difference for each parent in that parent's column on Line 11. The amount in the box "other parent" is what that parent pays to the custodial parent each month. Do not subtract the amount on the custodial parent's Line 11 from the amount in the other parent's box. The custodial parent is presumed to use the amount in that parent's column on Line 11 for the children.

WORKSHEET B - SHARED RESPONSIBILITY

_____ JUDICIAL DISTRICT COURT

COUNTY OF _____

STATE OF NEW MEXICO

NO. _____

_____,
Petitioner,

vs.

_____,
Respondent.

MONTHLY CHILD SUPPORT OBLIGATION

Part 1 - Basic Support:	Parent One		Parent Two		Combined
1. Gross Monthly Income	$_____	+	$_____	=	$_____
2. Percentage of Combined Income (Each parent's income divided by combined income)	_____ %	+	_____%	=	100%
3. Number of Children _____					
4. Basic Support from Schedule (Use combined income from Line 1)				=	_____
5. Shared Responsibility Basic Obligation (Line 4 x 1.5)				=	_____

6.	Each Parent's Share (Line 5 x each parent's Line 2)	_____		_____		
7.	Number of 24-Hour Days with Each Parent (must total 365)	_____	+	_____	=	365
8.	Percentage with Each Parent (Line 7 divided by 365)	_____%	+	_____%	=	100%
9.	Amount Retained (Line 6 x Line 8 for Each Parent)	_____		_____		
10.	Each Parent's Basic Obligation (subtract Line 9 from Line 6)	_____		_____		
11.	Amount Transferred (subtract smaller amount on Line 10 from larger amount on Line 10). Parent with larger amount on Line 10 pays other parent the difference.					_____
Part 2 - Additional Payments:						
12.	Children's Health and Dental Insurance Premium	_____	+	_____	=	_____
13.	Work-Related Child Care	_____	+	_____	=	_____
14.	Additional Expenses	_____	+	_____	=	_____
15.	Total Additional Payments (Add Lines 12, 13 and 14 for each parent and for combined column)	_____	+	_____	=	_____
16.	Each Parent's Obligation (Combined Column Line 15 x each parent's Line 2)	_____		_____		
17.	Amount Transferred (Subtract each parent's Line 16 from that parent's Line 15). Parent with "minus" figure pays that amount to other parent.	_____		_____		
Part 3 - Net Amount Transferred:						
18.	Combine Lines 11 and 17 by addition if same parent pays					

on both lines, otherwise by subtraction.

_____ PAYS_____EACH MONTH $ _____

_____ _____

Petitioner's Signature Respondent's Signature

Date: _____

SHARED RESPONSIBILITY
INSTRUCTIONS FOR WORKSHEET B

Part 1 - Basic Support:

Line 1. Gross Monthly Income:

Includes all income, except temporary assistance for needy families, food stamps and supplemental security income. See text for allowed deductions from income. Use current income if steady. If income varies a lot from month to month, use an average of the last twelve months, if available, or last year's income tax return. Add both parents' gross incomes and put total under the combined column.

Line 2. Percentage of Combined Income:

Divide each parent's income by combined income to get that parent's percentage of combined income.

Lines 3 and 4. Basic Support:

Fill in the number of children on the worksheet (Line 3). Round combined income to nearest fifty dollars ($50.00). Look at the basic child support schedule. In the far left-hand column of that schedule, find the rounded combined income figure. Read across to the column with the correct number of children. Enter that amount on Line 4.

Line 5. Shared Responsibility Basic Obligation:

Multiply the basic obligation on Line 4 by 1.5.

Line 6. Each Parent's Share:

Multiply the support amount on Line 5 by each parent's percentage share on Line 2, and enter each parent's dollar share under that parent's column on Line 6.

Line 7. Each Parent's Time of Care for Children:

Enter the number of twenty-four-hour days of responsibility that each parent has each child in a year according to the parenting plan.

Line 8. Percentage of Twenty-Four-Hour Days With Each Parent:

Divide each parent's number of twenty-four-hour days (Line 7) by three hundred sixty-five to obtain a percentage.

Line 9. Amount Retained:

Under shared responsibility arrangements, each parent retains the percentage of the basic support obligation equal to the number of twenty-four-hour days of responsibility spent by each child with each respective parent divided by three hundred sixty-five. Multiply each parent's share of basic support (Line 6) by the percentage in that parent's Line 8 and enter the result on that parent's Line 9. This is the amount that each parent retains to pay the children's expenses during that parent's periods of responsibility.

Line 10. Each Parent's Basic Obligation:

Subtract the amount retained by each parent for direct expenses (Line 9) from that parent's share (Line 6) and enter the difference on that parent's Line 10.

Line 11. Amount Transferred for Basic Support:

In shared responsibility situations, both parents are entitled not only to retain money for direct expenses but also to receive contributions from the other parent toward those expenses. Therefore, subtract the smaller amount on Line 10 from the larger amount on Line 10 to arrive at a net amount transferred for basic support.

Part 2 - Additional Payments:

Line 12. Children's Health and Dental Insurance Premium: Enter the cost paid by a parent for covering these children with medical and dental insurance under that parent's column on Line 12. Add costs paid by each parent and enter under the combined column on Line 12.

Line 13. Work-Related Child Care:

Enter the cost paid by each parent for work-related child care. If the cost varies (for example, between school year and summer), take the total yearly cost and divide by twelve. Enter each parent's figure in that parent's column on Line 13. Add the cost for both parents and enter in the combined column on Line 13.

Line 14. Additional Expenses:

Enter the cost paid by each parent for additional expenses provided by Subsection J of this section on Line 14.

Line 15. Total Additional Payments:

For each parent, total the amount paid by that parent for insurance, child care and additional expenses (Lines 12, 13 and 14). Enter the total in that parent's column on Line 15 and the total of both parents' expenses under the combined column on Line 15.

Line 16. Each Parent's Obligation:

Multiply the total additional payments (combined column on Line 15) by each parent's percentage share of income on Line 2, and enter each parent's dollar share of the additional payments on that parent's Line 16.

Line 17. Amount Transferred:

Subtract each parent's obligation for additional expenses (that parent's Line 16) from the total additional payments made by that parent (that parent's Line 15). The parent with a "minus" figure pays the other parent the amount on Line 17.

Part 3 - Net Amount Transferred:

Line 18. Combine Lines 11 and 17:

Combine the amount owed by one parent to the other for basic support (Line 11) and the amount owed by one parent to the other for additional payments (Line 17). If the same parent owes for both obligations, add Lines 11 and 17, and enter the total on Line 18. If one parent owes for basic support and the other owes for additional payments, subtract the smaller amount from the larger and enter on Line 18. Fill in the blanks by stating which parent pays and which parent receives the net amount transferred.

History: 1978 Comp., § 40-4-11.1, enacted by Laws 1988, ch. 87, § 2; 1991, ch. 206, § 1; 1995, ch. 142, § 1; 2008, ch. 48, § 1; 2021, ch. 20, § 1; 2023, ch. 106, § 1.

ANNOTATIONS

Repeals. — Laws 1991, ch. 206, § 4, effective June 14, 1991, repealed Laws 1988, ch. 87, § 4 which was to repeal 40-4-11.1 NMSA 1978 effective June 30, 1991.

Cross references. — For designation of health care authority department as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV D of the federal Social Security Act, *see* 27-2-27 NMSA 1978.

For local district court rules and forms, *see* LR2-Form J and LR11-114.

The 2023 amendment, effective January 1, 2024, removed the child support guideline schedule; required the human services department to update the child support tables by rule, defined "department" and "schedule"; in Subsection A, after "as set forth in this section", added "and the child support schedule promulgated by the department"; in Subsection F, added a new Paragraph F(1) and redesignated former Paragraphs F(1) through F(3) as Paragraphs F(2) through F(4), respectively, and added Paragraph F(5); in Subsection H, Paragraph H(1) and H(2), after "basic child support schedule", added "promulgated by the department"; and in Subsection M, deleted the child support guideline schedule and added "The department shall", and added Paragraphs M(1) and M(2).

Applicability. — Laws 2023, ch. 106, § 5, provided that Laws 2023, ch. 106, apply to all decrees, judgments or orders of child support made on or after January 1, 2024.

Temporary provisions. — Laws 2023, ch. 106, § 4, effective January 1, 2024, provided that the initial child support schedule established by the human services department [health care authority department] shall:

A. not decrease the yearly basic support obligation for any level of combined parental income by more than the dollar change in the federal poverty guidelines for one person since 2018;

B. not increase the yearly support obligation for any level of combined parental income by more than one and one-half times the change in the consumer price index since 2018. Any increase in support obligation that is larger than the increase in the consumer price index since 2018 must be specifically supported by economic data and evidence;

C. not change the format of the child support schedule in a way that would be inconsistent with Worksheet A or Worksheet B in Subsection M of 40-4-11.1 NMSA 1978; and

D. be promulgated, published and available to the public through the New Mexico Administrative Code, the New Mexico supreme court's website and the human services department's [health care authority department] website no later than January 1, 2024.

The 2021 amendment, effective July 1, 2021, required that any stipulation of child support that deviates from the guideline amount contain a statement of the reasons for the deviation, revised the definitions of "income" and "gross income" for purposes of the guidelines specified in this section, provided for the imputation of income, provided that incarceration may not be treated as voluntary unemployment, and completely rewrote the basic child support schedule; in Subsection A, after "Every decree or judgment", added "or stipulation"; in Subsection C, Paragraph C(1), deleted "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, a reasonable child care expense may be imputed", and in Subparagraph C(2)(a), added item designation "1)", in Item

C(2)(a)1), after "programs", added "including, but not limited to, temporary assistance for needy families, supplemental security income and general assistance", added Item C(2)(a)2), and item designation "3)", and in Subparagraph C(2)(e), after "Subsection", changed "K" to "M"; added new Subsections D and E and redesignated former Subsections D through J as Subsections F through L, respectively; after "Subsection", changed "K" to "L" throughout; deleted former Subsection K, which provided the basic child support schedule; and added Subsection M.

The 2008 amendment, effective May 14, 2008, changed the Basic Child Support Schedule in Subsection K by expanding the levels of combined gross monthly income and increasing the amount of child support.

The 1995 amendment, effective June 16, 1995, rewrote this section to the extent that a detailed comparison is impracticable.

Incarceration affecting child support. — Support payments should accrue while father is incarcerated. *Thomasson v. Johnson*, 1995-NMCA-109, 120 N.M. 512, 903 P.2d 254.

Child's income. — Under 40-4-11.1 NMSA 1978, child support is calculated based on the parents ' gross income. There is no provision in 40-4-11.1 NMSA 1978 for calculating basic child support based on the child's income. Rather, the child's income (whether from social security, his or her own earnings, from a trust established by grandparents or other sources) is relevant solely as a ground for deviating from the guidelines pursuant to 40-4-11.1 NMSA 1978. *Pedersen v. Pedersen*, 2000-NMCA-042, 129 N.M. 56, 1 P.3d 974.

Prior children. — The use of "prior children" in the text of 40-4-11.1C(2)(d) NMSA 1978 controls over the use of "other children" in the instructions for Worksheet A. The phrase "prior children" refers to birth order and not to the timing of child support orders. *Thompson v. Dehne*, 2009-NMCA-120, 147 N.M. 283, 220 P.3d 1132.

Calculation of child support where there are other children. — In a child support proceeding to obtain a support order for the second of defendant's three children, where each of defendant's three children had a different mother and support orders had been entered for defendant's first child and third child before petitioner filed a petition for a support order for the second child, the proper calculation of the second child's support should have been determined by deducing only the amount of the first child's support from defendant's income and not the amount of the third child's support. *Thompson v. Dehne*, 2009-NMCA-120, 147 N.M. 283, 220 P.3d 1132.

Garnishment statute is inapplicable to the calculation of child support. — The garnishment statute, 35-12-7 NMSA 1978, which provides that the maximum amount which may be taken from wages for the enforcement of child support is fifty percent of disposable income, is inapplicable to calculating the amount of child support. *Thompson v. Dehne*, 2009-NMCA-120, 147 N.M. 283, 220 P.3d 1132.

Requirement for use of Worksheet B. — Since the non-physical custodial parent had visitation with the child more than 30% of the time, the court was required to use Worksheet B in calculating child support. *Gomez v. Gomez*, 1995-NMCA-049, 119 N.M. 755, 895 P.2d 277, superseded by statute, *Erickson v. Erickson*, 1999-NMCA-056, 127 N.M. 140, 978 P.2d 347.

Recreational and educational and travel expenses are included within the basic child support provided by the child support guidelines. *Klinksiek v. Klinksiek*, 2005-NMCA-008, 136 N.M. 693, 104 P.3d 559.

Medical coverage alone not "child support." — Child support obligation was not met merely by father's provision of medical insurance for child, where such coverage was required by the Mandatory Medical Support Act, 40-4C-2 NMSA 1978, and was in addition to, not in lieu of, father's support obligations under the child support guidelines. *Sisneroz v. Polanco*, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Right to child support arrearages. — Mother's silence and conduct in accepting the unilaterally reduced child support payments, without more, was insufficient to support a finding of waiver of her right to child support arrearages as provided in the divorce decree; nor was such evidence sufficient to support a finding of acquiescence. *McCurry v. McCurry*, 1994-NMCA-047, 117 N.M. 564, 874 P.2d 25.

Custody neither "basic visitation" nor "shared responsibility." — Where one of two children of divorced parents lived 59% of the time with his father and 41% of his time with his mother and the other lived 71% of her time with her mother and 29% with her father, child support should have been computed, first, for the daughter, by treating her as the sole child in a basic visitation arrangement, then, for the son, by treating him as a child for whom father and mother had 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. *Erickson v. Erickson*, 1999-NMCA-056, 127 N.M. 140, 978 P.2d 347.

Income considerations. — Income under Subsection C includes "income from any source" and can include interest or trust income and as such the trial court was entitled to consider potential as well as actual, present income and could examine any such assets that could produce such income. *Talley v. Talley*, 1993-NMCA-003, 115 N.M. 89, 847 P.2d 323.

By limiting its determination of the father's gross monthly income to his tax returns, the trial court was too strict in defining what it believed was income, and it erred in not considering other sources of revenue, including cash savings, yearly interest, IRA's and land purchases. *Padilla v. Montano*, 1993-NMCA-127, 116 N.M. 398, 862 P.2d 1257.

Trial court properly included income from an individual retirement account in its calculations of a parent's child support obligation; the fact that the parent would have to pay a penalty for withdrawing the money from the individual retirement account prior to

reaching the age of retirement did not render the money unavailable for child support, under this section. *Quintana v. Eddins*, 2002-NMCA-008, 131 N.M. 435, 38 P.3d 203.

Use of the father's dividend earnings in the year prior to the year in question was error where it was shown that his dividend investments changed from year-to-year. *Boutz v. Donaldson*, 1999-NMCA-131, 128 N.M. 232, 991 P.2d 517.

Even though the father, a writer, was not engaged in writing and had no income from current literary efforts during the year in question, the trial court erred in refusing to allow him to deduct a sum for fixed overhead expenses from his earnings from previous writings during that year. *Boutz v. Donaldson*, 1999-NMCA-131, 128 N.M. 232, 991 P.2d 517.

Under Subsection C(1), the court should have imputed income from full-time employment to the mother even though she did not work full-time during the marriage. *Styka v. Styka*, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

As long as a parent was working full time in his or her area of expertise, earning an income within the range presented by the evidence and in a location reasonably accessible to his or her child, a trial court could not make finding of underemployment without also finding bad faith; to do otherwise would put a parent in the untenable position of choosing between playing an active role in the child's upbringing and leaving to earn enough money to meet the support obligation. *Quintana v. Eddins*, 2002-NMCA-008, 131 N.M. 435, 38 P.3d 203.

The trial court was within its discretion not to consider the mother underemployed by virtue of her reasonable, yet unsuccessful, efforts to establish a profitable business, and reasonable efforts to provide a home for her children. *Boutz v. Donaldson*, 1999-NMCA-131, 128 N.M. 232, 991 P.2d 517.

The language of Subsection C(2) requires consideration of the actual amount of income from the sources listed therein in the determination of each parent's gross income. *Styka v. Styka*, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Interest earned on cash assets received in a property distribution is income for purposes of child support and the determination of income includes the income potential of idle assets. *Styka v. Styka*, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Where a father failed to obtain full-time employment or attempt to regain his law license, a district court properly imputed income against him for child support purposes based on his underemployment; however, the amount imputed was not supported by sufficient evidence because there was no showing that the father could have secured

employment at the salary he made at his last job. *State ex rel. Human Servs. Dep't v. Kelley*, 2003-NMCA-050, 133 N.M. 510, 64 P.3d 537.

Past lifestyle of children. — Past status may provide probative evidence about the likelihood of future status. There was no error in the trial court's consideration of the children's past lifestyle to assess the fairness of the support award. *Roberts v. Wright*, 1994-NMCA-022, 117 N.M. 294, 871 P.2d 390.

Business expenses of closely-held corporation. — While the trial court may consider the tax treatment of business expenses claimed by a parent as "ordinary and necessary," the trial court is not limited to the tax treatment of a particular expense. The parent claiming a business expense must show not only that it is ordinary and necessary to the business, but also that it is irrelevant to calculating support obligations. For example, business expenses that are valid for accounting or tax purposes may not affect a parent's actual cash flow, so they would normally not be considered ordinary and necessary for purposes of calculating support. *Roberts v. Wright*, 1994-NMCA-022, 117 N.M. 294, 871 P.2d 390; *Jurado v. Jurado*, 1995-NMCA-014, 119 N.M. 522, 892 P.2d 969.

Rent payments. — Pursuant to the plain language of Subsection C(2)(b) of this section, the rent payments wife received from tenant constitute "gross receipts" in calculating her "gross income". *Klinksiek v. Klinksiek*, 2005-NMCA-008, 136 N.M. 693, 104 P.3d 559.

Wife is entitled to deduct from the "gross receipts" the "ordinary and necessary expenses" required to produce the rental income to determine her "gross income" from the rent. *Klinksiek v. Klinksiek*, 2005-NMCA-008, 136 N.M. 693, 104 P.3d 559.

Not considered income. — The term "in-kind benefits" in Subsection C(2) refers to employment benefits and does not apply to a residence in which the mother was living without cost. *Styka v. Styka*, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Monthly payments of capital not income. — Monthly payments on a real estate contract that constitutes return of capital is not income. *Leeder v. Leeder*, 1994-NMCA-105, 118 N.M. 603, 884 P.2d 494.

Gifts. — Under Subsection C(2), gross income generally does not include gifts; however, deviation from the child support guidelines as authorized under Subsection A could include the calculation of periodic dependable gifts. *Styka v. Styka*, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Attorney fees properly awarded. — The trial court's determination of attorney fees was proper where the length of the marriage, husband's substantial separate assets, and wife's lack of out-of-home working experience all supported its decision. *Talley v. Talley*, 1993-NMCA-003, 115 N.M. 89, 847 P.2d 323.

Changed circumstances required for modification of support. — The legislature intended 40-4-11.1 NMSA 1978 to update and make uniform throughout the state the amount of the child support obligation based on the income of the parents, but did not intend to abolish the requirement that the party seeking modification make the traditional showing of a substantial change in circumstances, harmonizing 40-4-11.1 with 40-4-7 NMSA 1978 and giving effect to both. *Perkins v. Rowson*, 1990-NMCA-089, 110 N.M. 671, 798 P.2d 1057, cert. denied, 110 N.M. 641, 798 P.2d 591.

Court order required for modification of undivided award. — Where a modification award provided one amount for "child support for the two minor children," and did not contain language expressly or even impliedly allowing an automatic reduction when the older child turned 18, relief could only have been obtained in court. *Bustos v. Bustos*, 2000-NMCA-040, 128 N.M. 842, 999 P.2d 1074.

Costs to be considered. — Under Subsection H, the trial court is required to include child-care costs in its computations. *Styka v. Styka*, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Trial court did not err in including the costs of private school in child support calculations. *Styka v. Styka*, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Child-care costs incurred while attending college. — Child-care costs paid by the mother while she attended college in pursuit of a college degree were incurred "due to employment or job search" for the purpose of calculating child support obligations under Subsection G. *Alverson v. Harris*, 1997-NMCA-024, 123 N.M. 153, 935 P.2d 1165.

Deviations from support guidelines. — Trial court erred in departing from the statutory child support guidelines without first determining the amount due under the guidelines, in failing to clearly indicate how it arrived at its award, and in failing to explain its deviations from the guidelines. *Tedford v. Gregory*, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105.

Annual abatement of child support is not deviation from guidelines but such deviations are explicitly provided for in those guidelines by Subsection A. *Grant v. Cumiford*, 2005-NMCA-058, 137 N.M. 485, 112 P.3d 1142.

Deviation from child support guidelines. — It is error to deviate from the child support guidelines in calculating the parties' gross incomes except as authorized by statute or appellate case law, and it is also error to deviate from the child support guidelines in any manner without providing written justification for such deviation. *Jury v. Jury*, 2017-NMCA-036.

Where petitioner appealed the district court's denial of her motion to modify a 2010 child support decree, claiming that the district court's ruling resulted from its erroneous determination of the parties' gross monthly incomes and, by extension, child support

obligations, reversal and remand for recalculation of the parties' gross monthly incomes was necessary to the extent that the district court improperly deviated from the child support guidelines in calculating the parties' gross monthly incomes and failed to specify the reasons for its decision in deviating from the child support guidelines. *Jury v. Jury*, 2017-NMCA-036.

Deviation from presumption. — The child support guidelines allow wife to make a proper showing that there should be a deviation from the presumptive amount of her gross income. *Klinksiek v. Klinksiek*, 2005-NMCA-008, 136 N.M. 693, 104 P.3d 559.

Law reviews. — For article, "Positive Parenting and Negative Contributions: Why Payment of Child Support Should Not Be Regarded as Dissipation of Marital Assets," see 30 N.M.L. Rev. 1 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R.4th 173.

Consideration of obligated spouse's earnings from overtime or "second job" held in addition to regular full-time employment in fixing alimony or child support awards, 17 A.L.R.5th 143.

Treatment of depreciation expenses claimed for tax or accounting purposes in determining ability to pay child or spousal support, 28 A.L.R.5th 46.

Validity, construction, and application of Child Support Recovery Act of 1992 (18 USCA § 228), 147 A.L.R. Fed. 1

Basis for imputing income for purpose of determining child support where obligor spouse is voluntarily unemployed or underemployed, 76 A.L.R.5th 191.

40-4-11.2. Grounds for deviation from child support guidelines.

Any deviation from the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 and the basic child support schedule promulgated by the human services department [health care authority department] shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines and basic child support schedule would be unjust or inappropriate. A finding that rebuts the child support guidelines and basic child support schedule shall state the amount of support that would have been required under the guidelines and basic child support schedule and the justification of why the order varies from the guidelines and the basic child support schedule. Circumstances creating a substantial hardship in the obligor, obligee or subject children may justify a deviation upward or downward from the amount that would otherwise be payable under the guidelines and basic child support schedule.

History: 1978 Comp., § 40-4-11.2, enacted by Laws 1989, ch. 36, § 1; 2021, ch. 20, § 2; 2023, ch. 106, § 2.

ANNOTATIONS

The 2023 amendment, effective January 1, 2024, added references to the basic child support schedule that the human services department is required to update by rule; and after "Any deviation from the child support", deleted "guideline amounts" and added "guidelines", after "Section 40-4-11.1 NMSA 1978", added "and the basic child support schedule promulgated by the human services department", and after each occurrence of "guidelines", added "and basic child support schedule" throughout the section.

Applicability. — Laws 2023, ch. 106, § 5, provided that Laws 2023, ch. 106, apply to all decrees, judgments or orders of child support made on or after January 1, 2024.

Temporary provisions. — Laws 2023, ch. 106, § 4, effective January 1, 2024, provided that the initial child support schedule established by the human services department [health care authority department] shall:

A. not decrease the yearly basic support obligation for any level of combined parental income by more than the dollar change in the federal poverty guidelines for one person since 2018;

B. not increase the yearly support obligation for any level of combined parental income by more than one and one-half times the change in the consumer price index since 2018. Any increase in support obligation that is larger than the increase in the consumer price index since 2018 must be specifically supported by economic data and evidence;

C. not change the format of the child support schedule in a way that would be inconsistent with Worksheet A or Worksheet B in Subsection M of 40-4-11.1 NMSA 1978; and

D. be promulgated, published and available to the public through the New Mexico Administrative Code, the New Mexico supreme court's website and the human services department's [health care authority department] website no later than January 1, 2024.

The 2021 amendment, effective July 1, 2021, required that a written finding that application of the child support guidelines would be unjust or inappropriate to state the amount of support that would have been required under the guidelines and the justification for the deviation from the guidelines; and added "A finding that rebuts the child support guidelines shall state the amount of support that would have been required under the guidelines and the justification of why the order varies from the guidelines".

Deviation from the child support guidelines.- It is error to deviate from the child support guidelines in calculating the parties' gross incomes except as authorized by

statute or appellate case law, and it is also error to deviate from the child support guidelines in any manner without providing written justification for such deviation. *Jury v. Jury*, 2017-NMCA-036.

Where petitioner appealed the district court's denial of her motion to modify a 2010 child support decree that resulted from the dissolution of the marriage between petitioner and respondent, claiming that the district court's ruling resulted from its erroneous determination of the parties' gross monthly incomes and, by extension, child support obligations, reversal and remand for recalculation of the parties' gross monthly incomes was necessary to the extent that the district court improperly deviated from the child support guidelines in calculating the parties' gross monthly incomes and failed to specify the reasons for its decision in deviating from the child support guidelines. *Jury v. Jury*, 2017-NMCA-036.

Child's income. — In allowing a credit against basic child support for off-schedule sources of income, such as social security benefits paid directly to the child, this section requires the trial court to exercise its discretion on a case-by-case basis, with the child's standard of living a crucial factor. *Pederson v. Pederson*, 2000-NMCA-042, 129 N.M. 56, 1 P.3d 974.

Deduction of guardian fees from child support. — 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.

40-4-11.3. Child support guidelines review commission; created; review of child support guidelines.

A. There is created the "child support guidelines review commission", which is administratively attached to the human services department [health care authority department]. The commission shall consist of seven members who shall be appointed by the secretary of human services. The commission shall be organized once every four years for a term not to exceed thirty days. The commission shall, within four years of the effective date of this section and every four years thereafter:

(1) review the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to ensure that the application of the guidelines results in the determination of appropriate child support order amounts; and

(2) provide a report of its findings to the secretary of human services.

B. The human services department [health care authority department] shall publish online and make accessible to the public the:

(1) findings of the child support guidelines review commission;

(2) membership of the commission; and

(3) date of the next quadrennial review.

C. Members of the child support guidelines review commission shall not be paid but shall receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

History: 1978 Comp., § 40-4-11.3, enacted by Laws 1989, ch. 36, § 2; 2021, ch. 20, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 2021 amendment, effective July 1, 2021, created the child support guidelines review commission, provided the duties of the commission, required the commission to provide periodic reports to the secretary of human services, and required the human services department to publish certain information regarding the commission; in the section heading, added "Child support guidelines review commission; created"; in Subsection A, added "There is created the 'child support guidelines review commission', which is administratively attached to the human services department. The commission shall consist of seven members who shall be appointed by the secretary of human services. The commission shall be organized once every four years for a term not to exceed thirty days. The commission shall", in Paragraph A(1), added "review", after "Section 40-4-11.1 NMSA 1978", deleted "shall be reviewed as to their appropriateness by an appropriate executive or legislative commission or executive department" and added "to ensure that the application of the guidelines results in the determination of appropriate child support amounts; and", and added Paragraph A(2); and added new Subsections B and C.

40-4-11.4. Modification of child support orders; exchange of financial information.

A. 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, including the health care needs of a child, to include the availability of health care coverage. There shall be a presumption of material and substantial changes in circumstances if application of the child support guidelines in Section 40-4-11.1 NMSA 1978 would result in a deviation upward or downward of more than twenty percent of the existing child support obligation and the petition for modification is filed more than one year after the filing of the pre-existing order.

B. All child support orders shall contain a provision for the annual exchange of financial information by the obligor and obligee upon a written request by either party. The financial information to be furnished shall 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.

For the purposes of this subsection, the wages of a subsequent spouse may be omitted from the financial information provided by either the obligor or the obligee.

C. The requirement to provide for the child's health care needs in the order, through insurance or other means, shall be a basis to initiate an adjustment of an order, regardless of whether an adjustment in the amount of child support is necessary.

History: Laws 1990, ch. 58, § 1; 1991, ch. 206, § 2; 2021, ch. 20, § 4.

ANNOTATIONS

The 2021 amendment, effective July 1, 2021, provided that the health care needs of a minor child are an adequate basis for modification of a child support order; in Subsection A, after "pre-existing order", added "including the health care needs of a child, to include the availability of health care coverage"; and added Subsection C.

The 1991 amendment, effective June 14, 1991, rewrote this section to the extent that a detailed comparison would be impracticable.

Cases in which there is a presumption of material and substantial changes in circumstances. — In cases in which application of the parties' updated financial information to the child support guidelines results in a deviation upward or downward of more than twenty percent of the existing child support obligation, the party seeking modification is entitled to a rebuttable presumption of material and substantial changes in circumstances justifying a modification. *Jury v. Jury*, 2017-NMCA-036.

Where petitioner appealed the district court's denial of her motion to modify a 2010 child support decree, claiming that the district court's ruling resulted from its erroneous

determination of the parties' gross monthly incomes and, by extension, child support obligations, reversal and remand for recalculation of the parties' gross monthly incomes was necessary to the extent that the district court improperly deviated from the child support guidelines in calculating the parties' gross monthly incomes and failed to specify the reasons for its decision in deviating from the child support guidelines, because the miscalculation potentially deprived petitioner of the presumption of material and substantial changes in circumstances. *Jury v. Jury*, 2017-NMCA-036.

Reduction of child support payments upon child reaching majority age. — When a prior decree directs that a noncustodial parent make lump-sum, 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 noncustodial parent who seeks a reduction in child support is to obtain a stipulated order authorizing such modification, or alternatively to request a hearing on the request for reduction. *McCurry v. McCurry*, 1994-NMCA-047, 117 N.M. 564, 874 P.2d 25.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Death of obligor parent as affecting decree for support of child, 14 A.L.R.5th 557.

Decrease in income of obligor spouse following voluntary termination of employment as basis for modification of child support award, 39 A.L.R.5th 1.

40-4-11.5. Modification of child support orders in cases enforced by the state Title IV-D agency.

A. For child support cases being enforced by the human services department [health care authority department] acting as the state's Title IV-D child support enforcement agency as provided in Section 27-2-27 NMSA 1978, the department shall implement a process for the periodic review of child support orders that shall include:

(1) a review of support orders every three years upon the request of either the obligor or obligee or, if there is an assignment of support rights pursuant to the Public Assistance Act [27-2-1 to 27-2-34 NMSA 1978], upon the request of the department or of either the obligor or obligee;

(2) notification by the department of its review to the obligor and obligee; and

(3) authorization to require financial information from the obligor and the obligee to determine whether the support obligation should be presented to the court for modification.

B. In carrying out its duties under this section, the secretary of human services, or the secretary's authorized representative, has the power to issue subpoenas:

(1) to compel the attendance of the obligor or the obligee at a hearing on the child support order;

(2) to compel production by the obligor or the obligee of financial or wage information, including federal or state tax returns;

(3) to compel the obligor or the obligee to disclose the location of employment of the payor party; and

(4) to compel the employer of the obligor or the obligee to disclose information relating to the employee's wages.

C. A subpoena issued by the human services department [health care authority department] under this section shall state with reasonable certainty the nature of the information required, the time and place where the information shall be produced, whether the subpoena requires the attendance of the person subpoenaed or only the production of information and records and the consequences of failure to obey the subpoena.

D. A subpoena issued by the human services department [health care authority department] under this section shall be served upon the person to be subpoenaed or, at the option of the secretary or the secretary's authorized representative, by certified mail addressed to the person at his last known address. The service of the subpoena shall be at least ten days prior to the required production of the information or the required appearance. If the subpoena is served by certified mail, proof of service is the affidavit of mailing. After service of a subpoena upon a person, if the person neglects or refuses to comply with the subpoena, the department may apply to the district court of the county where the subpoena was served or the county where the subpoena was responded to for an order compelling compliance. Failure of the person to comply with the district court's order shall be punishable as contempt.

E. If a review by the human services department [health care authority department] results in a finding that a child support order should be modified in accordance with the guidelines, it should be presented to the court for modification and the obligor and the obligee shall be notified of their respective rights and shall have thirty days to respond to the department's finding. The right to seek modification shall rest with the department in the case of obligations being enforced as a result of a public assistance recipient's assignment of support rights to the state as provided in the Social Security Act, 42 U.S.C. 602(a)(26).

F. At the request of the obligor or the obligee or upon the filing of a motion to modify child support, the human services department [health care authority department] shall furnish any information it has obtained in its review process regarding wages or other information pertaining to the obligor or the obligee.

G. Nothing in this section shall be construed to restrict the right of either party to petition the court to modify a child support obligation. The human services department [health care authority department] shall not be required to conduct a review of any party's obligation more than once every three years.

History: Laws 1990, ch. 58, § 2; 1997, ch. 237, § 21.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Cross references. — For designation of health care authority department as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV D of the federal Social Security Act, *see* 27-2-27 NMSA 1978.

The 1997 amendment, effective April 11, 1997, rewrote Paragraph A(1), inserted "human services" near the beginning of Subsection C, and inserted "should be modified in accordance with the guidelines, it" near the beginning of Subsection E.

Modification affecting non-residential parent. — The Uniform Interstate Family Support Act (Chapter 40, Article 6A NMSA 1978) supplements human services department's [health care authority department's] authority under the Public Assistance Act (27-2-1 NMSA 1978 et seq.) and human services department [health care authority department] therefore has the authority to bring an action to modify the child support obligation of a non-custodial parent residing in another state under UIFSA. *State ex rel. Washington Human Servs. Dep't v. Jackson*, 2007-NMCA-061, 141 N.M. 647, 159 P.3d 1132.

40-4-11.6. Attachment of guideline worksheet to order.

A completed child support obligation guideline worksheet shall be attached to all orders that establish or modify child support. The completed worksheet shall be signed by the obligor and obligee or their attorneys. The completed worksheet shall be incorporated as part of the child support order. The worksheet shall also be attached to the child support order unless the court decrees that the worksheet be sealed or unless the obligor and obligee agree that it should be sealed.

History: 1978 Comp., § 40-4-11.6, enacted by Laws 1991, ch. 206, § 3.

ANNOTATIONS

Review of worksheet on appeal. — Absent a request to the trial court that it include a worksheet, father failed to preserve this error for review. *Roberts v. Wright*, 1994-NMCA-022, 117 N.M. 294, 871 P.2d 390.

40-4-12. Allowance from spouse's separate property as alimony.

In proceedings for the dissolution of marriage, separation or support between husband and wife, the court may make an allowance to either spouse of the other spouse's separate property as alimony and the decree making the allowance shall have the force and effect of vesting the title of the property so allowed in the recipient.

History: 1941 Comp., § 25-716, enacted by Laws 1947, ch. 16, § 1; 1953 Comp., § 22-7-13; Laws 1973, ch. 319, § 9.

ANNOTATIONS

Cross references. — For notes regarding alimony, *see* "IV. ALLOWING AND MODIFYING ALIMONY." in notes following 40-4-7 NMSA 1978.

Failure to request alimony does not deny court's authority to award. — Ordinarily, alimony is an incident of divorce proceedings, but the failure to make a request for alimony in the pleadings cannot be construed as denying the trial court statutory authority to make an award of alimony. *Mitchell v. Mitchell*, 1953-NMSC-115, 57 N.M. 776, 264 P.2d 673.

Even though not specifically requested, the court may, in an effort to equitably divide the community property, grant an award of alimony. *Ridgway v. Ridgway*, 1980-NMSC-055, 94 N.M. 345, 610 P.2d 749.

Award of wife's share of community property not alimony. — An award to a wife of her share of the community property was not tantamount to an award of alimony. *Ridgway v. Ridgway*, 1980-NMSC-055, 94 N.M. 345, 610 P.2d 749.

Community estate becomes separate estate when divided by divorce. — When community property is divided incident to divorce, the property which previously was community estate becomes henceforth separate property of the respective parties. *Harper v. Harper*, 1950-NMSC-024, 54 N.M. 194, 217 P.2d 857.

Court may impose lien on separate property. — This section, which grants authority to provide allowances out of separate property only, does so for purposes of alimony or child support; however, under its inherent power, the court may impose a lien on separate property as security for a debt owed. *Ridgway v. Ridgway*, 1980-NMSC-055, 94 N.M. 345, 610 P.2d 749.

Allowance made notwithstanding separation agreement. — In suit for divorce, the court, having jurisdiction of the subject matter and parties, may allow the wife such a reasonable portion of the husband's separate property as may seem just, notwithstanding a separation agreement between the parties, effectuated by conveyances. *Oberg v. Oberg*, 1931-NMSC-051, 35 N.M. 601, 4 P.2d 918.

Lump sum award in lieu of alimony. — It is within the power of the trial court to award and to set over to the wife a lump sum in lieu of alimony out of the husband's interest in the community. *Harper v. Harper*, 1950-NMSC-024, 54 N.M. 194, 217 P.2d 857.

Wife's remarriage considered in fixing alimony amount. — In fixing the amount of alimony, some consideration should be given to the impending remarriage of the wife, bearing in mind that alimony is intended as a method of fulfilling the husband's obligation to provide the support needed by the wife in accordance with the husband's ability to pay. *Michelson v. Michelson*, 1976-NMSC-026, 89 N.M. 282, 551 P.2d 638.

Law reviews. — For symposium, "Equal Rights in Divorce and Separation," see 3 N.M.L. Rev. 118 (1973).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For note, "Community Property - Profit Sharing Plans - Approval of Undiscounted Current Actual Value and Distribution by Promissory Note Secured by Lien on Separate Property," see 11 N.M.L. Rev. 409 (1981).

For article, "New Mexico Community Property Law and the Division of Retirement Plan Benefits Pursuant to the Dissolution of Marriage," see 13 N.M.L. Rev. 641 (1983).

For annual survey of New Mexico family law, 19 N.M.L. Rev. 692 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation § 755.

Wife's misconduct or fault as affecting right to temporary alimony, 2 A.L.R.2d 307.

Right of former wife to counsel fees upon application after absolute divorce to increase or decrease alimony, 15 A.L.R.2d 1252.

Trial court's jurisdiction as to alimony or maintenance pending appeal of matrimonial action, 19 A.L.R.2d 703.

Default decree in divorce action as estoppel or res judicata with respect of marital property rights, 22 A.L.R.2d 724.

Divorce upon constructive service as affecting power to allow alimony upon subsequently obtaining personal jurisdiction over former husband, 28 A.L.R.2d 1378.

Enforcement of claim for alimony or for attorneys' fees against exemptions, 54 A.L.R.2d 1422.

Husband's right to alimony, maintenance, suit money or attorneys' fees in suit for divorce, 66 A.L.R.2d 880.

Trust income or assets as subject to claim against beneficiary for alimony, maintenance or child support, 91 A.L.R.2d 262.

Fault of party affecting right to alimony under statute making separation a substantive ground for divorce, 35 A.L.R.3d 1238.

Consideration of tax liability or consequences in determining alimony or property settlement provisions of divorce or separation, 51 A.L.R.3d 461, 9 A.L.R.5th 568.

Fault as consideration in alimony, spousal support, or property division awards pursuant to no-fault divorce, 86 A.L.R.3d 1116.

Divorced woman's subsequent sexual relations or misconduct as warranting, alone or with other circumstances, modification of alimony decree, 98 A.L.R.3d 453.

Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement, 4 A.L.R.4th 1294.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation, 15 A.L.R.4th 224.

Court's authority to award temporary alimony where existence of valid marriage is contested, 34 A.L.R.4th 814.

Necessity that divorce court value property before distributing it, 51 A.L.R.4th 11.

Divorce and separation: method of valuation of life insurance policies in connection with trial court's division of property, 54 A.L.R.4th 1203.

Divorce: excessiveness or adequacy of combined property division and spousal support awards - modern cases, 55 A.L.R.4th 14.

Withholding visitation rights for failure to make alimony or support payments, 65 A.L.R.4th 1155.

Death of obligor spouse as affecting alimony, 79 A.L.R.4th 10.

Effect of same-sex relationship on right to spousal support, 73 A.L.R.5th 599.

Propriety of equalizing income of spouses through alimony awards, 102 A.L.R.5th 395.

Liability of alimony for wife's debts, 10 A.L.R. Fed. 881.

27B C.J.S. Divorce § 398.

40-4-13. Spousal support to constitute lien on real estate.

A. The decree making the allowance for spousal support to either spouse shall be a lien on the real estate of the obligor spouse from the date of filing of a notice of order or decree in the office of the county clerk of each county where any of the property is situated.

B. The notice of order or decree shall contain:

(1) the caption of the case from which the duty of spousal support arose, including the state, county and court in which the case was heard, the case number and the names of the parties when the case was heard;

(2) the date of entry of the judgment, order or decree from which the duty of spousal support arose;

(3) the current names, social security numbers and dates of birth of the parties; and

(4) each party's last known address, unless ordered otherwise in the judgment, order or decree from which the duty of spousal support arose.

C. The notice shall be executed and acknowledged in the same manner as a grant of land is executed and acknowledged.

D. A copy of the recorded notice shall be sent to the obligor spouse at his last known address.

History: 1941 Comp., § 25-717, enacted by Laws 1947, ch. 16, § 2; 1953 Comp., § 22-7-14; Laws 1973, ch. 319, § 10; 1993, ch. 111, § 1.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, substituted "Spousal support" for "Money allowance" in the catchline, designated the existing provisions as Subsection A, substituted "spousal support" for "alimony", "obligor" for "other", and "of a notice of order or" for "for record a certified copy of the" in Subsection A, and added Subsections B through D.

Enforcement of child support by attachment for contempt. — Section 2190 of Code 1915 (39-4-1 NMSA 1978), though giving execution for money decrees in equity, does not abrogate equity power to enforce by attachment as for contempt its decree for monthly payments for support of children. *Ex parte Sedillo*, 1929-NMSC-038, 34 N.M. 98, 278 P. 202.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation §§ 884 to 893.

Decree for payment for support or alimony as a lien or the subject of declaration of lien, 59 A.L.R.2d 656.

Death of obligor spouse as affecting alimony, 79 A.L.R.4th 10.

27B C.J.S. Divorce § 471.

40-4-14. Allowance in property; appointment and removal of guardian.

In proceedings for the dissolution of marriage, separation or support between husband and wife, the court may make an allowance of certain property or properties of either party or of both parties for the maintenance, education and support of the minor children of the parties, and may vest title to the part of the property so allowed in a conservator appointed by the court. The conservator must qualify and serve in such capacity as provided in Sections 5-101 through 5-502 [45-5-101 to 45-5-502 NMSA 1978] of the [Uniform] Probate Code.

History: 1941 Comp., § 25-718, enacted by Laws 1947, ch. 16, § 3; 1953 Comp., § 22-7-15; Laws 1973, ch. 319, § 11; 1975, ch. 257, § 8-114.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Law reviews. — For symposium, "Equal Rights in Divorce and Separation," see 3 N.M.L. Rev. 118 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support, 91 A.L.R.3d 530.

40-4-15. Child support to constitute lien on real and personal property.

A. In case a sum of money is allowed to the children by the decree for the support, education or maintenance of the children, the decree shall become a lien on the real and personal property of the obligor party from the date of filing of a notice of order or decree in the office of the county clerk of each county where any of the property may be situated.

B. The notice of order or decree shall contain:

(1) the caption of the case from which the duty of child support arose, including the state, county and court in which the case was heard, the case number and the names of the parties when the case was heard;

(2) the date of entry of the judgment, order or decree from which the duty of child support arose;

(3) the current names and years of birth of the parties; and

(4) each party's last known address, unless ordered otherwise in the judgment, order or decree from which the duty of child support arose.

C. The notice shall be executed and acknowledged in the same manner as a grant of land is executed and acknowledged.

D. A copy of the recorded notice shall be sent to the obligor spouse at the obligor's last known address.

History: 1941 Comp., § 25-719, enacted by Laws 1947, ch. 16, § 4; 1953 Comp., § 22-7-16; Laws 1985, ch. 105, § 15; 1993, ch. 111, § 2; 2011, ch. 134, § 17.

ANNOTATIONS

The 2011 amendment, effective July 1, 2011, eliminated the requirement that an order contain the social security numbers of the parties and the month and day of their births.

The 1993 amendment, effective July 1, 1993, substituted "Child support" for "Money allowance to children" in the catchline, designated the existing provisions as Subsection A, substituted "obligor party" for "party who must furnish the child support" and "of a notice of order or" for "for record a certified copy of the" in Subsection A, and added Subsections B through D.

When lien perfected. — Once the decree is duly filed, a perfected and protected statutory lien arises. *Lekvold v. Henderson*, 18 Bankr. 663 (Bankr. D.N.M. 1982).

Claim for child support may be prosecuted against deceased father's estate. — Where a father has been ordered by a court of competent jurisdiction to make child support payments until his child reaches majority in accord with a stipulation made by parents and present in decree, and thereafter the father dies while the child is yet a minor, a claim may be successfully prosecuted in the probate court against the estate of the father to enforce the payment. *Hill v. Matthews*, 1966-NMSC-127, 76 N.M. 474, 416 P.2d 144.

Exemptions unavailable. — Statutory exemptions for debtors in foreclosure actions set forth in 42-10-1 NMSA 1978 et seq. are unavailable to a parent as against a lien for child support obligations under this section. *D'Avignon v. Graham*, 1991-NMCA-125, 113 N.M. 129, 823 P.2d 929.

Law reviews. — For comment on Hill v. Matthews, 76 N.M. 474, 416 P.2d 144 (1966), see 7 Nat. Resources J. 129 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Decree for periodical payments for support of children as lien or subject of declaration of lien, 59 A.L.R.2d 656.

Child support: court's authority to reinstitute parent's support obligation after terms of prior decree have been fulfilled, 48 A.L.R.4th 952.

40-4-16. [Satisfaction of liens.]

The liens created by this act [40-4-12 to 40-4-19 NMSA 1978] may be satisfied by execution or may be foreclosed under the same procedure as is now allowed for the foreclosure of judgment liens.

History: 1941 Comp., § 25-720, enacted by Laws 1947, ch. 16, § 5; 1953 Comp., § 22-7-17.

ANNOTATIONS

Cross references. — For execution and foreclosure, *see* 39-4-1 to 39-4-16 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Decree for periodic payments for support or alimony as a lien, or the subject of a declaration of a lien, 59 A.L.R.2d 656.

40-4-17. [Motion to remove lien; bond for alimony or support payments.]

The district court upon motion made in the cause wherein the decree was rendered may remove the liens created by this act [40-4-12 to 40-4-19 NMSA 1978] upon notice and upon good cause shown from any or all of the real estate, subject to such lien; and the judge, in his discretion, upon the removal of such lien, may require bond for the faithful performance of the payment of alimony or support money in accordance with the decree.

History: 1941 Comp., § 25-722, enacted by Laws 1947, ch. 16, § 7; 1953 Comp., § 22-7-19.

ANNOTATIONS

Law reviews. — For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Laches or acquiescence as defense so as to bar recovery of arrearages of permanent alimony or child support, 5 A.L.R.4th 1015.

40-4-18. [Limitation of liens under Laws 1901, ch. 62, 28, 29.]

All liens created by a decree rendered under Sections 28 and 29 of Chapter 62, Laws of 1901, (Sections 25-707 and 25-708, New Mexico Statutes, 1941, Annotated) against any property of a person shall be of no force and effect against any of said property after six months from the effective date of this act. Provided, however, that a certified copy of any such decree rendered prior to the effective date of this act may be filed for record with the county clerk as herein provided during said six months' period in which case it shall be a lien from the date of the decree and any such decree filed for record after such period shall be a lien only from and after the date of filing with the county clerk.

History: 1941 Comp., § 25-723, enacted by Laws 1947, ch. 16, § 8; 1953 Comp., § 22-7-20.

ANNOTATIONS

Compiler's notes. — Laws 1901, ch. 62, §§ 28 and 29, referred to in this section, were repealed by Laws 1947, ch. 16, § 10.

The phrase "effective date of this act" in the second sentence refers to the effective date of Laws 1947, ch. 16, § 12, which was February 20, 1947.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Laches or acquiescence as defense so as to bar recovery of arrearages of permanent alimony or child support, 5 A.L.R.4th 1015.

40-4-19. Enforcement of decree by attachment, garnishment, execution or contempt proceedings.

Nothing in Sections 40-4-12 through 40-4-19 NMSA 1978 shall prevent a person or persons entitled to benefits of any decree for alimony or support from enforcing the decree by attachment, garnishment, execution or contempt proceedings as is now provided by statute, except that the filing of an affidavit that the defendant has no property within the state subject to execution to satisfy the judgment shall not be a prerequisite to the issuance of a garnishment.

History: 1941 Comp., § 25-724, enacted by Laws 1947, ch. 16, § 9; 1953 Comp., § 22-7-21; Laws 1973, ch. 319, § 12; 1979, ch. 252, § 1.

ANNOTATIONS

Cross references. — For execution and foreclosure, *see* 39-4-1 to 39-4-16 NMSA 1978.

For attachment and garnishment, *see* 42-9-1 to 42-9-39 NMSA 1978.

Credit for lump sum payments. — An obligor spouse, whose children received a lump sum social security disability payment covering the period from the date of disability to the date of payment, may receive credit toward the support obligation for all of the period covered by the lump-sum payment. *Romero v. Romero*, 1984-NMCA-049, 101 N.M. 345, 682 P.2d 201.

Child support payments are final judgments when due. — Accrued and unpaid periodic child support installments mandated in a divorce decree are each considered final judgments on the date they become due. *Britton v. Britton*, 1983-NMSC-084, 100 N.M. 424, 671 P.2d 1135.

Support installments becoming due as absolute and vested right. — Where a decree is rendered for alimony and is made payable in future installments the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, unless by the law of the state in which a judgment for future alimony was rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive installments ordered by the decree to be paid. This principle has also been applied to child support. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Statute of limitations. — Because each monthly child support installment mandated in the final decree is a final judgment, the statute of limitations period found in 37-1-2 NMSA 1978 applies. *Britton v. Britton*, 1983-NMSC-084, 100 N.M. 424, 671 P.2d 1135.

Execution obtainable without reducing arrearages to judgment. — A creditor spouse may obtain a writ of execution based on a decree for child support without reducing the arrearages to judgment. *Gonzalez v. Gonzalez*, 1985-NMCA-071, 103 N.M. 157, 703 P.2d 934.

Inability to pay is a good defense in contempt proceeding for noncompliance with an in personam order to pay community debts, but the burden of proving the defense rests upon him who asserts it. *Nelson v. Nelson*, 1971-NMSC-027, 82 N.M. 324, 481 P.2d 403.

Court's discretion where counterclaim in form of contempt action. — In a suit for a money judgment very little discretion is allowed, the court merely examining the validity of the prior judgment and entering a money judgment, but since the wife counterclaimed against the husband in his change of custody action in the form of a contempt action, as

opposed to seeking a money judgment for arrearages, her action invoked the equitable powers of the court in which the trial court has discretion to fashion an installment payment plan of the husband's debt of child support and alimony arrearages. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Person subject to pay dischargeable debt not subject to contempt power. — A person subject to an in personam order to pay a dischargeable debt is not subject to the trial court's contempt power, for to hold otherwise would circumvent the policy behind allowing bankruptcies. *Sosaya v. Sosaya*, 1977-NMSC-001, 89 N.M. 769, 558 P.2d 38.

Imprisonment for failure to pay alimony or child support rests with the discretion of the trial court, which should use the power of contempt cautiously and sparingly, and the least possible power adequate to compel compliance with the court's order is its proper exercise. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Court obliged to give full force and effect to accrued support. — Since New Mexico gives Missouri divorce decrees full faith and credit, the trial court was obliged to give full force and effect to accrued alimony and child support due under a Missouri decree. The Missouri court granting the divorce had no power to modify accrued alimony and child support, and therefore, the district court in New Mexico had no such power either. *Corliss v. Corliss*, 1976-NMSC-023, 89 N.M. 235, 549 P.2d 1070.

Law reviews. — For comment on Hill v. Matthews, 76 N.M. 474, 416 P.2d 144 (1966), see 7 Nat. Resources J. 129 (1967).

For article, "Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings," see 14 N.M.L. Rev. 275 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation §§ 860 to 928.

Husband's default, contempt or other misconduct as affecting modification of decree for support, 6 A.L.R.2d 835.

Allowance in state of decedent's domicile for children's support as enforceable against decedent's real estate, or proceeds thereof in other state, 13 A.L.R.2d 973.

Maintenance of suit by child, independently of statute, against parent for support, 13 A.L.R.2d 1142.

Reciprocal enforcement of duty to support dependents, construction and application of state statutes providing for, 42 A.L.R.2d 768.

Right to maintain action in another state for support and maintenance of defendant's child, parent, or dependent in plaintiff's institution, 67 A.L.R.2d 771.

Husband's death as affecting periodic payment provision of separation agreement, 5 A.L.R.4th 1153.

Withholding visitation rights for failure to make alimony or support payments, 65 A.L.R.4th 1155.

Divorce: propriety of using contempt proceeding to enforce property settlement award or order, 72 A.L.R.4th 298.

United States Postal Service as subject to garnishment, 38 A.L.R. Fed. 546.

Construction and application of 42 USCS § 659(a) authorizing garnishment against United States or District of Columbia for enforcement of child support and alimony obligations, 44 A.L.R. Fed. 494.

40-4-19.1, 40-4-19.2. Repealed.

ANNOTATIONS

Repeals. — Laws 1985, ch. 105, § 21 repealed 40-4-19.1 and 40-4-19.2 NMSA 1978, as amended and enacted by Laws 1983, ch. 77, §§ 1 and 2, respectively, relating to wage deduction proceedings, effective June 14, 1985. For present comparable provisions, *see* Chapter 40, Article 4A NMSA 1978.

40-4-20. Failure to divide or distribute property on the entry of a decree of dissolution of marriage or separation; distribution of spousal or child support and determination of paternity when death occurs during proceedings for dissolution of marriage, separation, annulment of marriage or paternity.

A. The failure to divide or distribute property on the entry of a decree of dissolution of marriage or of separation shall not affect the property rights of either the husband or wife, and either may subsequently institute and prosecute a suit for division and distribution or with reference to any other matter pertaining thereto that could have been litigated in the original proceeding for dissolution of marriage or separation.

B. Upon the filing and service of a petition for dissolution of marriage, separation, annulment, division of property or debts, spousal support, child support or determination of paternity pursuant to the provisions of Chapter 40, Article 4 or 11 [repealed] NMSA 1978, 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, separation, annulment or determination of paternity, 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. The court may allow the spouse or any children of the

marriage support as if the decedent had survived, pursuant to the provisions of Chapter 40, Article 4 or 11 [repealed] NMSA 1978. In determining the support, the court shall, in addition to the factors listed in Chapter 40, Article 4 NMSA 1978, consider the amount and nature of the property passing from the decendent [decedent] to the person for whom the support would be paid, whether by will or otherwise.

History: Laws 1901, ch. 62, § 31; Code 1915, § 2781; C.S. 1929, § 68-509; 1941 Comp., § 25-709; 1953 Comp., § 22-7-22; Laws 1973, ch. 319, § 13; 1993, ch. 90, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Chapter 40, Article 11 NMSA 1978, the Uniform Parentage Act, was repealed by Laws 2009, ch. 215, § 19. For present comparable provisions, *see* Chapter 40, Article 11A, the New Mexico Uniform Parentage Act (40-11A-101 through 40-11A-903 NMSA 1978).

Cross references. — For proceeding for division of property, *see* 40-4-3 NMSA 1978.

For provisions relating to the establishment of a parent-child relationship for purposes of intestate succession, *see* 45-2-115 through 45-2-122 NMSA 1978 of the Uniform Probate Code.

The 1993 amendment, effective July 1, 1993, rewrote the catchline which read "Failure to divide property on dissolution of marriage"; designated the formerly undesignated provisions as Subsection A; in Subsection A, substituted "divide or distribute property on the entry of a decree of dissolution of marriage or of separation" for "divide the property on the dissolution of marriage" and added "or separation" at the end; added Subsection B; and made minor stylistic changes.

Voluntary dismissal of legal separation action following the death of one party. — Section 40-4-20 NMSA 1978 does not preclude voluntary dismissal of a legal separation action as a means of concluding the proceedings after the death of one of the parties. *Trinosky v. Johnstone*, 2011-NMCA-045, 149 N.M. 605, 252 P.3d 829.

Where petitioner filed a petition for legal separation, division of property and spousal support; while the action was pending and before entry of a final decree, respondent died; and petitioner filed a motion to voluntarily dismiss the action, 40-4-20 NMSA 1978 did not preclude the district court from granting the motion to dismiss the action. *Trinosky v. Johnstone*, 2011-NMCA-045, 149 N.M. 605, 252 P.3d 829.

The four-year statute of limitations of 37-1-4 NMSA 1978 does not apply to a division of undivided retirement benefits. *Gilmore v. Gilmore*, 2010-NMCA-013, 147 N.M. 625, 227 P.3d 115.

Subject matter jurisdiction. — Where defendant filed a divorce action against plaintiff in New Mexico; plaintiff obtained a default divorce in California; defendant's New Mexico divorce action was dismissed when the California divorce was granted; the California court initially issued a qualified domestic relations order awarding plaintiff a portion of defendant's retirement benefits; the California court subsequently set aside the qualified domestic relations order for lack of personal jurisdiction; and plaintiff then filed an action in New Mexico for division of the retirement benefits, the retirement benefits were an undivided asset, plaintiff's New Mexico action was an independent action, and the district court had subject matter jurisdiction to divide the retirement benefits. *Gilmore v. Gilmore*, 2010-NMCA-013, 147 N.M. 625, 227 P.3d 115.

Division of retirement benefits. — Where plaintiff filed an action to divide defendant's monthly retirement benefits; defendant offered to buy out plaintiff's share of the retirement benefits through a lump-sum payment; and defendant did not have the ability to pay a lump sum at the time of the hearing on plaintiff's petition, the district court did not abuse its discretion by awarding plaintiff a share of the retirement benefits under a pay-as-it-comes-in method. *Gilmore v. Gilmore*, 2010-NMCA-013, 147 N.M. 625, 227 P.3d 115.

Laches, equitable estoppel and waiver by acquiescence. — Where a California court granted plaintiff a default divorce from defendant in 1994; defendant retired and began receiving monthly retirement benefits in 2005; the California court issued a qualified domestic relations order awarding plaintiff a portion of defendant's retirement benefits in 2006; the California court set aside the qualified domestic relations order in 2006 for lack of personal jurisdiction; plaintiff filed an action in New Mexico in 2007 for a division of the retirement benefits; defendant testified that plaintiff told defendant that plaintiff did not want any money from defendant's retirement, that defendant relied on plaintiff's statement and paid defendant's subsequent wife a lump sum payment for her share of defendant's retirement, and that defendant was forced to select a retirement option of maximum monthly payments because plaintiff failed to perfect plaintiff's claim; and plaintiff testified that plaintiff asserted plaintiff's rights as soon as defendant retired, plaintiff rejected defendant's settlement offers; and plaintiff never waived plaintiff's right to defendant's retirement benefits, there was sufficient evidence to support the district court's denial of defendant's defenses of laches, equitable estoppel and waiver by acquiescence. *Gilmore v. Gilmore*, 2010-NMCA-013, 147 N.M. 625, 227 P.3d 115.

Method for division of retirement benefits. — Absent an agreement regarding calculation of benefits, there is no set rule for determining every case involving the division of retirement benefits. *Gilmore v. Gilmore*, 2010-NMCA-013, 147 N.M. 625, 227 P.3d 115.

Use of time-rule method. — Where plaintiff and defendant were married for nine years during which time plaintiff was a municipal police officer; plaintiff and defendant were divorced in 1994; the divorce decree did not provide for the division of defendant's retirement benefits; after the divorce, defendant was employed as an undersheriff and later as the director of a county detention center; defendant's salaries as undersheriff

and as director of the county detention center were significantly more than defendant's salary as a municipal police officer; defendant retired and began receiving monthly retirement benefits in 2005; and plaintiff filed an action in 2006 for division of the retirement benefits, the district court erred in assuming that the public employees retirement association required the use of the time-rule method to calculate plaintiff's share of defendant's retirement benefits. *Gilmore v. Gilmore*, 2010-NMCA-013, 147 N.M. 625, 227 P.3d 115.

Procedure when death occurs during dissolution. — A decedent's will and trust are not statutorily revoked by the entry of a 40-4-20B NMSA 1978 marital property judgment. Before the domestic relations proceedings can be continued, a personal representative who is not disqualified by a conflict of interest must be appointed to represent the decedent's estate through the conclusion of those proceedings. After the domestic relations court concludes the 40-4-20B NMSA 1978 proceedings, the decedent's estate can be distributed according to the decedent's estate plan and governing probate statutes. *Oldham v. Oldham*, 2011-NMSC-007, 149 N.M. 215, 247 P.3d 736, *rev'g in part* and *aff'g in part*, 2009-NMCA-126, 147 N.M. 329, 222 P.3d 701.

Appointment of decedent's spouse as personal representative of decedent's estate. — Where decedent executed a will designating decedent's spouse as the personal representative and beneficiary of decedent's estate; decedent subsequently filed a petition for divorce; and decedent died while the divorce proceeding was pending, the court erred in appointing decedent's spouse as personal representative of decedent's estate because the appointment of decedent's spouse as personal representative to represent decedent's estate against the spouse in the pending divorce proceeding created an inherent conflict of interest. *Oldham v. Oldham*, 2009-NMCA-126, 147 N.M. 329, 222 P.3d 701, *rev'd in part* and *aff'd in part by Oldham v. Oldham*, 2011-NMSC-007, 149 N.M. 215, 247 P.3d 736.

Death of a spouse during a divorce proceeding. — If one spouse dies during the pendency of a divorce proceeding, marital property and debt covered by this section are divided and distributed according to New Mexico domestic relations law, debt incurred after the death of the decedent spouse is separate debt to be dealt with through probate, and the surviving spouse is not the surviving spouse for purposes of probate. *Karpien v. Karpien*, 2009-NMCA-043, 146 N.M. 188, 207 P.3d 1165.

Spousal support and attorney fees awarded after death of spouse. — In a divorce proceeding continued after the death of a spouse pursuant to 40-4-20 NMSA 1978 in which the court awards lump-sum spousal support and attorney fees, the final judgment is not a claim against the estate of the deceased spouse for purposes of the [Uniform] Probate Code's (Chapter 45 NMSA 1978) creditor's claims provisions of 45-3-805 NMSA 1978. *Estate of Nauert v. Morgan-Nauret*, 2012-NMCA-037, 274 P.3d 799.

Where the deceased spouse who filed for divorce in March 2006; died while the divorce action was pending; in September 2007, the probate court appointed a personal representative of the estate; in November 2007, the divorce court awarded the surviving

spouse monthly spousal support from September 2007 and attorney fees and ordered the estate to pay the awards immediately; and the personal representative claimed that the awards were class six claims under 45-3-805 NMSA 1978, the awards were not claims under the [Uniform] Probate Code (Chapter 45 NMSA 1978) to which the creditors' claims provisions of Section 45-3-805 NMSA 1978 applied. *Estate of Nauert v. Morgan-Nauret*, 2012-NMCA-037, 274 P.3d 799.

Spousal support and attorney fees awarded after death of spouse did not violate Federal Insolvency Act. — Where a divorce proceeding was continued after the death of a spouse and the divorce court ordered the deceased spouse's estate to immediately pay a lump-sum amount for spousal support and attorney fees to the surviving spouse, the award did not violate the Federal Insolvency Act, 31 U.S.C. § 3713(a)(1)(B) which requires claims of the United States government to be paid first when the estate of the deceased debtor is not enough to pay all debts of the debtor, because the divorce court awards were not claims against the estate of the deceased spouse and the act did not apply. *Estate of Nauert v. Morgan-Nauret*, 2012-NMCA-037, 274 P.3d 799.

Property divided pursuant to this section must be divided in an independent action. *Lewis v. Lewis*, 1987-NMCA-073, 106 N.M. 105, 739 P.2d 974.

Divorce decree not bar to set aside action where property rights not litigated. — Where neither the property rights of the parties nor the validity of the conveyance of the property was litigated in the divorce proceeding, the divorce decree is not a bar to the wife's independent action to set aside her conveyance of community property. *Trujillo v. Padilla*, 1968-NMSC-090, 79 N.M. 245, 442 P.2d 203.

If property rights are not considered or disposed of in divorce action, a suit seeking division and distribution of the property may be subsequently prosecuted. *Zarges v. Zarges*, 1968-NMSC-151, 79 N.M. 494, 445 P.2d 97.

Petition not barred by res judicata. — A petition to divide a previously undivided asset involves a new cause of action not barred by res judicata. *Pacheco v. Quintana*, 1986-NMCA-007, 105 N.M. 139, 730 P.2d 1, cert. quashed, 105 N.M. 94, 728 P.2d 845.

Four-year statute of limitations of 37-1-4 NMSA 1978 applies to suits to divide personal property brought under this section. *Plaatje v. Plaatje*, 1981-NMSC-040, 95 N.M. 789, 626 P.2d 1286.

Property no longer community property after divorce. — After divorce the parties are no longer husband and wife, and the property is no longer community property and former 57-4-3, 1953 Comp., relating to management and conveyance, has no application. *Jones v. Tate*, 1961-NMSC-039, 68 N.M. 258, 360 P.2d 920.

Upon divorce of parties all community property not divided between them does not remain community property but becomes property which they hold as tenants in

common. *Jones v. Tate*, 1961-NMSC-039, 68 N.M. 258, 360 P.2d 920; Martinez v. Martinez, 2004-NMCA-007, 135 N.M. 11, 83 P.3d 298.

Statute of limitations does not apply to action for accounting and partition of real property. — There is nothing about the bare holding of title that should equate to the accrual of a cause of action that triggers a time limitation on the right to seek partition; thus, the trial court must analyze a post-divorce action to partition real property in the same fashion as any partition action by a tenant in common. *Martinez v. Martinez*, 2004-NMCA-007, 135 N.M. 11, 83 P.3d 298.

If rights were community property prior to divorce, such rights, after divorce, are owned as tenants in common. *Hickson v. Herrmann*, 1967-NMSC-083, 77 N.M. 683, 427 P.2d 36.

Existing present interest of wife continues even after divorce. — This section recognizes an existing present interest of the wife in the community property during the existence of the matrimonial status, which continues even after divorce, where the property is not divided in the decree in the divorce case. *In re Miller's Estate*, 1940-NMSC-021, 44 N.M. 214, 100 P.2d 908; Beals v. Ares, 1919-NMSC-067, 25 N.M. 459, 185 P. 780.

Wife's interest in community property not affected by adultery. *Beals v. Ares*, 1919-NMSC-067, 25 N.M. 459, 185 P. 780.

Spouses' equal interest as tenants-in-common in insurance policy. — Unless otherwise ordered by the court in the dissolution of marriage and the property settlement, the divorced spouses have an equal interest as tenants in common in a term life insurance policy until such time as the term determined by the last premium paid by community funds comes to an end. *Phillips v. Wellborn*, 1976-NMSC-038, 89 N.M. 340, 552 P.2d 471.

Where right to policy proceeds obtained during marriage. — Where there is an insured third person (the child) and a spouse (the defendant) as beneficiary and the proceeds were not paid during marriage, but the right to the proceeds was obtained during marriage, this right was not changed and was not divided upon the divorce. *Hickson v. Herrmann*, 1967-NMSC-083, 77 N.M. 683, 427 P.2d 36.

Since husband owned right to receive proceeds of policy as community property of the parties, this right, not having been disposed of by divorce, became the right of the parties as tenants in common. *Hickson v. Herrmann*, 1967-NMSC-083, 77 N.M. 683, 427 P.2d 36.

Interest in pension plan need not be vested for division. — A spouse's entitlement to half of the community interest in a pension plan earned during coverture does not rest upon whether the employee's interest was vested at the time of divorce, but whether the worker's rights in the pension constitute a property interest or right obtained with

community funds or labor. *Berry v. Meadows*, 1986-NMCA-002, 103 N.M. 761, 713 P.2d 1017.

Post-decree retirement benefit plan increases. — The community pension and profit-sharing plans maintained by the husband became a tenancy in common interest with the entry of the partial decree of divorce dissolving the parties' marriage, and since when two parties hold personal or real property as tenants in common, they each have a separate and distinct interest in the property that cannot legally be transferred or extinguished by the other co-tenant, and since the retirement benefit plan increases from the date of the partial decree were the result of passive earnings and appreciation, any increases should be shared equally at the time of the judgment dividing the parties' property, and therefore according to the parties' percentage of ownership as of the date of the latter judgment. *Lewis v. Lewis*, 1987-NMCA-073, 106 N.M. 105, 739 P.2d 974.

Future tax consequences of deferred pension payments are too speculative and should be disregarded in calculating the present value of the pensions. *Lewis v. Lewis*, 1987-NMCA-073, 106 N.M. 105, 739 P.2d 974.

Division of military benefits governed by jurisdiction granting alimony. — Trial court was without authority to award respondent part of petitioner's military benefits, whether as a modification of the original Colorado divorce and alimony decree or as a separate action under this section, where such benefits were not recognized under Colorado law as marital assets. *Reyes v. Reyes*, 1987-NMCA-007, 105 N.M. 383, 733 P.2d 14, cert. denied *sub nom. Reyes v. State*, 105 N.M. 358, 732 P.2d 1381 (1987).

Post-decree claim for military retirement benefits. — Where there was no substantial evidence to support the trial court's finding that the parties orally agreed that the husband should be awarded the entire community interest in his military retirement benefits, the wife was not precluded from asserting her post-decree claim for this undistributed asset. *Berry v. Meadows*, 1986-NMCA-002, 103 N.M. 761, 713 P.2d 1017.

Military retirement benefits are a form of employee compensation and are community property if the period of employment upon which those benefits are based occurred during coverture. Although the right to receive benefits matured prior to divorce, the right to receive each monthly installment accrues when the installment becomes due. Thus the statutory time limitation upon a former spouse's right to sue for a portion of each installment commences to run from the time each installment comes due. *Plaatje v. Plaatje*, 1981-NMSC-040, 95 N.M. 789, 626 P.2d 1286.

Applicability of USFSPA to pre-1981 divorce decrees. — The provisions of Paragraph 1408(c)(1) of the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(c)(1), do not entitle a non-military spouse to a share of the military spouse's pension, where the divorce decree was decided prior to June 25, 1981, and where such decree did not treat the pension as marital property or reserve jurisdiction to make such determination at a later date. *Hennessy v. Duryea*, 1998-NMCA-036, 124 N.M. 754, 955 P.2d 683, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Federal preemption. — The purpose of Paragraph 1408(c)(1) of the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(c)(1), is to preempt state laws that allow reopening of divorce decrees that were silent as to military retirement pay; to the extent that Subsection A of this section is inconsistent with such purpose, Subsection A of this section is preempted. *Hennessy v. Duryea*, 1998-NMCA-036, 124 N.M. 754, 955 P.2d 683, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Federal preemption regarding military disability retirement benefits. — United States Supreme Court decision in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989), holding that states were preempted by federal statute from treating military disability retirement benefits as community property, would not be applied retroactively. *Toupal v. Toupal*, 1990-NMCA-027, 109 N.M. 774, 790 P.2d 1055, cert. denied, 109 N.M. 751, 790 P.2d 1032, and cert. denied, 498 U.S. 982, 111 S. Ct. 513, 112 L. Ed. 2d 525 (1990).

New action to modify property division. — Even though the court which entered the original divorce decree no longer had jurisdiction under Rule 1-060 NMRA, concerning relief from a judgment or order, to modify property rights portion of the order, a party in the divorce could achieve a modification pursuant to this section. *Mendoza v. Mendoza*, 1985-NMCA-088, 103 N.M. 327, 706 P.2d 869.

Law reviews. — For article, "Federal Taxation of New Mexico Community Property," see 3 Nat. Resources J. 104 (1963).

For comment on Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968), see 9 Nat. Resources J. 101 (1969).

For annual survey of New Mexico law relating to domestic relations, see 13 N.M.L. Rev. 379 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Trial court's jurisdiction as to alimony or maintenance pending appeal of matrimonial action, 19 A.L.R.2d 703.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses, 94 A.L.R.3d 176.

Divorce and separation: treatment of stock options for purposes of dividing marital property, 46 A.L.R.4th 640.

Valuation of stock options for purposes of divorce court's property distribution, 46 A.L.R.4th 689.

Valuation of goodwill in medical or dental practice for purposes of divorce court's property distribution, 78 A.L.R.4th 853.

Accrued vacation, holiday time, and sick leave as marital or separate property, 78 A.L.R.4th 1107.

Divorce and separation: goodwill in law practice as property subject to distribution on dissolution of marriage, 79 A.L.R.4th 171.

What constitutes order made pursuant to state domestic relations law for purposes of qualified domestic relations order exception to antialienation provision of Employee Retirement Income Security Act of 1974 (29 USCS § 1056(d)), 79 A.L.R.4th 1081.

27B C.J.S. Divorce § 508.

ARTICLE 4A
Support Enforcement

40-4A-1. Short title.

This act may be cited as the "Support Enforcement Act".

History: Laws 1985, ch. 105, § 1.

ANNOTATIONS

Cross references. — For the Parental Responsibilty Act, *see* 40-5A-1 NMSA 1978 et seq.

For forms relating to garnishment of wages for child support, *see* Rules 4-811 and 4-812 NMRA.

Compiler's notes. — The term "this act" means Laws 1985, ch. 105, which appears as 27-2-32, 37-1-29, 40-4-15, and 40-4A-1 to 40-4A-16 NMSA 1978.

Law reviews. — For article, "Arbitration of Domestic Relations Disputes in New Mexico," see 16 N.M.L. Rev. 321 (1986).

Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

Right to credit on child support arrearages for gifts to child. 125 A.L.R. 5th 441.

40-4A-2. Definitions.

As used in the Support Enforcement Act:

A. "authorized quasi-judicial officer" means a person appointed by the court pursuant to rule 53(a) [Rule 1-053A NMRA] of the Rules of Civil Procedure for the District Courts;

B. "consumer reporting agency" means any person who, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties and who uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports;

C. "delinquency" means any payment under an order for support which has become due and is unpaid;

D. "department" means the human services department [health care authority department];

E. "income" means any form of periodic payment to an obligor, regardless of source, including but not limited to wages, salary, commission, compensation as an independent contractor, workers' compensation benefits, disability benefits, annuity and retirement benefits or other benefits, bonuses, interest or any other payments made by any person, but does not include:

(1) any amounts required by law to be withheld, other than creditor claims, including but not limited to federal, state and local taxes, social security and other retirement and disability contributions;

(2) union dues;

(3) any amounts exempted by federal law; or

(4) public assistance payments;

F. "notice of delinquency" means the notice of delinquency as provided for in Section 40-4A-4 NMSA 1978;

G. "notice to withhold income" means a notice that requires the payor to withhold from the obligor money necessary to meet the obligor's duty under an order for support and, in the event of a delinquency, requires the payor to withhold an additional amount to be applied towards the reduction of the delinquency;

H. "obligor" means the person who owes a duty to make payments under an order for support;

I. "obligee" means any person who is entitled to receive support under an order for support or that person's legal representative;

J. "order for support" means any order which has been issued by any judicial, quasi-judicial or administrative entity of competent jurisdiction of any state and which order provides for:

(1) periodic payment of funds for the support of a child or a spouse;

(2) modification or resumption of payment of support;

(3) payment of delinquency; or

(4) reimbursement of support;

K. "payor" means any person or entity who provides income to an obligor;

L. "person" means an individual, corporation, partnership, governmental agency, public office or other entity; and

M. "public office" means the state disbursement unit of the department as defined in Section 454B of the Social Security Act.

History: Laws 1985, ch. 105, § 2; 1993, ch. 254, § 1; 1997, ch. 237, § 6.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Cross references. — For district attorneys, *see* N.M. Const., art. VI, § 24 and 36-1-1 to 36-1-28 NMSA 1978.

For the health care authority department, *see* 9-8-1 to 9-8-12 NMSA 1978.

For provisions relating to establishing a state case registry of obligors and related information and additional support enforcement procedures, *see* 27-1-8 to 27-1-14 NMSA 1978.

For single state agency designation for Title IV-D, *see* 27-2-27 NMSA 1978.

For district court clerks, *see* 34-6-19 NMSA 1978.

For the State Directory of New Hires Act, *see* 50-13-1 NMSA 1978 et seq.

For Section 454B of the federal Social Security Act, *see* 42 U.S.C. § 654b.

The 1997 amendment, effective April 11, 1997, inserted "bonuses, interest" following "benefits" near the end of Subsection E, and rewrote Subsection M.

The 1993 amendment, effective June 18, 1993, substituted "or" for "and" at the end of Paragraph (3) of Subsection E; substituted "40-4A-4 NMSA 1978" for "4 of the Support Enforcement Act" in Subsection F; deleted a proviso concerning foreign orders from the end of the introductory language of Subsection J; and made stylistic changes in Subsections G and J.

40-4A-3. Purpose of income withholding.

Income withholding is intended to ensure compliance with the order for support and provide for the liquidation of any delinquency which may have accrued.

History: Laws 1985, ch. 105, § 3.

40-4A-4. Notice of delinquency.

A. When an obligor accrues a delinquency, the obligee or public office may prepare and serve upon the obligor a copy of a verified notice of delinquency. The income of a person with a support obligation imposed by a support order issued or modified in the state before January 1, 1994, if not otherwise subject to immediate withholding under Section 40-4A-4.1 NMSA 1978, shall become subject to immediate withholding as provided in Section 40-4A-4.1 NMSA 1978 if arrearages occur, without the need for a judicial or administrative hearing.

B. If the date upon which payment is due under an order for support is not stated in the order for support, the due date shall be deemed to be the last day of the month.

C. The notice of delinquency shall:

(1) recite those terms of the order for support which enumerate the support obligation;

(2) contain a current computation of the period and total amount of the delinquency;

(3) inform the obligor of the amount to be withheld;

(4) inform the obligor of the procedures available to contest the income withholding on the grounds that the withholding or the amount withheld is improper due to a mistake of fact;

(5) state that, unless the obligor complies with the procedures to contest the income withholding, a notice to withhold income shall be served upon the payor;

(6) state that the notice to withhold income shall be applicable to any current or subsequent payor; and

(7) state the name and address of the public office to which withheld income shall be sent.

D. The original notice of delinquency shall be filed with the clerk of the district court.

E. Service of the notice of delinquency upon the obligor shall be effected by sending the notice by prepaid certified mail addressed to the obligor at his last known address or by any method provided by law for service of a summons. Proof of service shall be filed with the clerk of the district court.

History: Laws 1985, ch. 105, § 4; 1997, ch. 237, § 7.

ANNOTATIONS

Cross references. — For provisions relating to establishing a state case registry of obligors and related information and additional support enforcement procedures, *see* 27-1-8 to 27-1-14 NMSA 1978.

For the State Directory of New Hires Act, *see* 50-13-1 NMSA 1978 et seq.

The 1997 amendment, effective April 11, 1997, rewrote Subsection A, in Paragraph C(4), added "on the grounds that the withholding or the amount withheld is improper due to a mistake of fact" at the end, substituted "contest the" for "avoid" in that paragraph and in Paragraph C(5), and made minor stylistic changes.

40-4A-4.1. Immediate child support income withholding.

A. In any judicial proceeding in which child support is ordered, modified or enforced and which proceeding is brought or enforced pursuant to Title IV-D of the Social Security Act as provided in Section 27-2-27 NMSA 1978, the income of the support obligor shall be subject to immediate income withholding regardless of the existence of any child support arrearage or delinquency. Effective January 1, 1994, in proceedings in which child support services are not being provided pursuant to Title IV-D and the initial child support order is issued in the state on or after January 1, 1994, the income of the support obligor shall be subject to immediate income withholding regardless of the existence of any child support arrearage or delinquency.

B. As part of the court or administrative order establishing, modifying or enforcing the child support obligation, the court shall issue the order to withhold.

C. The order to withhold shall state:

(1) the style, docket number and court having jurisdiction of the cause;

(2) the name, address and, if available, the social security number of the obligor;

(3) the amount and duration of the child support payments. If any of the ordered amount is toward satisfaction of an arrearage or delinquency up to the date of the order, the amount payable to current and past-due support shall be specified, together with the total amount of the delinquency or arrearage, including judgment interest, if any;

(4) the name and date of birth of the child for whom support is ordered and the name of the obligee;

(5) the name and address of the person or agency to whom the payment is to be made, together with the agency's internal case number; and

(6) any other information deemed necessary to effectuate the order.

D. All Title IV-D payments shall be made through the public office. All non-Title IV-D payments shall be made through the public office to be effective on October 1, 1998.

E. The maximum amount withheld pursuant to this section and any other garnishment shall not exceed fifty percent of the obligor's income.

F. The order of a withholding shall be mailed by the Title IV-D agency or the support obligee, obligee's attorney or court by certified mail to the payor. The payor shall pay over income as provided by and in compliance with the procedures of Section 40-4A-8 NMSA 1978.

G. The court may provide an exception to the immediate income withholding required by this section if it finds good cause for not ordering immediate withholding. The burden shall be on the party claiming good cause to raise the issue and demonstrate the existence of good cause to the court. In the event of a finding of good cause, the court shall make a written finding in the order specifying the reasons or circumstances justifying the good-cause exception and why income withholding would not be in the best interest of the child. If the order is one modifying a support obligation and immediate income withholding is not ordered, the order shall include a finding that the obligor has timely paid support in the past. The order shall provide that the obligor shall be subject to withholding if a one-month support delinquency accrues.

H. The court shall make an exception to the immediate income withholding required by this section if the parties to the proceeding enter into a written agreement providing for alternative means of satisfying the child support obligation. Such an agreement shall be incorporated into the order of the court. For the purposes of this subsection, the support obligee shall be considered to be the department in the case of child support obligations that the state is enforcing pursuant to an assignment of support rights to it as

a condition of the assignor's receipt of public assistance. The agreement shall contain the signatures of a representative of the department and the custodial parent.

I. Notwithstanding the provisions of Subsection G of this section, immediate income withholding shall take place if the child support obligor so requests. The notice to withhold shall be filed with the clerk of the district court and the requirements of Subsection C of this section, Subsections D, E and F of Section 40-4A-5 and Sections 40-4A-6, 40-4A-8, 40-4A-10 and 40-4A-11 NMSA 1978 shall apply.

J. A court shall order a wage withholding effective on the date on which a custodial parent requests such withholding to begin if the court determines, in accordance with such procedures and standards as it may establish, that the request should be approved, notwithstanding:

(1) the absence of a support delinquency of at least one month;

(2) a finding of good cause under Subsection G of this section; or

(3) an agreement under Subsection H of this section.

K. The standards and procedures established for purposes of Subsection J of this section shall provide for the protection of the due process rights of the support obligor, appropriate notices and the right to a hearing under the Support Enforcement Act.

L. Wages not subject to withholding under Subsection J of this section shall still be subject to withholding on an earlier date as provided by law.

M. Notwithstanding any other provision of this section, wages not subject to withholding because of a finding of good cause under Subsection G of this section shall not be subject to withholding at the request of a custodial parent unless the court changes its determination of good cause not to initiate immediate wage withholding.

N. In the event a child support obligor accrues a delinquency in an amount equal to at least one month's support obligation and notwithstanding any previous agreement or court finding to the contrary, income withholding shall issue against the support obligor and the procedures set out in Section 40-4A-4 NMSA 1978 shall be followed. Such withholding shall terminate only upon the termination of all obligations imposed by the order of support and payment in full of all enforceable child support delinquencies.

History: 1978 Comp., § 40-4A-4.1, enacted by Laws 1990, ch. 30, § 1; 1992, ch. 26, § 1; 1993, ch. 254, § 2; 1997, ch. 237, § 8.

ANNOTATIONS

Compiler's notes. — The reference to Subsections D, E and F of 40-4A-5 NMSA 1978 in Subsection I should be a reference to Subsections C, D and E in light of the 1997 amendment to Section 40-4A-5 NMSA 1978.

Cross references. — For provisions regarding collection of unpaid support obligations through seizure of lottery winnings, *see* 6-24-22 NMSA 1978.

For forms relating to garnishment of wages for child support, *see* Rules 4-811 and 4-812 NMRA.

For Title IV-D of the federal Social Security Act, *see* 42 U.S.C. § 651 et seq.

The 1997 amendment, effective April 11, 1997, rewrote Subsection D, and made minor stylistic changes throughout the section.

The 1993 amendment, effective June 18, 1993, substituted "Immediate" for "Title IV-D" in the catchline; in Subsection A, deleted "or administrative" after "judicial" in the first sentence and added the second sentence; deleted "or administrative body" after "court" in Subsection B, Paragraph (1) of Subsection C, the first, second and third sentences of Subsection G, the first and second sentences of Subsection H, and Subsection M; deleted "All" from the beginning and added the language beginning "with the exception" to the end, in Subsection D; inserted "or the support obligee, obligee's attorney or court" in the first sentence of Subsection F; divided the former third sentence of Subsection G into the present third and last sentences, substituting the language beginning "why income withholding" to the end of the present third sentence and "The order shall provide" at the beginning of the present last sentence for "shall further include as part of its written order"; added the fourth sentence to Subsection G; added the last sentence of Subsection H; in Subsection I, deleted "the department" from the end of the first sentence and deleted the former second sentence, which read: "Such request shall be in writing in a form provided by the department"; substituted "court" for "Title IV-D agency" in the introductory language of Subsection J; deleted "by the department" after "established" in Subsection K; and deleted "in a case being enforced pursuant to the state's Title IV-D program" after "obligation" in the first sentence of Subsection N.

The 1992 amendment, effective May 20, 1992, in Subsection H, substituted "shall be" for "must be" in the second sentence; in Subsections H and I, deleted "human services" preceding "department" at the first appearance of that word in both subsections; added present Subsection J and redesignated former Subsection J as Subsection N; and added subsections L and M.

40-4A-5. Notice to withhold income.

A. The obligee or public office shall file an affidavit with the clerk of the district court showing that notice of delinquency has been duly served upon the obligor.

B. Upon filing of the affidavit required by Subsection A of this section, the notice to withhold income shall be filed with the clerk of the district court and served upon the payor by certified mail or personal delivery, and proof of service shall be filed with the clerk of the district court.

C. A conformed copy of the notice to withhold income shall be mailed to the obligor at his last known address.

D. The notice to withhold income shall be verified by the obligee or public office and shall:

(1) state the amount of income to be withheld from the obligor; provided, however, the amount to be applied to satisfy the monthly obligation under the order for support, the amount of the delinquency which is set forth in the notice of delinquency and the amount to be applied to reduce the delinquency set forth in the notice of delinquency shall be stated separately;

(2) state that payments due from multiple obligors may be combined into one remittance so long as each withholding is separately identified;

(3) state that the maximum amount of an obligor's income subject to withholding pursuant to the Support Enforcement Act and pursuant to any garnishment shall not exceed fifty percent;

(4) state the duties of the payor as set forth in Section 40-4A-8 NMSA 1978; and

(5) require that all payments be made through the public office to ensure accurate recordkeeping.

E. The termination of the obligations imposed by the order of support and payment in full of any delinquency shall revoke the notice to withhold income.

History: Laws 1985, ch. 105, § 5; 1987, ch. 26, § 1; 1997, ch. 237, § 9.

ANNOTATIONS

The 1997 amendments, effective April 11, 1997, deleted former Subsection A which provided "at least twenty days following service of the notice of delinquency, the obligee or public office shall determine if the procedure to avoid income withholding pursuant to Section 40-4A-7 NMSA 1978 has been instituted", deleted the first sentence of former Subsection B providing "if the procedure to avoid income withholding has not been instituted", designated the second sentence of that subsection as Subsection A, deleting the second sentence relating to procedure to avoid income withholding having occurred, and redesignated the following subsections accordingly; and made minor stylistic changes throughout the section.

40-4A-6. Amount of income subject to withholding.

A. The income of an obligor shall be subject to withholding in an amount:

(1) equal to the monthly support obligation set forth in the order for support; and

(2) in the event of a delinquency, the additional amount of twenty percent of the monthly support obligation set forth in the order for support, or such amount as the court may order after notice and hearing, until payment in full of any delinquency set forth in the notice of delinquency.

B. The maximum amount of an obligor's income which may be subject to withholding pursuant to the Support Enforcement Act and pursuant to any garnishment shall not exceed fifty percent.

History: Laws 1985, ch. 105, § 6.

40-4A-7. Procedure to avoid income withholding.

Except as provided in Section 40-4A-4.1 NMSA 1978, the obligor may contest the notice to withhold income by filing a petition with the clerk of the district court within twenty days after service of the notice of delinquency. Grounds for the contest shall be limited to a dispute concerning the existence or amount of the delinquency or noncompliance with the Support Enforcement Act. The clerk of the district court shall notify the obligor and the obligee or public office, as appropriate, of the time and place of the hearing on the petition. The court shall hold the hearing pursuant to the provisions of Section 40-4A-9 NMSA 1978.

History: Laws 1985, ch. 105, § 7; 1987, ch. 26, § 2; 1990, ch. 30, § 2; 1997, ch. 237, § 10.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, in the first sentence, substituted "contest the" for "prevent a" near the beginning, deleted "from being served" following "income", and deleted "to stay service" following "petition" in that sentence and at the end of the second sentence; and substituted "contest" for "petition to stay service" at the beginning of the second sentence.

The 1990 amendment, effective May 16, 1990, added "Except as provided in Section 40-4A-4.1 NMSA 1978" at the beginning of the section and made a minor stylistic change in the final sentence.

40-4A-8. Duties of payor.

A. Any payor who has been served with a notice to withhold income shall deduct and pay over income as provided in this section. The payor shall deduct the amount designated in the notice to withhold income no later than the next payment of income that is payable to the obligor following service of the notice to withhold income and shall forward the amount withheld to the public office or in the case of non-Title IV-D support payments, pursuant to the court order until October 1, 1998, within seven business days of the employee's normal pay date. For each withholding of income, the payor shall be entitled to and may deduct a one dollar ($1.00) fee to be taken from the income to be paid to the obligor.

B. Whenever the obligor is no longer receiving income from the payor, the payor shall notify the public office, and the payor shall inform the obligee and public office of the last known address of the obligor and any subsequent payor, if known.

C. Withholding of income under the Support Enforcement Act shall have priority over any other legal process under the laws of this state against the same income. Where there is more than one order for withholding against a single obligor pursuant to the Support Enforcement Act, the payor shall allocate support among obligees, but in no case shall the allocation result in a withholding for one of the support obligations not being implemented.

D. No payor shall discharge, discipline, refuse to hire or otherwise penalize any obligor because of the duty to withhold income.

E. The payor shall terminate or modify withholding within fourteen days of receipt of a conformed copy of a notice to terminate or modify a withholding.

F. Any order or notice for income withholding made pursuant to Section 40-4A-4.1 or 40-4A-5 NMSA 1978 shall be binding against future payors by operation of law upon actual knowledge of the contents of the order or notice or upon receipt by personal delivery or certified mail of a filed copy of the order or notice to the payor.

History: Laws 1985, ch. 105, § 8; 1990, ch. 30, § 3; 1997, ch. 237, § 11.

ANNOTATIONS

Cross references. — For Title IV-D of the federal Social Security Act, *see* 42 U.S.C. § 651 et seq.

The 1997 amendment, effective April 11, 1997, rewrote the second sentence in Subsection A, deleted "designated" following "notify the" in Subsection B, and in Subsection C, substituted "the payor shall allocate support among obligees, but in no case shall the allocation result in a withholding for one of the support obligations not being implemented" for "the orders shall receive priority in payment according to the date of service on the payor, subject to any contrary directive established pursuant to Subsection B of Section 40-4A-9 NMSA 1978" at the end of the last sentence.

The 1990 amendment, effective May 16, 1990, substituted "and the payor shall inform the obligee and public office" for "Upon request the payor shall inform the obligee" in Subsection B; redesignated former Subsection C as part of present Subsection B; redesignated former Subsections D to F as present Subsections C to E; in present Subsection C, corrected a misspelling and substituted "Section 40-4A-9 NMSA 1978" for "Section 9 of the Support Enforcement Act"; and added Subsection F.

40-4A-9. Petitions to modify, suspend or terminate notice of withholding.

A. When an obligor files a petition pursuant to Section 40-4A-7 NMSA 1978, the court, after due notice to all parties, shall hear and resolve the matter no later than forty-five days following the service of the notice of delinquency. Where the court cannot promptly resolve the issues alleged in the petition, the court may order immediate execution of an amended notice to withhold income as to any undisputed amounts and may continue the hearing on the disputed issues for such reasonable length of time as required under the circumstances. Failure to meet the time requirements shall not constitute a defense to the notice to withhold income.

B. At any time, an obligor or obligee or the public office may petition the court to:

(1) modify, suspend or terminate the notice to withhold income because of a corresponding modification, suspension or termination of the underlying order for support;

(2) modify the amount of income to be withheld to increase the rate of payment of the delinquency; or

(3) suspend the notice to withhold income because of the inability of the public office to deliver income withheld to the obligee due to the obligee's failure to provide a mailing address or other means of delivery.

C. Except for orders to withhold issued pursuant to Section 40-4A-4.1 NMSA 1978, an obligor may petition the court at any time to terminate the withholding of income because payments pursuant to the notice to withhold income have been made for at least three years and all delinquencies have been paid. The court shall suspend the notice to withhold income, absent good cause for denying the petition. If the obligor subsequently becomes delinquent in payment of the order for support, the obligee or public office may serve another notice to withhold income by complying with all requirements for notice and service pursuant to the Support Enforcement Act.

History: 1978 Comp., § 40-4A-9, enacted by Laws 1985, ch. 105, § 9; 1987, ch. 26, § 3; 1990, ch. 30, § 4; 1997, ch. 237, § 12.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, deleted "to stay service or" from the section heading, deleted "to stay service" following "petition" near the beginning of Subsection A, and deleted Subsection D relating to an obligee seeking an order to reapportion the distribution of the obligor's withheld income upon notice to all interested parties.

The 1990 amendment, effective May 16, 1990, in the first sentence of Subsection C, substituted "Except for orders to withhold issued pursuant to Section 40-4A-4.1 NMSA 1978" for "At any time" at the beginning and made a minor stylistic change.

40-4A-10. Additional duties.

A. An obligee who is receiving income withholding payments under the Support Enforcement Act shall notify the public office forwarding such payments of any change of address within seven days of such change.

B. Within seven days of change of payor or residence, an obligor whose income is being withheld or who has been served with a notice of delinquency pursuant to the Support Enforcement Act shall notify the obligee and the public office of the new payor or new residence address.

C. Any public office that collects, disburses or receives payments pursuant to a notice to withhold income shall maintain complete, accurate and clear records of all payments and their disbursements.

D. The department shall take all actions necessary to institute income withholding upon the request of an obligor.

E. All new orders for support or modifications of orders for support shall provide notice that if an obligor accrues a delinquency in an amount equal to at least one month's support obligation, his income shall be subject to withholding in an amount sufficient to satisfy the order for support and that an additional amount shall be withheld to reduce and retire any delinquency.

F. In addition to any other materials provided to an obligee at the time the obligee applies to the department for assistance, the department shall make available to the obligee a list of the types of services available, and a copy of federal time frames concerning child support enforcement.

History: Laws 1985, ch. 105, § 10; 1987, ch. 26, § 4; 1990, ch. 30, § 5; 1993, ch. 148, § 1.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, added Subsection F.

The 1990 amendment, effective May 16, 1990, inserted "or residence" near the beginning and added "or new residence address" at the end of Subsection B, made a minor stylistic change in Subsection C and deleted the former Subsection F which read "The department shall promulgate, by regulation, forms and nonbinding, statewide child support guidelines for proceedings under the Support Enforcement Act and shall make available to the public and the courts the forms and guidelines and any other informational materials which describe the procedures and remedies set forth in that act".

40-4A-11. Penalties.

If any person willfully fails to withhold or pay over income pursuant to the Support Enforcement Act, willfully discharges, disciplines, refuses to hire or otherwise penalizes an obligor as prohibited by Subsection D of Section 40-4A-8 NMSA 1978, or otherwise fails to comply with any duty imposed by that act, the court, upon due notice and hearing:

A. shall impose a fine against the payor for the total amount that the payor willfully failed to withhold or pay over;

B. shall order reinstatement of or award damages to the obligor, or both, where the obligor has been discharged, disciplined or otherwise penalized by the payor; or

C. may take such other action, including action for contempt of court, as may be appropriate.

History: Laws 1985, ch. 105, § 11; 1997, ch. 237, § 13.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, substituted "Subsection D of Section 40-4A-8 NMSA 1978" for "Subsection E of Section 8 of that act" in the introductory language, and in Subsection A, substituted "impose a fine" for "enter judgment".

40-4A-12. Interstate withholding by registration of foreign support order.

A. Upon filing of a certified copy of a foreign order for support containing an income withholding provision, the clerk of the district court shall docket the case and inform the obligee of this action. The foreign order for support filed in accordance with this section shall constitute a legal basis for income withholding in this state. Upon filing the order, together with a notice to withhold income, the order may be served upon the payor and obligor by prepaid certified mail or by any method provided by law for service of summons. The payor shall promptly notify the obligor of receipt of service. Proof of service shall be filed with the clerk of the district court. The obligor may contest the validity or enforcement of the income withholding by filing a petition to stay income

withholding within twenty days after service of the order and notice. If the obligor files a petition to stay, the court shall hear and resolve the matter no later than forty-five days following service of the order and notice to withhold. The procedure and grounds for contesting the validity and enforcement of the income withholding are the same as those available for contesting an income withholding notice and order in this state. The obligor shall give notice of the petition to stay to the support enforcement agency providing services to the obligee, the person or agency designated to receive payments in the income withholding notice, or if there is no designated person or agency, the obligee.

B. Filing of the order for support shall not confer jurisdiction on the courts of this state for any purpose other than income withholding.

C. If the obligor presents evidence that constitutes a full or partial defense, the court shall, on the request of the obligee, continue the case to permit further evidence relative to the defense to be adduced by either party; provided, however, the court shall order immediate execution as to any undisputed amounts as set forth in Subsection A of Section 40-4A-9 NMSA 1978.

D. In addition to other procedural devices available to a party, any party to the proceeding may adduce testimony of witnesses in another state, including the parties and any of the children, by deposition, written discovery, photographic discovery such as videotaped depositions, telephone or photographic means. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner and terms upon which the testimony shall be taken.

E. A court of this state may request the appropriate court or agency of another state to hold a hearing to adduce evidence, to permit a deposition to be taken before the court or agency or to order a party to produce or give evidence under other procedures of that state and may request that certified copies of the evidence adduced in compliance with the request be forwarded to the court of this state.

F. Upon request of a court or agency of another state, a court of this state may order a person in this state to appear at a hearing or deposition before the court to adduce evidence or to produce or give evidence under other procedures available in this state. A certified copy of the evidence adduced, such as a transcript or videotape, shall be forwarded by the clerk of the district court to the requesting court or agency.

G. A person within this state may voluntarily testify by statement or affidavit in this state for use in a proceeding to obtain income withholding outside this state.

History: Laws 1985, ch. 105, § 12; 1990, ch. 30, § 6; 1993, ch. 254, § 3.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, rewrote Subsection A; in Subsection B, substituted "Filing" for "Registration" at the beginning and deleted "unless otherwise permitted by law" at the end; and deleted former Subsection H, concerning the modification or nullification of orders of support.

The 1990 amendment, effective May 16, 1990, added "by registration of foreign support order" in the catchline; in Subsection C, substituted "Section 40-4A-9 NMSA 1978" for "Section 9 of the Support Enforcement Act" and made a minor stylistic change; and substituted "Subsection A of this section" for "Subsection A of section 12 of the Support Enforcement Act" in the first sentence in Subsection H.

40-4A-13. Expedited process.

A. Any action for enforcement, establishment or modification of a child support obligation shall be given priority in scheduling for hearing. A hearing or trial shall be scheduled before the court or an authorized quasi-judicial officer within sixty days of the filing of the request for hearing; provided, however, a petition to stay service shall be resolved in accordance with Subsection A of Section 9 [40-4A-9 NMSA 1978] of the Support Enforcement Act.

B. The powers of an authorized quasi-judicial officer shall include at a minimum:

(1) authority to take testimony and establish a record;

(2) authority to evaluate evidence and make initial decisions and recommendations; and

(3) authority to accept voluntary acknowledgement of support liability and to approve stipulated agreements to pay support.

C. If a party seeks to invoke the contempt powers of the court, the matter shall not be delegated to an authorized quasi-judicial officer.

D. Failure to meet the time requirements shall not constitute a defense to the action for support.

History: Laws 1985, ch. 105, § 13.

40-4A-14. Bonding.

Upon notice, hearing and a showing of good cause, an obligor shall be ordered to post a bond or other sufficent [sufficient] surety to guarantee the payment to or on behalf of the obligee of any delinquency.

History: Laws 1985, ch. 105, § 16.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

40-4A-15. Consumer reporting agencies.

At the request of a consumer reporting agency, as defined in Section 603(f) of the Fair Credit Reporting Act, 15 U.S.C. 1681(a)(f), and upon thirty days' advance notice to the obligor, the department, in accordance with its regulations, may release information regarding the delinquency of an obligor. The department may charge a reasonable fee to the consumer reporting agency.

History: Laws 1985, ch. 105, § 17; 1997, ch. 237, § 23.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, inserted the federal act reference, and deleted "if the delinquency of the obligor exceeds one thousand dollars ($1,000)" at the end of the first sentence.

40-4A-16. Remedies in addition to other laws.

The rights, remedies, duties and penalties created by the Support Enforcement Act are in addition to any other rights, remedies, duties and penalties created by any other law.

History: Laws 1985, ch. 105, § 19.

ANNOTATIONS

Severability. — Laws 1985, ch. 105, § 20 provides for the severability of the act if any part or application thereof is held invalid.

40-4A-17. Publication of names of obligors; amount owed.

The department shall publish, once every three months in a newspaper with statewide circulation, the names and last known addresses of at least twenty-five delinquent obligors. In addition to publication of the obligors' names and last known addresses, the department shall publish the respective amounts of delinquency accrued by the individual obligors as of the date of publication.

History: Laws 1993, ch. 148, § 2.

40-4A-18. Information regarding delinquency payments.

Upon a request from an obligee, the department shall make available a written statement of:

A. payments made to the obligee by the obligor pursuant to an order for support; and

B. the amount of any delinquency still owed to the obligee by the obligor.

History: Laws 1993, ch. 148, § 3.

40-4A-19. Liens.

The state Title IV-D agency must have and use procedures under which:

A. liens arise by operation of law against real and personal property for amounts of overdue support owed by a noncustodial parent who resides or owns property in the state; and

B. the state courts and tribunals accord full faith and credit to liens arising in another state, when the state Title IV-D agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to recording or serving liens that arise within the state, except that such rules may not require judicial notice or hearing prior to the enforcement of such a lien.

History: Laws 1997, ch. 237, § 24.

ANNOTATIONS

Cross references. — For Title IV-D of the federal Social Security Act, *see* 42 U.S.C. § 651 et seq.

40-4A-20. Unpaid child support interest arrears management program.

The department shall designate an arrears management program starting on or after December 15, 2004 to provide amnesty for child support arrears, pursuant to procedures adopted by the department. The arrears management program shall not exceed more than twelve months and shall only be authorized thereafter every two years. The department shall, before renewing the next arrears management program, provide to the interim welfare reform oversight committee a report on the previous arrears management program.

History: Laws 2004, ch. 41, § 3.

ARTICLE 4B
Child Support Hearing Officers

40-4B-1. Short title.

Sections 1 through 10 [40-4B-1 to 40-4B-10 NMSA 1978] of this act may be cited as the "Child Support Hearing Officer Act".

History: Laws 1988, ch. 127, § 1.

40-4B-2. Purpose.

The purpose of the Child Support Hearing Officer Act is to provide the personnel and procedures necessary to insure prompt and full payment by obligated parties of child support obligations for their dependent children and, where applicable, attendant spousal support obligations. It is further the purpose of the Child Support Hearing Officer Act to insure that support payments are made in compliance with federal regulations governing the state's federally mandated program pursuant to Title IV D of the federal Social Security Act requiring a state plan and program to enforce child support obligations. Such compliance will speed up the processing of cases and completion of enforcement actions, thereby reducing expenditures for aid to families with dependent children.

History: Laws 1988, ch. 127, § 2.

ANNOTATIONS

Cross references. — For Title IV D of the federal Social Security Act, *see* 42 U.S.C. § 651 et seq.

40-4B-3. Definitions.

As used in the Child Support Hearing Officer Act:

A. "department" means the child support enforcement bureau of the human services department [health care authority department]; and

B. "secretary" means the secretary of human services.

History: Laws 1988, ch. 127, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human

services department shall be deemed to be references to the health care authority department.

40-4B-4. Child support hearing officers; appointment; terms; qualifications; compensation.

A. Child support hearing officers shall be appointed by and serve at the pleasure of the judges of the judicial districts determined pursuant to Subsection D of this section. Each hearing officer shall be selected by a majority of the district court judges in the judicial district to which he is assigned. The child support hearing officers shall be paid pursuant to a cooperative agreement between the human services department [health care authority department] and the judicial districts.

B. Child support hearing officers shall be lawyers who are licensed to practice law in this state and who have a minimum of five years experience in the practice of law, with at least twenty percent of that practice having been in family law or domestic relations matters. Child support hearing officers shall devote full time to their duties under the Child Support Hearing Officer Act and shall not engage in the private practice of law or in any employment, occupation or business interfering with or inconsistent with the discharge of their duties as a full-time child support hearing officer.

C. A child support hearing officer is required to conform to Canons 21-100 through 21-500 and 21-700 of the Code of Judicial Conduct as adopted by the supreme court. Violation of any such canon shall be grounds for dismissal of any child support hearing officer. Child support hearing officers shall be employees of the judicial branch of government and shall not be subject to the Personnel Act [Chapter 10, Article 9 NMSA 1978]. Their compensation shall be set by the judges who appoint them, but such compensation shall not exceed eighty percent of the current salary for district court judges.

D. Child support hearing officers shall serve in such judicial districts as the secretary deems appropriate considering the case loads and case needs of the state's Title IV D program.

History: Laws 1988, ch. 127, § 4; 1993, ch. 124, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Compiler's notes. — The phrase "Title IV D program" means a state program adopted pursuant to Title IV D, 42 U.S.C. § 651 et seq., of the federal Social Security Act, requiring a state plan and program to enforce child support obligations.

The 1993 amendment, effective June 18, 1993, in Subsection A, deleted "Five" at the beginning of the subsection and made a minor stylistic change.

Hearing officers distinguished. — Rule 1-053.2 NMRA and the Child Support Hearing Officer Act describe both material similarities and material differences between a domestic relations hearing officer and a child support hearing officer. *Buffington v. McGorty*, 2004-NMCA-092, 136 N.M. 226, 96 P.3d 787.

Review of report and recommendations. — The Child Support Hearing Officer Act did not preclude the district court from reviewing the report and recommendations of the hearing officer. *Buffington v. McGorty*, 2004-NMCA-092, 136 N.M. 226, 97 P.3d 787.

40-4B-5. Reference.

Actions covered under the Child Support Hearing Officer Act include but are not limited to petitions to establish support obligations, petitions to enforce court orders establishing support obligations, petitions to recover unpaid child support arrearages and post-judgment interest, actions pursuant to the Support Enforcement Act [40-4A-1 to 40-4A-16 NMSA 1978], actions brought to modify existing support obligations, actions to establish parentage and actions under the Revised Uniform Reciprocal Enforcement of Support Act [Uniform Interstate Family Support Act, Chapter 40, Article 6A NMSA 1978]; provided the Child Support Hearing Officer Act does not apply to proceedings for the establishment of custody. The presiding judge or his designee shall refer only matters concerning the establishment and enforcement of support obligations to a child support hearing officer in all of those proceedings in which:

A. the department as the state's Title IV D agency is acting as the enforcing party pursuant to an assignment of support rights under Section 27-2-27 NMSA 1978;

B. the department, pursuant to Section 27-2-27 NMSA 1978, is acting as the representative of a custodial parent who is not receiving aid to families with dependent children; and

C. the department is the enforcing Title IV D party pursuant to a written request for enforcement of a support obligation received from an agency in another state responsible for administering that state's federal Title IV D program.

History: Laws 1988, ch. 127, § 5; 1993, ch. 124, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 1994, ch. 107, § 904 repealed the Revised Uniform Reciprocal Enforcement of Support Act, 40-6-1 to 40-6-41 NMSA 1978, effective July 1, 1995.

Compiler's notes. — The phrase "Title IV D program" refers to a state program adopted pursuant to 42 U.S.C. § 651 et seq.

The 1993 amendment, effective June 18, 1993, in the introductory paragraph, inserted "actions to establish parentage and actions under the Revised Uniform Reciprocal Enforcement of Support Act" and made minor stylistic changes.

Limitation of reference. — A reference to a hearing officer under the Child Support Hearing Officer Act is limited to cases involving child support enforcement through the child support enforcement bureau of the human services department [health care authority department]. *Buffington v. McGorty*, 2004-NMCA-092, 136 N.M. 226, 96 P.3d 787.

40-4B-6. Hearings; powers of child support hearing officers.

A. Child support hearing officers have the adjudicatory powers possessed by district courts under the Support Enforcement Act [40-4A-1 to 40-4A-16 NMSA 1978], the Revised Uniform Reciprocal Enforcement of Support Act [Uniform Interstate Family Support Act, 40-6A-1 NMSA 1978] and any other law allowing the enforcement and establishment of support obligations by the state Title IV D agency.

B. Hearings shall be held in the judicial district in which the claim arose or in the judicial district where one of the parties resides.

C. The child support hearing officer shall have the power to preserve and enforce order during hearings; administer oaths; issue subpoenas to compel the attendance and testimony of witnesses, the production of books, papers, documents and other evidence or the taking of depositions before a designated individual competent to administer oaths; examine witnesses; and do all things conformable to law which may be necessary to enable him to discharge the duties of his office effectively.

D. Any person committing any of the following acts in a proceeding before a child support hearing officer may be held accountable for his conduct in accordance with the provisions of Subsection E of this section:

(1) disobedience of or resistance to any lawful order or process;

(2) misbehavior during a hearing or so near the place of the hearing as to obstruct it;

(3) failure to produce any pertinent book, paper or document after having been ordered to do so;

(4) refusal to appear after having been subpoenaed;

(5) refusal to take the oath or affirmation as a witness; or

(6) refusal to be examined according to law.

E. The child support hearing officer may certify to the district court the fact that an act specified in Paragraphs (1) through (6) of Subsection C [D] of this section was committed in that court. The court shall hold a hearing and if the evidence so warrants may punish the offending person in the same manner and to the same extent as for contempt committed before the court, or the court may commit the person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

History: Laws 1988, ch. 127, § 6.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1994, ch. 107, § 904 repealed the Revised Uniform Reciprocal Enforcement of Support Act, 40-6-1 to 40-6-41 NMSA 1978, effective July 1, 1995.

The bracketed "D" following "Subsection C" in the first sentence of Subsection E, was added by the compiler as the apparent intended reference.

Compiler's notes. — The phrase "Title IV D agency" means an agency established pursuant to Title IV D, 42 U.S.C. § 651 et seq., of the federal Social Security Act to administer a state plan and program to enforce child support obligations. *See* 40-4B-5A NMSA 1978.

40-4B-7. Proceedings.

A. When a reference is made, the clerk of the court shall furnish the hearing officer with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the hearing officer shall proceed in lieu of the district court in accordance with the Rules of Civil Procedure.

B. The parties may procure the attendance of witnesses before the hearing officer by the issuance and service of subpoenas as provided in Section 6 [40-4B-6 NMSA 1978] of the Child Support Hearing Officer Act. If without adequate excuse a witness fails to appear or give evidence, he may be punished by the district judge as for a contempt and be subjected to the consequences, penalties and remedies provided in Section 6 of the Child Support Hearing Officer Act and the Rules of Civil Procedure.

History: Laws 1988, ch. 127, § 7.

ANNOTATIONS

Cross references. — For the New Mexico Rules of Civil Procedure, *see* Rule 1-001 NMRA et seq.

40-4B-8. Report.

A. The child support hearing officer shall prepare a report with a decision upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, shall set them forth in the report. He shall file the report with the clerk of the court and unless waived by the parties shall file with it a transcript or other authorized recording of the proceedings and of the evidence and original exhibits. The clerk shall mail immediately notice of the filing to all parties.

B. Within ten days after being served with notice of the filing of the report, any party may file written objections with the district court and serve such objections on the other parties.

C. If the district court judge wishes to review the hearing officer's decision de novo or on the record, he shall take action on the objections presented by the parties within fifteen days after the objections are filed. Failure to act by the district judge within the time allowed is deemed acceptance by the district court of the child support hearing officer's decision and will grant the decision the full force and effect of a district court decision.

D. If the district court's review is on the record, he shall set aside the decision only if the decision is found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record as a whole; or

(3) otherwise not in accordance with law.

E. The effect of a child support hearing officer's report is the same whether or not the parties have consented to the reference; however, when the parties stipulate that a child support hearing officer's findings of fact shall be final, only questions of law arising upon the report may thereafter be considered.

History: Laws 1988, ch. 127, § 8; 1993, ch. 124, § 3.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "evidence" for "record" in Paragraph (2) of Subsection D and made a minor stylistic change in Subsection C.

40-4B-9. Review and appeal.

Within thirty days after the hearing officer's decision becomes final pursuant to Section 8 [40-4B-8 NMSA 1978] of the Child Support Hearing Officer Act, an applicant or recipient may file a notice of appeal in the same manner as that of an appeal from a district court decision pursuant to the Rules of Appellate Procedure.

History: Laws 1988, ch. 127, § 9.

ANNOTATIONS

Cross references. — For the Rules of Appellate Procedure, *see* Rule 12-101 NMRA et seq.

Law reviews. — For comment, "District Court Review of Judicial Officers in New Mexico Domestic Violence and Domestic Relations Cases: Rethinking the Rules," see 36 N.M.L. Rev. 487 (2006).

40-4B-10. Child support standards and guidelines.

In establishing any support obligations pursuant to the Child Support Hearing Officer Act, the child support hearing officer shall be governed by the child support standards and guidelines set out by the New Mexico supreme court, by New Mexico statutes or by the secretary.

History: Laws 1988, ch. 127, § 10.

ARTICLE 4C
Mandatory Medical Support

40-4C-1. Short title.

Chapter 40, Article 4C NMSA 1978 may be cited as the "Mandatory Medical Support Act".

History: Laws 1990, ch. 78, § 1; 2003, ch. 287, § 1.

ANNOTATIONS

Cross references. — For proceedings for the support of children, *see* 40-4-7 NMSA 1978.

For creation of health care authority department, *see* 9-8-4 NMSA 1978.

For designation of the health care authority department as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV D of the federal act, *see* 27-2-27 NMSA 1978.

For the Minimum Healthcare Protection Act, *see* Chapter 59A, Article 23B NMSA 1978.

The 2003 amendment, effective April 8, 2003, substituted "Chapter 40, Article 4C NMSA 1978" for "This act" at the beginning.

40-4C-2. Purpose.

To ensure that children have access to quality medical care, it is the purpose of the Mandatory Medical Support Act to require parents to provide or purchase health care coverage for their minor children when such coverage is available.

History: Laws 1990, ch. 78, § 2; 2003, ch. 287, § 2; 2007, ch. 165, § 2; 2021, ch. 20, § 5.

ANNOTATIONS

The 2021 amendment, effective July 1, 2021, after "provide or purchase", changed "health insurance coverage" to "health care coverage".

The 2007 amendment, effective June 15, 2007, made the Mandatory Medical Support Act apply to parents whether or not they are responsible for the support of their minor children and eliminated the provision that parents provide dental insurance.

The 2003 amendment, effective April 8, 2003, deleted "of divorced and separated parents" near the beginning, inserted "provide or" preceding "purchase health insurance", and deleted "through employers or unions" at the end.

Medical coverage alone not "child support." — Child support obligation was not met merely by father's provision of medical insurance for child, where such coverage was required by this section, and was in addition to, not in lieu of, father's support obligations under the child support guidelines. *Sisneroz v. Polanco*, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

40-4C-3. Definitions.

As used in the Mandatory Medical Support Act:

A. "carrier" means an entity that offers, delivers or administers an employment-related or other group health care coverage plan, a health maintenance organization, a nonprofit health care plan or other type of health care coverage plan under which medical or dental services are provided, regardless of service delivery mechanism;

B. "cash medical support" means an amount ordered to be paid toward the cost of health care coverage provided by another parent through employment or otherwise, or for other medical costs not covered by health care coverage;

C. "court" means any district court ordering support by a medical support obligor;

D. "department" means the human services department [health care authority department];

E. "employer" means an individual, organization, agency, business or corporation hiring a medical support obligor for pay;

F. "gross income" means income from any source and includes 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; provided that:

(1) "gross income" does not include benefits received from:

(a) means-tested public assistance programs, including temporary assistance for needy families, supplemental security income and general assistance;

(b) the earnings or public assistance benefits of a child who is the subject of a child support award; or

(c) child support received by a parent for the support of other children;

(2) for 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;

(3) "gross income" does not include the amount of alimony payments actually paid in compliance with a court order;

(4) "gross income" does not include the amount of child support actually paid by a parent in compliance with a court order for the support of prior children; and

(5) "gross income" does not include a reasonable amount for a parent's obligation to support prior children who are in that parent's custody. A duty to support subsequent children is not ordinarily a basis for reducing support owed to children of the parties but may be a defense to a child support increase for the children of the parties. In raising such a defense, a party may use the child support schedule promulgated by the department pursuant to Subsection M of Section 40-4-11.1 NMSA 1978 to calculate the support for the subsequent children;

G. "health care coverage" means fee-for-service, health maintenance organization, preferred provider organization and other types of private health insurance and public health care coverage under which medical services may be provided to minor children;

H. "medical support obligee" means a person to whom a duty of medical support is owed or a person who has commenced a proceeding for enforcement of a duty to provide health support for each minor child or for registration of a support order that includes a provision for such support for each minor child;

I. "medical support obligor" means a person owing a duty to provide medical support or against whom a proceeding for the enforcement of such a duty of support is commenced or for registration of a support order that includes provisions for such support for each minor child;

J. "minor child" means a child younger than eighteen years of age who has not been emancipated; and

K. "national medical support notice" means a notice to an employer that an employee's child must be covered by the employment-related group health and dental care coverage plan pursuant to a court order.

History: Laws 1990, ch. 78, § 3; 1994, ch. 76, § 4; 2003, ch. 287, § 3; 2007, ch. 165, § 3; 2009, ch. 32, § 2; 2021, ch. 20, § 6; 2023, ch. 106, § 3; 2023, ch. 107, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Cross references. — For Title 19 of the federal Social Security Act, *see* 42 U.S.C. § 1396 et seq.

2023 Multiple Amendments. — Laws 2023, ch. 106, § 3, effective January 1, 2024, and Laws 2023, ch. 107, § 1, effective June 16, 2023, enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2023, ch. 107, § 1 as the last act signed by the governor is set out above and incorporates both amendments. The amendments enacted by Laws 2023, ch. 106, § 3 and Laws 2023, ch. 107, § 1 are described below. To view the session laws in their entirety, see the 2023 session laws on NMOneSource.com.

The nature of the difference between the amendments is that Laws 2023, ch. 106, § 3, updated a reference to the child support schedule in the definition of "gross income" as used in the Mandatory Medical Support Act, and Laws 2023, ch. 107, § 1, revised the

definitions of "case medical support," "medical support obligee" and "medical support obligor" as used in the Mandatory Medical Support Act.

Laws 2023, ch. 107, § 1, effective June 16, 2023, revised the definitions of "case medical support," "medical support obligee" and "medical support obligor"; in Subsection B, after "coverage provided by", deleted "a public entity or by"; in Subsection H, after "owed or a person", deleted "including the department"; and in Subsection I, after "duty to provide", deleted "health" and added "medical".

Laws 2023, ch. 106, § 3, effective January 1, 2024, updated a reference to the child support schedule in the definition of "gross income"; and in Subsection F, Paragraph F(5), after "a party may use", deleted "Table A as set forth in" and added "the child support schedule promulgated by the department pursuant to".

Applicability. — Laws 2023, ch. 106, § 5 provided that the provisions of Laws 2023, ch. 106 apply to all decrees, judgments or orders of child support made on or after January 1, 2024.

Temporary provisions. — Laws 2023, ch. 106, § 4, effective January 1, 2024, provided that the initial child support schedule established by the human services department [health care authority department] shall:

A. not decrease the yearly basic support obligation for any level of combined parental income by more than the dollar change in the federal poverty guidelines for one person since 2018;

B. not increase the yearly support obligation for any level of combined parental income by more than one and one-half times the change in the consumer price index since 2018. Any increase in support obligation that is larger than the increase in the consumer price index since 2018 must be specifically supported by economic data and evidence;

C. not change the format of the child support schedule in a way that would be inconsistent with Worksheet A or Worksheet B in Subsection M of 40-4-11.1 NMSA 1978; and

D. be promulgated, published and available to the public through the New Mexico Administrative Code, the New Mexico supreme court's website and the human services department's [health care authority department] website no later than January 1, 2024.

The 2021 amendment, effective July 1, 2021, defined "carrier", "gross income", and "health care coverage", as used in the Mandatory Medical Support Act, and changed former references to "health insurance" to "health care coverage"; substituted each occurrence of "health insurance" with "health care coverage" throughout; added a new Subsection A and redesignated former Subsections A through D as Subsections B through E, respectively; added a new Subsection F and redesignated former Subsection

E as Subsection G; in Subsection G, after "'health care coverage' means", deleted "those coverages generally associated with a medical plan of benefits, which may include dental insurance, but not including medicaid coverage authorized by Title 19 of the Social Security Act and administered by the department" and added "fee-for-service, health maintenance organization preferred provider organization and other types of private health insurance and public health care coverage under which medical services may be provided to minor children"; and deleted former Subsection F and redesignated former Subsections G through J as Subsections H through K, respectively.

The 2009 amendment, effective June 19, 2009, added Subsection A.

The 2007 amendment, effective June 15, 2007, added Subsections F and G and deleted former Subsections B, I and J, which defined "dental insurance coverage", "obligee" and "obligor".

The 2003 amendment, effective April 8, 2003, deleted "human services" near the end of Subsection B; substituted "19" for "XIX" following "authorized by Title" in Subsections B and E; rewrote Subsection F; added present Subsection H; redesignated former Subsections H and I as Subsections I and J; and inserted "for" following "duty of support or" in Subsection J.

The 1994 amendment, effective March 4, 1994, deleted "the child support enforcement division of" following "means" in Subsection C, deleted "human services" preceding "department" in Subsections E and H, added Subsection F, and redesignated former Subsections F to H as Subsections G to I.

40-4C-4. Medical support; order.

A. The court shall determine a parent or both parents to be a medical support obligor based on the following:

(1) the availability of health care coverage that meets or exceeds the minimum standards required under the Mandatory Medical Support Act;

(2) the availability of health care coverage through an employment-related or other group health and dental care coverage plan; and

(3) the availability of health care coverage through a public entity when either parent meets eligibility requirements.

B. When a medical support obligor is ordered to provide health care coverage, the medical support obligor shall properly name each minor child on behalf of whom medical support is owed as an eligible dependent enrolled in health care coverage.

C. The court may consider the impact of the cost of health care coverage on the payment of the base child support amounts in determining whether the coverage shall be ordered; provided that:

(1) the health care coverage for the minor child shall be available to the parent responsible for providing medical support at a reasonable cost;

(2) cash medical support or the cost of health care coverage for the minor child is considered reasonable in cost if the cost to the parent responsible for providing medical support does not exceed five percent of the parent's gross income; and

(3) the court shall allocate the cost of coverage between the minor child's parents by including the costs in the child support worksheet as set forth in Section 40-4-11.1 NMSA 1978.

D. The court may order the medical support obligor to obtain health care coverage for each minor child to whom medical support is owed if the court finds that health care coverage for each minor child is not available to the medical support obligor through an employment-related or other group health care coverage plan.

E. The court shall require the medical support obligor to pay cash medical support in specific dollar amounts when:

(1) the court finds that health care coverage is not available at the time an order is entered or modified and until such time that health care coverage becomes available; or

(2) the court finds that the health care coverage required to be obtained by a medical support obligor does not pay all the medical or dental expenses of each minor child.

F. The court shall require the medical support obligor to be liable to the custodial parent for all or a portion of the uninsured or uncovered medical and dental expenses of each minor child.

G. The court shall require the medical support obligor to provide health care coverage or dental care coverage for the benefit of the medical support obligee if it is available at no additional cost to the medical support obligor.

H. The court in any proceeding for the establishment, enforcement or modification of a child support obligation may modify an existing order of support or establish child support, as applicable, for each minor child to incorporate the provisions for medical and dental support ordered pursuant to the Mandatory Medical Support Act.

I. The court shall consider health care coverage provided by a public entity as meeting the standards required under the Mandatory Medical Support Act.

History: Laws 1990, ch. 78, § 4; 2003, ch. 287, § 4; 2007, ch. 165, § 4; 2009, ch. 32, § 3; 2021, ch. 20, § 7; 2023, ch. 107, § 2.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, added the availability of health care coverage through a public entity when either parent meets eligibility requirements as a basis for a court to determine whether one or both parents is a medical support obligor, removed a provision requiring a court to order medical support obligors to pay cash medical support when a public entity provides health care coverage, and required a court to consider health care coverage provided by a public entity as meeting the standards required under the Mandatory Medical Support Act; in Subsection A, added Paragraph A(3); in Subsection E, deleted former Paragraph E(1) and redesignated former Paragraphs E(2) and E(3) as Paragraphs E(1) and E(2), respectively; in Subsection F, after "custodial parent", deleted "or the department"; and added Subsection I.

The 2021 amendment, effective July 1, 2021, revised certain factors the court must examine when determining whether health care coverage shall be ordered, changed former references to "health insurance" to "health care coverage" and former references to "dental care insurance" to "dental care coverage" throughout; in Subsection B, after "eligible dependent", deleted "on such insurance" and added "enrolled in health care coverage"; and in Subsection C, added Paragraphs C(1) through C(3).

The 2009 amendment, effective June 19, 2009, in Subsection E deleted the former provision, which provided that the obligor was liable for medical and dental expenses of each minor child that is not covered by health insurance coverage and added "pay cash medical support in specific dollar amounts when"; in Subsection E, added Paragraphs (1) and (2); in Paragraph (3) of Subsection E, deleted "reasonable and necessary" before "medical"; in Subsection E, deleted former Paragraph (2), which required the court to find that the obligor has the financial resources to contribute to the payment of medical and dental expenses; and added Subsection F.

The 2007 amendment, effective June 15, 2007, required the court to determine parents to be medical support obligors based on the listed criteria; eliminated references to dental insurance coverage; and added Subsection B.

The 2003 amendment, effective April 8, 2003, substituted "employment-related or other group health care insurance plan" for "employer or union" at the end of Paragraphs A(2) and C(1); and inserted "coverage" following " health insurance" in Subsection B and Paragraph C(1).

40-4C-5. Order; proof of compliance; notice.

A. The medical support obligor shall provide to the medical support obligee within thirty days of receipt of effective notice of a court order for health care coverage

pursuant to the Mandatory Medical Support Act written proof of the medical support obligor's compliance with that order. Compliance means either that the health care coverage has been obtained or that a correct and complete application for health care coverage has been made.

B. The medical support obligee shall forward a copy of the court order for health care coverage issued pursuant to the Mandatory Medical Support Act to the medical support obligor's employer or union only when ordered to do so by the court or when:

(1) the medical support obligor fails to provide written proof of compliance with the court order to the medical support obligee within thirty days of the medical support obligor's receipt of effective written notice of the court order;

(2) the medical support obligee serves by mail at the medical support obligor's last known post office address written notice on the medical support obligor of the medical support obligee's intent to enforce the order; and

(3) the medical support obligor fails to provide within fifteen days after the date the medical support obligee mailed the notice in Paragraph (2) of this subsection written proof to the medical support obligee that the medical support obligor has obtained the health care coverage ordered by the court or has applied for such coverage.

C. Upon receipt of a court order for health care coverage pursuant to the Mandatory Medical Support Act, the employer or union shall forward a copy of the order to the carrier or dental care coverage provider, as applicable.

History: Laws 1990, ch. 78, § 5; 2007, ch. 165, § 5; 2021, ch. 20, § 8.

ANNOTATIONS

The 2021 amendment, effective July 1, 2021, changed former references of "health insurance" to "health care coverage", "dental care insurance" to "dental care coverage", and "health insurer" to "carrier" throughout.

The 2007 amendment, effective June 15, 2007, eliminated references to dental insurance coverage and changed "obligee" and "obligor" to "medical support obligee" and "medical support obligor".

40-4C-6. Obligations; employers, unions and carriers; plan.

A. Upon receipt of a national medical support notice or the court order for health care coverage pursuant to Section 40-4C-5 NMSA 1978 or upon application of the medical support obligor pursuant to the court order, the employer or union shall enroll the minor child as an eligible dependent in the health care coverage plan and withhold any required premium from the medical support obligor's income or wages. If more than

one health care coverage plan and dental care coverage plan is offered by the employer, union or carrier, the minor child shall be enrolled in the plan in which the medical support obligor is enrolled. If the medical support obligor is not enrolled in a plan, the child shall be enrolled in a plan that meets the minimum coverage criteria required pursuant to the Mandatory Medical Support Act. If the medical support obligor is not enrolled in a plan, the premiums charged for the child or children of the medical support obligor shall be those charged for the enrollment of the medical support obligor only.

B. In any instance in which the medical support obligor is required by a court order to provide health care coverage for each minor child and the medical support obligor is eligible for health care coverage through an employment-related or other group health care coverage plan, the employer, union or carrier shall do the following:

(1) permit the medical support obligor to enroll for health care coverage each minor child who is otherwise eligible for coverage without regard to any enrollment season restrictions;

(2) enroll each minor child for health care coverage if the medical support obligor fails to enroll each minor child upon application by the medical support obligee or the department;

(3) not disenroll or eliminate coverage of any minor child so enrolled unless:

(a) the employer is provided with satisfactory written evidence that the court order is no longer in effect;

(b) the minor child is or will be enrolled in comparable health care coverage that meets the health care coverage criteria required pursuant to the Mandatory Medical Support Act and that will take effect not later than the effective date of the disenrollment;

(c) the medical support obligor has terminated employment; or

(d) the employer has eliminated health care coverage for all of its employees; and

(4) withhold from the medical support obligor's compensation the medical support obligor's share, if any, of premiums for health care coverage and to pay the share of premiums to the carrier, unless otherwise provided in law or regulation.

C. In those instances in which the medical support obligor fails or refuses to execute any document necessary to enroll a minor child in a health care coverage plan ordered by the court, the required information and authorization may be provided by the department or the custodial parent or guardian of the minor child.

D. Information and authorization provided by the department or the custodial parent or guardian of a minor child shall be valid for the purpose of meeting enrollment requirements of the health care coverage plan and shall not affect the obligation of the employer or union and the carrier to enroll the minor child in the health care coverage plan for which other eligibility, enrollment, underwriting terms and other requirements are met. In instances in which a minor child is covered through the medical support obligor, the carrier shall provide all information to the medical support obligee that may be helpful or necessary for the minor child to obtain benefits.

E. A minor child that a medical support obligor is required to cover as an eligible dependent pursuant to the Mandatory Medical Support Act shall be considered for health care coverage purposes as a dependent of the medical support obligor until the child is emancipated or until further order of the court.

F. In instances in which a minor child is provided health care coverage through a medical support obligor, unless prohibited by federal law, the carrier is prohibited from denying health care coverage of the minor child on the grounds that:

(1) the minor child was born out of wedlock;

(2) the minor child is not claimed as a dependent on the medical support obligor's federal income tax return; or

(3) the minor child does not reside with the medical support obligor or reside in the carrier's service area.

G. In instances in which a minor child is provided health care coverage through a medical support obligor, the carrier is prohibited from imposing requirements on the department that are different from requirements applicable to an agent or assignee of any other individual covered by the health care coverage plan.

H. In instances in which a minor child is provided health care coverage through a medical support obligor who is a noncustodial parent, the carrier shall permit the custodial parent or health care provider, with the approval of the custodial parent, to submit claims for covered services without the approval of the medical support obligor. The carrier shall make payments on submitted claims directly to the custodial parent or the health care provider.

I. In instances in which a minor child is covered through a public entity, the medical support obligor is required to maintain the recertification of the health care coverage as long as the medical support obligor meets eligibility requirements.

J. If the medical support obligor is terminated, the employer shall notify the department of the termination.

History: Laws 1990, ch. 78, § 6; 1994, ch. 76, § 5; 2003, ch. 287, § 5; 2007, ch. 165, § 6; 2021, ch. 20, § 9; 2023, ch. 107, § 3.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, provided that when a minor child is covered through a public entity, the medical support obligor is required to maintain the recertification of the health care coverage as long as the medical support obligor meets eligibility requirements; and added a new Subsection I and redesignated former Subsection I as Subsection J.

The 2021 amendment, effective July 1, 2021, provided an exception to the prohibition of a carrier from denying health care coverage to a minor child for certain reasons; changed former references of "health insurance" to "health care coverage", of "dental insurance" to "dental care coverage", of "insured" to "provided health care coverage" and "insurer" to "carrier" throughout; and in Subsection F, after "through a medical support obligor,", added "unless prohibited by federal law", and added paragraph designations "(1)", "(2)" and "(3)".

The 2007 amendment, effective June 15, 2007, eliminated references to dental insurance coverage and changed "obligor" and "obligee" to "medical support obligor" and "medical support obligee".

The 2003 amendment, effective April 8, 2003, in Subsection A, inserted "a national medical support notice or" near the beginning, substituted "the court" for "that" following "obligor pursuant to", substituted "union or insurer" for "or union" following "by the employer", substituted "If the obligor is not enrolled in a plan, the child shall be enrolled in a plan" for "or the least costly plan available to the obligor" following "obligor is enrolled", added the last sentence; substituted "employment-related or other group health care insurance plan" for "employer or union" following "coverage through an" in the first paragraph of Subsection B; deleted "that" at the beginning of Subparagraph B(3)(b); inserted "plan" following "the health insurance" in Subsection D; and inserted "health care" twice in Subsection H; and added Subsection I.

The 1994 amendment, effective March 4, 1994, substituted "Section 40-4C-5 NMSA 1978" for "Section 5 of the Mandatory Medical Support Act" in Subsection A, added Subsection B, redesignated former Subsections B to D as Subsections C to E, inserted the sentence beginning "In instances" in Subsection D, and added Subsections F to H.

40-4C-7. Health care coverage required.

Any health care coverage plan ordered for a minor child pursuant to the Mandatory Medical Support Act shall, at a minimum, meet minimum standards of acceptable coverage, deductibles, cost-sharing, lifetime benefits, out-of-pocket expenses, co-payments and plan requirements as set forth in regulations promulgated by the secretary of human services pursuant to the Mandatory Medical Support Act. To be an

acceptable choice under that act, a health maintenance organization plan, in addition to meeting minimum standards, shall have a coverage area specified under the plan that includes the residential area of the minor child who is covered under the plan as an eligible dependent.

History: Laws 1990, ch. 78, § 7; 2021, ch. 20, § 10.

ANNOTATIONS

The 2021 amendment, effective July 1, 2021, changed former references of "health insurance coverage" to "health care coverage", and after "deductibles", deleted "co-insurance" and added "cost-sharing".

40-4C-8. Limitation on application.

No insurer, health maintenance organization or non-profit health care plan shall be required to change coverages offered as a result of the minimum standards promulgated pursuant to the Mandatory Medical Support Act. Nothing in the Mandatory Medical Support Act shall be construed as creating any regulatory authority over the business of insurance.

History: Laws 1990, ch. 78, § 8.

40-4C-9. Authorization for claims.

The signature of the custodial parent of the minor child insured pursuant to a court order or a directive issued by the department is a valid authorization to the health insurer or dental insurer for purposes of processing an insurance reimbursement payment.

History: Laws 1990, ch. 78, § 9; 2003, ch. 287, § 6.

ANNOTATIONS

The 2003 amendment, effective April 8, 2003, inserted "or a directive issued by the department" following "a court order".

40-4C-10. Employer, union or carrier notice.

When an order for health care coverage pursuant to the Mandatory Medical Support Act is in effect, upon termination of the medical support obligor's employment or upon termination of the health care coverage, the employer, union or carrier shall make a good faith effort to notify the department and the other parent within ten days of the termination date with notice of conversion privileges.

History: Laws 1990, ch. 78, § 10; 2003, ch. 287, § 7; 2007, ch. 165, § 7; 2021, ch. 20, § 11.

ANNOTATIONS

The 2021 amendment, effective July 1, 2021, changed former references of "health insurance coverage" to "health care coverage" and "insurer" to "carrier".

The 2007 amendment, effective June 15, 2007, eliminated references to dental insurance coverage and changed "obligor" to "medical support obligor" and "obligee" to "department and the other parent".

The 2003 amendment, effective April 8, 2003, substituted "union or insurer" for "or union" in the section heading and following "coverage, the employer".

40-4C-11. Release of information.

When an order for health care coverage pursuant to the Mandatory Medical Support Act is in effect, the medical support obligor's employer, union or carrier shall release to the other parent, upon request, information on such coverage, including the name of the carrier.

History: Laws 1990, ch. 78, § 11; 2003, ch. 287, § 8; 2007, ch. 165, § 8; 2021, ch. 20, § 12.

ANNOTATIONS

The 2021 amendment, effective July 1, 2021, changed former references of "health insurance coverage" to "health care coverage" and "insurer" to "carrier".

The 2007 amendment, effective June 15, 2007, eliminated references to dental insurance coverage and changed "obligor" to "medical support obligor" and "obligee" to "other parent".

The 2003 amendment, effective April 8, 2003, substituted "union or insurer" for "or union" following "the obligor's employer".

40-4C-12. Medical support obligor liability.

A. A medical support obligor who fails to maintain the health care coverage for the benefit of a minor child as ordered pursuant to the Mandatory Medical Support Act shall be liable to the other parent for any medical and dental expenses incurred from the date of the court order.

B. A medical support obligor who receives payment from a third party for the costs of medical or dental services provided to a minor child and who fails to use the payment

to reimburse the department is liable to the department to the extent of the department's payment for the services. The department is authorized to intercept the obligor's tax refund, if the medical support obligor is a noncustodial parent, or use other means of enforcement available to the department to recoup amounts paid. Claims for current or past due child support take priority over any claims made pursuant to this subsection. Failure to maintain health care coverage as ordered constitutes a showing of increased need and provides a basis for modification of the medical support obligor's child support order.

C. A medical support obligor is required to provide the department with the following information concerning health care coverage:

(1) medical support obligor's name and tax identification number;

(2) type of coverage (single or family);

(3) name, address and identifying number of health care coverage;

(4) name and tax identification number of other individuals who are provided health care coverage by the medical support obligor;

(5) effective period of coverage; and

(6) name, address and the tax identification number of the employer.

History: Laws 1990, ch. 78, § 12; 1994, ch. 76, § 6; 2003, ch. 287, § 9; 2007, ch. 165, § 9; 2021, ch. 20, § 13; 2023, ch. 107, § 4.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, revised a provision related to a medical support obligor's liability when the medical support obligor fails to maintain the health care coverage for the benefit of a minor child; and in Subsection A, after "liable to", deleted "the department or".

The 2021 amendment, effective July 1, 2021, changed former references of "health insurance coverage" to "health care coverage".

The 2007 amendment, effective June 15, 2007, eliminated references to dental insurance coverage; changed "obligor" to "medical support obligor" and "obligee" to "department or other parent"; and authorized the department to intercept tax refunds if the medical support obligor is a noncustodial parent.

The 2003 amendment, effective April 8, 2003, substituted "An" for "The" at the beginning of Subsection A; in Subsection B, inserted "or use other means of enforcement available to the department" following "obligor's tax refund", inserted

"coverage" following "or dental insurance"; and substituted "An" for "If the department is the obligee, the" at the beginning of Subsection C.

The 1994 amendment, effective March 4, 1994, inserted the language beginning "An obligor" preceding "Proof of failure" in Subsection B, and added Subsection C.

40-4C-13. Department; duties.

The department shall pursue the establishment and enforcement of an order for health care coverage of a minor child upon application of a custodial or noncustodial parent to the department and payment by the custodial or noncustodial parent of fees required by the department.

History: Laws 1990, ch. 78, § 13; 1994, ch. 76, § 7; 2003, ch. 287, § 10; 2007, ch. 165, § 10; 2021, ch. 20, § 14; 2023, ch. 107, § 5.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, revised the department of human services' duties related to pursuing the establishment and enforcement of an order for health care coverage of a minor child; and after "health care coverage", deleted "when" and added "of", and after "minor child", deleted "receives public assistance or medicaid or".

The 2021 amendment, effective July 1, 2021, changed former references of "health insurance coverage" to "health care coverage".

The 2007 amendment, effective June 15, 2007, eliminated references to dental insurance coverage and required the department to take enforcement action against custodial and noncustodial parents.

The 2003 amendment, effective April 8, 2003, inserted "or medicaid" following "receives public assistance".

The 1994 amendment, effective March 4, 1994, deleted "human services" following "required by the" at the end of the section.

40-4C-14. Enforcement.

All remedies available for the collection and enforcement of child support apply to medical support ordered pursuant to the Mandatory Medical Support Act. For the purpose of enforcement, the costs of individual or group health or hospitalization coverage or liabilities established pursuant to Section 40-4C-12 NMSA 1978 shall be included in a medical support judgment.

History: Laws 1990, ch. 78, § 14; 2007, ch. 165, § 11.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, provided that health or hospitalization coverage or liabilities established pursuant to Section 40-4C-12 NMSA be included in a medical support judgment.

ARTICLE 5
Illegitimacy and Support (Repealed.)

40-5-1 to 40-5-26. Repealed.

ANNOTATIONS

Repeals. — Laws 1985, ch. 105, § 21 and Laws 1986, ch. 47, § 25 repealed 40-5-1 to 40-5-26 NMSA 1978, as enacted and amended by Laws 1923, ch. 32, §§ 9, 11 to 14, 17 to 20, 25 and 27, Laws 1969, ch. 100, § 1, Laws 1973, ch. 103, and Laws 1977, ch. 119, § 1, relating to illegitimacy and support.

ARTICLE 5A
Parental Responsibility

40-5A-1. Short title.

This act [40-5A-1 to 40-5A-13 NMSA 1978] may be cited as the "Parental Responsibility Act".

History: Laws 1995, ch. 25, § 1.

ANNOTATIONS

Cross references. — For the State Directory of New Hires Act, *see* 50-13-1 NMSA 1978 et seq.

40-5A-2. Purpose.

The purpose of the Parental Responsibility Act is to require:

A. parents to eliminate child support arrearages in order to be issued, maintain or renew a license; and

B. compliance with, after receiving appropriate notice, subpoenas or warrants relating to paternity or child support, which will subsequently reduce both the number of children in New Mexico who live at or below the poverty level and the financial obligation that falls to the state when parents do not provide for their minor children.

History: Laws 1995, ch. 25, § 2; 1997, ch. 237, § 25; 1998, ch. 53, § 1.

ANNOTATIONS

The 1998 amendment, effective March 9, 1998, deleted "to require" in Subsections A and B, and substituted "be issued, maintain or renew a license" for "maintain a professional, occupational or recreational license, including but not limited to a hunting, fishing or trapping license, and a driver's license" in Subsection A.

The 1997 amendment, effective April 11, 1997, designated the existing language as Subsections A and B, inserted "or recreational license, including but not limited to a hunting, fishing or trapping license, and a driver's" at the end of Subsection A, and added the language beginning "to require" and ending "child support," to the beginning of Subsection B, and made minor stylistic changes in the section.

40-5A-3. Definitions.

As used in the Parental Responsibility Act:

A. "applicant" means an obligor who is applying for issuance of a license;

B. "board" means:

(1) the 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;

(2) the manufactured housing committee and manufactured housing division of the regulation and licensing department;

(3) a board, commission or agency that administers a profession or occupation licensed pursuant to Chapter 61 NMSA 1978;

(4) any other state agency to which the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978] is applied by law;

(5) 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;

(6) the department of game and fish;

(7) the motor vehicle division of the taxation and revenue department; or

(8) the alcohol and gaming division of the regulation and licensing department;

C. "certified list" means a verified list that includes the names, social security numbers and last known addresses of obligors not in compliance;

D. "compliance" means that:

(1) an obligor is no more than thirty days in arrears in payment of amounts required to be paid pursuant to an outstanding judgment and order for support; and

(2) an obligor has, after receiving appropriate notice, complied with subpoenas or warrants relating to paternity or child support proceedings;

E. "department" means the human services department [health care authority department];

F. "judgment and order for support" means the judgment entered against an obligor by the district court or a tribal court in a case enforced by the department pursuant to Title IV-D of the Social Security Act;

G. "license" means a liquor license or other license, certificate, registration or permit issued by a board that a person is required to have to engage in a profession or occupation in New Mexico; "license" includes a commercial driver's license, driver's license and recreational licenses, including hunting, fishing or trapping licenses;

H. "licensee" means an obligor to whom a license has been issued; and

I. "obligor" means the person who has been ordered to pay child or spousal support pursuant to a judgment and order for support.

History: Laws 1995, ch. 25, § 3; 1997, ch. 237, § 26; 1998, ch. 53, § 2; 2005, ch. 51, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Cross references. — For Title IV-D of the Federal Social Security Act, *see* 42 U.S.C. § 651 et seq.

The 2005 amendment, effective June 17, 2005, amended the definition of "judgment and order for support" to mean judgments entered in cases enforced by the human services department.

The 1998 amendment, effective March 9, 1998, in Subsection B, deleted "or" in Paragraph B(6), added "or" in Paragraph B(7), and added Paragraph B(8); deleted "with a judgment and order for support" at the end of Subsection C; and in Subsection G inserted "liquor license or other" near the beginning, substituted "license" for "and", and deleted "but not limited to" after "including".

The 1997 amendment, effective April 11, 1997, added Paragraphs B(6) and B(7), designated Paragraph D(1) and inserted "no" near the beginning, added Paragraph D(2), added "driver's license and recreational licenses, including but not limited to hunting, fishing or trapping licenses" in Subsection G, and made minor stylistic changes.

40-5A-4. Application for license.

A person who submits an application for a license issued by a board is not eligible for issuance of the license if he is not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings. A board that denies or proposes to deny the application on the grounds that he is not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings shall advise the applicant in writing of the grounds for denial of his application and his right, if any, to a hearing. The applicant shall have a right to a hearing if, pursuant to applicable law governing hearings, the denial of the application on other grounds would have entitled the applicant to a hearing. The application shall be reinstated if, within thirty days of the date of the notice, the applicant provides the board with a certified statement from the department that he is in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings.

History: Laws 1995, ch. 25, § 4; 1997, ch. 237, § 27.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" at the end of the first and last sentences and in the middle of the second sentence, inserted "applicable" following "pursuant to" in the third sentence, and made minor stylistic changes.

40-5A-5. Renewal of license.

A licensee who seeks renewal of his license from a board is not eligible to have the license renewed if he is not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings. A board that denies or proposes to deny the renewal of a license on the grounds that the licensee is not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings shall advise the licensee in writing of the grounds for the denial or proposed denial and his right to a hearing. The licensee shall have a right to a hearing on the denial of the renewal of his license pursuant to the

applicable law governing hearings. The application for renewal shall be reinstated if, within thirty days of the date of the notice, the licensee provides the board with a certified statement from the department that he is in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings.

History: Laws 1995, ch. 25, § 5; 1997, ch. 237, § 28.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" at the end of the first and last sentences and in the middle of the second sentence, in the third sentence inserted "the applicable" following "pursuant to", and deleted "for his profession or occupation" at the end of that sentence.

40-5A-6. Suspension or revocation of license.

The failure of a licensee to be in compliance with a judgment and order for support or subpoena or warrants relating to paternity or child support proceedings is grounds for suspension or revocation of a license. The proceeding shall be conducted by a board or the administrative hearings office pursuant to the law governing suspension and revocation proceedings for the license.

History: Laws 1995, ch. 25, § 6; 1997, ch. 237, § 29; 2015, ch. 73, § 26.

ANNOTATIONS

The 2015 amendment, effective July 1, 2015, provided that in suspension and revocation of license proceedings, such proceedings shall be conducted by the administrative hearings office or a board that administers the license; and after "a board", added "or the administrative hearings office".

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" at the end of the first sentence, and substituted "the license" for "his profession or occupation" at the end of the last sentence, and made a minor stylistic change.

40-5A-7. Certified lists.

The department shall provide each board with a certified list of obligors not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings within ten calendar days after the first day of each month. By the end of the month in which the certified list is received, each board shall report to the department the names of applicants and licensees who are on the list and the action the board has taken in connection with such applicants and licensees.

History: Laws 1995, ch. 25, § 7; 1997, ch. 237, § 30.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" in the first sentence, deleted "of the board" following "licensees" in the last sentence, and made a minor stylistic change.

40-5A-8. Court orders.

As part of a judgment and order for support, a district court may require the obligor to surrender any license held by him or may refer the matter to the appropriate board for further action.

History: Laws 1995, ch. 25, § 8.

40-5A-9. Rules and regulations.

On or before November 1, 1995, boards shall promulgate and file, in accordance with the States Rules Act [Chapter 14, Article 4 NMSA 1978], rules and regulations to implement the provisions of the Parental Responsibility Act.

History: Laws 1995, ch. 25, § 9.

40-5A-10. Action by supreme court.

The supreme court shall adopt by order rules for the denial of applications or licensing and renewal of licenses and for the suspension or revocation of licenses of lawyers and other persons licensed by the supreme court for the failure of an applicant or licensee to be in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings and may delegate the enforcement of the rules to a board under its supervision.

History: Laws 1995, ch. 25, § 10; 1997, ch. 237, § 31.

ANNOTATIONS

Cross references. — For rules governing admission to the New Mexico Bar, *see* Rule 15-101 NMRA et seq.

For rules of professional conduct, *see* Rule 16-101 NMRA et seq.

For rules governing the New Mexico Bar, *see* Rule 24-101 NMRA et seq.

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" near the end of the section.

40-5A-11. Joint powers agreements.

A board may enter into a joint powers agreement with the regulation and licensing department to administer the provisions of the Parental Responsibility Act for the board.

History: Laws 1995, ch. 25, § 11.

40-5A-12. Federal funds; board surcharges.

A. The department may enter into joint powers agreements with boards to assist in the implementation of the Parental Responsibility Act. The agreements shall provide for payment to the boards of federal funds to cover the portion of costs allowable under federal law and regulation that are incurred by the boards in implementing those sections. The agreement shall also provide for payment by the boards to the department for the nonfederal share of costs incurred by the department in assisting the boards. The boards shall reimburse the department for the nonfederal share of costs incurred pursuant to the Parental Responsibility Act from money collected from licensees or applicants for licenses.

B. Notwithstanding any other provision of law, each board may levy a surcharge on any fee assessed for licensure or regulation of the profession or occupation to cover the costs of implementing and administering the provisions of the Parental Responsibility Act. The surcharge may be adopted after notice to the licensees and applicants, but shall not require the adoption or amendment of a regulation.

History: Laws 1995, ch. 25, § 12.

40-5A-13. Annual report.

The department shall report to the governor and the legislature by December 1 of each year on the progress of child support enforcement measures, including:

A. the number of delinquent obligors certified by the department;

B. the number of obligors who also were licensees or applicants subject to the provisions of the Parental Responsibility Act;

C. the number of licenses that were suspended or revoked by each board, the number of new licenses and renewals that were delayed or denied by each board and the number of licenses and renewals that were granted following an applicant's compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings; and

D. the costs incurred in the implementation and enforcement of the Parental Responsibility Act.

History: Laws 1995, ch. 25, § 13; 1997, ch. 237, § 32.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" to the end of Subsection C.

ARTICLE 6
Reciprocal Enforcement of Support (Repealed.)

40-6-1 to 40-6-41. Repealed.

ANNOTATIONS

Repeals. — Laws 1994, ch. 107, § 904 repealed 40-6-1 to 40-6-41 NMSA 1978, as enacted by Laws 1969, ch. 242, §§ 1-41, and as amended by Laws 1977, ch. 252, § 25, relating to uniform reciprocal enforcement of support, effective July 1, 1995. For provisions of former sections, *see* the 1993 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 40, Article 6A NMSA 1978.

ARTICLE 6A
Uniform Interstate Family Support

ARTICLE 1
GENERAL PROVISIONS

40-6A-100. Recompiled.

History: Laws 1907, ch. 49, § 4; Code 1915, § 5657; Laws 1919, ch. 46, § 1; C.S. 1929, § 151-104; Laws 1937, ch. 178, § 1; 1947, ch. 142, § 1; 1941 Comp., § 77-201; 1953 Comp., § 75-2-1; Laws 1971, ch. 234, § 10; 1977, ch. 254, § 92; 1982, ch. 10, § 3; recompiled as 40-6A-100 by Laws 2005, ch. 166, § 47; § 40-6A-100 recompiled as 40-6A-101 by Laws 2011, ch. 159, § 68.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 159, § 68 recompiled former 40-6A-100 NMSA 1978 as 40-6A-101 NMSA 1978, effective May 18, 2016.

40-6A-101. Short title.

Chapter 40, Article 6A NMSA 1978 may be cited as the "Uniform Interstate Family Support Act".

History: Laws 1994, ch. 107, § 902; 1997, ch. 9, § 23; 1978 Comp., 40-6A-902 recompiled as 40-6A-100 by Laws 2005, ch. 166, § 47; § 40-6A-100 recompiled as § 40-6A-101 by Laws 2011, ch. 159, § 68.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 159, § 68 recompiled former 40-6A-100 NMSA 1978 as a new 40-6A-101 NMSA 1978, effective May 18, 2016.

Laws 2005, ch. 166, § 1 recompiled former 40-6A-101 NMSA 1978 as 40-6A-102 NMSA 1978, effective June 17, 2005.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 1997 amendment, effective July 1, 1997, substituted "Chapter 40, Article 6A NMSA 1978" for "This act".

40-6A-102. Definitions.

As used in the Uniform Interstate Family Support Act:

A. "child" means an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent;

B. "child-support order" means a support order for a child, including a child who has attained the age of majority under the law of the issuing state or foreign country;

C. "convention" means the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007;

D. "duty of support" means an obligation imposed or imposable by law to provide support for a child, spouse or former spouse, including an unsatisfied obligation to provide support;

E. "foreign country" means a country, including a political subdivision thereof, other than the United States, that authorizes the issuance of support orders and:

(1) that has been declared under the law of the United States to be a foreign reciprocating country;

(2) that has established a reciprocal arrangement for child support with this state as provided in Section 40-6A-308 NMSA 1978;

(3) that has enacted a law or established procedures for the issuance and enforcement of support orders that are substantially similar to the procedures pursuant to the Uniform Interstate Family Support Act; or

(4) in which the convention is in force with respect to the United States;

F. "foreign support order" means a support order of a foreign tribunal;

G. "foreign tribunal" means a court, administrative agency or quasi-judicial entity of a foreign country that is authorized to establish, enforce or modify support orders or to determine parentage of a child. "Foreign tribunal" includes a competent authority pursuant to the convention;

H. "gross income" means income from any source and includes 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; provided that:

(1) "gross income" does not include benefits received from:

(a) means-tested public assistance programs, including temporary assistance for needy families, supplemental security income and general assistance;

(b) the earnings or public assistance benefits of a child who is the subject of a child support award; or

(c) child support received by a parent for the support of other children;

(2) for 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;

(3) "gross income" does not include the amount of alimony payments actually paid in compliance with a court order;

(4) "gross income" does not include the amount of child support actually paid by a parent in compliance with a court order for the support of prior children; and

(5) "gross income" does not include a reasonable amount for a parent's obligation to support prior children who are in that parent's custody. A duty to support subsequent children is not ordinarily a basis for reducing support owed to children of the parties but may be a defense to a child support increase for the children of the parties. In raising such a defense, a party may use Table A as set forth in Subsection M of Section 40-4-11.1 NMSA 1978 to calculate the support for the subsequent children;

I. "home state" means the state or foreign country in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the state or foreign country in which the child lived from birth with a parent or a person acting as parent. A period of temporary absence of any of them is counted as part of the six-month or other period;

J. "income" means actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed. 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;

K. "income-withholding order" means an order or other legal process directed to an obligor's employer or other debtor to withhold support from the income of the obligor;

L. "initiating tribunal" means the tribunal of a state or foreign country from which a petition or comparable pleading is forwarded or in which a petition or comparable pleading is filed for forwarding to another state or a foreign country;

M. "issuing foreign country" means the foreign country in which a tribunal issues a support order or a judgment determining parentage of a child;

N. "issuing state" means the state in which a tribunal issues a support order or a judgment determining parentage of a child;

O. "issuing tribunal" means the tribunal of a state or foreign country that issues a support order or a judgment determining parentage of a child;

P. "law" includes decisional and statutory law and rules and regulations having the force of law;

Q. "obligee" means:

(1) an individual to whom a duty of support is or is alleged to be owed or in whose favor a support order or a judgment determining parentage of a child has been issued;

(2) a foreign country, state or political subdivision of a state to which the rights under a duty of support or support order have been assigned or which has independent

claims based on financial assistance provided to an individual obligee in place of child support;

(3) an individual seeking a judgment determining parentage of the individual's child; or

(4) a person that is a creditor in a proceeding pursuant to Sections 40-6A-701 through 40-6A-713 NMSA 1978;

R. "obligor" means an individual or the estate of a decedent who:

(1) owes or is alleged to owe a duty of support;

(2) is alleged but has not been adjudicated to be a parent of a child;

(3) is liable under a support order; or

(4) is a debtor in a proceeding pursuant to Sections 40-6A-701 through 40-6A-713 NMSA 1978;

S. "outside this state" means a location in another state or in a country other than the United States, whether or not the country is a foreign country;

T. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality or any other legal or commercial entity;

U. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

V. "register" means to file in a tribunal of this state a support order or judgment determining parentage of a child issued in another state or a foreign country;

W. "registering tribunal" means a tribunal in which a support order or judgment determining parentage of a child is registered;

X. "responding state" means a state in which a petition or comparable pleading for support or to determine parentage of a child is filed or to which a petition or comparable pleading is forwarded for filing from another state or a foreign country;

Y. "responding tribunal" means the authorized tribunal in a responding state or foreign country;

Z. "spousal support order" means a support order for a spouse or former spouse of the obligor;

AA. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession under the jurisdiction of the United States. "State" includes an Indian tribe, pueblo, nation or band;

BB. "support enforcement agency" means a public official, governmental entity or private agency, acting under contract with such a public official or governmental entity, that is authorized to:

(1) seek enforcement of support orders or laws relating to the duty of support;

(2) seek establishment or modification of child support;

(3) request determination of parentage of a child;

(4) attempt to locate obligors or their assets; or

(5) request determination of the controlling child-support order;

CC. "support order" means a judgment, decree, order, decision or directive, whether temporary, final or subject to modification, issued in a state or foreign country for the benefit of a child, a spouse or a former spouse, that provides for monetary support, health care, arrearages, retroactive support or reimbursement for financial assistance provided to an individual obligee in place of child support. "Support order" may include related costs and fees, interest, income withholding, automatic adjustment, reasonable attorney fees and other relief; and

DD. "tribunal" means a court, administrative agency or quasi-judicial entity authorized to establish, enforce or modify support orders or to determine parentage of a child.

History: Laws 1994, ch. 107, § 101; 1997, ch. 9, § 1; amended and recompiled as 40-6A-102 by Laws 2005, ch. 166, § 1; 2011, ch. 159, § 1; 2021, ch. 20, § 15.

ANNOTATIONS

Recompilations. — Laws 2005, ch. 166, § 47 recompiled former 40-6A-102 NMSA 1978 as 40-6A-105 NMSA 1978, effective June 17, 2005.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2021 amendment, effective July 1, 2021, defined "gross income" and revised the definition of "income" as used in the Uniform Interstate Family Support Act; added a new Subsection H and redesignated the succeeding subsections accordingly; and in Subsection J, after "'income'", deleted "includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under the law of this state" and added the remainder of the subsection.

The 2011 amendment, effective May 18, 2016, added definitions of "convention", "foreign country", "foreign support order", "foreign tribunal", "issuing foreign country", and "outside this state"; included foreign countries within the scope of the definitions of "child-support order", "issuing tribunal", "oblige", "register", "responding state", "responding tribunal", and "support order"; included a creditor as an "obligee"; and included a debtor as an "obligor".

The 2005 amendment, effective June 17, 2005, deleted the references in Subsection (7) to the Uniform Reciprocal Enforcement of Support Act and the Revised Uniform Reciprocal Enforcement of Support Act (former Sections 40-6-1 to 40-6-41 NMSA 1978); added the definition of "person" in subsection (14); added the definition of "record" in Subsection (15) to mean information in a tangible medium or in an electronic or other medium; defined "state" in Subsection (21) to include an Indian pueblo, nation or band and a foreign country or subdivision that has been declared to be a reciprocating country or political subdivision under federal law or has established a reciprocal arrangement for child support with New Mexico; deleted the references in Subsection (21)(iii) to the Uniform Reciprocal Enforcement of Support Act and the Revised Uniform Reciprocal Enforcement of Support Act; defined "support enforcement agency" in Subsection (22)((v)to include a public official or agency that is authorized to determine the controlling child-support order; and defined "support order" to mean a document issued by a tribunal, including a directive.

The 1997 amendment, effective July 1, 1997, in Paragraph (7), inserted "is forwarded or in which a proceeding is filed for forwarding to a responding state" and "or procedure" near the middle, and deleted "is filed for forwarding to a responding state" at the end; in Paragraph (16), inserted "is filed or to which a proceeding", "for filing from an initiating state" and "or procedure" ; and in Paragraph (19), deleted "the Commonwealth of" following "District of Columbia", inserted "the United States Virgin Islands", and "enacted a law or" and added "the Uniform Reciprocal Enforcement of Support Act or the Revised Uniform Reciprocal Enforcement of Support Act" at the end; and made minor stylistic changes.

"Duty of support". — The duty to support a spouse by way of alimony is a duty of support for purposes of the Reciprocal Enforcement Act. *State ex rel. Benzing v. Benzing*, 1986-NMCA-026, 104 N.M. 129, 717 P.2d 105 (decided under prior law).

Law reviews. — For article, "Child Support Enforcement: The New Mexico Experience," see 9 N.M.L. Rev. 25 (1978-79).

For article, "Arbitration of Domestic Relations Disputes in New Mexico," see 16 N.M.L. Rev. 321 (1986).

40-6A-103. State tribunal and support enforcement agency.

A. The district courts are the tribunals of this state.

B. The human services department [health care authority department] is the support enforcement agency of this state.

History: Laws 1994, ch. 107, § 102; 1997, ch. 9, § 2; recompiled as 40-6A-105 by Laws 2005, ch. 166, § 47; § 40-6A-105 recompiled as § 40-6A-103 by Laws 2011, ch. 159, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Recompilations. — Laws 2011, ch. 159, § 2 recompiled former 40-6A-105 NMSA 1978 as 40-6A-103 NMSA 1978, effective May 18, 2016.

Laws 2005, ch. 166, § 2 recompiled former 40-6A-103 NMSA 1978 as 40-6A-104 NMSA 1978, effective June 17, 2005.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, designated the human services department as the support enforcement agency of New Mexico.

40-6A-104. Remedies cumulative.

A. Remedies provided by the Uniform Interstate Family Support Act are cumulative and do not affect the availability of remedies under other law or the recognition of a foreign support order on the basis of comity.

B. The Uniform Interstate Family Support Act does not:

(1) provide the exclusive method of establishing or enforcing a support order under the law of this state; or

(2) grant a tribunal of this state jurisdiction to render judgment or issue an order relating to child custody or visitation in a proceeding pursuant to the Uniform Interstate Family Support Act.

History: Laws 1994, ch. 107, § 103; amended and recompiled as 40-6A-104 by Laws 2005, ch. 166, § 2; 2011, ch. 159, § 3.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, provided in Subsection (a) that the remedies do not affect available remedies under other law, including the recognition of a support order of a foreign country of political subdivision on the basis of comity and added Subsections (b)(1) and (2) to provide that the Uniform Act does not provide the exclusive method of establishing or enforcing support orders or grant a tribunal of New Mexico jurisdiction to render judgment or issue an order relating to custody or visitation in a proceeding under the Uniform Act.

40-6A-105. Application of Uniform Interstate Family Support Act to resident of foreign country and foreign support proceeding.

A. A tribunal of this state shall apply Sections 40-6A-101 through 40-6A-616 NMSA 1978 and, as applicable, Sections 40-6A-701 through 40-6A-713 NMSA 1978, to a support proceeding involving:

(1) a foreign support order;

(2) a foreign tribunal; or

(3) an obligee, obligor or child residing in a foreign country.

B. A tribunal of this state that is requested to recognize and enforce a support order on the basis of comity may apply the procedural and substantive provisions of Sections 40-6A-101 through 40-6A-616 NMSA 1978.

C. Sections 40-6A-701 through 40-6A-713 NMSA 1978 shall apply only to a support proceeding pursuant to the convention. In such a proceeding, if a provision of Sections 40-6A-701 through 40-6A-713 NMSA 1978 is inconsistent with Sections 40-6A-101

through 40-6A-616 NMSA 1978, the provisions of Sections 40-6A-701 through 40-6A-713 NMSA 1978 control.

History: 1978 Comp., § 40-6A-105, enacted by Laws 2011, ch. 159, § 4.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Recompilations. — Laws 2011, ch. 159, § 2 recompiled former 40-6A-105 NMSA 1978 as 40-6A-103 NMSA 1978, effective May 18, 2016.

Laws 2005, ch. 166, § 47 recompiled former 40-6A-102 NMSA 1978 as 40-6A-105 NMSA 1978, effective June 17, 2005.

ARTICLE 2
JURISDICTION

PART A
EXTENDED PERSONAL JURISDICTION

40-6A-201. Bases for jurisdiction over nonresident.

A. In a proceeding to establish or enforce a support order or to determine parentage of a child, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(1) the individual is personally served with notice within this state;

(2) 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;

(3) the individual resided with the child in this state;

(4) the individual resided in this state and provided prenatal expenses or support for the child;

(5) the child resides in this state as a result of the acts or directives of the individual;

(6) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;

(7) the individual asserted parentage of a child in the putative father registry maintained in this state by the department of health; or

(8) there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

B. The bases of personal jurisdiction set forth in Subsection A of this section or in any other law of this state may not be used to acquire personal jurisdiction for a tribunal of this state to modify a child support order of another state unless the requirements of Section 40-6A-611 NMSA 1978 are met or, in the case of a foreign support order, unless the requirements of Section 40-6A-615 NMSA 1978 are met.

History: Laws 1994, ch. 107, § 201; 2005, ch. 166, § 3; 2011, ch. 159, § 5.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, granted New Mexico courts personal jurisdiction to modify a foreign support order if the requirements of Section 40-6A-615 NMSA 1978 are met.

The 2005 amendment, effective June 17, 2005, deleted in Subsection (a) jurisdiction to modify a support order or to determine parentage and added Subsection (b) to provide that jurisdiction under Subsection (a) does not confer jurisdiction on a tribunal to modify a child support order of another state unless the requirement of Section 40-6A-611 or 40-6A-615 NMSA 1978 are met.

Modification affecting non-residential parent. — The Uniform Interstate Family Support Act (Chapter 40, Article 6A NMSA 1978) supplements human services department's [health care authority department's] authority under the Public Assistance Act (27-2-1 NMSA 1978 et seq.) and that human services department [health care authority department] therefore has the authority to bring an action to modify the child support obligation of a non-custodial parent residing in another state under UIFSA. *State ex rel. Washington Human Servs.Dep't v. Jackson*, 2007-NMCA-061, 141 N.M. 647, 159 P.3d 1132.

Subject matter jurisdiction. — Where parent who was a resident of Texas filed a petition in New Mexico to enforce the provisions of a Texas judgment, the New Mexico

court had personal jurisdiction over the parent regarding the Texas judgment and subject matter jurisdiction to enforce, but not to modify, the child support order in the Texas judgment. *Harbison v. Johnston*, 2001-NMCA-051, 130 N.M. 595, 28 P.3d 1136.

No denial of due process or equal protection under former 40-6-1 NMSA 1978 et seq. — Defendant's claim of deprivation of due process in that he did not have an opportunity to examine plaintiff, where no explanation was made as to why plaintiff's deposition was not taken, there was no attempt to obtain further information from her by way of discovery under the provisions of this law, and no continuance was requested, was denied as the Reciprocal Act does not violate the fourteenth amendment as claimed by the defendant, and there was no denial of due process or equal protection of the law. *State ex rel. Terry v. Terry*, 1969-NMSC-040, 80 N.M. 185, 453 P.2d 206 (decided under prior law).

Requirements of due process complied with. — That there is no deprivation of due process is clear. When the court of this state receives the papers from the initiating state the defendant is given notice, an opportunity to be heard, by deposition to examine and cross-examine the plaintiff and any witness that may have testified in the initiating state, to examine and cross-examine any witnesses that may testify in this state, to meet opposing evidence, and to oppose with evidence. Thus the requirements of due process are complied with. *State ex rel. Terry v. Terry*, 1969-NMSC-040, 80 N.M. 185, 453 P.2d 206.

Status as Indian not shield where significant contacts with other jurisdiction. — Where the totality of the marriage relationship shows significant contacts with jurisdictions other than the Zuni reservation, appellant cannot interpose his special status as an Indian as a shield to protect him from obligations that result from his marriage to appellee which had been entered into off the reservation. *Natewa v. Natewa*, 1972-NMSC-049, 84 N.M. 69, 499 P.2d 691 (decided under former law).

All that was needed for proper jurisdiction in proceeding under former act was the presence of the husband or father in the responding state, the presence of the child or the wife in another state, and the existence of a duty of support on the part of the father under the laws of the responding state. *Natewa v. Natewa*, 1972-NMSC-049, 84 N.M. 69, 499 P.2d 691 (decided under prior law).

Enforcement of provisions does not interfere with Indian government or federal grant. — The enforcement of the New Mexico Revised Uniform Reciprocal Enforcement of Support Act does not interfere with the internal self-government of the Zuni tribe or contravene an express federal grant or reservation by placing jurisdiction of actions to enforce support obligations in the district courts of New Mexico rather than tribal courts, as the support obligation here arises from the marital relationship between appellant and appellee. *Natewa v. Natewa*, 1972-NMSC-049, 84 N.M. 69, 499 P.2d 691 (decided under prior law).

Extradition provisions apply to reciprocal support provisions. — The real effect of former 40-6-5 NMSA 1978 was to make 31-4-6 NMSA 1978 specifically applicable to extradition for the crime of nonsupport. Under this section, in considering a requested extradition, the governor of this state need not look to see whether the demanding state has a specific statute making it a crime to fail to support a wife or child when the "failure" by the accused occurs when he is beyond the borders of the demanding state. 1953 Op. Att'y Gen. No. 53-5713 (rendered under former law).

40-6A-202. Duration of personal jurisdiction.

Personal jurisdiction acquired by a tribunal of this state in a proceeding under the Uniform Interstate Family Support Act or other law of this state relating to a support order continues as long as a tribunal of this state has continuing, exclusive jurisdiction to modify its order or continuing jurisdiction to enforce its order as provided by Sections 40-6A-205, 40-6A-206 and 40-6A-211 NMSA 1978.

History: Laws 1994, ch. 107, § 202; repealed and reenacted by Laws 2005, ch. 166, § 4.

ANNOTATIONS

Repeal and reenactments. — Laws 2005, ch. 166, § 4 repealed and reenacted 40-6A-202 NMSA 1978, effective June 17, 2005.

PART B
PROCEEDINGS INVOLVING TWO OR MORE STATES

40-6A-203. Initiating and responding tribunal of state.

Pursuant to the Uniform Interstate Family Support Act, a tribunal of this state may serve as an initiating tribunal to forward proceedings to a tribunal of another state or a foreign country and as a responding tribunal for proceedings initiated in another state or a foreign country.

History: Laws 1994, ch. 107, § 203; 1997, ch. 9, § 3; 2011, ch. 159, § 6.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included foreign countries within the scope of this section.

The 1997 amendment, effective July 1, 1997, deleted "this" following "of" from the section heading.

40-6A-204. Simultaneous proceedings.

A. A tribunal of this state may exercise jurisdiction to establish a support order if the petition or comparable pleading is filed after a petition or comparable pleading is filed in another state or a foreign country only if:

(1) the petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state or the foreign country for filing a responsive pleading challenging the exercise of jurisdiction by the other state or the foreign country;

(2) the contesting party timely challenges the exercise of jurisdiction in the other state or the foreign country; and

(3) if relevant, this state is the home state of the child.

B. A tribunal of this state may not exercise jurisdiction to establish a support order if the petition or comparable pleading is filed before a petition or comparable pleading is filed in another state or a foreign country if:

(1) the petition or comparable pleading in the other state or foreign country is filed before the expiration of the time allowed in this state for filing a responsive pleading challenging the exercise of jurisdiction by this state;

(2) the contesting party timely challenges the exercise of jurisdiction in this state; and

(3) if relevant, the other state or foreign country is the home state of the child.

History: Laws 1994, ch. 107, § 204; 2005, ch. 166, § 5; 2011, ch. 159, § 7.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included foreign countries within the scope of this section.

The 2005 amendment, effective June 17, 2005, deleted "in another state" from the catchline.

40-6A-205. Continuing, exclusive jurisdiction to modify child-support order.

A. A tribunal of this state that has issued a child-support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child-support order if the order is the controlling order and:

(1) at the time of the filing of a request for modification this state is the residence of the obligor, the individual obligee or the child for whose benefit the support order is issued; or

(2) even if this state is not the residence of the obligor, the individual obligee or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order.

B. A tribunal of this state that has issued a child-support order consistent with the law of this state may not exercise continuing, exclusive jurisdiction to modify the order if:

(1) all of the parties who are individuals file consent in a record with the tribunal of this state that a tribunal of another state that has jurisdiction over at least one of all the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction; or

(2) its order is not the controlling order.

C. If a tribunal of another state has issued a child-support order pursuant to the Uniform Interstate Family Support Act or a law substantially similar to that act that modifies a child-support order of a tribunal of this state, tribunals of this state shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state.

D. A tribunal of this state that lacks continuing, exclusive jurisdiction to modify a child-support order may serve as an initiating tribunal to request a tribunal of another state to modify a support order issued in that state.

E. A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

History: Laws 1994, ch. 107, § 205; 1997, ch. 9, § 4; 2005, ch. 166, § 6; 2011, ch. 159, § 8.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, provided in Subsection (a) that a tribunal in New Mexico that has issued a child-support order has continuing jurisdiction to modify the order it the order is the controlling order; deleted the former language in Subsection (a)(2) and provided that a New Mexico tribunal has continuing jurisdiction even if the obligor, obligee or the child do not reside in New Mexico but consent to the jurisdiction of the tribunal to modify the child support order; deleted in Subsection (b) the qualification that the order has been modified by a tribunal in another state; deleted former Subsection (c) which provided for the loss of jurisdiction by a New Mexico tribunal if the tribunal of another state modified a child-support order of New Mexico; added Subsection (b)(1) and (2) to provide that a New Mexico tribunal does not have continuing exclusive jurisdiction to modify a child-support order if all parties file a consent that a tribunal of another state that has jurisdiction of one party may modify the order and assume jurisdiction or the order is not the controlling order; provided in Subsection (c) that if a tribunal of another state has issued a child-support order under the Uniform Interstate Family Support Act or a similar act that modifies a child-support order of New Mexico, then the New Mexico tribunals shall recognize the jurisdiction of the tribunal of the other state; added Subsection (d) to provide that a tribunal in New Mexico that lacks jurisdiction to modify a child-support order may serve as an initiating tribunal to request a tribunal of another state to modify the support order issued in that state; and deleted former Subsection (f) which provided that a tribunal in New Mexico that has issued a child-support order has jurisdiction over a spousal support order but may not modify a spousal support order issued by another state.

The 1997 amendment, effective July 1, 1997, substituted "all of the parties who are individuals have" for "each individual party has" and "consents" for "consent" near the beginning of Subsection (a)(2).

Law of state where respondent present applicable. — Under former 40-6-4 and 40-6-7 NMSA 1978, the duty of support imposed by the laws of this state or the laws of the state where respondent was present for any period during which support is sought are binding upon the respondent regardless of the presence or residence or the petitioner-obligee. *State ex rel. Alleman v. Shoats*, 1984-NMCA-072, 101 N.M. 512, 684 P.2d 1177 (decided under former law).

No absolute right of obligee to choose applicable law. — The choice of law provision in the former reciprocal enforcement act was intended to prevent the obligee from having the absolute right to choose the applicable law as her interest might dictate. *Altman v. Altman*, 1984-NMCA-060, 101 N.M. 380, 683 P.2d 62 (decided under former law).

40-6A-206. Continuing jurisdiction to enforce child-support order.

A. A tribunal of this state that has issued a child-support order consistent with the law of this state may serve as an initiating tribunal to request a tribunal of another state to enforce:

(1) the order if the order is the controlling order and has not been modified by a tribunal of another state that assumed jurisdiction pursuant to the Uniform Interstate Family Support Act; or

(2) a money judgment for arrears of support and interest on the order accrued before a determination that an order of a tribunal of another state is the controlling order.

B. A tribunal of this state having continuing jurisdiction over a support order may act as a responding tribunal to enforce the order.

History: Laws 1994, ch. 107, § 206; 2005, ch. 166, § 7; 2011, ch. 159, § 9.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, added Subsections (a)(1) and (2) to provide that a New Mexico tribunal may request a tribunal of another state to enforce a New Mexico child-support order or a money judgment for arrears of support; deleted language in Subsection (b) which provided that if a party did not reside in the issuing state, then a tribunal could receive evidence or discovery from another state; and deleted Subsection (c) which provided that a New Mexico tribunal that lacks jurisdiction over a spousal order cannot serve as a responding tribunal to modify the other of another state.

PART C
RECONCILIATION WITH ORDERS OF OTHER STATES

40-6A-207. Determination of controlling child-support order.

A. If a proceeding is brought pursuant to the Uniform Interstate Family Support Act and only one tribunal has issued a child-support order, the order of that tribunal controls and shall be so recognized.

B. If a proceeding is brought pursuant to the Uniform Interstate Family Support Act and two or more child-support orders have been issued by tribunals of this state, another state or a foreign country with regard to the same obligor and same child, a tribunal of this state having personal jurisdiction over both the obligor and individual obligee shall apply the following rules and by order shall determine which order controls and must be recognized:

(1) if only one of the tribunals would have continuing, exclusive jurisdiction pursuant to the Uniform Interstate Family Support Act, the order of that tribunal controls;

(2) if more than one of the tribunals would have continuing, exclusive jurisdiction pursuant to the Uniform Interstate Family Support Act:

(a) an order issued by a tribunal in the current home state of the child controls; or

(b) if an order has not been issued in the current home state of the child, the order most recently issued controls; and

(3) if none of the tribunals would have continuing, exclusive jurisdiction pursuant to the Uniform Interstate Family Support Act, the tribunal of this state shall issue a child-support order, which controls.

C. If two or more child-support orders have been issued for the same obligor and same child upon request of a party who is an individual or that is a support enforcement agency, a tribunal of this state having personal jurisdiction over both the obligor and the obligee who is an individual shall determine which order controls pursuant to Subsection B of this section. The request may be filed with a registration for enforcement or registration for modification pursuant to Sections 40-6A-601 through 40-6A-615 NMSA 1978, or may be filed as a separate proceeding.

D. A request to determine which is the controlling order shall be accompanied by a copy of every child-support order in effect and the applicable record of payments. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.

E. The tribunal that issued the controlling order under Subsection A, B or C of this section has continuing jurisdiction to the extent provided in Section 40-6A-205 or 40-6A-206 NMSA 1978.

F. A tribunal of this state that determines by order which is the controlling order pursuant to Paragraph (1) or (2) of Subsection B or Subsection C of this section or that issues a new controlling order pursuant to Paragraph (3) of Subsection B of this section shall state in that order:

(1) the basis on which the tribunal made its determination;

(2) the amount of prospective support, if any; and

(3) the total amount of consolidated arrears and accrued interest, if any, under all of the orders after all payments made are credited as provided by Section 40-6A-209 NMSA 1978.

G. Within thirty days after issuance of an order determining which is the controlling order, the party obtaining the order shall file a certified copy of it in each tribunal that issued or registered an earlier order of child support. A party or support enforcement agency obtaining the order that fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order.

H. An order that has been determined to be the controlling order, or a judgment for consolidated arrears of support and interest, if any, made pursuant to this section must be recognized in proceedings under the Uniform Interstate Family Support Act.

History: Laws 1994, ch. 107, § 207; 1997, ch. 9, § 5; 2005, ch. 166, § 8; 2011, ch. 159, § 10.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included tribunals of foreign countries within the scope of Subsection B.

The 2005 amendment, effective June 17, 2005, provided in Subsection (b) that in a proceeding under the Uniform Interstate Family Support Act, if more than one child-support order has been issued with regard to the same obligor and the same child, then a New Mexico tribunal that has personal jurisdiction of the obligor and the obligee shall

apply the rules in Subsection (b) to determine which order controls; provided in Subsection (c) that if more than one child-support order has been issued with regard to the same obligor and the same child, then upon request of a party or a support enforcement agency, a New Mexico tribunal which has personal jurisdiction over the obligor and the obligee shall determine which order controls and that the request may be filed with a registration for enforcement or modification or as a separate proceeding; added Subsection (d) to provide that a request to determine a controlling order shall be accompanied by a copy of every child-support order in effect and payment records; added the reference to Section 40-6A-206 NMSA 1978 in Subsection (e); added Subsections (f)(2) and (3) to require that an order shall state the amount of the prospective support and the amount of arrears and accrued interest; provided in Subsection (g) that a support enforcement agency that fails to file a copy of the order as required may be subject to sanctions; and added Subsection (h) to provide that a controlling order or a judgment for consolidated arrears of support and interest must be recognized in a proceeding under the Uniform Interstate Family Support Act.

The 1997 amendment, effective July 1, 1997, substituted "controlling child-support order" for "child support orders" in the section heading and rewrote this section to the extent that a detailed comparison is impracticable.

Laws of New Mexico have long required father to support children and such a duty is emphasized under the provisions of the Reciprocal Enforcement Act. *State ex rel. Terry v. Terry*, 1969-NMSC-040, 80 N.M. 185, 453 P.2d 206 (decided under prior law).

Law of state where respondent present applicable. — Under former 40-6-4 and 40-6-7 NMSA 1978, the duty of support imposed by the laws of this state or the laws of the state where respondent was present for any period during which support is sought were binding upon the respondent regardless of the presence or residence of the petitioner-obligee. *State ex rel. Alleman v. Shoats*, 1984-NMCA-072, 101 N.M. 512, 684 P.2d 1177 (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and effect of provision of Uniform Reciprocal Enforcement of Support Act that no support order shall supersede or nullify any other order, 31 A.L.R.4th 347.

Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

40-6A-208. Child support orders for two or more obligees.

In responding to registrations or petitions for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which was issued by a tribunal of another state or a foreign country, a tribunal of this state shall enforce those orders in the same manner as if the orders had been issued by a tribunal of this state.

History: Laws 1994, ch. 107, § 208; 2005, ch. 166, § 9; 2011, ch. 159, § 11.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included tribunals of foreign countries within the scope of this section.

The 2005 amendment, effective June 17, 2005, deleted "multiple" in two places.

40-6A-209. Credit for payments.

A tribunal of this state shall credit amounts collected for a particular period pursuant to any child-support order against the amounts owed for the same period under any other child-support order for support of the same child issued by a tribunal of this or another state or a foreign country.

History: Laws 1994, ch. 107, § 209; 2005, ch. 166, § 10; 2011, ch. 159, § 12.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included tribunals of foreign countries within the scope of this section.

The 2005 amendment, effective June 17, 2005, provided that a New Mexico tribunal shall credit amounts collected for a particular period against the amount owed for the same period under any other child-support order for the same child.

40-6A-210. Application of the Uniform Interstate Family Support Act to a nonresident subject to personal jurisdiction.

A tribunal of this state exercising personal jurisdiction over a nonresident in a proceeding pursuant to the Uniform Interstate Family Support Act, pursuant to other law of this state relating to a support order or recognizing a foreign support order may receive evidence from outside this state pursuant to Section 40-6A-316 NMSA 1978, communicate with a tribunal outside this state pursuant to Section 40-6A-317 NMSA 1978 and obtain discovery through a tribunal outside this state pursuant to Section 40-

6A-318 NMSA 1978. In all other respects, Sections 40-6A-301 through 40-6A-616 NMSA 1978 do not apply and the tribunal shall apply the procedural and substantive law of this state.

History: Laws 2005, ch. 166, § 11; 2011, ch. 159, § 13.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, narrowed the scope of the inapplicable sections to Sections 40-6A-301 through 40-6A-616 NMSA 1978.

40-6A-211. Continuing, exclusive jurisdiction to modify spousal-support order.

A. A tribunal of this state issuing a spousal-support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal-support order through the existence of the support obligation.

B. A tribunal of this state may not modify a spousal-support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order pursuant to the law of that state or foreign country.

C. A tribunal of this state that has continuing, exclusive jurisdiction over a spousal-support order may serve as:

(1) an initiating tribunal to request a tribunal of another state to enforce the spousal-support order issued in this state; or

(2) a responding tribunal to enforce or modify its own spousal-support order.

History: Laws 2005, ch. 166, § 12; 2011, ch. 159, § 14.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included tribunals of foreign countries within the scope of Subsection B.

Collateral attack on foreign order of child support. — Where, in a neglect case, the New Mexico court ordered the father to reimburse the children, youth and families department for child support due for the time the child was in the custody of the department and dismissed the mother's claim for child support from the father and the mother then invoked the jurisdiction of the Texas court to establish child support from the father, the human services department [health care authority department] was precluded from collaterally attacking the Texas order in the New Mexico neglect case and from relitigating the mother's claims of child support from the father. *State ex rel. CYFD v. Andree G.*, 2007-NMCA-156, 143 N.M. 195, 174 P.3d 531.

ARTICLE 3
CIVIL PROVISIONS OF GENERAL APPLICATION

40-6A-301. Proceedings under the Uniform Interstate Family Support Act.

A. Except as otherwise provided in the Uniform Interstate Family Support Act, Sections 40-6A-301 through 40-6A-319 NMSA 1978 apply to all proceedings pursuant to that act.

B. An individual petitioner or a support enforcement agency may initiate a proceeding authorized pursuant to the Uniform Interstate Family Support Act by filing a petition in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state or a foreign country that has or can obtain personal jurisdiction over the respondent.

History: Laws 1994, ch. 107, § 301; 2005, ch. 166, § 13; 2011, ch. 159, § 15.

ANNOTATIONS

Cross references. — For service of process outside this state, *see* Paragraph M of Rule 1-004 NMRA.

For depositions within this state in an action pending in another state, *see* Paragraph B(6) of Rule 1-045 NMRA.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included tribunals of foreign countries within the scope of Subsection B.

The 2005 amendment, effective June 17, 2005, changed the reference in Subsection (a) from "this article" to "Sections 40-6A-301 through 40-6A-319 NMSA 1978"; and deleted former Subsection (b) which listed the proceeding that were provided in the Uniform Interstate Family Support Act.

40-6A-302. Proceeding by minor parent.

A minor parent, or a guardian or other legal representative of a minor parent, may maintain a proceeding on behalf of or for the benefit of the minor's child.

History: Laws 1994, ch. 107, § 302; 2005, ch. 166, § 14.

ANNOTATIONS

Cross references. — For age of majority, *see* 28-6-1 NMSA 1978.

For rules of procedure, *see* the Rules of Civil Procedure for the District Courts, Rule 1-001 NMRA.

The 2005 amendment, effective June 17, 2005, in the catchline changed "Action" to "Proceeding".

40-6A-303. Application of law of state.

Except as otherwise provided by the Uniform Interstate Family Support Act, a responding tribunal of this state shall:

A. apply the procedural and substantive law generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings; and

B. determine the duty of support and the amount payable in accordance with the law and support guidelines of this state.

History: Laws 1994, ch. 107, § 303; 1997, ch. 9, § 6; 2005, ch. 166, § 15; 2011, ch. 159, § 16.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For

provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, deleted the provision in Subsection (1) that a responding tribunal shall apply the rules on choice of law.

The 1997 amendment, effective July 1, 1997, deleted "this" preceding "state" in the section heading.

40-6A-304. Duties of initiating tribunal.

A. Upon the filing of a petition authorized pursuant to the Uniform Interstate Family Support Act, an initiating tribunal of this state shall forward the petition and its accompanying documents:

(1) to the responding tribunal or appropriate support enforcement agency in the responding state; or

(2) if the identity of the responding tribunal is unknown, to the state information agency of the responding state with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged.

B. If requested by the responding tribunal, a tribunal of this state shall issue a certificate or other document and make findings required by the law of the responding state. If the responding state is in a foreign country, upon request, the tribunal of this state shall specify the amount of support sought, convert that amount into the equivalent amount in the foreign currency under applicable official or market exchange rate as publicly reported and provide any other documents necessary to satisfy the requirements of the responding foreign tribunal.

History: Laws 1994, ch. 107, § 304; 1997, ch. 9, § 7; 2005, ch. 166, § 16; 2011, ch. 159, § 17.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included foreign tribunals within the scope of Subsection B.

The 2005 amendment, effective June 17, 2005, deleted the requirement that three copies of the petition be forwarded to the responding tribunal in Subsection (a); deleted the qualification in Subsection (b) that the responding state not have enacted the Uniform Interstate Family Support Act or a similar law or procedure; provided that upon request of a responding tribunal, a New Mexico tribunal shall issue a certificate or document and make finding required by the other state; and provided that if the responding state is a foreign country or political subdivision that, upon request, a New Mexico tribunal shall convert the amount of child support into the equivalent amount of foreign currency under the exchange rate that is publicly reported

The 1997 amendment, effective July 1, 1997, designated the existing language as Subsection (a) and added Subsection (b).

40-6A-305. Duties and powers of responding tribunal.

A. When a responding tribunal of this state receives a petition or comparable pleading from an initiating tribunal or directly pursuant to Subsection B of Section 40-6A-301 NMSA 1978, it shall cause the petition or pleading to be filed and notify the petitioner where and when it was filed.

B. A responding tribunal of this state, to the extent not prohibited by other law, may do one or more of the following:

(1) establish or enforce a support order, modify a child-support order, determine the controlling child-support order or determine parentage of a child;

(2) order an obligor to comply with a support order, specifying the amount and the manner of compliance;

(3) order income withholding;

(4) determine the amount of any arrearage and specify a method of payment;

(5) enforce orders by civil or criminal contempt, or both;

(6) set aside property for satisfaction of the support order;

(7) place liens and order execution on the obligor's property;

(8) order an obligor to keep the tribunal informed of the obligor's current residential address, electronic mail address, telephone number, employer, address of employment and telephone number at the place of employment;

(9) issue a bench warrant for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the bench warrant in any local and state computer systems for criminal warrants;

(10) order the obligor to seek appropriate employment by specified methods;

(11) award reasonable attorney's fees and other fees and costs; and

(12) grant any other available remedy.

C. A responding tribunal of this state shall include in a support order issued pursuant to the Uniform Interstate Family Support Act, or in the documents accompanying the order, the calculations on which the support order is based.

D. A responding tribunal of this state may not condition the payment of a support order issued pursuant to the Uniform Interstate Family Support Act upon compliance by a party with provisions for visitation.

E. If a responding tribunal of this state issues an order pursuant to the Uniform Interstate Family Support Act, the tribunal shall send a copy of the order to the petitioner and the respondent and to the initiating tribunal, if any.

F. If requested to enforce a support order, arrears or judgment or modify a support order stated in a foreign currency, a responding tribunal of this state shall convert the amount stated in the foreign currency to the equivalent amount in dollars under applicable official or market exchange rate as publicly reported.

History: Laws 1994, ch. 107, § 305; 1997, ch. 9, § 8; 2005, ch. 166, § 17; 2011, ch. 159, § 18.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, authorized the court to order an obligor to keep the court informed of the obligor's electronic mail address.

The 2005 amendment, effective June 17, 2005, required in Subsection (b) that a New Mexico tribunal shall, to the extent not prohibited by other law to determine the controlling child-support order and added Subsection (f) to provide that if requested to enforce or modify an order or judgment expressed in a foreign currency, a New Mexico tribunal shall convert the amount to the equivalent amount in dollars under an exchange rate as publicly reported.

The 1997 amendment, effective July 1, 1997, in Subsection (a), substituted "Subsection (c) of Section 40-6A-301 NMSA 1978" for "Section 301(c) of the Uniform

Interstate Family Support Act" and deleted "by first class mail" following "the petitioner"; and in Subsection (e) deleted "by first class mail" preceding "the petitioner".

Responding state not limited to enforcement of support order. — Power of district court in this state acting as responding state is not limited to enforcement of support order of initiating state, so that New Mexico district court had jurisdiction to grant judgment for child support arrearages and order defendant to pay child support even though initiating state's decree may not be entitled to full faith and credit because it lacked personal jurisdiction over defendant. *State ex rel. Alleman v. Shoats*, 1984-NMCA-072, 101 N.M. 512, 684 P.2d 1177 (decided under prior law).

Provisions for receipt of evidence of out-of-state obligor's defenses. — Where the obligor of an out-of-state child support obligation has provided evidence that constitutes a strong and convincing defense to the payment of support, the district court may order that the case be continued to allow the obligee the opportunity to provide further evidence, either by appearing in person or by providing deposition testimony. Furthermore, the district court may order that if the obligee chooses to provide evidence by a deposition, then the petitioner must pay the costs of the obligor's attorney to travel to an out-of-state deposition. It would be unjust and inequitable to limit interrogation to written questions under these circumstances. *State ex rel. California v. Ramirez*, 1982-NMSC-141, 99 N.M. 92, 654 P.2d 545 (decided under prior law).

Jurisdictional requisites in responding state. — In a support proceeding initiated in another state and filed in district court in New Mexico as the responding state, all that is needed for proper jurisdiction is the presence of the person owing support in New Mexico, the presence of the child or person owed support in another state, and the existence of a duty of support under the laws of the responding state. *State ex rel. Alleman v. Shoats*, 1984-NMCA-072, 101 N.M. 512, 684 P.2d 1177 (decided under prior law).

Responding state may make independent finding as to necessary support. — The responding state has the authority to make an independent finding on the amount of support necessary for the maintenance of a minor child, regardless of the amount which may have been set by another court, and has discretionary equitable power to make an order of child support retroactive to the date a complaint is received and filed with the responding state. *State ex rel. Alleman v. Shoats*, 1984-NMCA-072, 101 N.M. 512, 684 P.2d 1177 (decided under prior law).

40-6A-306. Inappropriate tribunal.

If a petition or comparable pleading is received by an inappropriate tribunal of this state, the tribunal shall forward the pleading and accompanying documents to an appropriate tribunal of this state or another state and notify the petitioner where and when the pleading was sent.

History: Laws 1994, ch. 107, § 306; 1997, ch. 9, § 9; 2005, ch. 166, § 18; 2011, ch. 159, § 19.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made a stylistic change.

The 2005 amendment, effective June 17, 2005, changed "it" to "the tribunal".

The 1997 amendment, effective July 1, 1997, deleted "by first class mail" following "the petitioner".

40-6A-307. Duties of support enforcement agency.

A. A support enforcement agency of this state, upon request, shall provide services to a petitioner in a proceeding pursuant to the Uniform Interstate Family Support Act.

B. A support enforcement agency of this state that is providing services to the petitioner shall:

(1) take all steps necessary to enable an appropriate tribunal of this state, another state or a foreign country to obtain jurisdiction over the respondent;

(2) request an appropriate tribunal to set a date, time and place for a hearing;

(3) make a reasonable effort to obtain all relevant information, including information as to income and property of the parties;

(4) within two days, exclusive of Saturdays, Sundays and legal holidays, after receipt of a written notice in a record from an initiating, responding or registering tribunal, send a copy of the notice to the petitioner;

(5) within two days, exclusive of Saturdays, Sundays and legal holidays, after receipt of a written communication in a record from the respondent or the respondent's attorney, send a copy of the communication to the petitioner; and

(6) notify the petitioner if jurisdiction over the respondent cannot be obtained.

C. A support enforcement agency of this state that requests registration of a child-support order in this state for enforcement or for modification shall make reasonable efforts:

(1) to ensure that the order to be registered is the controlling order; or

(2) if two or more child-support orders exist and the identity of the controlling order has not been determined, to ensure that a request for such a determination is made in a tribunal having jurisdiction to do so.

D. A support enforcement agency of this state that requests registration and enforcement of a support order, arrears or judgment stated in a foreign currency shall convert the amounts stated in the foreign currency into the equivalent amounts in dollars under the applicable official or market exchange rate as publicly reported.

E. A support enforcement agency of the state shall issue or request a tribunal of this state to issue a child-support order and an income-withholding order that redirect payment of current support, arrears and interest if requested to do so by a support enforcement agency of another state pursuant to Section 40-6A-319 NMSA 1978.

F. The Uniform Interstate Family Support Act does not create or negate a relationship of attorney and client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency.

History: Laws 1994, ch. 107, § 307; 1997, ch. 9, § 10; 2005, ch. 166, § 19; 2011, ch. 159, § 20.

ANNOTATIONS

Cross references. — For the health care authority department, *see* 9-8-1 to 9-8-12 NMSA 1978.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included tribunals of another state or a foreign country within the scope of Subsection B.

The 2005 amendment, effective June 17, 2005, added Subsection (c) to provide that a New Mexico support enforcement agency that requests registration of a child-support order shall ensure that the order is the controlling order and that if there are more that one orders, ensure that a request is made to determine the identity of the controlling

order; added Subsection (d) to provide that a New Mexico support enforcement agency that requests the registration and enforcement of an order or judgment stated in a foreign currency shall convert the amount to the equivalent amount in dollars under an exchange rate as publicly reported; and added Subsection (e) to provide that a New Mexico support enforcement agency shall issue or request a New Mexico tribunal to issue a child-support order and an income-withholding order that redirects payment if requested by a support enforcement agency of another state.

The 1997 amendment, effective July 1, 1997, deleted "by first class mail" following "copy of the notice" in Paragraph (b)(4), and deleted "by first class mail" following "a copy of the communication" in Paragraph (b)(5).

The human services department [health care authority department] has the authority to bring an action in district court under the Uniform Interstate Family Support Act to modify the child support obligation of a non-custodial parent residing in another state. *State ex rel., Washington HSD v. Jackson*, 2007-NMCA-061, 141 N.M. 647, 159 P.3d 1132.

40-6A-308. Duty of attorney general.

A. If the attorney general determines that the support enforcement agency is neglecting or refusing to provide services to an individual, the attorney general may order the agency to perform its duties pursuant to the Uniform Interstate Family Support Act or may provide those services directly to the individual.

B. The attorney general may determine that a foreign country has established a reciprocal arrangement for child support with this state and take appropriate action for notification of the determination.

History: Laws 1994, ch. 107, § 308; 2005, ch. 166, § 20; 2011, ch. 159, § 21.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, eliminated political subdivisions from the scope of Subsection B.

The 2005 amendment, effective June 17, 2005, added Subsection (b) to provide that the attorney general may determine that a foreign country or political subdivision has established a reciprocal arrangement for child support with New Mexico.

40-6A-309. Private counsel.

An individual may employ private counsel to represent the individual in proceedings authorized by the Uniform Interstate Family Support Act.

History: Laws 1994, ch. 107, § 309.

40-6A-310. Duties of state information agency.

A. The human services department [health care authority department] is the state information agency pursuant to the Uniform Interstate Family Support Act.

B. The state information agency shall:

(1) compile and maintain a current list, including addresses, of the tribunals in this state that have jurisdiction pursuant to the Uniform Interstate Family Support Act and any support enforcement agencies in this state and transmit a copy to the state information agency of every other state;

(2) maintain a register of names and addresses of tribunals and support enforcement agencies received from other states;

(3) forward to the appropriate tribunal in the county in this state in which the obligee who is an individual or the obligor resides, or in which the obligor's property is believed to be located, all documents concerning a proceeding pursuant to the Uniform Interstate Family Support Act received from another state or a foreign country; and

(4) obtain information concerning the location of the obligor and the obligor's property within this state not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers and examination of governmental records, including, to the extent not prohibited by other law, those relating to real property, vital statistics, law enforcement, taxation, motor vehicles, driver's licenses and social security.

History: Laws 1994, ch. 107, § 310; 2005, ch. 166, § 21; 2011, ch. 159, § 22.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18,

2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included documents from another state or a foreign country within the scope of Subsection B.

The 2005 amendment, effective June 17, 2005, provided in Subsection (b)(2) that the state information agency shall maintain a register of the names and address of tribunals and support agencies of other states and added the qualification in Subsection (b)(3) that the obligee must be an individual.

40-6A-311. Pleadings and accompanying documents.

A. In a proceeding pursuant to the Uniform Interstate Family Support Act, a petitioner seeking to establish a support order, to determine parentage of a child or to register and modify a support order of a tribunal of another state or a foreign country shall file a petition. Unless otherwise ordered pursuant to Section 40-6A-312 NMSA 1978, the petition or accompanying documents shall provide, so far as known, the name, residential address and social security numbers of the obligor and the obligee or the parent and alleged parent and the name, sex, residential address, social security number and date of birth of each child for whose benefit support is sought or whose parentage is to be determined. Unless filed at the time of registration, the petition shall be accompanied by a copy of any support order known to have been issued by another tribunal. The petition may include any other information that may assist in locating or identifying the respondent.

B. The petition shall specify the relief sought. The petition and accompanying documents shall conform substantially with the requirements imposed by the forms mandated by federal law for use in cases filed by a support enforcement agency.

History: Laws 1994, ch. 107, § 311; 2005, ch. 166, § 22; 2011, ch. 159, § 23.

ANNOTATIONS

Cross references. — For New Mexico Uniform Parentage Act, *see* 40-11A-1 NMSA 1978 et seq.

For rules of procedure, *see* Rule 1-001 NMRA.

For petition to establish parentage, *see* Form 4A-402 NMRA.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For

provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included tribunals of a foreign country within the scope of Subsection A.

The 2005 amendment, effective June 17, 2005, provided in Subsection (a) that in a proceeding under the Uniform Interstate Family Support Act, a petitioner seeking to register and modify a support order of another state shall file a petition; provided that the petition provide name, residential address and social security numbers of the parent and alleged parent for whose benefit support is sought or whose parentage is to be determined; and provided that a copy of any support order known to have been issued by another tribunal shall be filed.

40-6A-312. Nondisclosure of information in exceptional circumstances.

If a party alleges in an affidavit or a pleading under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure or specific identifying information, that information shall be sealed and may not be disclosed to the other party or the public. After a hearing in which a tribunal takes into consideration the health, safety or liberty of the party or child, the tribunal may order disclosure of information that the tribunal determines to be the interest of justice.

History: Laws 1994, ch. 107, § 312; 2005, ch. 166, § 23.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, deleted all former provisions which provided that a tribunal could order that the address of a child or party or other identifying information not be disclosed in a document filed in a proceeding under the Uniform Interstate Family Support Act and added a provision requiring a tribunal to seal information if a party alleges that the health, safety or liberty of a party or a child will be jeopardized by disclosure of information and that permits the tribunal to disclose information after a hearing.

40-6A-313. Costs and fees.

A. The petitioner may not be required to pay a filing fee or other costs.

B. If an obligee prevails, a responding tribunal of this state may assess against an obligor filing fees, reasonable attorney 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 or foreign country, except as provided by other law. Attorney 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.

C. The tribunal shall order the payment of costs and reasonable attorney fees if it determines that a hearing was requested primarily for delay. In a proceeding pursuant to Sections 40-6A-601 through 40-6A-616 NMSA 1978, a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change.

History: Laws 1994, ch. 107, § 313; 2005, ch. 166, § 24; 2011, ch. 159, § 24.

ANNOTATIONS

Cross references. — For costs and attorney fees, *see* Rule 1-054 NMRA.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included foreign countries within the scope of Subsection B and broadened the scope of proceedings in which a hearing may be presumed to have been requested primarily for delay to Sections 40-6A-601 through 40-6A-616 NMSA 1978.

The 2005 amendment, effective June 17, 2005, changed the statutory reference in Subsection (c) to "Sections 40-6A-601 through 40-6A-615 NMSA 1978".

40-6A-314. Limited immunity of petitioner.

A. Participation by a petitioner in a proceeding pursuant to the Uniform Interstate Family Support Act before a responding tribunal, whether in person, by private attorney or through services provided by the support enforcement agency, does not confer personal jurisdiction over the petitioner in another proceeding.

B. A petitioner is not amenable to service of civil process while physically present in this state to participate in a proceeding pursuant to the Uniform Interstate Family Support Act.

C. The immunity granted by this section does not extend to civil litigation based on acts unrelated to a proceeding pursuant to the Uniform Interstate Family Support Act committed by a party while present in this state to participate in the proceeding.

History: Laws 1994, ch. 107, § 314; 2005, ch. 166, § 25; 2011, ch. 159, § 25.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, added a reference to the Uniform Interstate Family Support Act in Subsection (a).

40-6A-315. Nonparentage as defense.

A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding pursuant to the Uniform Interstate Family Support Act.

History: Laws 1994, ch. 107, § 315; 2011, ch. 159, § 26.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made a stylistic change.

40-6A-316. Special rules of evidence and procedure.

A. The physical presence of a nonresident party who is an individual in a tribunal of this state is not required for the establishment, enforcement or modification of a support order or the rendition of a judgment determining parentage of a child.

B. An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them that would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this state.

C. A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it and is admissible to show whether payments were made.

D. Copies of bills for testing for parentage of a child and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least ten days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary and customary.

E. Documentary evidence transmitted from outside this state to a tribunal of this state by telephone, telecopier or other electronic means that do not provide an original record may not be excluded from evidence on an objection based on the means of transmission.

F. In a proceeding pursuant to the Uniform Interstate Family Support Act, a tribunal of this state shall permit a party or witness residing outside this state to be deposed or to testify by telephone, audiovisual means or other electronic means at a designated tribunal or other location. A tribunal of this state shall cooperate with other tribunals in designating an appropriate location for the deposition or testimony.

G. If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

H. A privilege against disclosure of communications between spouses does not apply in a proceeding pursuant to the Uniform Interstate Family Support Act.

I. The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding pursuant to the Uniform Interstate Family Support Act.

J. A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child.

History: Laws 1994, ch. 107, § 316; 2005, ch. 166, § 26; 2011, ch. 159, § 27.

ANNOTATIONS

Cross references. — For New Mexico Rules of Evidence, *see* Rules 11-101 to 11-1102 NMRA.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included transmissions by other electronic means within the scope of Subsection E.

The 2005 amendment, effective June 17, 2005, provided in Subsection (a) that the physical presence of a nonresident party who is an individual is not required; deleted the provision that a verified petition is admissible in evidence and requires that documents be given under penalty of perjury to be admissible in evidence; and added Subsection (j) to provide that a voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage.

40-6A-317. Communications between tribunals.

A tribunal of this state may communicate with a tribunal outside this state in a record or by telephone, electronic mail or other means to obtain information concerning the laws, the legal effect of a judgment, decree or order of that tribunal and the status of a proceeding. A tribunal of this state may furnish similar information by similar means to a tribunal outside this state.

History: Laws 1994, ch. 107, § 317; 2005, ch. 166, § 27; 2011, ch. 159, § 28.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, permitted communications between tribunals by electronic mail.

The 2005 amendment, effective June 17, 2005, permitted a New Mexico tribunal to communicate with a tribunal in a foreign country or political subdivision to obtain information concerning the laws, legal effect of a judgment, order or decree of that tribunal and the status of a proceeding in the foreign country or political subdivision and may provide information to the tribunal of a foreign country or political subdivision.

40-6A-318. Assistance with discovery.

A tribunal of this state may:

A. request a tribunal outside this state to assist in obtaining discovery; and

B. upon request, compel a person over which it has jurisdiction to respond to a discovery order issued by a tribunal outside this state.

History: Laws 1994, ch. 107, § 318; 2011, ch. 159, § 29.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

40-6A-319. Receipt and disbursement of payments.

A. A support enforcement agency or tribunal of this state shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The agency or tribunal shall furnish to a requesting party or tribunal of another state or a foreign country a certified statement by the custodian of the record of the amounts and dates of all payments received.

B. If neither the obligor, nor the obligee who is an individual, nor the child resides in this state, upon request from the support enforcement agency of this state or another state, the support enforcement agency of this state or a tribunal of this state shall:

(1) direct that the support payment be made to the support enforcement agency in the state in which the obligee is receiving services; and

(2) issue and send to the obligor's employer a conforming income-withholding order or an administrative notice of change of payee, reflecting the redirected payments.

C. The support enforcement agency of this state receiving redirected payments from another state pursuant to a law similar to Subsection B of this section shall furnish to a requesting party or tribunal of the other state a certified statement by the custodian of the record of the amount and dates of all payments received.

History: Laws 1994, ch. 107, § 319; 2005, ch. 166, § 28; 2011, ch. 159, § 30.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included tribunals of foreign countries within the scope of Subsection A.

The 2005 amendment, effective June 17, 2005, added Subsection (b) to provide that if the obligor, obligee or child resides in New Mexico, then upon request of a support

enforcement agency, the New Mexico support agency or tribunal shall direct that support payments be made to the support enforcement agency and send to the obligor's employer a conforming income-withholding order or notice of change of payee and added Subsection (c) to provide that a New Mexico support enforcement agency that receives redirected payment from another state shall furnish to a requesting party or tribunal of the other state a statement of the amounts and dates of payments received.

ARTICLE 4
ESTABLISHMENT OF SUPPORT ORDER

40-6A-401. Establishment of support order.

A. If a support order entitled to recognition pursuant to the Uniform Interstate Family Support Act has not been issued, a responding tribunal of this state with personal jurisdiction over the parties may issue a support order if:

(1) the individual seeking the order resides outside this state; or

(2) the support enforcement agency seeking the order is located outside this state.

B. The tribunal may issue a temporary child support order if the tribunal determines that such an order is appropriate and the individual ordered to pay is:

(1) a presumed father of the child;

(2) petitioning to have his paternity adjudicated;

(3) identified as the father of the child through genetic testing;

(4) an alleged father who has declined to submit to genetic testing;

(5) shown by clear and convincing evidence to be the father of the child;

(6) an acknowledged father as provided by applicable state law;

(7) the mother of the child; or

(8) an individual who has been ordered to pay child support in a previous proceeding and the order has not been reversed or vacated.

C. Upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to Section 40-6A-305 NMSA 1978.

History: Laws 1994, ch. 107, § 401; 2005, ch. 166, § 29; 2011, ch. 159, § 31.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, deleted the former criteria for the issuance of a temporary child support order in Subsections (b)(1) through (3) and added new criteria in Subsections (b)(1) through (8).

40-6A-402. Proceeding to determine parentage.

A tribunal of this state authorized to determine parentage of a child may serve as a responding tribunal in a proceeding to determine parentage of a child brought pursuant to the Uniform Interstate Family Support Act or a law or procedure substantially similar to that act.

History: 1978 Comp., § 40-6A-402, enacted by Laws 2011, ch. 159, § 32.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 32 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

ARTICLE 5
DIRECT ENFORCEMENT OF ORDER OF ANOTHER STATE WITHOUT REGISTRATION

40-6A-501. Employer's receipt of income-withholding order of another state.

An 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.

History: Laws 1994, ch. 107, § 501; 1997, ch. 9, § 11; 2005, ch. 166, § 30.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, provided that an income-withholding order issued by another state may be sent by or on behalf of the obligee, or a support enforcement agency to the obligor's employer.

The 1997 amendment, effective July 1, 1997, substituted "Employer's receipt of" for "Recognition of" at the beginning of the section heading and rewrote this section to the extent that a detailed comparison is impracticable.

40-6A-502. Employer's compliance with income-withholding order of another state.

A. Upon receipt of an income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.

B. The employer shall treat an income-withholding order issued in another state that appears regular on its face as if it had been issued by a tribunal of this state.

C. Except as otherwise provided in Subsection D of this section and Section 40-6A-503 NMSA 1978, the employer shall withhold and distribute the funds as directed in the withholding order by complying with terms of the order that specify:

(1) the duration and amount of periodic payments of current child support, stated as a sum certain;

(2) the person designated to receive payments and the address to which the payments are to be forwarded;

(3) medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;

(4) the amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal and the obligee's attorney, stated as sums certain; and

(5) the amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

D. An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:

(1) the employer's fee for processing an income-withholding order;

(2) the maximum amount permitted to be withheld from the obligor's income; and

(3) the times within which the employer shall implement the withholding order and forward the child-support payment.

History: Laws 1997, ch. 9, § 12; 2005, ch. 166, § 31; 2011, ch. 159, § 33.

ANNOTATIONS

Repeals and reenactments. — Laws 1997, ch. 9, § 12, repealed 40-6A-502 NMSA 1978, as enacted by Laws 1994, ch. 107, § 502, and enacted the above section, effective July 1, 1997.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, corrected the spelling of "withholding" in Subsections (a) and (b) and deleted "or agency" in Subsection (c)(2).

40-6A-503. Employee's compliance with two or more income-withholding orders.

If an obligor's employer receives two or more income-withholding orders with respect to the earnings of the same obligor, the employer satisfies the terms of the orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating income withheld for two or more child-support obligees.

History: Laws 1997, ch. 9, § 13; 2005, ch. 166, § 32.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, replaced "multiple" with "two or more".

40-6A-504. Immunity from civil liability.

An employer that complies with an income-withholding order issued in another state in accordance with Sections 40-6A-501 through 40-6A-507 NMSA 1978 is not subject to civil liability to an individual or agency with regard to the employer's withholding of child support from the obligor's income.

History: 1978 Comp., § 40-6A-504, enacted by Laws 1997, ch. 9, § 14; 2011, ch. 159, § 34.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

40-6A-505. Penalties for noncompliance.

An employer that willfully fails to comply with an income-withholding order issued in another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this state.

History: 1978 Comp., § 40-6A-505, enacted by Laws 1997, ch. 9, § 15; 2011, ch. 159, § 35.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

40-6A-506. Contest by obligor.

A. 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-616 NMSA 1978, or otherwise contesting the order in the same manner as if the order had been issued by a tribunal of this state.

B. The obligor shall give notice of the contest to:

(1) a support enforcement agency providing services to the obligee;

(2) each employer that has directly received an income-withholding order relating to the obligor; and

(3) the person designated to receive payments in the income-withholding order or, if no person is designated, to the obligee.

History: Laws 1997, ch. 9, § 16; 2005, ch. 166, § 33; 2011, ch. 159, § 36.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, expanded the scope of the sections under which an obligor may register and consent to an order to Section 40-6A-601 through 40-6A-616 NMSA 1978.

40-6A-507. Administrative enforcement of orders.

A. A party or support enforcement agency seeking to enforce a support order or an income-withholding order, or both, issued in another state, or a foreign support order may send the documents required for registering the order to a support enforcement agency of this state.

B. Upon receipt of the documents, the support enforcement agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of this state to enforce a support order or an income-withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency shall register the order pursuant to the Uniform Interstate Family Support Act.

History: Laws 1997, ch. 9, § 17; 2005, ch. 166, § 34; 2011, ch. 159, § 37.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For

provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included foreign support orders within the scope of Subsection A.

The 2005 amendment, effective June 17, 2005, added "or support enforcement agency" to Subsection (a).

ARTICLE 6
ENFORCEMENT AND MODIFICATION OF SUPPORT ORDER AFTER REGISTRATION

PART A
REGISTRATION AND ENFORCEMENT OF SUPPORT ORDER

40-6A-601. Registration of order for enforcement.

A support order or income-withholding order issued in another state or a foreign support order may be registered in this state for enforcement.

History: Laws 1994, ch. 107, § 601; 2005, ch. 166, § 35; 2011, ch. 159, § 38.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included foreign support orders within the scope of this section.

The 2005 amendment, effective June 17, 2005, deleted "an".

40-6A-602. Procedure to register order for enforcement.

A. Except as otherwise provided in Section 40-6A-706 NMSA 1978, a support order or income-withholding order of another state or a foreign support order may be registered in this state by sending the following records to the appropriate tribunal in this state:

(1) a letter of transmittal to the tribunal requesting registration and enforcement;

(2) two copies, including one certified copy, of the order to be registered, including any modification of the order;

(3) a sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;

(4) the name of the obligor and, if known:

(a) the obligor's address and social security number;

(b) the name and address of the obligor's employer and any other source of income of the obligor; and

(c) a description and the location of property of the obligor in this state not exempt from execution; and

(5) except as otherwise provided in Section 40-6A-312 NMSA 1978, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.

B. On receipt of a request for registration, the registering tribunal shall cause the order to be filed as an order of a tribunal of another state or as a foreign support order, together with one copy of the documents and information, regardless of their form.

C. A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this state may be filed at the same time as the request for registration or later. The pleading shall specify the grounds for the remedy sought.

D. If two or more orders are in effect, the person requesting registration shall:

(1) furnish to the tribunal a copy of every support order asserted to be in effect in addition to the documents specified in this section;

(2) specify the order alleged to be the controlling order, if any; and

(3) specify the amount of consolidated arrears, if any.

E. A request for a determination of which is the controlling order may be filed separately or with a request for registration and enforcement or for registration and modification. The person requesting registration shall give notice of the request to each party whose rights may be affected by the determination.

History: Laws 1994, ch. 107, § 602; 2005, ch. 166, § 36; 2011, ch. 159, § 39.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made an exception for the registration of convention support orders pursuant to Section 40-6A-706 NMSA 1978; included foreign support orders within the scope of Subsection A; and required the registering tribunal to cause an order to be filed as an order of a tribunal of another state or as a foreign support order.

The 2005 amendment, effective June 17, 2005, added the qualification in Subsection (a)(5) that except as otherwise provided in Section 40-6A-312 NMSA 1978, the information shall contain name and address of the obligee; added Subsection (d) to provide that if more than one order is in effect, the person registering the order shall furnish a copy of every support order asserted to be in effect, specify the order alleged to be the controlling order and specify the amount of the arrears; and added Subsection (e) to provide that a request for a determination of the controlling order may be filed separately or with a request for registration and enforcement and modification and that the person requesting registration shall give notice to all affected parties.

Filing petition to enforce foreign judgment. — A support order in a Texas judgment was registered in New Mexico when a parent filed the judgment in the district court for purposes of enforcing the visitation provisions. *Harbison v. Johnston*, 2001-NMCA-051, 130 N.M. 595, 28 P.3d 1136.

40-6A-603. Effect of registration for enforcement.

A. A support order or income-withholding order issued in another state or a foreign support order is registered when the order is filed in the registering tribunal of this state.

B. A registered support order issued in another state or a foreign country is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state.

C. Except as otherwise provided in Sections 40-6A-601 through 40-6A-616 NMSA 1978, a tribunal of this state shall recognize and enforce, but may not modify, a registered support order if the issuing tribunal had jurisdiction.

History: Laws 1994, ch. 107, § 603; 2011, ch. 159, § 40.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included foreign support orders within the scope of Subsections A and B.

40-6A-604. Choice of law.

A. Except as otherwise provided in Subsection D of this section, the law of the issuing state or foreign country governs:

(1) the nature, extent, amount and duration of current payments under a registered support order;

(2) the computation and payment of arrearages and accrual of interest on the arrearages under the support order; and

(3) the existence and satisfaction of other obligations under the support order.

B. In a proceeding for arrears under a registered support order, the statute of limitation of this state or of the issuing state or foreign country, whichever is longer, applies.

C. A responding tribunal of this state shall apply the procedures and remedies of this state to enforce current support and collect arrears and interest due on a support order of another state or a foreign country registered in this state.

D. After a tribunal of this or another state determines which is the controlling order and issues an order consolidating arrears, if any, a tribunal of this state shall prospectively apply the law of the state or foreign country issuing the controlling order, including its law on interest on arrears, on current and future support, and on consolidated arrears.

History: Laws 1994, ch. 107, § 604; 2005, ch. 166, § 37; 2011, ch. 159, § 41.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included the law of foreign countries within the scope of this section.

The 2005 amendment, effective June 17, 2005, added the qualification in Subsection (a) that except as otherwise provided in Subsection (d), the law of the issuing state governs payments under a registered support order; added Subsections (a)(2) and (3) to provide respectively that the law of the issuing state governs the computation and payment of arrearages and interest and that the existence and satisfaction of other obligations under the support order; added Subsection (c) to provide that a New Mexico responding tribunal shall apply the procedures and remedies of New Mexico to enforce current support and collect arrearages and interest of a support order of another state; and added Subsection (d) to provide that after a tribunal determines the controlling order and issues an order consolidating arrears, a New Mexico tribunal shall prospectively apply the law of the state issuing the controlling order.

PART B
CONTEST OF VALIDITY OR ENFORCEMENT

40-6A-605. Notice of registration of order.

A. When a support order or income-withholding order issued in another state or a foreign support order is registered, the registering tribunal of this state shall notify the nonregistering party. The notice shall be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

B. A notice shall inform the nonregistering party:

(1) that a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this state;

(2) that a hearing to contest the validity or enforcement of the registered order must be requested within twenty days after notice unless the registered order is pursuant to Section 40-6A-707 NMSA 1978;

(3) that failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearage and precludes further contest of that order with respect to any matter that could have been asserted; and

(4) of the amount of any alleged arrearage.

C. If the registering party asserts that two or more orders are in effect, a notice shall also:

(1) identify the two or more orders and the order alleged by the registering party to be the controlling order and the consolidated arrears, if any;

(2) notify the nonregistering party of the right to a determination of which is the controlling order;

(3) state that the procedures provided in Subsection B of this section apply to the determination of which is the controlling order; and

(4) state that failure to contest the validity or enforcement of the order alleged to be the controlling order in a timely manner may result in confirmation that the order is the controlling order.

D. Upon registration of an income-withholding order for enforcement, the support enforcement agency or the registering tribunal shall notify the obligor's employer.

History: Laws 1994, ch. 107, § 605; 1997, ch. 9, § 18; 2005, ch. 166, § 38; 2011, ch. 159, § 42.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, included foreign support orders within the scope of Subsection A; exempted orders registered pursuant to Section 40-6A-707 NMSA 1978 from the requirement that the nonregistering party be notified that a hearing may be requested; and required support enforcement agencies to notify the obligor's employer upon registration of a withholding order.

The 2005 amendment, effective June 17, 2005, added Subsection (c) to specify the content of the notice if the registering party asserts that more than one order is in effect.

The 1997 amendment, effective July 1, 1997, deleted the former second sentence in Subsection (a), and substituted "shall" for "must" in the present second sentence; substituted "shall" for "must" following "notice" in Subsection (b); and deleted "the date of mailing or personal service of the notice" following "twenty days after" in Paragraph (b)(2).

40-6A-606. Procedure to contest validity or enforcement of registered support order.

A. A nonregistering party seeking to contest the validity or enforcement of a registered support order in this state shall request a hearing within the time required by Section 40-6A-605 NMSA 1978. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered support order or to contest the remedies being sought or the amount of any alleged arrearage pursuant to Section 40-6A-607 NMSA 1978.

B. If the nonregistering party fails to contest the validity or enforcement of the registered support order in a timely manner, the order is confirmed by operation of law.

C. If a nonregistering party requests a hearing to contest the validity or enforcement of the registered support order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time and place of the hearing.

History: Laws 1994, ch. 107, § 606; 1997, ch. 9, § 19; 2011, ch. 159, § 43.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, required a nonregistering party to request a hearing within twenty days after notice of registration of an order as required by Section 40-6A-605 NMSA 1978.

The 1997 amendment, effective July 1, 1997, substituted "40-6A-607 NMSA 1978" for "607 of the Uniform Interstate Family Support Act" at the end of Subsection (a) and deleted "by first class mail" following "notice to the parties" near the end of Subsection (c).

40-6A-607. Contest of registration or enforcement.

A. A party contesting the validity or enforcement of a registered support order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(1) the issuing tribunal lacked personal jurisdiction over the contesting party;

(2) the order was obtained by fraud;

(3) the order has been vacated, suspended or modified by a later order;

(4) the issuing tribunal has stayed the order pending appeal;

(5) there is a defense under the law of this state to the remedy sought;

(6) full or partial payment has been made;

(7) the statute of limitation under Section 40-6A-604 NMSA 1978 precludes enforcement of some or all of the alleged arrearage; or

(8) the alleged controlling order is not the controlling order.

B. If a party presents evidence establishing a full or partial defense under Subsection A of this section, a tribunal may stay enforcement of a registered support order, continue the proceeding to permit production of additional relevant evidence and issue other appropriate orders. An uncontested portion of the registered support order may be enforced by all remedies available under the law of this state.

C. If the contesting party does not establish a defense under Subsection A of this section to the validity or enforcement of a registered support order, the registering tribunal shall issue an order confirming the order.

History: Laws 1994, ch. 107, § 607; 2005, ch. 166, § 39; 2011, ch. 159, § 44.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, added Subsection (a)(8) to provide the defense that the alleged controlling order is not the controlling order.

40-6A-608. Confirmed order.

Confirmation of a registered support 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.

History: Laws 1994, ch. 107, § 608; 2011, ch. 159, § 45.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18,

2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

PART C
REGISTRATION AND MODIFICATION OF CHILD SUPPORT ORDER

40-6A-609. Procedure to register child support order of another state for modification.

A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another state shall register that order in this state in the same manner provided in Sections 40-6A-601 through 40-6A-608 NMSA 1978 if the order has not been registered. A petition for modification may be filed at the same time as a request for registration, or later. The pleading shall specify the grounds for modification.

History: Laws 1994, ch. 107, § 609; 2011, ch. 159, § 46.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

40-6A-610. Effect of registration for modification.

A tribunal of this state may enforce a child support order of another state registered for purposes of modification, in the same manner as if the order had been issued by a tribunal of this state, but the registered support order may be modified only if the requirements of Section 40-6A-611 or 40-6A-613 NMSA 1978 have been met.

History: Laws 1994, ch. 107, § 610; 2005, ch. 166, § 40; 2011, ch. 159, § 47.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, changed the statutory reference to Sections 40-6A-611 and 40-6A-613 NMSA 1978.

40-6A-611. Modification of child-support order of another state.

A. If Section 40-6A-613 NMSA 1978 does not apply, upon petition, a tribunal of this state may modify a child-support order issued in another state that is registered in this state if, after notice and hearing, the tribunal finds that:

(1) the following requirements are met:

(a) neither the child, nor the obligee who is an individual nor the obligor resides in the issuing state;

(b) a petitioner who is a nonresident of this state seeks modification; and

(c) the respondent is subject to the personal jurisdiction of the tribunal of this state; or

(2) this state is the residence of the child or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.

B. Modification of a registered child-support order is subject to the same requirements, procedures and defenses that apply to the modification of an order issued by a tribunal of this state, and the order may be enforced and satisfied in the same manner.

C. A tribunal of this state may not modify any aspect of a child-support order that may not be modified under the law of the issuing state, including the duration of the obligation of support. If two or more tribunals have issued child-support orders for the same obligor and same child, the order that controls and shall be so recognized under Section 40-6A-207 NMSA 1978 establishes the aspects of the support order which are nonmodifiable.

D. In a proceeding to modify a child-support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the

obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of further obligation of support by a tribunal of this state.

E. On issuance of an order by a tribunal of this state modifying a child-support order issued in another state, the tribunal of this state becomes the tribunal having continuing, exclusive jurisdiction.

F. Notwithstanding Subsections A through E of this section and Subsection B of Section 40-6A-201 NMSA 1978, a tribunal of this state retains jurisdiction to modify an order issued by a tribunal of this state if:

(1) one party resides in another state; and

(2) the other party resides outside the United States.

History: Laws 1994, ch. 107, § 611; 1997, ch. 9, § 20; 2005, ch. 166, § 41; 2011, ch. 159, § 48.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, in Subsections A and C, eliminated the exception for the application of Section 40-6A-615 NMSA 1978; and added Subsection F to provide for the retention of jurisdiction to modify orders issued by a tribunal in New Mexico.

The 2005 amendment, effective June 17, 2005, provided in Subsection (a) that if Section 40-6A-613 NMSA 1978 does not apply, except as otherwise provided in Section 40-6A-615 NMSA 1978, upon petition a New Mexico tribunal may modify a child-support order of another state if the tribunal finds pursuant to Subsection (a)(1)(i) that the child, obligee who is an individual or the obligor do not reside in the issuing state or pursuant to Subsection (a)(2) that this state is the state of residence of the child or a party who is an individual; deleted the former provision in Subsection (a)(2) which provided that if the issuing state is a foreign jurisdiction that has not enacted law similar to the Uniform Interstate Family Support Act, then the consent of a party residing in New Mexico is not required for the tribunal to assume jurisdiction; added the qualification in Subsection (c) that except as otherwise provided in Section 40-6A-615 NMSA 1978, a New Mexico tribunal may not modify a child-support order that may not be modified in the issuing state, including the duration of the support obligation; and added Subsection (d) to provide that in a proceeding to modify a child-support order, the law of the state that issued the controlling order governs the duration of the support obligation and that the

obligor's fulfillment of the support obligation established by that order precludes the imposition of further support obligation by a New Mexico tribunal.

The 1997 amendment, effective July 1, 1997, inserted "Section 40-6A-613 NMSA 1978 does not apply and" near the end of the introductory paragraph of Subsection (a), rewrote Paragraph (a)(2), substituted "having" for "of" in the first sentence of Subsection (d) and added the second sentence; and deleted Subsection (e) which related to the issuance of a modified child support order and the filing of a certified copy of the order with the issuing tribunal.

40-6A-612. Recognition of order modified in another state.

If a child-support order issued by a tribunal of this state is modified by a tribunal of another state that assumed jurisdiction pursuant to the Uniform Interstate Family Support Act, a tribunal of this state:

A. may enforce its order that was modified only as to arrears and interest accruing before the modification;

B. may provide appropriate relief for violations of its order that occurred before the effective date of the modification; and

C. shall recognize the modifying order of the other state, upon registration, for the purpose of enforcement.

History: Laws 1994, ch. 107, § 612; 2005, ch. 166, § 42; 2011, ch. 159, § 49.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

The 2005 amendment, effective June 17, 2005, provided that if a child-support order issued by a New Mexico tribunal is modified by a tribunal of another state, then a New Mexico tribunal may enforce its order only as to arrears and interest; provide appropriate relief for violations of the order and must recognize the modifying order of the other state for enforcement purposes; and deleted former Subsection (2), which provided that the New Mexico tribunal may enforce only non-modifiable aspects of its order.

40-6A-613. Jurisdiction to modify child-support order of another state when individual parties reside in this state.

A. If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child-support order in a proceeding to register that order.

B. A tribunal of this state exercising jurisdiction under this section shall apply the provisions of Sections 40-6A-101 through 40-6A-211 and 40-6A-601 through 40-6A-616 NMSA 1978 and the procedural and substantive law of this state to the proceeding for enforcement or modification. Sections 40-6A-301 through 40-6A-507 and 40-6A-701 through 40-6A-802 NMSA 1978 do not apply.

History: 1978 Comp., § 40-6A-613, enacted by Laws 1997, ch. 9, § 21; 2011, ch. 159, § 50.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylistic changes.

40-6A-614. Notice to issuing tribunal of modification.

Within thirty days after issuance of a modified child-support order, the party obtaining the modification shall file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order, and in each tribunal in which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction.

History: 1978 Comp., § 40-6A-614, enacted by Laws 1997, ch. 9, § 22.

40-6A-615. Jurisdiction to modify child-support order of foreign country.

A. Except as otherwise provided in Section 40-6A-711 NMSA 1978, if a foreign country lacks or refuses to exercise jurisdiction to modify its child-support order pursuant to its laws, a tribunal of this state may assume jurisdiction to modify the child-

support order and bind all individuals subject to the personal jurisdiction of the tribunal whether or not the consent to modification of a child-support order otherwise required of the individual pursuant to Section 40-6A-611 NMSA 1978 has been given or whether the individual seeking modification is a resident of this state or of the foreign country.

B. An order issued by a tribunal of this state modifying a foreign child-support order pursuant to this section is the controlling order.

History: Laws 2005, ch. 166, § 43; 2011, ch. 159, § 51.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, in Subsection A, excepted the modification of child-support convention orders pursuant to Section 40-6A-711 NMSA 1978 from the application of this section and granted jurisdiction to New Mexico courts if a foreign country lacks or refuses to exercise jurisdiction to modify its child support orders; and in Subsection B, made an order issued by a New Mexico tribunal modifying a foreign child-support order controlling.

40-6A-616. Procedure to register child-support order of foreign country for modification.

A party or support enforcement agency seeking to modify, or to modify and enforce, a foreign child-support order not pursuant to the convention may register that order in this state pursuant to Sections 40-6A-601 through 40-6A-608 NMSA 1978 if the order has not been registered. A petition for modification may be filed at the same time as a request for registration or at another time. The petition shall specify the grounds for modification.

History: 1978 Comp., § 40-6A-616, enacted by Laws 2011, ch. 159, § 52.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 52 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

ARTICLE 7
DETERMINATION OF PARENTAGE

40-6A-701. Definitions.

As used in Sections 40-6A-701 through 40-6A-713 NMSA 1978:

A. "application" means a request pursuant to the convention by an obligee or obligor, or on behalf of a child, made through a central authority for assistance from another central authority;

B. "central authority" means the entity designated by the United States or a foreign country described in Paragraph (4) of Subsection E of Section 40-6A-102 NMSA 1978 to perform the functions specified in the convention;

C. "convention child-support order" means a child-support order of a tribunal of a foreign country described in Paragraph (4) of Subsection E of Section 40-6A-102 NMSA 1978;

D. "convention support order" means a support order of a tribunal of a foreign country described in Paragraph (4) of Subsection E of Section 40-6A-102 NMSA 1978;

E. "direct request" means a petition filed by an individual in a tribunal of this state in a proceeding involving an obligee, obligor or child residing outside the United States;

F. "foreign central authority" means the entity designated by a foreign country described in Paragraph (4) of Subsection E of Section 40-6A-102 NMSA 1978 to perform the functions specified in the convention;

G. "foreign support agreement":

(1) means an agreement for support in a record that:

(a) is enforceable as a support order in the country of origin;

(b) has been: 1) formally drawn up or registered as an authentic instrument by a foreign tribunal; or 2) authenticated by or concluded, registered or filed with a foreign tribunal; and

(c) may be reviewed and modified by a foreign tribunal; and

(2) includes a maintenance arrangement or authentic instrument pursuant to the convention; and

H. "United States central authority" means the secretary of the United States department of health and human services.

History: Laws 1994, ch. 107, § 701; 2005, ch. 166, § 44; repealed and reenacted by Laws 2011, ch. 159, § 53.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Repeals and reenactments. — Laws 2011, ch. 159, § 53 repealed former 40-6A-701 NMSA 1978, as enacted by Laws 1994, ch. 107, § 701, and enacted a new 40-6A-701 NMSA 1978.

40-6A-702. Applicability.

Sections 40-6A-701 through 40-6A-713 NMSA 1978 apply only to a support proceeding pursuant to the convention. In such a proceeding, if a provision of Sections 40-6A-701 through 40-6A-713 NMSA 1978 is inconsistent with Sections 40-6A-101 through 40-6A-616 NMSA 1978, the provisions of Sections 40-6A-701 through 40-6A-713 NMSA 1978 control.

History: 1978 Comp., § 40-6A-702, enacted by Laws 2011, ch. 159, § 54.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 54 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-703. Relationship of human services department [health care authority department] to United States central authority.

The human services department [health care authority department] of this state is recognized as the agency designated by the United States central authority to perform specific functions pursuant to the convention.

History: 1978 Comp., § 40-6A-703, enacted by Laws 2011, ch. 159, § 55.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 55 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-704. Initiation by human services department [health care authority department] of support proceeding under convention.

A. In a support proceeding pursuant to Sections 40-6A-701 through 40-6A-713 NMSA 1978, the human services department [health care authority department] of this state shall:

(1) transmit and receive applications; and

(2) initiate or facilitate the institution of a proceeding regarding an application in a tribunal of this state.

B. The following support proceedings are available to an obligee pursuant to the convention:

(1) recognition or recognition and enforcement of a foreign support order;

(2) enforcement of a support order issued or recognized in this state;

(3) establishment of a support order if there is no existing order, including, if necessary, determination of parentage of a child;

(4) establishment of a support order if recognition of a foreign support order is refused pursuant to Paragraph (2), (4) or (9) of Subsection B of Section 40-6A-708 NMSA 1978;

(5) modification of a support order of a tribunal of this state; and

(6) modification of a support order of a tribunal of another state or a foreign country.

C. The following support proceedings are available pursuant to the convention to an obligor against which there is an existing support order:

(1) recognition of an order suspending or limiting enforcement of an existing support order of a tribunal of this state;

(2) modification of a support order of a tribunal of this state; and

(3) modification of a support order of a tribunal of another state or a foreign country.

D. A tribunal of this state may not require security, bond or deposit, however described, to guarantee the payment of costs and expenses in proceedings pursuant to the convention.

History: 1978 Comp., § 40-6A-704, enacted by Laws 2011, ch. 159, § 56.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 56 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-705. Direct request.

A. A petitioner may file a direct request seeking establishment or modification of a support order or determination of parentage of a child. In the proceeding, the law of this state applies.

B. A petitioner may file a direct request seeking recognition and enforcement of a support order or foreign support agreement. In the proceeding, Sections 40-6A-706 through 40-6A-713 NMSA 1978 apply.

C. In a direct request for recognition and enforcement of a convention support order or foreign support agreement:

(1) a security, bond or deposit is not required to guarantee the payment of costs and expenses; and

(2) an obligee or obligor that in the issuing country has benefited from free legal assistance is entitled to benefit, at least to the same extent, from any free legal assistance provided for by the law of this state under the same circumstances.

D. A petitioner filing a direct request is not entitled to assistance from the human services department [health care authority department] of this state.

E. Sections 40-6A-701 through 40-6A-713 NMSA 1978 do not prevent the application of laws of this state that provide simplified, more expeditious rules regarding a direct request for recognition and enforcement of a foreign support order or foreign support agreement.

History: 1978 Comp., § 40-6A-705, enacted by Laws 2011, ch. 159, § 57.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 57 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-706. Registration of convention support order.

A. Except as otherwise provided in Sections 40-6A-701 through 40-6A-713 NMSA 1978, a party who is an individual or a support enforcement agency seeking recognition of a convention support order shall register the order in this state as provided in Sections 40-6A-601 through 40-6A-616 NMSA 1978.

B. Notwithstanding Section 40-6A-311 NMSA 1978 and Subsection A of Section 40-6A-602 NMSA 1978, a request for registration of a convention support order must be accompanied by:

(1) a complete text of the support order or an abstract or extract of the support order drawn up by the issuing foreign tribunal, which may be in the form recommended by The Hague Conference on Private International Law;

(2) a record stating that the support order is enforceable in the issuing country;

(3) if the respondent did not appear and was not represented in the proceedings in the issuing country, a record attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard or that the respondent had proper notice of the support order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal;

(4) a record showing the amount of arrears, if any, and the date the amount was calculated;

(5) a record showing a requirement for automatic adjustment of the amount of support, if any, and the information necessary to make the appropriate calculations; and

(6) if necessary, a record showing the extent to which the applicant received free legal assistance in the issuing country.

C. A request for registration of a convention support order may seek recognition and partial enforcement of the order.

D. A tribunal of this state may vacate the registration of a convention support order without the filing of a contest pursuant to Section 40-6A-707 NMSA 1978 only if, acting on its own motion, the tribunal finds that recognition and enforcement of the order would be manifestly incompatible with public policy.

E. The tribunal shall promptly notify the parties of the registration or the order vacating the registration of a convention support order.

History: 1978 Comp., § 40-6A-706, enacted by Laws 2011, ch. 159, § 58.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 58 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-707. Contest of registered convention support order.

A. Except as otherwise provided in Sections 40-6A-701 through 40-6A-713 NMSA 1978, Sections 40-6A-605 through 40-6A-608 NMSA 1978 apply to a contest of a registered convention support order.

B. A party contesting a registered convention support order shall file a contest not later than thirty days after notice of the registration, but if the contesting party does not reside in the United States, the contest must be filed not later than sixty days after notice of the registration.

C. If the nonregistering party fails to contest the registered convention support order by the time specified in Subsection B of this section, the order is enforceable.

D. A contest of a registered convention support order may be based only on grounds set forth in Section 40-6A-708 NMSA 1978. The contesting party bears the burden of proof.

E. In a contest of a registered convention support order, a tribunal of this state:

(1) is bound by the findings of fact on which the foreign tribunal based its jurisdiction; and

(2) may not review the merits of the order.

F. A tribunal of this state deciding a contest of a registered convention support order shall promptly notify the parties of its decision.

G. A challenge or appeal, if any, does not stay the enforcement of a convention support order unless there are exceptional circumstances.

History: 1978 Comp., § 40-6A-707, enacted by Laws 2011, ch. 159, § 59.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18,

2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 59 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-708. Recognition and enforcement of registered convention support order.

A. Except as otherwise provided in Subsection B of this section, a tribunal of this state shall recognize and enforce a registered convention support order.

B. The following grounds are the only grounds on which a tribunal of this state may refuse recognition and enforcement of a registered convention support order:

(1) recognition and enforcement of the order is manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and an opportunity to be heard;

(2) the issuing tribunal lacked personal jurisdiction consistent with the requirements of Section 40-6A-201 NMSA 1978 if those requirements were applied to the foreign country where the tribunal is located;

(3) the order is not enforceable in the issuing foreign country;

(4) the order was obtained by fraud in connection with a matter of procedure;

(5) a record transmitted in accordance with Section 40-6A-706 NMSA 1978 lacks authenticity or integrity;

(6) a proceeding between the same parties and having the same purpose is pending before a tribunal of this state and that proceeding was the first to be filed;

(7) the order is incompatible with a more recent support order involving the same parties and having the same purpose if the more recent support order is entitled to recognition and enforcement pursuant to Sections 40-6A-701 through 40-6A-713 NMSA 1978 in this state;

(8) payment, to the extent alleged arrears have been paid in whole or in part;

(9) in a case in which the respondent neither appeared nor was represented in the proceeding in the issuing foreign country:

(a) if the law of that country provides for prior notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or

(b) if the law of that country does not provide for prior notice of the proceedings, the respondent did not have proper notice of the order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal; or

(10) the order was made in violation of Section 40-6A-711 NMSA 1978.

C. If a tribunal of this state does not recognize a convention support order pursuant to Paragraph (2), (4), (6) or (9) of Subsection B of this section:

(1) the tribunal may not dismiss the proceeding without allowing a reasonable time for a party to request the establishment of a new convention support order; and

(2) the human services department [health care authority department] of this state shall take all appropriate measures to request a child-support order for the obligee if the application for recognition and enforcement was received pursuant to Section 40-6A-704 NMSA 1978.

History: 1978 Comp., § 40-6A-708, enacted by Laws 2011, ch. 159, § 60.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 60 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-709. Partial enforcement.

If a tribunal of this state does not recognize and enforce a convention support order in its entirety, it shall enforce any severable part of the order. An application or direct request may seek recognition and partial enforcement of a convention support order.

History: 1978 Comp., § 40-6A-709, enacted by Laws 2011, ch. 159, § 61.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 61 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-710. Foreign support agreement.

A. Except as otherwise provided in Subsections C and D of this section, a tribunal of this state shall recognize and enforce a foreign support agreement registered in this state.

B. An application or direct request for recognition and enforcement of a foreign support agreement must be accompanied by:

(1) a complete text of the foreign support agreement; and

(2) a record stating that the foreign support agreement is enforceable as an order of support in the issuing foreign country.

C. A tribunal of this state may vacate the registration of a foreign support agreement only if, acting on its own motion, the tribunal finds that recognition and enforcement would be manifestly incompatible with public policy.

D. In a contest of a foreign support agreement, a tribunal of this state may refuse recognition and enforcement of the agreement if it finds:

(1) recognition and enforcement of the agreement is manifestly incompatible with public policy;

(2) the agreement was obtained by fraud or falsification;

(3) the agreement is incompatible with a support order involving the same parties and having the same purpose in this state, another state, or a foreign country if the support order is entitled to recognition and enforcement pursuant to Sections 40-6A-701 through 40-6A-713 NMSA 1978 in this state; or

(4) the record submitted pursuant to Subsection B of this section lacks authenticity or integrity.

E. A proceeding for recognition and enforcement of a foreign support agreement must be suspended during the pendency of a challenge to or appeal of the agreement before a tribunal of another state or a foreign country.

History: 1978 Comp., § 40-6A-710, enacted by Laws 2011, ch. 159, § 62.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 62 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-711. Modification of convention child-support order.

A. A tribunal of this state may not modify a convention child-support order if the obligee remains a resident of the foreign country where the support order was issued unless:

(1) the obligee submits to the jurisdiction of a tribunal of this state, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity; or

(2) the foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order.

B. If a tribunal of this state does not modify a convention child-support order because the order is not recognized in this state, Subsection C of Section 40-6A-708 NMSA 1978 applies.

History: 1978 Comp., § 40-6A-711, enacted by Laws 2011, ch. 159, § 63.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 63 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-712. Personal information; limit on use.

Personal information gathered or transmitted pursuant to Sections 40-6A-701 through 40-6A-713 NMSA 1978 may be used only for the purposes for which it was gathered or transmitted.

History: 1978 Comp., § 40-6A-712, enacted by Laws 2011, ch. 159, § 64.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 64 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

40-6A-713. Record in original language; English translation.

A record filed with a tribunal of this state pursuant to Sections 40-6A-701 through 40-6A-713 NMSA 1978 must be in the original language and, if not in English, must be accompanied by an English translation. The cost of the translation shall be paid by the state or foreign country issuing the record.

History: 1978 Comp., § 40-6A-713, enacted by Laws 2011, ch. 159, § 65.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

Effective dates. — Laws 2011, ch. 159, § 65 became effective May 18, 2016 due to the repeal of Laws 2011, ch. 159, §§ 69 and 70 by Laws 2016, ch. 61, § 1.

ARTICLE 8
INTERSTATE RENDITION

40-6A-801. Grounds for rendition.

A. For purposes of Section 40-6A-802 NMSA 1978, "governor" includes an individual performing the functions of governor or the executive authority of a state covered by the Uniform Interstate Family Support Act.

B. The governor of this state may:

(1) demand that the governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to provide for the support of an obligee; or

(2) on the demand of the governor of another state, surrender an individual found in this state who is charged criminally in the other state with having failed to provide for the support of an obligee.

C. A provision for extradition of individuals not inconsistent with the Uniform Interstate Family Support Act applies to the demand even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled therefrom.

History: Laws 1994, ch. 107, § 801; 2005, ch. 166, § 45; 2011, ch. 159, § 66.

ANNOTATIONS

Cross references. — For extradition generally, *see* 31-4-1 to 31-4-31 NMSA 1978.

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylist changes.

The 2005 amendment, effective June 17, 2005, changed "by" to "of" in Subsection (b)(2).

40-6A-802. Conditions of rendition.

A. Before making demand that the governor of another state surrender an individual charged criminally in this state with having failed to provide for the support of an obligee, the governor of this state may require a prosecutor of this state to demonstrate that at least sixty days previously the obligee had initiated proceedings for support pursuant to the Uniform Interstate Family Support Act or that the proceeding would be of no avail.

B. If, under the Uniform Interstate Family Support Act or a law substantially similar to that act, the governor of another state makes a demand that the governor of this state surrender an individual charged criminally in that state with having failed to provide for the support of a child or other individual to whom a duty of support is owed, the governor may require a prosecutor to investigate the demand and report whether a proceeding for support has been initiated or would be effective. If it appears that a proceeding would be effective but has not been initiated, the governor may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

C. If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the governor may decline to honor the demand. If the petitioner prevails and the individual whose rendition is demanded is subject to a support order, the governor may decline to honor the demand if the individual is complying with the support order.

History: Laws 1994, ch. 107, § 802; 2005, ch. 166, § 46; 2011, ch. 159, § 67.

ANNOTATIONS

Compiler's notes. — Laws 2016, ch. 61, § 1 repealed Laws 2011, ch. 159, §§ 69 and 70, an applicability clause and contingent effective date, respectively, effective May 18, 2016, thereby making Laws 2011, ch. 159, §§ 1 through 68, effective May 18, 2016. For provisions of Laws 2011, ch. 159, §§ 69 and 70, *see* compiler's note to 40-6A-100 NMSA 1978.

The 2011 amendment, effective May 18, 2016, made stylist changes.

The 2005 amendment, effective June 17, 2005, deleted the reference to the Uniform Reciprocal Enforcement of Support Act and the Revised Uniform Reciprocal Enforcement of Support Act in Subsection (b).

ARTICLE 9
MISCELLANEOUS PROVISIONS

40-6A-901. Uniformity of application and construction.

The Uniform Interstate Family Support Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act among states enacting it.

History: Laws 1994, ch. 107, § 901.

40-6A-902. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2005, ch. 166, § 47 recompiled former 40-6A-902 NMSA 1978 as 40-6A-100 NMSA 1978, effective June 17, 2005.

40-6A-903. Severability clause.

If any provision of the Uniform Interstate Family Support Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act which can be given effect without the invalid provision or application, and to this end the provisions of that act are severable.

History: Laws 1994, ch. 107, § 903.

ARTICLE 7
Adoption (Repealed, Recompiled.)

40-7-1 to 40-7-24. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 171, § 12, repealed 40-7-20 NMSA 1978, as enacted by Laws 1975, ch. 349, § 3, relating to the minimum requirements for licensing child placement agencies, and repealed 40-7-22 to 40-7-24 NMSA 1978, as enacted by Laws 1975, ch. 349, §§ 5 to 7, relating to revocation or suspension of a license, judicial review and penalty for operation of a child placement agency with a license, effective June 19, 1981.

Laws 1985, ch. 194, § 39 repealed 40-7-1 to 40-7-19 NMSA 1978, as enacted and amended by Laws 1971, ch. 222, and Laws 1973, ch. 261, Laws 1975, chs. 185 and 349, Laws 1977, ch. 223, Laws 1979, ch. 113, Laws 1981, ch. 111, and Laws 1983, ch. 239, relating to the Adoption Act, and repealed 40-7-21 NMSA 1978, as enacted by Laws 1975, ch. 349, § 4, relating to a criminal offender's character evaluation, effective July 1, 1985.

40-7-25 to 40-7-28. Recompiled.

ANNOTATIONS

Recompilations. — Laws 1985, ch. 194, § 38 recompiled 40-7-25 to 40-7-28 NMSA 1978 as 40-7-36 to 40-7-39 NMSA 1978; the sections were recompiled again as 40-7-62 to 40-7-65 NMSA 1978 to conform to the code assignation of the Adoption Act, 40-7-29 to 40-7-61 NMSA 1978.

40-7-29 to 40-7-65. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 77, § 234E repealed 40-7-29 to 40-7-65 NMSA 1978, as enacted by Laws 1985, ch. 194, §§ 1 to 33 and amended by Laws 1987, ch. 106, §§ 5 and 6, and by Laws 1989, ch. 341, §§ 2 to 15, and as recompiled by Laws 1985, ch. 194, § 38, relating to adoptions, effective July 1, 1993. For provisions of former sections, *see* the 1992 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 32A-5-1 to 32A-5-45 NMSA 1978.

ARTICLE 7A
Child Placement Agency Licensing

40-7A-1. Short title.

Chapter 40, Article 7A NMSA 1978 may be cited as the "Child Placement Agency Licensing Act".

History: Laws 1981, ch. 171, § 1; 2011, ch. 130, § 1.

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, changed the statutory reference.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Foster parent's right to immunity from foster child's negligence claims, 55 A.L.R.4th 778.

40-7A-2. Purpose.

The purpose of the Child Placement Agency Licensing Act is to facilitate the licensing of child placement agencies for the placement of abused, neglected, dependent or homeless children in a stable and loving environment where a healthy and normal parent-child relationship may exist between the foster or adoptive parent and the child.

History: Laws 1981, ch. 171, § 2.

40-7A-3. Definitions.

As used in the Child Placement Agency Licensing Act:

A. "child" means an individual under the age of eighteen years;

B. "child placement agency" means any individual, partnership, unincorporated association or corporation undertaking to place a child in a home in this or any other state for the purpose of foster care or adoption of the child;

C. "department" means the children, youth and families department;

D. "division" means the protective services division of the department;

E. "foster home" means a home maintained by an individual having the care and control, for periods exceeding twenty-four hours, of a child who is not placed for adoption;

F. "person" means any individual, partnership, unincorporated association or corporation; and

G. "secretary" means the secretary of children, youth and families.

History: Laws 1981, ch. 171, § 3; 2011, ch. 130, § 2.

ANNOTATIONS

Cross references. — For the health care authority department, *see* 9-8-1 to 9-8-12 NMSA 1978.

For the social services division, *see* 9-8-4 NMSA 1978.

For the secretary of human services, *see* 9-8-5 NMSA 1978.

The 2011 amendment, effective June 17, 2011, assigned responsibility for licensing child placement agencies to the children, youth and families department, and removed homes for abused, neglected, dependent and homeless children from the application of the act.

40-7A-4. Licensing; rules; application for license.

A. An application for a license to operate a child placement agency shall be made to the division on forms provided and in the manner prescribed by the division. A child placement agency may be licensed either to place children in foster homes or in homes for adoption, or both. The division shall investigate the applicant to ascertain whether the applicant qualifies under the rules promulgated by the division. If qualified, the division shall issue a license valid for one year from date of issuance. A license shall be renewed for successive periods of time not to exceed three years, as determined by the division, if the division is satisfied that the child placement agency is in compliance with the division's rules. No fee shall be charged for a license.

B. No person shall operate a child placement agency without first being licensed to operate the agency by the division. An individual desiring to operate a foster home shall obtain a license from the division or the child placement agency under which it will operate. The child placement agency shall notify the division when the individual is licensed to operate a foster home. The notification shall be on a form provided by the

division and shall contain such information as the division requires. No foster home shall be licensed by more than one child placement agency. A license shall be renewed for successive one- or two-year periods if the child placement agency is satisfied that the foster home is in compliance with the division's rules.

C. Upon licensure to operate a foster home, the child placement agency may place a child for foster care in the licensed foster home.

D. The division shall prescribe and publish minimum standards and other rules for licensing of child placement agencies and licensing of foster homes. The prescribed minimum standards and other rules shall be promulgated by the division and shall be restricted to:

(1) the responsibility assumed by the foster home or child placement agency for the shelter, health, diet, safety and education of the child served;

(2) the character, suitability and qualifications of the applicant for a license and of other persons directly responsible for the health and safety of the child served;

(3) the general financial ability of the applicant for a license to provide care for the child served;

(4) the maintenance of records pertaining to the admission, progress, health and discharge of the child served;

(5) the maintenance of records concerning agency personnel, foster parents and foster parent applicants; and

(6) the filing of reports with the division.

E. The regulations shall not proscribe or interfere with the religious beliefs or religious training of child placement agencies and foster homes, except when the beliefs or training endanger the child's health or safety.

F. The division may inspect child placement agencies and foster homes as necessary to ensure that they are in compliance with the rules of the division.

G. Any person licensed to operate a child placement agency under the provisions of the Child Placement Agency Licensing Act has the right to appeal any rule that the person believes has been improperly applied by representatives of the division or that exceeds the authority granted to the division by the Child Placement Agency Licensing Act. The secretary shall designate a hearing officer or officers from the department to hear an appeal. The hearing officer or officers shall make a written recommendation to the secretary for resolution of the appeal. The secretary's decision shall be in writing and shall be the final administrative determination of the matter.

H. Any individual licensed to operate a foster home under the provisions of the Child Placement Agency Licensing Act has the right to appeal a decision by the division or by a child placement agency to revoke, suspend or not renew a license and has the right to request an administrative review of a denial of a license.

History: Laws 1981, ch. 171, § 4; 1991, ch. 100, § 1; 2011, ch. 130, § 3.

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, removed the placement of children with a relative or guardian from the licensing requirement of Subsection B; authorized the division or child placement agencies to issue licenses for the operation of foster homes; permitted licenses to be issued for two-year periods; permitted only licensed foster homes to provide foster care; required the maintenance of records concerning agency personnel, foster parents and foster parent applicants; restricted the right to appeal rules of the agency to licensed placement agencies; and granted licensed foster homes a right to appeal decisions of the division or a child placement agency to revoke, suspend or not renew a license.

The 1991 amendment, effective June 14, 1991, substituted "periods of time not to exceed three years, as determined by the division" for "one-year periods" near the end of Subsection A and substituted "served" for "services" at the end of Paragraph (4) of Subsection D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of public or private agency or its employees to prospective adoptive parents in contract or tort for failure to complete arrangement for adoption, 8 A.L.R.5th 860.

40-7A-5. Variances.

Upon written application from a child placement agency, the division in exercise of its sole discretion may issue a variance that permits a noncompliance with the division's rules. The variance shall be in writing and may be temporary or permanent. No variance shall be issued that is contrary to the Child Placement Agency Licensing Act. There shall be no right to a variance.

History: Laws 1981, ch. 171, § 5; 2011, ch. 130, § 4.

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, removed foster homes from the application of this section.

40-7A-6. Revocation or suspension of license; notice; reinstatement; appeal.

A. The division may deny, revoke, suspend, place on probation or refuse to renew the license of any child placement agency for failure to comply with the division's rules. The holder of the license that is to be denied, revoked, suspended or placed on probation or that is not renewed shall be given notice in writing of the proposed action and the reason therefor and shall, at a date and place to be specified in the notice, be given a hearing before a hearing officer appointed by the secretary with an opportunity to produce testimony in the holder's behalf and to be assisted by counsel. The hearing shall be held no earlier than twenty days after service of notice thereof unless the time limitations are waived or a child safety or health issue is present. A person whose license has been denied, revoked, suspended, placed on probation or not renewed may, on application to the division, have the license issued, reinstated or reissued upon proof that the noncompliance with the rules has ceased.

B. A child placement agency adversely affected by a decision of the division denying, revoking, suspending, placing on probation or refusing to renew a license may obtain a review by appealing to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

C. The division or a child placement agency may deny, revoke, suspend or refuse to renew the license of any foster home for failure to comply with the division's rules. The holder of a license that is to be revoked or suspended or that is not renewed shall be given notice in writing of the proposed action and the reason for the proposed action and shall be given the opportunity to appeal the decision. A foster home that is denied a license shall be given the opportunity to request an administrative review of the reasons for the denial of the license.

D. When any foster home license is denied, suspended, revoked or not renewed, the care and control of any child placed pursuant to the Child Placement Agency Licensing Act shall be transferred to the child placement agency or the division.

History: Laws 1981, ch. 171, § 6; 1998, ch. 55, § 44; 1999, ch. 265, § 46; 2011, ch. 130, § 5.

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, removed foster homes from the application of this section; permitted a hearing sooner than twenty days if there is an issue concerning child safety or health; granted child placement agencies a right to appeal a decision of the division regarding licensure; and authorized the division and child placement agencies to deny, revoke, suspend or refuse to renew licenses of foster homes, and granted foster homes a right of appeal from such decisions.

The 1999 amendment, effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection B.

The 1998 amendment, effective September 1, 1998, in the section heading inserted "; appeal"; in Subsection A, substituted "rules" for "regulations" in two places; rewrote Subsection B; in Subsection C, substituted "pursuant to" for "under" and made minor stylistic changes.

40-7A-7. Judicial review; scope of review.

The filing of a petition with the district court shall not stay the enforcement of the decision of the division, but the court may order a stay upon a showing of good cause.

History: Laws 1981, ch. 171, § 7.

40-7A-8. Penalty.

Any person who operates a child placement agency or foster home without a license as provided for in the Child Placement Agency Licensing Act shall be guilty of a misdemeanor.

History: Laws 1981, ch. 171, § 8.

ARTICLE 7B
Interstate Compact on Adoption and Medical Assistance

40-7B-1. Compact.

The "Interstate Compact on Adoption and Medical Assistance" is hereby enacted into law and entered into with all other jurisdictions legally joining therein in form substantially as follows:

ARTICLE I. FINDINGS

The party states find that:

1. in order to obtain adoptive families for children with special needs, prospective adoptive parents must be assured of substantial assistance, usually on a continuing basis, in meeting the high costs of supporting and providing for the special needs and services required by such children;

2. the states have a fundamental interest in promoting adoption for children with special needs because the care, emotional stability and general support and encouragement required by such children to surmount their physical, mental or emotional conditions can be best, and often only, obtained in family homes with a normal parent-child relationship;

3. the states obtain advantages from providing adoption assistance because the customary alternative is for the state to defray the entire cost of meeting all the needs of such children;

4. the special needs involved are for the emotional and physical maintenance of the child and medical support and services; and

5. the necessary assurances of adoption assistance for children with special needs, in those instances where children and adoptive parents are in states other than the one undertaking to provide the assistance, require the establishment and maintenance of suitable substantive guarantees and workable procedures for interstate payments to assist with the necessary child maintenance, procurement of services and medical assistance.

ARTICLE II. PURPOSES

The purposes of this compact are to:

1. strengthen protections for the interests of the children with special needs on behalf of whom adoption assistance is committed to be paid, when such children are in or move to states other than the one committed to make adoption assistance payments; and

2. provide substantive assurances and procedures which will promote the delivery to children of medical and other services on an interstate basis through programs of adoption assistance established by the laws of the party states.

ARTICLE III. DEFINITIONS

As used in the Interstate Compact on Adoption and Medical Assistance, unless the context clearly requires a different construction:

1. "child with special needs" means a minor who has not yet attained the age at which the state normally discontinues children's services or twenty-one, where the state determines that the child's mental or physical handicaps warrant the continuation of assistance, for whom the state has determined the following:

(a) that the child cannot or should not be returned to the home of his parents;

(b) that there exists with respect to the child a specific factor or condition such as ethnic background, age, membership in a minority or sibling group or the presence of factors such as medical condition or physical, mental or emotional handicaps because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance; or

(c) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents developed while the child is in the care of such parents as a foster child, a reasonable but unsuccessful effort has been made to place the child with appropriate adoptive parents without providing assistance payments;

2. "adoption assistance" means the making of payment or payments for maintenance of a child, which payment or payments are made or committed to be made pursuant to the adoption assistance program established by the laws of a party state;

3. "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands or a territory or possession of the United States;

4. "adoption assistance state" means the state that is signatory to an adoption assistance agreement in a particular case;

5. "residence state" means the state of which the child is a resident by virtue of the residence of the adoptive parents; and

6. "parents" means either the singular or plural of the word "parent".

ARTICLE IV. ADOPTION ASSISTANCE

A. Each state shall determine the amounts of adoption assistance and other aid which it will give to children with special needs and to their adoptive parents in accordance with its own laws and programs. The adoption assistance and other aid may be made subject to periodic reevaluation of eligibility by the adoption assistance state in accordance with its laws. The provisions of this article and of Article V are subject to the limitation set forth in this subsection.

B. The adoption assistance and medical assistance services and benefits to which the Interstate Compact on Adoption and Medical Assistance applies are those provided to children with special needs and to their adoptive parents from the time of the final decree of adoption or the interlocutory decree of adoption, as the case may be, pursuant to the laws of the adoption assistance state. In addition to the content required by subsequent provisions of this article for adoption assistance agreements, each such agreement shall state whether the initial adoption assistance period begins with the final or interlocutory decree of adoption. Aid provided by party states to children with special needs during the preadoptive placement period or earlier shall be under the foster care of other programs of the states and, except as provided in Subsection C of this article, shall not be governed by the provisions of that compact.

C. Every case of adoption assistance shall include an adoption assistance agreement between the adoptive parents and the agency of the state undertaking to

provide the adoption assistance. Every such agreement shall contain provisions for the fixing of actual or potential interstate aspects of the adoption assistance, as follows:

(1) an express commitment that the adoption assistance shall be payable by the adoption assistance state without regard for the state of residence of the adoptive parents, both at the outset of the agreement period and at all times during its continuance;

(2) a provision setting forth with particularity the types of child care and services toward which the adoption assistance state will make payments;

(3) a commitment to make medical assistance available to the child in accordance with Article V of the Interstate Compact on Adoption and Medical Assistance; and

(4) an express declaration that the agreement is for the benefit of the child, the adoptive parents and the state and that it is enforceable by any or all of them.

D. Any services or benefits provided by the residence state and the adoption assistance state for a child may be facilitated by the party states on each other's behalf. To this end, the personnel of the child welfare agencies of the party states will assist each other and beneficiaries of adoption assistance agreements with other party states in implementing benefits expressly included in adoption assistance agreements. However, it is recognized and agreed that, in general, children to whom adoption assistance agreements apply are eligible for benefits under the child welfare, education, rehabilitation, mental health and other programs of their state of residence on the same basis as other resident children.

E. Adoption assistance payments, when made on behalf of a child in another state, shall be made on the same basis and in the same amounts as they would be made if the child were in the state making the payments.

ARTICLE V. MEDICAL ASSISTANCE

A. Children for whom a party state is committed, in accordance with the terms of an adoption assistance agreement, to make adoption assistance payments are eligible for medical assistance during the entire period for which such payments are to be provided. Upon application therefor, the adoptive parents of a child on whose behalf a party state's duly constituted authorities have entered into an adoption assistance agreement shall receive a medical assistance identification card made out in the child's name. The identification shall be issued by the medical assistance program of the residence state and shall entitle the child to the same benefits, pursuant to the same procedures, as any other child who is a resident of the state and covered by medical assistance, whether or not the adoptive parents are eligible for medical assistance.

B. The identification shall bear no indication that an adoption assistance agreement with another state is the basis for issuance. However, if the identification is issued on account of an outstanding adoption assistance agreement to which another state is a signatory, the records of the issuing state and the adoption assistance state shall show the fact and shall contain a copy of the adoption assistance agreement and any amendment or replacement therefor and all other pertinent information. The adoption assistance and medical assistance programs of the adoption assistance state shall be notified of the identification issuance.

C. A state which has issued a medical assistance identification card pursuant to the Interstate Compact on Adoption and Medical Assistance which identification is valid and currently in force, shall accept, process and pay medical assistance claims thereon as on any other medical assistance eligibilities of residents.

D. An adoption assistance state which provides medical services or benefits to children covered by its adoption assistance agreements, which services or benefits are not provided for those children under the medical assistance program of the residence state, may enter into cooperative arrangements with the residence state to facilitate the delivery and administration of such services and benefits. However, any such arrangements shall not be inconsistent with the Interstate Compact on Adoption and Medical Assistance nor shall they relieve the residence state of any obligation to provide medical assistance in accordance with its laws and that compact.

E. A child whose residence is changed from one party state to another party state shall be eligible for medical assistance under the medical assistance program of the new state of residence.

ARTICLE VI. JOINDER AND WITHDRAWAL

A. The Interstate Compact on Adoption and Medical Assistance shall be open to joinder by any state. It shall enter into force as to a state when the duly constituted and empowered authority of the state has executed it or when enacted into law by the legislature of that state.

B. In order that the provisions of the Interstate Compact on Adoption and Medical Assistance may be accessible to and known by the general public and so that its status as law in each of the party states may be fully implemented, the full text of that compact, together with a notice of its execution, shall be published by the authority which has executed it in each party state. Copies of that compact shall be made available upon request made of the executing or administering authority in any state.

C. Withdrawal from the Interstate Compact on Adoption and Medical Assistance shall be by written notice sent by the authority which executed it to the appropriate officials of all other party states, but no such notice shall take effect until one year after it is given in accordance with the requirements of this subsection.

D. All adoption assistance agreements outstanding and to which a party state is signatory at the time when its withdrawal from the Interstate Compact on Adoption and Medical Assistance takes effect shall continue to have the effects given to them pursuant to that compact until they expire or are terminated in accordance with their provisions. Until such expiration or termination, all beneficiaries of the agreements involved shall continue to have all rights and obligations conferred or imposed by that compact and the withdrawing state shall continue to administer that compact to the extent necessary to accord and implement fully the rights and protections preserved hereby.

History: Laws 1985, ch. 133, § 1.

40-7B-2. Human services department [health care authority department] to administer compact; rules and regulations.

The New Mexico human services department [health care authority department], hereinafter called "the department", or its successor agency is the compact administrator of the Interstate Compact on Adoption and Medical Assistance [40-7B-1 to 40-7B-6 NMSA 1978], hereinafter called "the compact". The department shall promulgate rules and regulations to carry out more effectively the terms of the compact. Where appropriate, the department shall act jointly with the officers of other party states in promulgating such rules and regulations. The department may cooperate with all other departments and agencies of this state and its political subdivisions in facilitating the proper administration of the compact and any amendments or supplementary agreements thereunder entered into by this state.

History: Laws 1985, ch. 133, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

40-7B-3. Supplementary agreements.

The compact administrator of the Interstate Compact on Adoption and Medical Assistance may enter into supplementary agreements with appropriate officials of other states pursuant to the compact. If any supplementary agreement requires or contemplates the use of any institution or facility of this state or requires or contemplates the provision of any service by this state, it shall not become effective until approved by the head of the agency under whose jurisdiction the institution or facility is operated or whose agency will be charged with rendering the service.

History: Laws 1985, ch. 133, § 3.

40-7B-4. Financial arrangements.

Subject to legislative appropriations, the compact administrator of the Interstate Compact on Adoption and Medical Assistance shall arrange for any payments necessary to discharge any financial obligations imposed upon this state by the compact or any supplementary agreement entered into thereunder.

History: Laws 1985, ch. 133, § 4.

40-7B-5. Special provisions relating to medical assistance.

A. A child with special needs, resident in this state, who is the subject of an adoption assistance agreement with another state shall be entitled to receive a medical assistance identification from this state upon filing with the department a certified copy of the adoption assistance agreement obtained from the adoption assistance state. In accordance with regulations of the department, the adoptive parents may be required periodically to show that the agreement is still in force or has been renewed.

B. The department shall consider the holder of a medical assistance identification pursuant to this section as any other holder of a medical assistance identification under the laws of this state and shall process and make payment on claims on account of such holder in the same manner and pursuant to the same conditions and procedures as for the recipients of medical assistance.

C. Where the department has entered into an adoption assistance agreement to provide to a child services which are not provided by the residence state, the department shall provide those services agreed to which are not provided by the residence state. The department will not make any payment for services provided by the residence state, even if the payment authorized for the service in the residence state is less than the payment amount authorized in New Mexico for that service. The adoptive parents acting for the child may submit evidence of payment for services or benefit amounts not provided by the residence state and shall be reimbursed therefor. However, there shall be no reimbursement for services or benefit amounts covered under any insurance or other third party medical contract or arrangement held by the child or the adoptive parents. The additional coverages and benefit amounts provided pursuant to this section shall be for services for which there is no federal contribution or which, if federally aided, are not provided by the residence state. Among other things, such regulations shall include procedures to be followed in obtaining prior approvals for services in those instances where required for the assistance.

D. The provisions of this section shall apply to medical assistance for children under adoption assistance agreements from states that have entered into a compact with this state under which the other state provides medical assistance to children with special needs under adoption assistance agreements made by this state. All other children entitled to medical assistance pursuant to adoption assistance agreements entered into

by this state shall be eligible to receive such assistance in accordance with the laws and procedures applicable thereto.

History: Laws 1985, ch. 133, § 5.

40-7B-6. Federal participation.

Consistent with federal law, the department, in connection with the administration of the compact entered into pursuant to this act, shall include in any state plan made pursuant to the federal Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272), Titles IV(e) and XIX of the Social Security Act and any other applicable federal laws the provision of adoption assistance and medical assistance for which the federal government pays some or all of the cost. The department shall apply for and administer all relevant federal aid in accordance with law.

History: Laws 1985, ch. 133, § 6.

ANNOTATIONS

Cross references. — For the federal Adoption Assistance and Child Welfare Act of 1980, *see* 42 U.S.C. § 602 et seq.

For Titles IV(e) and XIX of the Social Security Act, see 42 U.S.C. § 670 et seq. and 42 U.S.C. § 1396 et seq.

ARTICLE 8
Change of Name

40-8-1. Change of name; petition and order.

A. Any resident of this state fourteen years of age or older may, upon petition to the district court of the district in which the petitioner resides, if no sufficient cause is shown to the contrary, have the petitioner's name changed or established by order of the court. The legal parents or legal guardians of any resident of this state under the age of fourteen years may, upon petition to the district court of the district in which the petitioner resides, if no sufficient cause is shown to the contrary, have the name of the petitioner's child or ward changed or established by order of the court. When residents under the age of fourteen years petition the district court for a name change, notice shall be given to all legal parents or legal guardians. The order shall be entered at length upon the record of the court, and a copy of the order, duly certified, shall be filed in the office of the county clerk of the county in which the person resides. The county clerk shall record the same in a record book to be kept by the county clerk for that purpose.

B. If the court finds that notice to one or more legal parents or legal guardians of a child who is under fourteen years of age will jeopardize the child's or the applicant's

personal safety, the court shall not require notice. The court shall order all records regarding the petition to be sealed. The records shall only be opened by court order based upon a showing of good cause or at the applicant's request.

History: Laws 1889, ch. 3, § 1; C.L. 1897, § 2910; Code 1915, § 3807; C.S. 1929, § 92-101; Laws 1937, ch. 162, § 1; 1941 Comp., § 25-501; 1953 Comp., § 22-5-1; Laws 1979, ch. 14, § 1; 1989, ch. 161, § 1; 2023, ch. 28, § 1.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, clarified criteria for filing a petition for change of name, eliminated the requirement to file notice with proof of publication, and provided that notice to one or more legal parents or legal guardians of a child under fourteen years of age is not required upon a finding by the court that the notice will jeopardize the applicant's safety; in Subsection A, after "Any resident of this state", deleted "over the age of fourteen" and added "fourteen years of age or older", after each occurrence of "the district in which the petitioner resides", deleted "and upon filing the notice required with proof of publication", substituted each occurrence of "his" with "the petitioner's", after "by order of the court. The", deleted "parent" and added "legal parents", after the next occurrence of "or", deleted "guardian" and added "legal guardians", after "the district court for a name change", deleted "the required", after "notice shall", deleted "include notice" and added "be given", after the next occurrence of "to", deleted "both" and added "all", after the next occurrence of "legal parents", added "or legal guardians", and after "be kept by", deleted "him" and added "the county clerk"; and added Subsection B.

The 1989 amendment, effective June 16, 1989, substituted the present first four sentences for the former first sentence, which read: "Any resident of this state over the age of fourteen years, may, upon petition to the district court of the district in which the petitioner resides, and upon filing the notice required with proof of publication thereof, if no sufficient cause be shown to the contrary have his name changed or established by order of the court; such order shall be entered at length upon the record of the court, and a copy thereof, duly certified, shall be filed in the office of the county clerk of the county in which such person resides".

Common decency and good taste. — The district court did not abuse its discretion when it denied the petitioner's request to change his name to "Fuck Censorship!" on the grounds that the change was offensive to common decency and good taste. *In the Matter of Petition of Variable*, 2008-NMCA-105, 144 N.M. 633, 190 P.3d 354.

This section does not limit number of times person can petition to change his or her name. *In re Mokiligon*, 2005-NMCA-021, 137 N.M. 22, 106 P.3d 584.

Res judicata does not apply to name changes. *In re Mokiligon*, 2005-NMCA-021, 137 N.M. 22, 106 P.3d 584.

Sufficient cause to deny application. — Where the court summarily denied petitioner's request without providing sufficient factual support for the denial, and the docketing statement represented that petitioner did not receive a hearing, but was informed by mail that his request was denied, there appears to have been no showing of wrongful or fraudulent purpose, and based on the record, sufficient cause was shown to deny petitioner's application for a name change. *In re Mokiligon*, 2005-NMCA-021, 137 N.M. 22, 106 P.3d 584.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Names §§ 10 to 16.

Change of child's name in adoption proceedings, 53 A.L.R.2d 927.

Right of married woman to use maiden surname, 67 A.L.R.3d 1266.

Circumstances justifying grant or denial of petition to change adult's name. 79 A.L.R.3d 562.

Rights and remedies of parents inter se with respect to the names of their children, 40 A.L.R.5th 697.

2 C.J.S. Adoption § 37; 3 C.J.S. Aliens § 142; 27C C.J.S. Divorce § 763; 65 C.J.S. Names § 1.

40-8-2. Repealed.

History: Laws 1889, ch. 3, § 2; C.L. 1897, § 2911; Code 1915, § 3808; C.S. 1929, § 92-102; 1941 Comp., § 25-502; 1953 Comp., § 22-5-2; 1978 Comp., § 40-8-2; 2001, ch. 125, § 1; repealed by Laws 2023, ch. 28, § 2.

ANNOTATIONS

Repeals. — Laws 2023, ch. 28, § 2 repealed 40-8-2 NMSA 1978, as enacted by Laws 1889, ch. 3, § 2, relating to notice of petition, exception, effective June 16, 2023. For provisions of former section, *see* the 2022 NMSA 1978 on *NMOneSource.com*.

40-8-3. [Hearing at regular term in county of petitioner's residence.]

That the hearing and determination of all proceedings instituted under the provisions of this chapter [40-8-1, 40-8-3 NMSA 1978], and the final order of the court therein, shall be had and made at some regular term of the district court sitting within and for the county wherein said petitioner resides.

History: Laws 1889, ch. 3, § 3; C.L. 1897, § 2912; Code 1915, § 3809; C.S. 1929, § 92-103; 1941 Comp., § 25-503; 1953 Comp., § 22-5-3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Circumstances justifying grant or denial of petition to change adult's name, 79 A.L.R.3d 562.

65 C.J.S. Names § 15.

ARTICLE 9
Grandparent's Visitation Privileges

40-9-1. Short title.

Chapter 40, Article 9 NMSA 1978 may be cited as the "Grandparent's Visitation Privileges Act".

History: 1978 Comp., § 40-9-1, enacted by Laws 1993, ch. 93, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 93, § 1 repealed former 40-9-1 NMSA 1978, as enacted by Laws 1979, ch. 13, § 1, relating to visitation privileges upon judgments of dissolution of marriage, legal separation or parentage, and enacted a new section effective July 1, 1993.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Domestic Relations and Juvenile Law," see 11 N.M.L. Rev. 134 (1981).

For note, "Family Law - A Limitation on Grandparental Rights in New Mexico: Christian Placement Service v. Gordon," see 17 N.M.L. Rev. 207 (1987).

Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Grandparents' visitation rights, 90 A.L.R.3d 222.

Religion as factor in child custody and visitation cases, 22 A.L.R.4th 971.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified, 69 A.L.R.5th 1.

Grandparent's visitation rights where child's parents are living, 71 A.L.R.5th 99.

40-9-1.1. Definitions.

As used in the Grandparent's Visitation Privileges Act, "grandparent" means:

A. the biological grandparent or great-grandparent of a minor child; or

B. a person who becomes a grandparent or great-grandparent due to the adoption of a minor child by a member of that person's family.

History: 1978 Comp., § 40-9-1.1, enacted by Laws 1993, ch. 93, § 2.

40-9-2. Children; visitation by grandparent; petition; mediation.

A. In rendering a judgment of dissolution of marriage, legal separation or the existence of the parent and child relationship pursuant to the provisions of the Uniform Parentage Act [New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978], or at any time after the entry of the judgment, the district court may grant reasonable visitation privileges to a grandparent of a minor child, not in conflict with the child's education or prior established visitation or time-sharing privileges.

B. If one or both parents of a minor child are deceased, any grandparent of the minor child may petition the district court for visitation privileges with respect to the minor. The district court may order temporary visitation privileges until a final order regarding visitation privileges is issued by the court.

C. If a minor child resided with a grandparent for a period of at least three months and the child was less than six years of age at the beginning of the three-month period and the child was subsequently removed from the grandparent's home by the child's parent or any other person, the grandparent may petition the district court for visitation privileges with respect to the child, if the child's home state is New Mexico, as provided in the Child Custody Jurisdiction Act [repealed].

D. If a minor child resided with a grandparent for a period of at least six months and the child was six years of age or older at the beginning of the six-month period and the child was subsequently removed from the grandparent's home by the child's parent or any other person, the grandparent may petition the district court for visitation privileges with respect to the child, if the child's home state is New Mexico, as provided in the Child Custody Jurisdiction Act [repealed] .

E. A biological grandparent may petition the district court for visitation privileges with respect to a grandchild when the grandchild has been adopted or adoption is sought, pursuant to the provisions of the Adoption Act [Chapter 32A, Article 5 NMSA 1978], by:

(1) a stepparent;

(2) a relative of the grandchild;

(3) a person designated to care for the grandchild in the provisions of a deceased parent's will; or

(4) a person who sponsored the grandchild at a baptism or confirmation conducted by a recognized religious organization.

F. When a minor child is adopted by a stepparent and the parental rights of the natural parent terminate or are relinquished, the biological grandparents are not precluded from attempting to establish visitation privileges. When a petition filed pursuant to the provisions of the Grandparent's Visitation Privileges Act is filed during the pendency of an adoption proceeding, the petition shall be filed as part of the adoption proceedings. The provisions of the Grandparent's Visitation Privileges Act shall have no application in the event of a relinquishment or termination of parental rights in cases of other statutory adoption proceedings.

G. When considering a grandparent's petition for visitation privileges with a child, the district court shall assess:

(1) any factors relevant to the best interests of the child;

(2) the prior interaction between the grandparent and the child;

(3) the prior interaction between the grandparent and each parent of the child;

(4) the present relationship between the grandparent and each parent of the child;

(5) time-sharing or visitation arrangements that were in place prior to filing of the petition;

(6) the effect the visitation with the grandparent will have on the child;

(7) if the grandparent has any prior convictions for physical, emotional or sexual abuse or neglect; and

(8) if the grandparent has previously been a full-time caretaker for the child for a significant period.

H. The district court may order mediation and evaluation in any matter when a grandparent's visitation privileges with respect to a minor child are at issue. When a judicial district has established a domestic relations mediation program pursuant to the provisions of the Domestic Relations Mediation Act [Chapter 40, Article 12 NMSA 1978], the mediation shall conform with the provisions of that act. Upon motion and hearing, the district court shall act promptly on the recommendations set forth in a mediation report and consider assessment of mediation and evaluation to the parties. The district court may order temporary visitation privileges until a final order regarding visitation privileges is issued by the court.

I. When the district court decides that visitation is not in the best interest of the child, the court may issue an order requiring other reasonable contact between the grandparent and the child, including regular communication by telephone, mail or any other reasonable means.

J. The provisions of the Child Custody Jurisdiction Act and Section 30-4-4 NMSA 1978, regarding custodial interference, are applicable to the provisions of the Grandparent's Visitation Privileges Act.

History: 1978 Comp., § 40-9-2, enacted by Laws 1993, ch. 93, § 3; 1999, ch. 73, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 93, § 3 repealed former 40-9-2 NMSA 1978, as enacted by Laws 1979, ch. 13, § 2, and enacted a new section, effective July 1, 1993.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2009, ch. 215, § 19 repealed the Uniform Parentage Act, 40-11-1 to 40-11-23 NMSA 1978, effective January 1, 2010. For comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

Laws 2001, ch. 114, § 404 repealed the Child Custody Jurisdiction Act, effective July 1, 2001. For comparable provisions, *see* the Uniform Child-Custody Jurisdiction and Enforcement Act, 40-10A-101 to 40-10A-403 NMSA 1978.

The 1999 amendment, effective July 1, 1999, in Subsection G added "any factors relevant to" in Paragraph (1), added Paragraphs (6) through (8), and made minor stylistic changes.

Subsections C and G of 40-9-2 NMSA 1978 are separate, distinct provisions that require separate proof. *French-Hesch v. French-Williams*, 2010-NMCA-008, 147 N.M. 620, 227 P.3d 110.

Determination of standing. — Where the child lived with the grandparent from birth for a period of two years, and the trial court ruled that the grandparent did not have standing to petition for visitation with the child based on the trial court's findings that at the time the child was born, the child's parent was coerced by the grandparent to live with the child in the grandparent's home, that a domestic disturbance between the child's parent and the grandparent led the child's parent to leave the grandparent's home without the child, that the evidence was conflicting as to when the child was returned to the child's parent, and that there was insufficient evidence to find that the child lived with the grandparent for three months from the date the child's parent left the grandparent's home, the trial court erred by considering factors in addition to whether the child resided for at least three months in the grandparent's home before age six in determining whether the grandparent had standing. *French-Hesch v. French-Williams*, 2010-NMCA-008, 147 N.M. 620, 227 P.3d 110.

Constitutionality. — This act, authorizing the trial court to permit grandparent child visitation, withstands state and federal constitutional challenges if the allowance of

visitation is shown to be in the best interest of the child. *Ridenour v. Ridenour*, 1995-NMCA-072, 120 N.M. 352, 901 P.2d 770, cert. denied, 120 N.M. 68, 898 P.2d 120.

Visitation not a substantial interference. — Even though the state's enforcement of the Grandparent's Visitation Privileges Act impacts a parent's right to raise a child, the intrusion is not a substantial interference and is thus an appropriate mechanism by which the state may balance the parties' competing interests. *Ridenour v. Ridenour*, 1995-NMCA-072, 120 N.M. 352, 901 P.2d 770, cert. denied, 120 N.M. 68, 898 P.2d 120.

Constitutionality. — The Grandparent's Visitation Privileges Act is not unconstitutional on its face. *Deem v. Lobato*, 2004-NMCA-102, 136 N.M. 266, 96 P.3d 1186, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

Wishes of parents. — Troxell v. Granville, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), requires courts to give special consideration to the wishes of the parents in a grandparents' visitation case, but it does not give the parents an ultimate veto; the court may balance the interests of the parents, grandparents, and children. *Williams v. Williams*, 2002-NMCA-074, 132 N.M. 445, 50 P.3d 194.

Findings required. — Troxell v. Granville, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), does not require a formal finding of parental unfitness before a court can order grandparent visitation; the court must only find the presence of "special factors" before it can order grandparent visitation over the objections of a fit parent. *Williams v. Williams*, 2002-NMCA-074, 132 N.M. 445, 50 P.3d 194.

"Special factors" that a court may consider before awarding grandparent visitation over the objections of a fit parent include the court's concerns, founded in the record, regarding the ability of the parents to carry out their responsibilities in an appropriate manner. *Williams v. Williams*, 2002-NMCA-074, 132 N.M. 445, 50 P.3d 194.

Visitation allowed even where parental rights relinquished. — The legislature intended that the trial court, upon a showing that grandparent visitation was in the best interests of the child, could authorize grandparent visitation even though the grandparent's son had relinquished his parental rights. *Lucero v. Hart*, 1995-NMCA-121, 120 N.M. 794, 907 P.2d 198.

Grandparent's burden. — In seeking application of the Grandparent's Visitation Privileges Act, the grandparents have the burden to show that visitation is appropriate. *Ridenour v. Ridenour*, 1995-NMCA-072, 120 N.M. 352, 901 P.2d 770, cert. denied, 120 N.M. 68, 898 P.2d 120.

Visitation will be denied where grandparents failed to meet their burden under Subsection G of this section to show factors that could support grandparent visitation under Subsection A of this section. *Gutierrez v. Connick*, 2004-NMCA-017, 135 N.M. 272, 87 P.3d 552.

Orders for injunctive relief in family matters that provide for continuing jurisdiction are modifiable. — Where grandmother petitioned for visitation privileges with her granddaughter under the Grandparent's Visitation Privileges Act (GVPA), 40-9-1 to 40-9-4 NMSA 1978, and where, while the GVPA proceeding was pending, a no-contact order that had been issued in a separate proceeding under the Kinship Guardianship Act (KGA), 40-10B-1 to 40-10B-15 NMSA 1978, was clarified to prohibit contact between grandmother and the child, and where the district court determined that the revised no-contact order precluded any contact between grandmother and the child, and as a result dismissed the GVPA petition for failure to state a claim without receiving grandmother's evidence, the district court erred in dismissing grandmother's petition as precluded as a matter of law, because orders for injunctive relief in family matters that provide for continuing jurisdiction are modifiable, whether for changed circumstances or some other reason that the injunctive relief should no longer govern the parties' conduct, and grandmother, in this case, alleged sufficient facts to support a claim for visitation, and therefore grandmother was entitled to offer evidence to demonstrate that the petition created a genuine issue of material fact about whether under the current circumstances, modification of the revised no-contact order was justified and visitation under the GVPA was appropriate. *Flores v. McLain*, 2024-NMCA-079.

When visitation challenged, guardian may be appointed. — When a petition for grandparent visitation is challenged by the child's parents, the trial court should consider whether it would be beneficial to appoint a guardian ad litem to represent the child in the face of conflicting family interests. *Lucero v. Hart*, 1995-NMCA-121, 120 N.M. 794, 907 P.2d 198.

Non-statutory factors relevant to request. — In addition to the statutory factors enumerated in Subsection G, other relevant factors relating to a request for grandparent visitation which the trial court may consider include: (1) the love, affection and other emotional ties which may exist between the grandparent and child; (2) the nature and quality of the grandparent-child relationship and the length of time that it has existed; (3) whether visitation will promote or disrupt the child's development; (4) the physical, emotional, mental and social needs of the child; (5) the wishes and opinions of the parents; and (6) the willingness and ability of the grandparent to facilitate and encourage a close relationship among the parent and child. *Lucero v. Hart*, 1995-NMCA-121, 120 N.M. 794, 907 P.2d 198.

No grandparent visitation right existed at common law. *Gutierrez v. Connick*, 2004-NMCA-017, 135 N.M. 272, 87 P.3d 552.

Grandparent visitation privileges are conferred by statute. — Grandparent visitation privileges are not derivative of the rights of the parents but rather exist independently under the Grandparent's Visitation Privileges Act. *Deem v. Lobato*, 2004-NMCA-102, 136 N.M. 266, 96 P.3d 1186, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

Grandparent visitation privileges are circumscribed by constitutional limitations, in that parents have a fundamental liberty right to make decisions concerning the care, custody, and control of their children, a right that is protected under the due process clause of the fourteenth amendment. *Gutierrez v. Connick*, 2004-NMCA-017, 135 N.M. 272, 87 P.3d 552.

Putative grandparent has standing as interested party under 40-11-7A NMSA 1978 to bring an action to establish a parent-child relationship for the purpose of establishing the grandparent as either the maternal or paternal grandparent of a child in order to obtain visitation privileges under this section. *Gutierrez v. Connick*, 2004-NMCA-017, 135 N.M. 272, 87 P.3d 552.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Grandparents' visitation rights, 90 A.L.R.3d 222.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified, 69 A.L.R.5th 1.

Grandparent's visitation rights where child's parents are living, 71 A.L.R.5th 99.

40-9-3. Visitation; modification; restrictions.

A. When the district court grants reasonable visitation privileges to a grandparent pursuant to the provisions of the Grandparent's Visitation Privileges Act, the court shall issue any necessary order to enforce the visitation privileges and may modify the privileges or order upon a showing of good cause by any interested person.

B. Absent a showing of good cause, no grandparent or parent shall file a petition pursuant to the provisions of the Grandparent's Visitation Privileges Act more often than once a year.

C. When an action for enforcement of a court order allowing visitation privileges is brought pursuant to the Grandparent's Visitation Privileges Act by a grandparent, the court may award court costs and reasonable attorneys' fees to the prevailing party when a court order is violated.

History: 1978 Comp., § 40-9-3, enacted by Laws 1993, ch. 93, § 4; 1995, ch. 58, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 93, § 4 repealed former 40-9-3 NMSA 1978, as enacted by Laws 1979, ch. 13, § 3, and enacted a new section, effective July 1, 1993.

The 1995 amendment, effective June 16, 1995, inserted "or parent" in Subsection B and added Subsection C.

Orders for injunctive relief in family matters that provide for continuing jurisdiction are modifiable. — Where grandmother petitioned for visitation privileges with her granddaughter under the Grandparent's Visitation Privileges Act (GVPA), 40-9-1 to 40-9-4 NMSA 1978, and where, while the GVPA proceeding was pending, a no-contact order that had been issued in a separate proceeding under the Kinship Guardianship Act (KGA), 40-10B-1 to 40-10B-15 NMSA 1978, was clarified to prohibit contact between grandmother and the child, and where the district court determined that the revised no-contact order precluded any contact between grandmother and the child, and as a result dismissed the GVPA petition for failure to state a claim without receiving grandmother's evidence, the district court erred in dismissing grandmother's petition as precluded as a matter of law, because orders for injunctive relief in family matters that provide for continuing jurisdiction are modifiable, whether for changed circumstances or some other reason that the injunctive relief should no longer govern the parties' conduct, and grandmother, in this case, alleged sufficient facts to support a claim for visitation, and therefore grandmother was entitled to offer evidence to demonstrate that the petition created a genuine issue of material fact about whether under the current circumstances, modification of the revised no-contact order was justified and visitation under the GVPA was appropriate. *Flores v. McLain*, 2024-NMCA-079.

Rebuttable presumption. — The presumption that a fit parent acts in the best interests of his or her child is a rebuttable presumption. *Deem v. Lobato*, 2004-NMCA-102, 136 N.M. 266, 96 P.3d 1186, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Grandparents' visitation rights, 90 A.L.R.3d 222.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified, 69 A.L.R.5th 1.

Grandparent's visitation rights where child's parents are living, 71 A.L.R.5th 99.

40-9-4. Change of child's domicile; notice to grandparent.

A. When a grandparent is granted visitation privileges with respect to a minor child pursuant to the provisions of the Grandparent's Visitation Privileges Act and the child's custodian intends to depart the state or to relocate within the state with the intention of changing that child's domicile, the custodian shall:

(1) notify the grandparents of the minor child of the custodian's intent to change the child's domicile at least five days prior to the child's change of domicile;

(2) provide the grandparent with an address and telephone number for the minor child; and

(3) afford the grandparent of the minor child the opportunity to communicate with the child.

B. This state will recognize an order or act regarding grandparent visitation privileges issued by any state, district, Indian tribe or territory of the United States of America.

History: 1978 Comp., § 40-9-4, enacted by Laws 1993, ch. 93, § 5; 1995, ch. 58, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 93, § 5 repealed former 40-9-4 NMSA 1978, as enacted by Laws 1979, ch. 13, § 4, relating to applicability of article, and enacted a new section, effective July 1, 1993.

The 1995 amendment, effective June 16, 1995, redesignated the subsections, inserted "or to relocate within the state" in Subsection A, substituted "change of domicile" for "departure from the state" in Paragraph (1) of Subsection A, and added Subsection B.

ARTICLE 10
Child Custody Jurisdiction (Repealed.)

40-10-1 to 40-10-24. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 114, § 405 repealed 40-10-1 to 40-10-24 NMSA 1978, as enacted by Laws 1981, ch. 119, §§ 1 to 23 and 25, regarding child custody jurisdiction, effective July 1, 2001. For provisions of former sections, *see* the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 40, Article 10A NMSA 1978.

ARTICLE 10A
Child Custody

ARTICLE 1
GENERAL PROVISIONS

40-10A-101. Short title.

This act [40-10A-101 to 40-10A-403 NMSA 1978] may be cited as the "Uniform Child-Custody Jurisdiction and Enforcement Act".

History: Laws 2001, ch. 114, § 101.

ANNOTATIONS

Discretion of trial court. — The trial court is vested with great discretion in awarding the custody and visitation of young children, and an appellate court cannot reverse such a decision unless the court's conclusion about the best interests of the child is a manifest abuse of discretion under the evidence in the case. *Olsen v. Olsen*, 1982-NMSC-112, 98 N.M. 644, 651 P.2d 1288.

Best interest of the child is the principal consideration on determining a child's custody, as well as in effecting a change in custody. *Olsen v. Olsen*, 1982-NMSC-112, 98 N.M. 644, 651 P.2d 1288.

Must show change in circumstances for change in custody or visitation. — A change in custody is permissible only upon a showing of a change of circumstances. This standard is equally applicable where visitation rights are involved. *Olsen v. Olsen*, 1982-NMSC-112, 98 N.M. 644, 651 P.2d 1288.

When decree to set out visitation times, places, and circumstances. — If there is any possibility of visitation problems, the visitation rights in a decree should spell out the times, places and circumstances of visitation. *Olsen v. Olsen*, 1982-NMSC-112, 98 N.M. 644, 651 P.2d 1288.

Court of original jurisdiction ordinarily retains continuing jurisdiction to modify a custody decree. *Trask v. Trask*, 1986-NMCA-098, 104 N.M. 780, 727 P.2d 88.

Limitation on court's authority to modify another state's decree. — Under both the Child Custody Jurisdiction Act in 40-10-15A(1) NMSA 1978 (now see Uniform Child Custody Jurisdiction and Enforcement Act, 40-10A-206 NMSA 1978) and the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, there is a limitation upon the children's court's authority to modify another state's decree. *State ex rel. Dep't of Human Servs. v. Avinger*, 1985-NMCA-097, 104 N.M. 355, 721 P.2d 781, *aff'd*, 1986-NMSC-032, 104 N.M. 255, 720 P.2d 290.

Preemption by federal Parental Kidnapping Prevention Act. — The long line of New Mexico cases which permits a New Mexico court to modify an out-of-state issued child custody decree based solely on the physical presence of the child and a substantial change of circumstances is preempted by the federal Parental Kidnapping Prevention Act (28 U.S.C. § 1738A). *State ex rel. Valles v. Brown*, 1981-NMSC-136, 97 N.M. 327, 639 P.2d 1181.

Attorney fees. — The Uniform Child-Custody Jurisdiction and Enforcement Act does not suggest legislative intent to require attorney fees be paid to the prevailing party in a child custody dispute. *Bursum v. Bursum*, 2004-NMCA-133, 136 N.M. 584, 102 P.3d 651, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Law reviews. — For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

For annual survey of New Mexico law relating to domestic relations, see 13 N.M.L. Rev. 379 (1983).

For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act of 1980: State ex rel. Valles v. Brown," see 13 N.M.L. Rev. 527 (1983).

For article, "Survey of New Mexico Law, 1982-83: Domestic Relations," see 14 N.M.L. Rev. 135 (1984).

For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

For annual survey of New Mexico family law, 19 N.M.L. Rev. 692 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Attorneys' fees awards in parent-nonparent child custody case, 45 A.L.R.4th 212.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 A.L.R.4th 1170.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 A.L.R.4th 786.

What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 78 A.L.R.4th 1028.

Applicability of Uniform Child Custody Jurisdiction Act (UCCJA) to temporary custody orders, 81 A.L.R.4th 1101.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 A.L.R.4th 742.

Child custody and visitation rights of person infected with AIDS, 86 A.L.R.4th 211.

Denial or restriction of visitation rights to parent charged with sexually abusing child, 1 A.L.R.5th 776.

Home state jurisdiction of court under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 A.L.R.5th 1.

Default jurisdiction of court under § 3(a)(4) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(D), 6 A.L.R.5th 69.

Parties' misconduct as ground for declining jurisdiction under § 8 of the Uniform Child Custody Jurisdiction Act (UCCJA), 16 A.L.R.5th 650.

Significant connection jurisdiction of court to modify foreign child custody decree under §§ 3(a)(2) and 14(b) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §§ 1738A(c)(2)(b) and 1738A(f)(1), 67 A.L.R.5th 1.

Home state jurisdiction of court to modify foreign child custody decree under §§ 3(a)(1) and 14(a)(2) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §§ 1738A(c)(2)(A) and 1738A(f)(1), 72 A.L.R.5th 249.

Declining jurisdiction to modify prior child custody decree under § 14(a)(1) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A(f)(2), 73 A.L.R.5th 185.

Abandonment jurisdiction of court under §§ 3(a)(3)(i) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.A. §§ 1738A(c)(2)(C)(i) and 1738A(f), notwithstanding existence of prior valid custody decree rendered by second state, 78 A.L.R.5th 465.

Construction and operation of Uniform Child Custody Jurisdiction and Enforcement Act, 100 A.L.R.5th 1.

Construction and application of International Child Abduction Remedies Act (42 USC § 11601 et seq.), 125 A.L.R. Fed. 217.

40-10A-102. Definitions.

As used in the Uniform Child-Custody Jurisdiction and Enforcement Act:

(1) "abandoned" means left without provision for reasonable and necessary care or supervision;

(2) "child" means an individual who has not attained eighteen years of age;

(3) "child-custody determination" means a judgment, decree or other order of a court providing for legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial or modification order. The term does not include an order relating to child support or other monetary obligation of an individual;

(4) "child-custody proceeding" means a proceeding in which legal custody, physical custody or visitation with respect to a child is an issue. The term includes a proceeding for dissolution of marriage, custody of a child when dissolution of a 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 in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation or enforcement under Article 3 of the Uniform Child-Custody Jurisdiction and Enforcement Act;

(5) "commencement" means the filing of the first pleading in a proceeding;

(6) "court" means an entity authorized under the law of a state to establish, enforce or modify a child-custody determination;

(7) "home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period;

(8) "initial determination" means the first child-custody determination concerning a particular child;

(9) "issuing court" means the court that makes a child-custody determination for which enforcement is sought under the Uniform Child-Custody Jurisdiction and Enforcement Act;

(10) "issuing state" means the state in which a child-custody determination is made;

(11) "modification" means a child-custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination;

(12) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity;

(13) "person acting as a parent" means a person, other than a parent, who:

(A) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and

(B) has been awarded legal custody by a court or claims a right to legal custody under the law of this state;

(14) "physical custody" means the physical care and supervision of a child;

(15) "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States;

(16) "tribe" means an Indian tribe or band, or Alaskan Native village, which is recognized by federal law or formally acknowledged by a state; and

(17) "warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

History: Laws 2001, ch. 114, § 102.

ANNOTATIONS

Non-Indian-owned land within the exterior boundaries of a Pueblo. — In a divorce and custody dispute, where the mother was a non-Indian; the father was an enrolled member of the tribe; the couple's children were enrolled members of the tribe; the couple spent most of their four years of married life on the tribal lands; the mother took the children to her father's house on non-Indian-owned fee land within the exterior boundaries of the tribal lands, the fee land was not tribal territory for purposes of determining the home state of the children. *Garcia v. Gutierrez*, 2009-NMSC-044, 147 N.M. 105, 217 P.3d 591, *rev'g* 2008-NMCA-116, 144 N.M. 761, 192 P.3d 275.

Home state. — Land owned in fee by a non-Indian within the exterior boundaries of a pueblo is part of the tribe for purposes of determining the home state of a child. *Garcia v. Gutierrez*, 2008-NMCA-116, 144 N.M. 761, 192 P.3d 275, *rev'd*, 2009-NMSC-044, 147 N.M. 105, 217 P.3d 591.

Home state. — Where the child continuously lived in New Mexico with the child's parent from birth until the child was four months of age when the parent and the child moved to

Texas; the child and the parent lived in Texas for less than two weeks when the parent returned to New Mexico and filed a child custody proceeding; the child was on New Mexico medicaid; and the child's physician was in New Mexico, New Mexico was the child's home state and the New Mexico court had jurisdiction even though the Texas parent had filed a custody proceeding in Texas before the New Mexico proceeding was filed. *Malissa v. Matthew Wayne H.*, 2008-NMCA-128, 145 N.M. 22, 193 P.3d 569.

"Home state". — As defined in this section and used in 40-10-4A NMSA 1978 (now see 40-10A-201 NMSA 1978), "home state" means the state in which the child resided for six consecutive months immediately preceding the commencement of the current, not original, proceedings. *Trask v. Trask*, 1986-NMCA-098, 104 N.M. 780, 727 P.2d 88.

"Modification decree". — The father's Petition to Establish Child Custody and Visitation, alleging that a California decree was void and not entitled to full faith and credit, constituted a "modification decree" as defined in this section, even though the father did not specifically use the term "modification." *Nelson v. Nelson*, 1996-NMCA-015, 121 N.M. 243, 910 P.2d 319.

Construed with 32-1-54 NMSA 1978. — That the nonparent custodians of a child were "acting as parents" pursuant to 40-10-3H NMSA 1978 (now see Subsection (13) of this section) because they had physical custody of the child and claimed a right to custody did not have applicability in a neglect or abuse case so as to entitle the custodians to the protections afforded in a termination of parent rights case. *In re Agnes P.*, 1990-NMCA-091, 110 N.M. 768, 800 P.2d 202 (decided under prior law, *see* Section 32A-4-27).

Law reviews. — Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

40-10A-103. Proceedings governed by other law.

The Uniform Child-Custody Jurisdiction and Enforcement Act does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

History: Laws 2001, ch. 114, § 103.

ANNOTATIONS

Cross references. — For provisions pertaining to adoption, *see* Chapter 32A, Article 5 NMSA 1978.

40-10A-104. Application to Indian tribes.

(a) A child-custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to the Uniform Child-Custody Jurisdiction and Enforcement Act to the extent that it is governed by the Indian Child Welfare Act.

(b) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying Articles 1 and 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act.

(c) A child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of the Uniform Child-Custody Jurisdiction and Enforcement Act must be recognized and enforced under Article 3 of that act.

History: Laws 2001, ch. 114, § 104.

ANNOTATIONS

The Indian Child Welfare Act, 25 U.S.C. §1901 does not apply to give a tribal court exclusive jurisdiction over custody disputes in divorce proceedings. *Cherino v. Cherino*, 2008-NMCA-024, 143 N.M. 452, 176 P.3d 1184.

Divorce proceedings. — The Indian Child Welfare Act, 25 U.S.C. §1901, does not apply in divorce proceedings when the custody of children remain with the biological parents. *Cherino v. Cherino*, 2008-NMCA-024, 143 N.M. 452, 176 P.3d 1184.

Law reviews. — For article, "Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders", see 34 N.M.L. Rev. 381 (2004).

40-10A-105. International application of the Uniform Child-Custody Jurisdiction and Enforcement Act.

(a) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying Articles 1 and 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of the Uniform Child-Custody Jurisdiction and Enforcement Act must be recognized and enforced under Article 3 of that act.

(c) A court of this state need not apply the Uniform Child-Custody Jurisdiction and Enforcement Act if the child custody law of a foreign country violates fundamental principles of human rights.

History: Laws 2001, ch. 114, § 105.

ANNOTATIONS

40-10A-106. Effect of child-custody determination.

A child-custody determination made by a court of this state that had jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act binds all persons who have been served in accordance with the laws of this state or notified in accordance with Section 108 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

History: Laws 2001, ch. 114, § 106.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 A.L.R.4th 742.

40-10A-107. Priority.

If a question of existence or exercise of jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act is raised in a child-custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

History: Laws 2001, ch. 114, § 107.

ANNOTATIONS

40-10A-108. Notice to persons outside state.

(a) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in

a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(b) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

History: Laws 2001, ch. 114, § 108.

ANNOTATIONS

Notice to interested parties. — Where jurisdiction is sought to be established under the Child Custody Jurisdiction Act (now see the Uniform Child-Custody Jurisdiction and Enforcement Act), a petitioner must obtain service upon the other parties entitled to such notice by affirmatively undertaking to give notice and obtain service upon other interested parties as contemplated by this section. *In re Sabrina Mae D.*, 1992-NMCA-050, 114 N.M. 133, 835 P.2d 849, cert. denied, 113 N.M. 744, 832 P.2d 1223.

Waiver of notice. — Mother's handwritten document authorizing grandparents to sign any necessary papers for medical reasons for the child was insufficient to constitute consent to relinquish complete custody of her child to grandparents; nor was such document sufficient to constitute a valid waiver of notice or consent by her to submit to jurisdiction under Subsection D of 40-10-6 NMSA 1978 (now see this section). *In re Sabrina Mae D.*, 1992-NMCA-050, 114 N.M. 133, 835 P.2d 849, cert. denied, 113 N.M. 744, 832 P.2d 1223.

40-10A-109. Appearance and limited immunity.

(a) A party to a child-custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child-custody determination, is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(b) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(c) The immunity granted by subsection (a) does not extend to civil litigation based on acts unrelated to the participation in a proceeding under the Uniform Child-Custody Jurisdiction and Enforcement Act committed by an individual while present in this state.

History: Laws 2001, ch. 114, § 109.

40-10A-110. Communication between courts.

(a) A court of this state may communicate with a court in another state concerning a proceeding arising under the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Communication between courts on schedules, calendars, court records and similar matters may occur without informing the parties. A record need not be made of the communication.

(d) Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

History: Laws 2001, ch. 114, § 110.

40-10A-111. Taking testimony in another state.

(a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

History: Laws 2001, ch. 114, § 111.

40-10A-112. Cooperation between courts; preservation of records.

(a) A court of this state may request the appropriate court of another state to:

(1) hold an evidentiary hearing;

(2) order a person to produce or give evidence pursuant to procedures of that state;

(3) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(4) forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented and any evaluation prepared in compliance with the request; and

(5) order a party to a child-custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (a).

(c) Travel and other necessary and reasonable expenses incurred under subsections (a) and (b) may be assessed against the parties according to the law of this state.

(d) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations and other pertinent records with respect to a child-custody proceeding until the child attains eighteen years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records.

History: Laws 2001, ch. 114, § 112.

ANNOTATIONS

"Upon request of the court of another state". — An order by a trial court requiring the human services department [health care authority department] to perform a social study of the home of a resident of New Mexico at the request of an Illinois county's social services department, which was ordered by an Illinois state court to perform the home study, amounts to acting "(u)pon request of the court of another state" for Subsection A (now see Subsection (b) of this section). *State ex rel. Human Servs. Dep't v. Martin*, 1986-NMCA-041, 104 N.M. 279, 720 P.2d 314.

ARTICLE 2
JURISDICTION

40-10A-201. Initial child-custody jurisdiction.

(a) Except as otherwise provided in Section 204, a court of this state has jurisdiction to make an initial child-custody determination only if:

(1) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(2) a court of another state does not have jurisdiction under paragraph (1) or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 207 or 208] and:

(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 this state other than mere physical presence; and

(B) substantial evidence is available in this state concerning the child's care, protection, training and personal relationships;

(3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 207 or 208; or

(4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2) or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

History: Laws 2001, ch. 114, § 201.

ANNOTATIONS

Home state. — Where the child continuously lived in New Mexico with the child's parent from birth until the child was four months of age when the parent and the child moved to Texas; the child and the parent lived in Texas for less than two weeks when the parent returned to New Mexico and filed a child custody proceeding; the child was on New Mexico medicaid; and the child's physician was in New Mexico, New Mexico was the child's home state and the New Mexico court had jurisdiction even though the Texas parent had filed a custody proceeding in Texas before the New Mexico proceeding was filed. *Malissa v. Matthew Wayne H.*, 2008-NMCA-128, 145 N.M. 22, 193 P.3d 569.

As defined in 40-10-3E NMSA 1978 (now 40-10A-102(7) NMSA 1978) and used in this section, "home state" means the state in which the child resided for six consecutive months immediately preceding the commencement of the current, not original, proceedings. *Trask v. Trask*, 1986-NMCA-098, 104 N.M. 780, 727 P.2d 88.

Concurrent jurisdiction with tribal court. — In a divorce and custody dispute, where the mother was a non-Indian; the father was an enrolled member of the tribe; the couple's children were enrolled members of the tribe; the couple spent most of their four years of married life on the tribal lands; the mother took the children to her father's house on non-Indian-owned fee land within the exterior boundaries of the tribal lands; the district court awarded the mother temporary custody of the children; the mother later filed a divorce action in the district court; and the father subsequently filed a parallel divorce action in tribal court, the district court had significant connections jurisdiction that was concurrent with the jurisdiction of the tribal court over the child-custody dispute. *Garcia v. Gutierrez*, 2009-NMSC-044, 147 N.M. 105, 217 P.3d 591, *rev'g* 2008-NMCA-116, 144 N.M. 761, 192 P.3d 275.

Parental Kidnapping Prevention Act, 28 U.S.C. §1738A (2000) does not apply to tribes and under the act, tribes are not bound to give full faith and credit to state court judgments in state court cases and New Mexico is not bound to defer to tribal courts under the act. *Garcia v. Gutierrez*, 2009-NMSC-044, 147 N.M. 105, 217 P.3d 591, *rev'g* 2008-NMCA-116, 144 N.M. 761, 192 P.3d 275.

Termination of parental rights. — A straight termination proceeding, not involving custody, adoption, or other similar issues, does not fall within the Child Custody Jurisdiction Act (now see the Uniform Child-Custody Jurisdiction and Enforcement Act). *In re Vernon R.V.*, 1999-NMCA-125, 128 N.M. 242, 991 P.2d 986.

Compliance required with only one of prerequisites in Subsection A. — The New Mexico statute requires compliance with only one of four prerequisites in 40-10-4 NMSA 1978 (now see this section) to satisfy the jurisdictional requirement. *Olsen v. Olsen*, 1982-NMSC-112, 98 N.M. 644, 651 P.2d 1288; *Serna v. Salazar*, 1982-NMSC-117, 98 N.M. 648, 651 P.2d 1292.

Jurisdiction is mixed question of law and fact. — A determination of jurisdiction under this section involves a mixed question of law and fact, and an evidentiary record is necessary for a review of the factual claims in an appeal. *Meier v. Davignon*, 1987-NMCA-030, 105 N.M. 567, 734 P.2d 807.

Assertion of custody rights through guardianship proceedings. — In New Mexico, while a district court is invested with subject matter jurisdiction to grant a petition for guardianship of a minor or to adjudicate custody disputes between parents and non-parents involving children, except as provided in former 32-1-58 NMSA 1978, in the Children's Code (now 32A-4-31 NMSA 1978), over objection of a parent, guardianship proceedings are not the proper means to involuntarily terminate a parent's right to

custody of his or her children. *In re Sabrina Mae D.*, 1992-NMCA-050, 114 N.M. 133, 835 P.2d 849, cert. denied, 113 N.M. 744, 832 P.2d 1223.

Jurisdiction found. — Mother's voluntary placement of her child with grandparents in this state and allowing the child to remain in New Mexico for almost ten months prior to seeking her return, provided a proper basis for the court's determination that the child had a significant connection with this state so as to enable the court to exercise jurisdiction over the child. *In re Sabrina Mae D.*, 1992-NMCA-050, 114 N.M. 133, 835 P.2d 849, cert. denied, 113 N.M. 744, 832 P.2d 1223.

A New Mexico court had jurisdiction to modify a California order on custody since New Mexico was the home state of the parents and children at the time of commencement of the proceeding and since the California divorce decree court had retained jurisdiction only over property and related issues, not custody issues. *Nelson v. Nelson*, 1996-NMCA-015, 121 N.M. 243, 910 P.2d 319.

The New Mexico district court had jurisdiction over an action by a biological mother's lesbian domestic partner for time sharing and custody of children because there were significant connections between the mother, the children, and New Mexico, and there was substantial evidence regarding the children's care, protection, training and relationships. *Barnae v. Barnae*, 1997-NMCA-077, 123 N.M. 583, 943 P.2d 1036.

Jurisdiction not asserted. — Where the children resided in New Mexico for less than one year at the time of the divorce, and there is no indication of any connections between the children and the state other than the children's relationship to their father, jurisdiction could not be asserted in "best interests" of children. *Trask v. Trask*, 1986-NMCA-098, 104 N.M. 780, 727 P.2d 88.

Jurisdiction to make initial child custody determination. — In a domestic relations case, where petitioner and respondent were in a domestic relationship and decided to raise a child together, and where respondent was artificially inseminated by an anonymous donor and gave birth to child, and where petitioner initiated an action in district court to establish parentage and determine custody and timesharing with regard to child when the domestic relationship began to fall apart, and where respondent filed an objection to the district court’s jurisdiction over the case after respondent and child left the state of New Mexico, the district court erred in declining jurisdiction, because it was undisputed that child and respondent lived in New Mexico for at least six consecutive months immediately before the commencement of a child custody proceeding, and therefore at the time the petition was filed, New Mexico was child’s home state and the district court had jurisdiction to make the initial child custody determination. *Tomlinson v. Weatherford*, 2017-NMCA-055.

Venue. — A court which renders the initial decree in child custody and visitation proceedings is the proper venue for subsequent modifications of the cutodial order. *Dugie v. Cameron*, 1999-NMSC-002, 126 N.M. 433, 971 P.2d 390.

Law reviews. — Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 A.L.R.4th 742.

Significant connection jurisdiction of court under § 3(a)(2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(B), 5 A.L.R.5th 550.

Abandonment and emergency jurisdiction of court under § 3(a)(3) of the Uniform Child Custody Juridiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(C), 5 A.L.R.5th 788.

Home state jurisdiction of court under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 A.L.R.5th 1.

Default jurisdiction of court under § 3(a)(4) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(D), 6 A.L.R.5th 69.

Significant connection jurisdiction of court to modify foreign child custody decree under §§ 3(a)(2) and 14(b) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PICPA), 28 U.S.C.A. §§ 1738A(c)(2)(b) and 1738A(f)(1), 67 A.L.R.5th 1.

Home state jurisdiction of court to modify foreign child custody decree under §§ 3(a)(1) and 14(a)(2) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §§ 1738A(c)(2)(A) and 1738A(f)(1), 72 A.L.R.5th 249.

Declining jurisdiction to modify prior child custody decree under § 14(a)(1) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A(f)(2), 73 A.L.R.5th 185.

Abandonment jurisdiction of court under §§ 3(a)(3)(i) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.A. §§ 1738A(c)(2)(C)(i) and 1738A(f), notwithstanding existence of prior valid custody decree rendered by second state, 78 A.L.R.5th 465.

Emergency jurisdiction of court under §§ 3(a)(3)(ii) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.A. §§ 1738A(c)(2)(C)(ii) and 1738A(f), to protect interests of child notwithstanding existence of prior, valid custody decree rendered by another state, 80 A.L.R.5th 117.

40-10A-202. Exclusive, continuing jurisdiction.

(a) Except as otherwise provided in Section 204, a court of this state which has made a child-custody determination consistent with Section 201 or 203 has exclusive, continuing jurisdiction over the determination until:

(1) a court of this state determines that the child, or the child and one parent, or the child and a person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships; or

(2) a court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state.

(b) A court of this state which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 201.

History: Laws 2001, ch. 114, § 202.

ANNOTATIONS

Court had subject matter jurisdiction to enjoin publication of information. — Where, in a contentious divorce and child custody proceeding, the district court ordered plaintiff to stop filing complaints, motions or other devices pertaining to the child's guardian ad litem; plaintiff discussed the custody proceedings and published pleadings in the custody proceeding on the internet; and plaintiff claimed that the district court lacked jurisdiction to order plaintiff to remove the information from the internet because the entire family had moved to Canada and defendant had agreed that the district court no longer had jurisdiction over the custody case, the court's order was not related to child custody determinations and the court had general jurisdiction to issue an injunction regarding plaintiff's speech. *Kimbrell v. Kimbrell*, 2013-NMCA-070, 306 P.3d 495, *rev'd*, 2014-NMSC-027.

Full faith and credit. — The Uniform Child-Custody Jurisdiction and Enforcement Act requires States to fulfill their full faith and credit requirements under Article IV, § 4 of the United States Constitution. *State ex rel. Children, Youth and Families Dep't. v. Donna J.*, 2006-NMCA-023, 139 N.M. 131, 129 P.3d 167.

Jurisdiction. — Texas court did not lose its exclusive, continuous jurisdiction after father died and mother and child moved from Texas to New Mexico. *State ex rel. Children, Youth and Families Dep't. v. Donna J.*, 2006-NMCA-023, 139 N.M. 131, 129 P.3d 167.

"Reside" defined. — Mother's involuntary relocation to the Texas penitentiary because of her incarceration for murder does meet the definition of reside in this section. *State ex rel. Children, Youth and Families Dep't. v. Donna J.*, 2006-NMCA-023, 139 N.M. 131, 129 P.3d 167.

40-10A-203. Jurisdiction to modify determination.

Except as otherwise provided in Section 204, a court of this state may not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 201(a)(1) or (2) and:

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under Section 202 or that a court of this state would be a more convenient forum under Section 207; or

(2) a court of this state or a court of the other state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state.

History: Laws 2001, ch. 114, § 203.

ANNOTATIONS

Limitation on court authority. — Under both 28 U.S.C. § 1738A(f) of the federal Parental Kidnapping Prevention Act and 40-10-15A NMSA 1978 (now see this section), the children's court lacks the authority to modify another state's custody decree unless the other court no longer has jurisdiction or has declined to exercise jurisdiction to modify its custody decree. *State ex rel. Dep't of Human Servs. v. Avinger*, 1985-NMCA-097, 104 N.M. 355, 721 P.2d 781, *aff'd*, 1986-NMSC-032, 104 N.M. 255, 720 P.2d 290.

Section 40-10-15A NMSA 1978 (now see 32A-1-108 NMSA 1978) limits the court's exercise of jurisdiction in a "neglected child" proceeding brought under 32-1-9(A) NMSA 1978 (now 32A-1-8 NMSA 1978) where that proceeding could result in the modification of another state's custody decree where the other state has not given up jurisdiction. *State ex rel. Dep't of Human Servs. v. Avinger*, 1986-NMSC-032, 104 N.M. 255, 720 P.2d 290.

Federal Parental Kidnapping Prevention Act 28 U.S.C. § 1738A has supremacy over state law. *Serna v. Salazar*, 1982-NMSC-117, 98 N.M. 648, 651 P.2d 1292.

Compliance with jurisdictional prerequisites. — The New Mexico statute requires compliance with only one of four prerequisites in 40-10-4 NMSA 1978 (now see 40-10A-203 NMSA 1978) to satisfy the jurisdictional requirement. *Olsen v. Olsen*, 1982-NMSC-112, 98 N.M. 644, 651 P.2d 1288; *Serna v. Salazar*, 1982-NMSC-117, 98 N.M. 648, 651 P.2d 1292.

Law reviews. — For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order, 57 A.L.R.4th 710.

40-10A-204. Temporary emergency jurisdiction.

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child-custody determination that is entitled to be enforced under the Uniform Child-Custody Jurisdiction and Enforcement Act and a child-custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 201 through 203, a child-custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 201 through 203. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 201 through 203, a child-custody determination made under this section becomes a final determination, if it so provides, and this state becomes the home state of the child.

(c) If there is a previous child-custody determination that is entitled to be enforced under the Uniform Child-Custody Jurisdiction and Enforcement Act, or a child-custody proceeding has been commenced in a court of a state having jurisdiction under Sections 201 through 203, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Sections 201 through 203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) A court of this state which has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a state

having jurisdiction under Sections 201 through 203, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to Sections 201 through 203, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child and determine a period for the duration of the temporary order.

History: Laws 2001, ch. 114, § 204.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Appealability of interlocutory or pendente lite order for temporary child custody, 82 A.L.R.5th 389.

40-10A-205. Notice; opportunity to be heard; joinder.

(a) Before a child-custody determination is made under the Uniform Child-Custody Jurisdiction and Enforcement Act, notice and an opportunity to be heard in accordance with the standards of Section 108 must be given to all persons entitled to notice under the law of this state as in child-custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated and any person having physical custody of the child.

(b) The Uniform Child-Custody Jurisdiction and Enforcement Act does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.

(c) The obligation to join a party and the right to intervene as a party in a child-custody proceeding under the Uniform Child-Custody Jurisdiction and Enforcement Act are governed by the law of this state as in child-custody proceedings between residents of this state.

History: Laws 2001, ch. 114, § 205.

ANNOTATIONS

Notice to interested parties. — Where jurisdiction is sought to be established under the Child Custody Jurisdiction Act, a petitioner must obtain service upon the other parties entitled to such notice by affirmatively undertaking to give notice and obtain service upon other interested parties as contemplated by 40-10-6 NMSA 1978 (now see 40-10A-108 NMSA 1978). *In re Sabrina Mae D.*, 1992-NMCA-050, 114 N.M. 133, 835 P.2d 849, cert. denied, 113 N.M. 744, 832 P.2d 1223.

Waiver of notice. — Mother's handwritten document authorizing grandparents to sign any necessary papers for medical reasons for the child was insufficient to constitute

consent to relinquish complete custody of her child to grandparents; nor was such document sufficient to constitute a valid waiver of notice or consent by her to submit to jurisdiction under Subsection D of 40-10-6 NMSA 1978 (now see 40-10A-108 NMSA 1978). *In re Sabrina Mae D.*, 1992-NMCA-050, 114 N.M. 133, 835 P.2d 849, cert. denied, 113 N.M. 744, 832 P.2d 1223.

When foreign custody order not enforceable. — A temporary New Hampshire ex parte child custody order was not enforceable in New Mexico, where it was obtained without providing notice to the father and an opportunity to be heard. *Elder v. Park*, 1986-NMCA-034, 104 N.M. 163, 717 P.2d 1132.

Execution of facially valid ex parte custody order. — It was objectively reasonable for a social worker, sued under 42 U.S.C. § 1983, to have believed that participating with California police officers in executing in California a facially valid New Mexico ex parte custody order, based on allegations of sexual abuse, that complied with the post-deprivation prompt notice and hearing requirements in Rules 10-303 and 10-304 NMRA (now 10-315 and 10-314 NMRA), would not violate the federal rights of the child's mother. Social workers reasonably would not know that ex parte orders cannot be served in another state without domesticating them. *Yount v. Millington*, 1993-NMCA-143, 117 N.M. 95, 869 P.2d 283, cert. denied, 117 N.M. 121, 869 P.2d 820 (1994).

Law reviews. — For annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

40-10A-206. Simultaneous proceedings.

(a) Except as otherwise provided in Section 204, a court of this state may not exercise its jurisdiction under Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act 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 substantially in conformity with the Uniform Child-Custody Jurisdiction and Enforcement Act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 207.

(b) Except as otherwise provided in Section 204, a court of this state, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 209. If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with the Uniform Child-Custody Jurisdiction and Enforcement Act, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with the Uniform Child-Custody Jurisdiction and Enforcement Act does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(c) In a proceeding to modify a child-custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child-custody determination has been commenced in another state, the court may:

(1) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying or dismissing the proceeding for enforcement;

(2) enjoin the parties from continuing with the proceeding for enforcement; or

(3) proceed with the modification under conditions it considers appropriate.

History: Laws 2001, ch. 114, § 206.

ANNOTATIONS

Jurisdiction substantially in conformity with the act. — Where a four-month old child lived exclusively in New Mexico from birth until the child's parents departed for Texas; the child was on New Mexico medicaid and his doctor was in New Mexico; the child lived in Texas for thirteen days before the mother left Texas; the father filed a custody proceeding in Texas and the mother subsequently filed a custody proceeding in New Mexico; the pleadings filed in the Texas proceeding did not state where or with whom the child had resided since birth, the New Mexico court had jurisdiction because the Texas court was not exercising jurisdiction substantially in conformity with the act and substantial evidence supported the New Mexico court's finding that the child's home state was New Mexico. *Malissa C. v. Matthew Wayne H.*, 2008-NMCA-128, 145 N.M. 22, 193 P.3d 569.

Assumption of jurisdiction by New Mexico court. — A New Mexico court had jurisdiction to modify a California order on custody since New Mexico was the home state of the parents and children at the time of commencement of the proceeding and since the California divorce decree court had retained jurisdiction only over property and related issues, not custody issues. *Nelson v. Nelson*, 1996-NMCA-015, 121 N.M. 243, 910 P.2d 319.

Proceeding in other state. — Award of temporary custody to the mother was improper pursuant to the former New Mexico Child Custody Jurisdiction Act because child custody proceedings were previously filed and pending in the child's home state, which was Missouri. *Escobar v. Reisinger*, 2003-NMCA-047, 133 N.M. 487, 64 P.3d 514.

Cessation of home state jurisdiction. — The Uniform Child-Custody Jurisdiction Enforcement Act's language specifically requires action by either the home state or another state before exclusive, continuing jurisdiction in the home state ceases. *State ex rel. Children, Youth and Families Dep't' v. Donna J.*, 2006-NMCA-023, 139 N.M. 131, 129 P.3d 167.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 78 A.L.R.4th 1028.

Pending proceeding in another state as ground for declining jurisdiction under § 6(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(g), 20 A.L.R.5th 700.

40-10A-207. Inconvenient forum.

(a) A court of this state which has jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, 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.

(c) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this state may decline to exercise its jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

History: Laws 2001, ch. 114, § 207.

ANNOTATIONS

Determination of jurisdiction should ordinarily be made as preliminary matter, but where neither side offered affidavits or other evidence that would have enabled the trial court to rule on the jurisdictional question before the hearing, a later decision was justified. *Hester v. Hester*, 1984-NMCA-002, 100 N.M. 773, 676 P.2d 1338.

New Mexico held to be most convenient forum. — New Mexico was properly ruled to be a convenient forum for an action by a biological mother's lesbian domestic partner for time sharing and custody of children because of the lack of an adequate forum in California. *Barnae v. Barnae*, 1997-NMCA-077, 123 N.M. 583, 943 P.2d 1036.

Certain factors must be considered when declining jurisdiction. — In a domestic relations case, where petitioner and respondent were in a domestic relationship and decided to raise a child together, and where respondent was artificially inseminated by an anonymous donor and gave birth to child, and where petitioner initiated an action in district court to establish parentage and determine custody and timesharing with regard to child when the domestic relationship began to fall apart, and where respondent filed an objection to the district court’s jurisdiction over the case after respondent and child left the state of New Mexico, the district court erred in declining jurisdiction, because it was undisputed that child and respondent lived in New Mexico for at least six consecutive months immediately before the commencement of a child custody proceeding, and therefore at the time the petition was filed, New Mexico was child’s home state and the district court had jurisdiction to make the initial child custody determination, and declining jurisdiction would only have been appropriate if the district court determined that another state was a more appropriate forum. *Tomlinson v. Weatherford*, 2017-NMCA-055.

Standard of appellate review. — A court's determination under this section is discretionary, and will not be reversed unless the decision is contrary to the reason, logic, evidence, and equities in the case. *Meier v. Davignon*, 1987-NMCA-030, 105 N.M. 567, 734 P.2d 807.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Inconvenience of forum as ground for declining jurisdiction under § 7 of the Uniform Child Custody Jurisdiction Act (UCCJA), 21 A.L.R.5th 396.

40-10A-208. Jurisdiction declined by reason of conduct.

(a) Except as otherwise provided in Section 204 or by other law of this state, if a court of this state has jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) a court of the state otherwise having jurisdiction under Sections 201 through 203 determines that this state is a more appropriate forum under Section 207; or

(3) no court of any other state would have jurisdiction under the criteria specified in Sections 201 through 203.

(b) If a court of this state declines to exercise its jurisdiction pursuant to subsection (a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under Sections 201 through 203.

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (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. The court may not assess fees, costs or expenses against this state unless authorized by law other than the Uniform Child-Custody Jurisdiction and Enforcement Act.

History: Laws 2001, ch. 114, § 208.

ANNOTATIONS

Certain factors must be considered when declining jurisdiction. — In a domestic relations case, where petitioner and respondent were in a domestic relationship and decided to raise a child together, and where respondent was artificially inseminated by an anonymous donor and gave birth to child, and where petitioner initiated an action in district court to establish parentage and determine custody and timesharing with regard

to child when the domestic relationship began to fall apart, and where respondent filed an objection to the district court's jurisdiction over the case after respondent and child left the state of New Mexico, the district court erred in declining jurisdiction, because it was undisputed that child and respondent lived in New Mexico for at least six consecutive months immediately before the commencement of a child custody proceeding, and therefore at the time the petition was filed, New Mexico was child's home state and the district court had jurisdiction to make the initial child custody determination, and declining jurisdiction would only have been appropriate if the district court determined that another state was a more appropriate forum. *Tomlinson v. Weatherford*, 2017-NMCA-055.

Attorneys' fees awardable if forum found inconvenient, even if not clearly inappropriate. — Where trial court declines jurisdiction under this section can be the basis for awarding attorney fees on appeal even though trial court did not find New Mexico a clearly inappropriate forum. *Hester v. Hester*, 1984-NMCA-002, 100 N.M. 773, 676 P.2d 1338.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis, 20 A.L.R.4th 823.

40-10A-209. Information to be submitted to court.

(a) Subject to local law providing for the confidentiality of procedures, addresses and other identifying information in a child-custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(1) 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 and, if so, identify the court, the case number and the date of the child-custody determination, if any;

(2) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions and, if so, identify the court, the case number and the nature of the proceeding; and

(3) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(b) If the information required by subsection (a) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(c) If the declaration as to any of the items described in subsection (a)(1) through (3) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(d) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(e) If a party alleges in an affidavit or a pleading under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety or liberty of the party or child and determines that the disclosure is in the interest of justice.

History: Laws 2001, ch. 114, § 209.

40-10A-210. Appearance of parties and child.

(a) In a child-custody proceeding in this state, the court may order a party to the proceeding who is in this state to appear before the court in person with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear in person with the child.

(b) If a party to a child-custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to Section 108 include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(c) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(d) If a party to a child-custody proceeding who is outside this state is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

History: Laws 2001, ch. 114, § 210.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 A.L.R.4th 864.

ARTICLE 3
ENFORCEMENT

40-10A-301. Definitions.

As used in Article 3 of the Uniform Child-Custody Jurisdiction and Enforcement Act:

(1) "petitioner" means a person who seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child-custody determination; and

(2) "respondent" means a person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child-custody determination.

History: Laws 2001, ch. 114, § 301.

40-10A-302. Enforcement under Hague Convention.

Under Article 3 of the Uniform Child-Custody Jurisdiction and Enforcement Act, a court of this state 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.

History: Laws 2001, ch. 114, § 302.

ANNOTATIONS

Cross references. — For the Hague Convention on the Civil Aspects of International Child Abduction, *see* the International Agreements Volume of the United States Code Service and 42 U.S.C. § 11601 et seq.

40-10A-303. Duty to enforce.

(a) A court of this state shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with the Uniform Child-Custody Jurisdiction and Enforcement Act or if the determination was made under factual circumstances meeting the jurisdictional standards of that act and the determination has not been modified in accordance with that act.

(b) A court of this state may utilize any remedy available under other law of this state to enforce a child-custody determination made by a court of another state. The remedies provided in Article 3 of the Uniform Child-Custody Jurisdiction and Enforcement Act are cumulative and do not affect the availability of other remedies to enforce a child-custody determination.

(c) A court of this state may enforce a custody determination made pursuant to Sections 201 and 203 until it is modified by a court having jurisdiction pursuant to Sections 201 and 203.

History: Laws 2001, ch. 114, § 303.

40-10A-304. Temporary visitation.

(a) A court of this state which does not have jurisdiction to modify a child-custody determination may issue a temporary order enforcing:

(1) a visitation schedule made by a court of another state; or

(2) the visitation provisions of a child-custody determination of another state that does not provide for a specific visitation schedule.

(b) If a court of this state makes an order under subsection (a)(2), it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act. The order remains in effect until an order is obtained from the other court or the period expires.

History: Laws 2001, ch. 114, § 304.

40-10A-305. Registration of child-custody determination.

(a) A child-custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the appropriate court in this state:

(1) a letter or other document requesting registration;

(2) two copies, including one certified copy, of the determination sought to be registered and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

(3) except as otherwise provided in Section 209, the name and address of the person seeking 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.

(b) On receipt of the documents required by subsection (a), the registering 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.

(c) The notice required by subsection (b)(2) 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.

(d) 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 of the Uniform Child-Custody Jurisdiction and Enforcement Act;

(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 Uniform Child-Custody Jurisdiction and Enforcement Act; or

(3) the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of Section 108 in the proceedings before the court that issued the order for which registration is sought.

(e) 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.

(f) 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.

History: Laws 2001, ch. 114, § 305.

ANNOTATIONS

Law reviews. — For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act (now see the Uniform Child-Custody Jurisdiction and Enforcement Act); State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

40-10A-306. Enforcement of registered determination.

(a) A court of this state may grant any relief normally available under the law of this state to enforce a registered child-custody determination made by a court of another state.

(b) A court of this state shall recognize and enforce, but may not modify, except in accordance with Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act, a registered child-custody determination of a court of another state.

History: Laws 2001, ch. 114, § 306.

ANNOTATIONS

Law reviews. — For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act (now see the Uniform Child-Custody Jurisdiction and Enforcement Act); State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

40-10A-307. Simultaneous proceedings.

If a proceeding for enforcement under Article 3 of the Uniform Child-Custody Jurisdiction and Enforcement Act is commenced in a court of this state and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

History: Laws 2001, ch. 114, § 307.

40-10A-308. Expedited enforcement of child-custody determination.

(a) A petition under Article 3 of the Uniform Child-Custody Jurisdiction and Enforcement Act must be verified. Certified copies of all orders sought to be enforced

and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(b) A petition for enforcement of a child-custody determination must state:

(1) whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(2) whether the determination for which enforcement is sought has been vacated, stayed or modified by a court whose decision must be enforced under the Uniform Child-Custody Jurisdiction and Enforcement Act and, if so, identify the court, the case number and the nature of the proceeding;

(3) 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 and, if so, identify the court, the case number and the nature of the proceeding;

(4) the present physical address of the child and the respondent, if known;

(5) 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

(6) if the child-custody determination has been registered and confirmed under Section 305, the date and place of registration.

(c) Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(d) An order issued under subsection (c) must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs and expenses under Section 312 and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(1) the child-custody determination has not been registered and confirmed under Section 305 and that:

(A) the issuing court did not have jurisdiction under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act;

(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 Uniform Child-Custody Jurisdiction and Enforcement Act; and

(C) the respondent was entitled to notice, but notice was not given in accordance with the standards of Section 108 in the proceedings before the court that issued the order for which enforcement is sought; or

(2) the child-custody determination for which enforcement is sought was registered and confirmed under Section 305, but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act.

History: Laws 2001, ch. 114, § 308.

40-10A-309. Service of petition and order.

Except as otherwise provided in Section 311, the petition and order must be served, by any method authorized by the law of this state, upon the respondent and any person who has physical custody of the child.

History: Laws 2001, ch. 114, § 309.

40-10A-310. Hearing and order.

(a) Unless the court issues a temporary emergency order pursuant to Section 204, upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(1) the child-custody determination has not been registered and confirmed under Section 305 and that:

(A) the issuing court did not have jurisdiction under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act;

(B) the child-custody determination for which enforcement is sought has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act; or

(C) the respondent was entitled to notice, but notice was not given in accordance with the standards of Section 108 in the proceedings before the court that issued the order for which enforcement is sought; or

(2) the child-custody determination for which enforcement is sought was registered and confirmed under Section 305 but has been vacated, stayed or modified

by a court of a state having jurisdiction to do so under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) The court shall award the fees, costs and expenses authorized under Section 312 and may grant additional relief, including a request for the assistance of law enforcement officials, and set a further hearing to determine whether additional relief is appropriate.

(c) If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(d) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under Article 3 of the Uniform Child-Custody Jurisdiction and Enforcement Act.

History: Laws 2001, ch. 114, § 310.

40-10A-311. Warrant to take physical custody of child.

(a) Upon the filing of a petition seeking enforcement of a child-custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this state.

(b) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by Section 308(b).

(c) A warrant to take physical custody of a child must:

(1) recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(2) direct law enforcement officers to take physical custody of the child immediately; and

(3) provide for the placement of the child pending final relief.

(d) The respondent must be served with the petition, warrant and order immediately after the child is taken into physical custody.

(e) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(f) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

History: Laws 2001, ch. 114, § 311.

40-10A-312. Costs, fees and expenses.

(a) 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.

(b) The court may not assess fees, costs or expenses against a state unless authorized by law other than the Uniform Child-Custody Jurisdiction and Enforcement Act.

History: Laws 2001, ch. 114, § 312.

40-10A-313. Recognition and enforcement.

A court of this state shall accord full faith and credit to an order issued by another state and consistent with the Uniform Child-Custody Jurisdiction and Enforcement Act which enforces a child-custody determination by a court of another state, unless the order has been vacated, stayed or modified by a court having jurisdiction to do so under Article 2 of that act.

History: Laws 2001, ch. 114, § 313.

ANNOTATIONS

Law reviews. — For Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(a), 40 A.L.R.5th 227.

Abandonment jurisdiction of court under §§ 3(a)(3)(i) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.A. §§ 1738A(c)(2)(C)(i) and 1738A(f), notwithstanding existence of prior valid custody decree rendered by second state, 78 A.L.R.5th 465.

40-10A-314. Appeals.

An appeal may be taken from a final order in a proceeding under Article 3 of the Uniform Child-Custody Jurisdiction and Enforcement Act in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under Section 204, the enforcing court may not stay an order enforcing a child-custody determination pending appeal.

History: Laws 2001, ch. 114, § 314.

40-10A-315. Role of prosecutor or public official.

(a) In a case arising under the Uniform Child-Custody Jurisdiction and Enforcement Act or involving the Hague Convention on the Civil Aspects of International Child Abduction, the prosecutor or other appropriate public official may take any lawful action, including resort to a proceeding under Article 3 of the Uniform Child-Custody Jurisdiction and Enforcement Act or any other available civil proceeding, to locate a child, obtain the return of a child or enforce a child-custody determination if there is:

(1) an existing child-custody determination;

(2) a request to do so from a court in a pending child-custody proceeding;

(3) a reasonable belief that a criminal statute has been violated; or

(4) a reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(b) A prosecutor or appropriate public official acting under this section acts on behalf of the court and may not represent any party.

History: Laws 2001, ch. 114, § 315.

ANNOTATIONS

Cross references. — For the Hague Convention, *see* 40-10A-302 NMSA 1978 and notes thereto.

40-10A-316. Role of law enforcement.

At the request of a prosecutor or other appropriate public official acting under Section 315, a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official with responsibilities under Section 315.

History: Laws 2001, ch. 114, § 316.

40-10A-317. Costs and expenses.

If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or other appropriate public official and law enforcement officers under Section 315 or 316.

History: Laws 2001, ch. 114, § 317.

ARTICLE 4
MISCELLANEOUS PROVISIONS

40-10A-401. Application and construction.

In applying and construing the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 to 40-10A-403 NMSA 1978], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2001, ch. 114, § 401.

40-10A-402. Severability clause.

If any provision of the Uniform Child-Custody Jurisdiction and Enforcement Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act which can be given effect without the invalid provision or application and to this end the provisions of the act are severable.

History: Laws 2001, ch. 114, § 402.

40-10A-403. Transitional provision.

A motion or other request for relief made in a child-custody proceeding or to enforce a child-custody determination which was commenced before the effective date of the Uniform Child-Custody Jurisdiction and Enforcement Act is governed by the law in effect at the time the motion or other request was made.

History: Laws 2001, ch. 114, § 403.

ARTICLE 10B
Kinship Guardianship

40-10B-1. Short title.

Chapter 40, Article 10B NMSA 1978 may be cited as the "Kinship Guardianship Act".

History: Laws 2001, ch. 167, § 1; 2020, ch. 51, § 1.

ANNOTATIONS

Cross references. — For forms approved for use in Kinship Guardianship proceedings, *see* Civil Forms 4A-501 to 4A-513 NMRA.

Compiler's notes. — The Kinship Guardianship Act, codified as 40-10B-1 to 40-10B-15 NMSA 1978, was originally drafted and enacted to be Chapter 45, Article 5 NMSA 1978, but it was recompiled to Chapter 40 NMSA 1978, as the latter seems a more appropriate placement.

The 2020 amendment, effective May 20, 2020, changed "This act" to "Chapter 40, Article 10B NMSA 1978".

40-10B-2. Repealed.

History: Laws 2001, ch. 167, § 2; repealed by Laws 2020, ch. 51, § 10.

ANNOTATIONS

Repeals. — Laws 2020, ch. 51, § 10 repealed 40-10B-2 NMSA 1978, as enacted by Laws 2001, ch. 167, § 2, relating to policy, purpose, effective May 20, 2020. For provisions of former section, *see* the 2019 NMSA 1978 on *NMOneSource.com*.

40-10B-3. Definitions.

As used in the Kinship Guardianship Act:

A. "caregiver" means an adult, who is not a parent of a child, with whom a child resides and who provides that child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child;

B. "child" means an individual who is a minor;

C. "department" means the children, youth and families department;

D. "guardian" means a person appointed as a guardian by a court or Indian tribal authority;

E. "Indian" means, whether an adult or child, a person who is:

(1) a member of an Indian tribe; or

(2) eligible for membership in an Indian tribe;

F. "Indian child" means an Indian person, or a person whom there is reason to know is an Indian person, under eighteen years of age, who is neither:

(1) married; or

(2) emancipated;

G. "Indian child's tribe" means:

(1) the Indian tribe in which an Indian child is a member or eligible for membership; or

(2) in the case of an Indian child who is a member or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts;

H. "Indian custodian" means an Indian who, pursuant to tribal law or custom or pursuant to state law:

(1) is an adult with legal custody of an Indian child; or

(2) has been transferred temporary physical care, custody and control by the parent of the Indian child;

I. "Indian tribe" means an Indian nation, tribe, pueblo or other band, organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary of the interior because of their status as Indians, including an Alaska native village as defined in 43 U.S.C. Section 1602(c) or a regional corporation as defined in 43 U.S.C. Section 1606. For the purposes of notification to and

communication with a tribe as required in the Indian Family Protection Act [32A-28-1 to 32A-28-42 NMSA 1978], "Indian tribe" also includes those tribal officials and staff who are responsible for child welfare and social services matters;

J. "kinship" means the relationship that exists between a child and a relative of the child, a godparent, a member of the child's tribe or clan or an adult with whom the child has a significant bond;

K. "parent" means a biological or adoptive parent of a child whose parental rights have not been terminated and includes an individual identified as a parent under the New Mexico Uniform Parentage Act [40-11A-101 to 40-11A-903 NMSA 1978]; and

L. "relative" means an individual related to a child as a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin or any person denoted by the prefix "grand" or "great", or the spouse or former spouse of the persons specified.

History: Laws 2001, ch. 167, § 3; 2020, ch. 51, § 2; 2023, ch. 90, § 22.

ANNOTATIONS

The 2023 amendment, effective July 1, 2023, defined "Indian," "Indian child," "Indian child's tribe," "Indian custodian," and "Indian tribe", revised the definitions of "guardian" and "parent," and removed the definitions of "guardianship assistance agreement," "guardianship assistance payments," "guardianship assistance program," "legal custody," "subsidized guardianship," and "voluntary placement agreement"; in Subsection D, after "authority", deleted "or a person authorized to care for the child by a parental power of attorney as permitted by law"; deleted former Subsections E through G; added new Subsections E through I and redesignated former Subsection H as Subsection J; deleted former Subsection I and redesignated former Subsections J and K as Subsections K and L, respectively; in Subsection K, after "terminated", added "and includes an individual identified as a parent under the New Mexico Uniform Parentage Act; and"; and deleted former Subsections L and M.

The 2020 amendment, effective May 20, 2020, defined "department", "guardian", "guardianship assistance agreement", "guardianship assistance payments", "guardianship assistance program", "legal custody", "subsidized guardianship" and "voluntary placement agreement" as used in the Kinship Guardianship Act; added new Subsections C through G and redesignated former Subsection C as Subsection H; added a new Subsection I and redesignated former Subsections D and E as Subsections J and K, respectively; and added Subsections L and M.

40-10B-4. Jurisdiction and venue.

A. The district court has jurisdiction of proceedings pursuant to the Kinship Guardianship Act.

B. Proceedings pursuant to the Kinship Guardianship Act shall be in the district court of the county of the child's legal residence or the county where the child resides, if different from the county of legal residence.

History: Laws 2001, ch. 167, § 4.

40-10B-5. Petition; who may file; contents.

A. A petition seeking the appointment of a guardian pursuant to the Kinship Guardianship Act may be filed only by:

(1) a kinship caregiver;

(2) a caregiver, who has reached the age of twenty-one, with whom no kinship with the child exists who has been nominated to be guardian of the child by the child, and the child has reached the age of fourteen;

(3) a caregiver designated formally or informally by a parent in writing if the designation indicates on its face that the parent signing understands:

(a) the purpose and effect of the guardianship;

(b) that the parent has the right to be served with the petition and notices of hearings in the action; and

(c) that the parent may appear in court to contest the guardianship; or

(4) a caregiver with whom the department has placed the child pursuant to the Children's Code.

B. A petition seeking the appointment of a guardian shall be verified by the petitioner and allege the following with respect to the child:

(1) facts that, if proved, will meet the requirements of Subsection B of Section 40-10B-8 NMSA 1978;

(2) the date and place of birth of the child, if known, and if not known, the reason for the lack of knowledge;

(3) the legal residence of the child and the place where the child resides, if different from the legal residence;

(4) the name and address of the petitioner;

(5) the kinship, if any, between the petitioner and the child;

(6) the names and addresses of the parents of the child;

(7) the names and addresses of persons having legal custody of the child;

(8) the existence of any matters pending involving the custody of the child;

(9) a statement that the petitioner agrees to accept the duties and responsibilities of guardianship;

(10) the existence of any matters pending pursuant to the provisions of Chapter 32A, Article 4 NMSA 1978 and, if so, a statement that the department consents to the relief requested in the petition;

(11) whether the child is an Indian child or there is reason to know that the child is an Indian child, and subject to provisions of the Indian Family Protection Act and, if so:

(a) the Indian child's tribe;

(b) the tribal affiliations of the Indian child's parents; and

(c) active efforts made to comply with the notice requirements pursuant to the Indian Family Protection Act, including results of the contact and the names, addresses, titles and telephone numbers of the persons contacted. Copies of any correspondence with the Indian child's tribe shall be attached as exhibits to the petition; and

(12) other facts in support of the guardianship sought.

History: Laws 2001, ch. 167, § 5; 2015, ch. 28, § 1; 2022, ch. 41, § 69; 2023, ch. 90, § 23.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901 et seq.

The 2023 amendment, effective July 1, 2023, provided that a caregiver with whom the children, youth and families department has placed the child is authorized to file a petition seeking the appointment of a guardian pursuant to the Kinship Guardianship Act, and revised the required contents of a petition seeking the appointment of a guardian if the child is an Indian child; in Subsection A, added Paragraph A(4); and in Subsection B, Paragraph B(11), added a new Subparagraph B(11)(a), deleted former Subparagraph B(11)(b) and added Subparagraph B(11)(c).

The 2022 amendment, effective July 1, 2022, amended an existing provision that listed items of information that are required to be set forth in a petition seeking the

appointment of a guardian to include whether the child is an Indian child or there is reason to know that the child is an Indian child, and subject to the provisions of the Indian Family Protection Act; and in Subsection B, Paragraph B(11), after "whether the child is", added "an Indian child or there is reason to know that the child is an Indian child, and", and after "provisions of the", deleted "federal Indian Child Welfare Act of 1978" and added "Indian Family Protection Act".

Applicability. — Laws 2022, ch. 41, § 73 provided that the provisions of Laws 2022, ch. 41 apply to all cases filed on or after July 1, 2022.

The 2015 amendment, effective June 19, 2015, removed the requirement to state marital status of the child in a petition seeking the appointment of a guardian pursuant to the Kinship Guardianship Act and made technical corrections; in Subsection A, Paragraph (2), after the first occurrence of "reached", deleted "his twenty-first birthday" and added "the age of twenty-one", and after the second occurrence of "reached", deleted "his fourteenth birthday" and added "the age of fourteen"; in Subparagraph A(3)(b), after "that", deleted "he" and added "the parent"; in Subparagraph A(3)(c), after "that", deleted "he" and added "the parent"; in Subsection B, Paragraph (1), after "Section", deleted "8 of the Kinship Guardianship Act" and added "40-10B-8 NMSA 1978"; in Subsection B, Paragraph (3), after "where", deleted "he" and added "the child"; and deleted former Paragraph (4) of Subsection B, and redesignated the succeeding paragraphs accordingly.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. § 1901 et seq.) upon child custody determinations, 89 A.L.R.5th 195.

40-10B-6. Service of petition; notice; parties.

A. The court shall set a date for hearing on the petition, which date shall be no less than thirty and no more than ninety days from the date of filing the petition.

B. The petition and a notice of the hearing shall be served upon:

(1) the department if there is any pending matter relating to the child pursuant to the provisions of the Children's Code [Chapter 32A NMSA 1978];

(2) the child if the child has reached the age of fourteen;

(3) the parents of the child;

(4) a person having custody of the child or visitation rights pursuant to a court order; and

(5) if the child is an Indian child or there is reason to know the child is an Indian child subject to the provisions of the Indian Family Protection Act [32A-28-1 to

32A-28-42 NMSA 1978], the appropriate Indian tribe and any "Indian custodian", together with a notice of pendency of the guardianship proceedings, pursuant to the provisions of the Indian Family Protection Act.

C. Service of process required by Subsection A of this section shall be made in accordance with the requirements for giving notice of a hearing pursuant to Subsection A of Section 45-1-401 NMSA 1978.

D. The persons required to be served pursuant to Subsection B of this section have a right to file a response as parties to this action. Other persons may intervene pursuant to Rule 1-024 NMRA.

History: Laws 2001, ch. 167, § 6; 2015, ch. 28, § 2; 2022, ch. 41, § 70; 2023, ch. 90, § 24.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901 et seq.

For service of process forms, *see* Civil Forms 4-206, 4-209 and 4-209B NMRA.

The 2023 amendment, effective July 1, 2023, clarified language in the section; and in Subsection B, Paragraph B(1), after "provisions of", deleted "Chapter 32A, Article 4 NMSA 1978" and added "the Children's Code", in Paragraph B(5), after the second occurrence of "Indian child", deleted "as defined in the Children's Code" and added "subject to the provisions of the Indian Family Protection Act", and after "guardianship proceedings", added "pursuant to the provisions of the Indian Family Protection Act".

The 2022 amendment, effective July 1, 2022, required, when a court sets a date for hearing on a petition seeking the appointment of a guardian, that the petition and notice of hearing be served, when the child is an Indian child or there is reason to know the child is an Indian child as defined in the Children's Code, on the Indian tribe and the child's parent or Indian custodian; and in Subsection B, Paragraph B(5), after the first occurrence of "Indian child", added "or there is reason to know the child is an Indian child", after "defined in the", deleted "federal Indian Child Welfare Act of 1978" and added "Children's Code", after "Indian tribe and", deleted "any" and added "the child's parent or", and after "guardianship proceedings", deleted "pursuant to the provisions of the federal Indian Child Welfare Act of 1978".

Applicability. — Laws 2022, ch. 41, § 73 provided that the provisions of Laws 2022, ch. 41 apply to all cases filed on or after July 1, 2022.

The 2015 amendment, effective June 19, 2015, amended the process for obtaining a court hearing; in Subsection A, after "A.", deleted "At the time of filing the petition, the petitioner shall obtain an order of the court setting" and added "The court shall set"; and

in Subsection B, Paragraph (2), after "if", deleted "he" and added "the child", and after "reached", deleted "his fourteenth birthday" and added "the age of fourteen".

Procedural due process denied. — Where a grandparent filed a petition for guardianship; the matter was resolved when the grandparent and the parents of the child reached a settlement agreement; respondent was a parent of the child; when the other parent breached the settlement agreement, the grandparent, without filing a new petition for guardianship, prepared a guardianship order; the district court signed the guardianship order in an ex parte proceeding; and no notice was given to respondent and no hearing was scheduled or held on the matter, respondent was denied procedural due process. *Burris-Awalt v. Knowles*, 2010-NMCA-083, 148 N.M. 616, 241 P.3d 617.

40-10B-7. Temporary guardianship pending hearing.

A. After the filing of the petition, upon motion of the petitioner or a person required to be served pursuant to Subsection B of Section 40-10B-6 NMSA 1978, or upon its own motion, the court may appoint a temporary guardian to serve for not more than one hundred eighty days or until the case is decided on the merits, whichever occurs first.

B. A motion for temporary guardianship shall be heard within twenty days of the date the motion is filed. The motion and notice of hearing shall be served on all persons required to be served pursuant to Subsection B of Section 40-10B-6 NMSA 1978.

C. An order pursuant to Subsection A of this section may be entered ex parte upon good cause shown. If the order is entered ex parte, a copy of the order shall be served on the persons required to be served pursuant to Subsection B of Section 40-10B-6 NMSA 1978. If a person files an objection to the order, the court immediately shall schedule a hearing to be held within ten days of the date the objection is filed. Notice of the hearing shall be given to the petitioner and all persons required to be served pursuant to Subsection B of Section 40-10B-6 NMSA 1978.

History: Laws 2001, ch. 167, § 7; 2023, ch. 90, § 25.

ANNOTATIONS

The 2023 amendment, effective July 1, 2023, substituted "40-10B-6 NMSA 1978" for "6 of the Kinship Guardianship Act" throughout the section.

40-10B-8. Hearing; elements of proof; burden of proof; judgment; child support.

A. Upon hearing, if the court finds that a qualified person seeks appointment, the venue is proper, the required notices have been given, the requirements of Subsection B of this section have been proved and the best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases, the court

may dismiss the proceedings or make any other disposition of the matter that will serve the best interests of the minor.

B. A guardian may be appointed pursuant to the Kinship Guardianship Act only if:

(1) a parent of the child is living and has consented in writing to the appointment of a guardian and the consent has not been withdrawn;

(2) a parent of the child is living but all parental rights in regard to the child have been terminated or suspended by prior court order; or

(3) the child has resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed and a parent having legal custody of the child is currently unwilling or unable to provide adequate care, maintenance and supervision for the child or there are extraordinary circumstances; and

(4) no guardian of the child is currently appointed pursuant to a provision of the Uniform Probate Code.

C. The burden of proof shall be by clear and convincing evidence.

D. As part of a judgment entered pursuant to the Kinship Guardianship Act, the court may order a parent to pay the reasonable costs of support and maintenance of the child that the parent is financially able to pay. The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment.

E. The court may order visitation between a parent and child to maintain or rebuild a parent-child relationship if the visitation is in the best interests of the child.

History: Laws 2001, ch. 167, § 8; 2015, ch. 28, § 3; 2020, ch. 51, § 3; 2023, ch. 90, § 26.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901 et seq.

The 2023 amendment, effective July 1, 2023, removed a provision allowing the court to consider the potential impact of financial payments on the relationship of the parent and child and on the prospects of family reunification; and in Subsection D, after "financially able to pay", deleted "The court shall consider the potential impact of financial payments pursuant to this subsection on the relationship of the parent and child and on the prospects of family reunification.".

The 2020 amendment, effective May 20, 2020, required the court to consider the potential impact of financial payments when ordering a parent to pay costs of support and maintenance of a child; and in Subsection D, added "The court shall consider the potential impact of financial payments pursuant to this subsection on the relationship of the parent and child on the prospects of family reunification.".

The 2015 amendment, effective June 19, 2015, changed the standard of proof in cases involving an Indian child; in Subsection C, deleted "except that in those cases involving an Indian child as defined in the federal Indian Child Welfare Act of 1978, the burden of proof shall be proof beyond a reasonable doubt".

Both parents must satisfy the conditions for appointment of a guardian. — Section 40-10B-8 NMSA 1978 requires both parents to satisfy at least one of the three conditions of Subsection B, but does not require both parents to satisfy the same condition. *Freedom C. v. Brian D.*, 2012-NMSC-017, 280 P.3d 909, *rev'g* 2011-NMCA-040, 149 N.M. 588, 252 P.3d 812.

Both parents satisfied the conditions for appointment of a guardian. — Where the parents and the child lived with the child's grandparents for three years; one parent was the child of the grandparents; the other parent moved out of the house and ended the relationship with the other parent in 2008; in a custody proceeding filed by the parents, the district court awarded temporary sole legal and physical custody of the child to the grandparents and visitation rights to the parents; in 2009, almost nine months after they had been awarded custody, the grandparents filed a petition for kinship guardianship and custody of the child; one parent consented to the guardianship; the other parent did not consent to the guardianship; and the district court found the parents to be unfit to raise the child and granted the grandparent's petition for kinship guardianship, the district court properly applied 40-10B-8 NMSA 1978 because both parents satisfied the conditions of Subsection B(3) of 40-10B-8 NMSA 1978. *Freedom C. v. Brian D.*, 2012-NMSC-017, 280 P.3d 909, *rev'g* 2011-NMCA-040, 149 N.M. 588, 252 P.3d 812.

Extraordinary circumstances defined. — Extraordinary circumstances for purposes of the Kinship Guardianship Act are circumstances other than the parent's current inability or unwillingness to provide the child with adequate care, maintenance and supervision that justify appointing guardians for a child over the objections of the child's parents. *Debbie L. v. Galadriel R.*, 2009-NMCA-007, 145 N.M. 500, 201 P.3d 169, cert. denied, 2008-NMCERT-012, 145 N.M. 571, 203 P.3d 102.

Extraordinary circumstances. — A showing that the petitioners have assumed the role of the psychological parents of the child who is the subject of a Kinship Guardianship Act proceeding to the extent that the child will suffer a significant degree of psychological and emotional harm if the relationship with the psychological parents is abruptly terminated is sufficient to rebut the presumption that the biological parent is acting in the child's best interests and to establish extraordinary circumstances within the meaning of the Kinship Guardianship Act. *Debbie L. v. Galadriel R.*, 2009-NMCA-

007, 145 N.M. 500, 201 P.3d 169, cert. denied, 2008-NMCERT-012, 145 N.M. 571, 203 P.3d 102.

"Extraordinary circumstances" construed. — Where grandmother sought kinship guardianship of her twelve-year-old granddaughter after the unexpected death of the child's mother, alleging that there were extraordinary circumstances warranting the appointment, and where grandmother's petition disclosed that the child had resided with her for fourteen days, and where the district court granted the child's father's motion to dismiss grandmother's petition on the grounds that the child had not resided with grandmother for a period of ninety days prior to the filing of the petition as required by § 40-10B-8(B)(3) NMSA 1978, and that the petition failed to allege facts sufficient to establish "extraordinary circumstances" under the act as a matter of law, the district court erred in dismissing the petition because the legislature did not intend the ninety-day residence requirement to be strictly applied when there are extraordinary circumstances, and the extraordinary circumstances alleged by grandmother, that the child's mother had suddenly died and that the child had not had contact with her father for nearly a year based on his noncompliance with an order of a domestic relations court requiring him to improve his parenting skills, satisfied the purposes and spirit of Subsection 40-10B-8(B)(3). *D.W. v. B.C.*, 2022-NMCA-006.

Extraordinary circumstances were not proven. — Where, in a divorce action, although respondent and respondent's ex-spouse were both found to be fit, custody of respondent's children was awarded to the ex-spouse; the ex-spouse and children lived in New Mexico for eleven years; respondent lived in Texas where the children visited respondent during summers and holidays; when the ex-spouse developed cancer, the children stayed with petitioners for brief periods while the ex-spouse receive medical treatments; when the ex-spouse died, petitioners sought to be appointed as kinship guardians over the children; petitioners were friends of the ex-spouse, but had no biological relationship to the children; the children wanted to stay with petitioners because they had strong ties with the community, wanted to finish school in the community, and were eligible for college scholarships in New Mexico; and there was no evidence that the move to Texas with respondent would cause serious psychological harm or other serious detriment to the children, the evidence did not establish that there were extraordinary circumstances to rebut the presumption that the welfare and best interests of the children would best be served in the custody of respondent. *Stanley J. v. Cliff J.*, 2014-NMCA-029.

40-10B-9. Guardian ad litem; appointment.

A. In a proceeding to appoint a guardian pursuant to the Kinship Guardianship Act, the court may appoint a guardian ad litem for the child upon the motion of a party or solely in the court's discretion. 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.

B. In 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.

C. The court may order all or some of the parties to a proceeding to pay a reasonable fee of a guardian ad litem. If all of the parties are indigent, the court may award a reasonable fee to the guardian ad litem to be paid out of funds of the court.

History: Laws 2001, ch. 167, § 9.

40-10B-10. Guardian ad litem; powers and duties.

A guardian ad litem appointed by the court in a proceeding pursuant to the Kinship Guardianship Act shall:

A. in connection with a petition for guardianship, make a diligent investigation of the circumstances surrounding the petition, including visiting the child in the home, interviewing the person proposed as guardian and interviewing the parents of the child if available;

B. in connection with a petition or motion for revocation of a guardianship, recommend an appropriate transition plan in the event the guardianship is revoked; and

C. at a hearing held in connection with proceedings described in Subsection A or B of this section, report to the court concerning the best interests of the child and the child's position on the requested relief.

History: Laws 2001, ch. 167, § 10.

40-10B-11. Nomination objection by child.

In a proceeding for appointment of a guardian pursuant to the Kinship Guardianship Act:

A. the court shall appoint a person nominated by a child who has reached the age of fourteen unless the court finds the nomination contrary to the best interests of the child; and

B. the court shall not appoint a person as guardian if a child who has reached the age of fourteen files a written objection in the proceeding before the person accepts appointment as guardian unless the court makes a specific finding that it is in the best interest of the child.

History: Laws 2001, ch. 167, § 11; 2023, ch. 90, § 27.

ANNOTATIONS

The 2023 amendment, effective July 1, 2023, authorized the court to appoint a person as guardian even if a child who has reached the age of fourteen files a written objection, provided the court makes a specific finding that it is in the best interest of the child; and in Subsection B, after "appointment as guardian", added "unless the court makes a specific finding that it is in the best interest of the child".

40-10B-12. Revocation of guardianship.

A. Any person, including a child who has reached the age of fourteen, may move for revocation of a guardianship created pursuant to the Kinship Guardianship Act. The person requesting revocation shall attach to the motion a transition plan proposed to facilitate the reintegration of the child into the home of a parent or a new guardian. A transition plan shall take into consideration the child's age, development and any bond with the guardian.

B. If the court finds that a preponderance of the evidence proves a change in circumstances and the revocation is in the best interests of the child, it shall grant the motion and:

(1) adopt a transition plan proposed by a party or the guardian ad litem;

(2) propose and adopt its own transition plan; or

(3) order the parties to develop a transition plan by consensus if they will agree to do so.

History: Laws 2001, ch. 167, § 12; 2023, ch. 90, § 28.

ANNOTATIONS

The 2023 amendment, effective July 1, 2023, in Subsection A, after "reached", deleted "his fourteenth birthday" and added "the age of fourteen".

Right of third party to file motion to revoke guardianship. — Where the petitioner, who was the child's aunt by marriage, filed a petition for custody of the child; the child lived with the child's grandmother; the child's mother consented to a kinship guardianship of the child to the grandmother; the court dismissed the petition on the basis of standing; during proceedings on petitioner's motion for reconsideration, petitioner expressed an intention to file a motion under 40-10B-12 NMSA 1978 of the Kinship Guardianship Act; and the court disallowed petitioner from filing the motion and warned petitioner that the court would consider the motion contemptuous of the court's prior order of dismissal, the court's prohibition was erroneous, because 40-10B-12 NMSA 1978 permits any person to file a motion to revoke a kinship guardianship. *Vescio v. Wolf*, 2009-NMCA-129, 147 N.M. 374, 223 P.3d 371.

40-10B-13. Rights and duties of guardian.

A. A guardian appointed for a child pursuant to the Kinship Guardianship Act has the legal rights and duties of a parent except the right to consent to adoption of the child and except for parental rights and duties that the court orders retained by a parent.

B. Unless otherwise ordered by the court, a guardian appointed pursuant to the Kinship Guardianship Act has authority to make all decisions regarding visitation between a parent and the child.

C. A certified copy of the court order appointing a guardian pursuant to the Kinship Guardianship Act shall be satisfactory proof of the authority of the guardian, and letters of guardianship need not be issued.

History: Laws 2001, ch. 167, § 13.

ANNOTATIONS

Kinship guardians possess the rights of biological parents. — A kinship guardian appointed under the Kinship Guardianship Act, 40-10B-1 NMSA 1978 et seq., possesses the same legal rights and responsibilities of a biological parent and may not be involuntarily dismissed as a party from a termination of parental rights case under the Abuse and Neglect Act, 32A-4-1 NMSA 1978 et seq., without first revoking the kinship guardianship according to the procedures specified in the Kinship Guardianship Act and the rules of evidence, but is not a necessary and indispensable party as defined by Rule 1-019 NMRA. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

Where guardian was appointed by a family court as a kinship guardian pursuant to the Kinship Guardianship Act, 40-10B-1 NMSA 1978 et seq., and where Children, Youth and Families Department (CYFD) brought abuse and neglect proceedings in children's court against guardian and children's biological parents pursuant to the Abuse and Neglect Act, 32A-4-1 NMSA 1978 et seq., the kinship guardian, who possesses the same legal rights and responsibilities of a biological parent, must be a party to a termination of parental rights hearing under the Abuse and Neglect Act, but is not a necessary and indispensable party as defined by Rule 1-019 NMRA. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

Kinship guardian is a necessary and indispensable party. — A kinship guardian under the Kinship Guardianship Act, 40-10B-1 NMSA 1978 et seq., who is named as a respondent in an abuse and neglect proceeding is a necessary and indispensable party in the abuse and neglect case and may not be involuntarily dismissed from the case without first revoking the kinship guardianship according to the procedures specified in the Kinship Guardianship Act. *State ex rel. CYFD v. Djamila B.*, 2014-NMCA-045, cert. granted, 2014-NMCERT-004.

Where the guardian was appointed as kinship guardian for the children pursuant to the Kinship Guardianship Act, 40-10B-1 NMSA 1978 et seq.; the children lived with the

guardian; the department filed a neglect and abuse petition under the Abuse and Neglect Act, Chapter 32A, Article 4 NMSA 1978, against the guardian and the children's parents; the district court adopted the department's permanency plan to reunify the children with the guardian; six months later, the district court changed the permanency plan from reunification to adoption and dismissed the guardian from the proceedings; and the guardian's kinship guardianship had not been revoked pursuant to the Kinship Guardianship Act because the permanency plan included a proposed adoption, the guardian was a necessary and indispensable party to the abuse and neglect case so long as the guardian's kinship guardianship remained in effect. *State ex rel. CYFD v. Djamila B.*, 2014-NMCA-045, cert. granted, 2014-NMCERT-004.

40-10B-14. Continuing jurisdiction of the court.

The court appointing a guardian pursuant to the Kinship Guardianship Act retains continuing jurisdiction of the matter.

History: Laws 2001, ch. 167, § 14.

ANNOTATIONS

Orders for injunctive relief in family matters that provide for continuing jurisdiction are modifiable. — Where grandmother petitioned for visitation privileges with her granddaughter under the Grandparent's Visitation Privileges Act (GVPA), 40-9-1 to 40-9-4 NMSA 1978, and where, while the GVPA proceeding was pending, a no-contact order that had been issued in a separate proceeding under the Kinship Guardianship Act (KGA), 40-10B-1 to 40-10B-15 NMSA 1978, was clarified to prohibit contact between grandmother and the child, and where the district court determined that the revised no-contact order precluded any contact between grandmother and the child, and as a result dismissed the GVPA petition for failure to state a claim without receiving grandmother's evidence, the district court erred in dismissing grandmother's petition as precluded as a matter of law, because orders for injunctive relief in family matters that provide for continuing jurisdiction are modifiable, whether for changed circumstances or some other reason that the injunctive relief should no longer govern the parties' conduct, and grandmother, in this case, alleged sufficient facts to support a claim for visitation, and therefore grandmother was entitled to offer evidence to demonstrate that the petition created a genuine issue of material fact about whether under the current circumstances, modification of the revised no-contact order was justified and visitation under the GVPA was appropriate. *Flores v. McLain*, 2024-NMCA-079.

Courts appointing guardians have concurrent jurisdiction with Children's Courts. — Family courts which appoint kinship guardianships have continuing concurrent jurisdiction with children's courts presiding over abuse and neglect proceedings, and therefore petitions to revoke the rights of a kinship guardian may be filed within abuse and neglect proceedings. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

Where the children’s court judge interpreted continuing jurisdiction to mean exclusive jurisdiction, the children’s court judge erred in ruling that the court lacked jurisdiction to revoke the kinship guardianship pursuant to this Act. *State ex rel. Children, Youth & Families Dep’t v. Djamila B.*, 2015-NMSC-003.

40-10B-15. Caregiver's authorization affidavit.

A. A caregiver who executes a caregiver's authorization affidavit substantially in the form contained in Subsection J of this section by completing Items 1 through 4 of the form and who subscribes and swears to it before a notary public, is authorized to:

(1) enroll the named child in early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve school;

(2) consent to medical care, including school-related medical care, immunizations, sports physical examinations, dental care and mental health care; and

(3) be the authorized contact person for school-related purposes.

B. A caregiver who is a relative of the child, who executes a caregiver's authorization affidavit substantially in the form set forth in Subsection J of this section by completing Items 1 through 7 and who subscribes and swears to the affidavit before a notary public, has the same authority to authorize medical care, dental care and mental health care for the child as a guardian appointed pursuant to the Kinship Guardianship Act.

C. A caregiver's authorization affidavit executed pursuant to this section is not valid for more than one year after the date of its execution.

D. The decision of a caregiver to consent to or refuse medical, dental or mental health care pursuant to a caregiver's authorization affidavit is superseded by a contravening decision of a parent or other person having legal custody of the child if the contravening decision does not jeopardize the life, health or safety of the child.

E. No person who acts in good faith reliance on a caregiver's authorization affidavit to provide medical, dental or mental health care to a child without actual knowledge of facts contrary to those stated in the affidavit is subject to criminal culpability, civil liability or professional disciplinary action if the affidavit complies with the requirements of this section. The foregoing exclusions apply even though a parent having parental rights or person having legal custody of the child has contrary wishes as long as the provider of the care has no actual knowledge of the contrary wishes.

F. A person who relies upon a caregiver's authorization affidavit is under no duty to make further inquiry or investigation.

G. If a child stops living with the caregiver, the caregiver shall give notice of that fact to a school, early intervention services provider, child development program provider, headstart provider, preschool or kindergarten through grade twelve school, medical or dental health care provider, mental health care provider, health insurer or other person who has been given a copy of the caregiver's authorization affidavit.

H. A caregiver's authorization affidavit is invalid unless it contains the warning statement set out in the form contained in Subsection J of this section in not less that ten-point boldface type, or a reasonable equivalent thereof, enclosed in a box with three-point rule lines.

I. As used in this section, "school-related medical care" means medical care that is required by the state or a local government authority as a condition for school enrollment.

J. The caregiver's authorization affidavit shall be in substantially the following form:

"Caregiver's Authorization Affidavit"

Use of this affidavit is authorized by the Kinship Guardianship Act.

Instructions:

A. Completion of Items 1-4 and the signing of the affidavit is sufficient to authorize the caregiver to:

(1) enroll a minor in early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve school ("school");

(2) consent to medical care, including school-related medical care, immunizations, sports physical examinations, dental care and mental health care; and

(3) be the authorized contact person for school-related purposes.

B. Completion of Items 5-7 is additionally required to authorize any other medical care.

Print clearly:

The minor named below lives in my home and I am 18 years of age or older.

1. Name of minor: _____.

2. Minor's birth date: _____.

3. My name (adult giving authorization): _____.

4. My home address: _____.

5. Check one or both (for example, if one parent was advised and the other cannot be located):

( ) I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.

( ) I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.

6. My date of birth: _____.

7. My NM driver's license or other identification card number: _____.

WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment or both.

I declare under penalty of perjury under the laws of the state of New Mexico that the foregoing is true and correct.

Signed: _____

The foregoing affidavit was subscribed, sworn to and acknowledged before me this _____ day of _____, 20_____, by _____.

My commission expires: _____ _____

Notary Public

Notices:

1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody and control of the minor and does not mean that the caregiver has legal custody of the minor.

2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.

3. This affidavit is not valid for more than one year after the date on which it is executed.

Additional Information:

TO CAREGIVERS:

1. If the minor stops living with you, you are required to notify any school, early intervention services provider, child development program provider, headstart provider, preschool or kindergarten through grade twelve school, medical or dental health care provider, mental health care provider, health insurer or other person to whom you have given this affidavit.

2. If you do not have the information requested in Item 7, provide another form of identification such as your social security number or medicaid number.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. No person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical, dental or mental health care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for such reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

History: Laws 2001, ch. 167, § 15; 2017, ch. 62, § 1.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, amended the caregiver's authorization affidavit process to include early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve school, and consent to medical care; in Subsection A, after "is authorized to", added the paragraph designation "(1)", in Paragraph A(1), after "named child in", added "early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve", and after "school", deleted "and consent to school-related medical care for the child", and added Paragraphs A(2) and A(3); in Subsection B, after "Items 1 through", deleted "8" and added "7"; in Subsection G, after "fact to a school", added "early intervention services provider, child development program provider, headstart provider, preschool or kindergarten through grade twelve school, medical or dental"; in Subsection J, Paragraph A of the "Caregiver's Authorization Affidavit", after "sufficient to authorize", deleted "enrollment of" and added "the caregiver to", and added Subparagraphs (1) through (3); in Paragraph B of the Caregiver's Authorization Affidavit, after "Items", deleted "5-8" and added "5-7", deleted Subparagraph (5) and redesignated the succeeding subparagraphs accordingly; and in the section titled "TO CAREGIVERS", deleted Subparagraph (1) and redesignated the succeeding subparagraphs accordingly; and in Subparagraph (1), after "notify any school", added "early intervention services provider, child development program provider, headstart provider, preschool or kindergarten through grade twelve school, medical or dental", and in Subparagraph (2), after "Item", deleted "8" and added "7".

40-10B-16. Repealed.

History: 1978 Comp., § 40-10B-16, as enacted by Laws 2020, ch. 51, § 4; repealed by Laws 2023, ch. 90, § 29.

ANNOTATIONS

Repeals. — Laws 2023, ch. 90, § 29 repealed 40-10B-16 NMSA 1978, as enacted by Laws 2020, ch. 51, § 4, relating to financial subsidies, eligibility, effective July 1, 2023. For provisions of former section, *see* the 2022 NMSA 1978 on *NMOneSource.com*.

40-10B-17. Repealed.

History: 1978 Comp., § 40-10B-17, as enacted by Laws 2020, ch. 51, § 5; repealed by Laws 2023, ch. 90, § 29.

ANNOTATIONS

Repeals. — Laws 2023, ch. 90, § 29 repealed 40-10B-17 NMSA 1978, as enacted by Laws 2020, ch. 51, § 5, relating to financial subsidies, nonrecurring expenses, effective July 1, 2023. For provisions of former section, *see* the 2022 NMSA 1978 on *NMOneSource.com*.

40-10B-18. Repealed.

History: 1978 Comp., § 40-10B-18, as enacted by Laws 2020, ch. 51, § 6; repealed by Laws 2023, ch. 90, § 29.

ANNOTATIONS

Repeals. — Laws 2023, ch. 90, § 29 repealed 40-10B-18 NMSA 1978, as enacted by Laws 2020, ch. 51, § 6, relating to guardianship assistance agreements, effective July 1, 2023. For provisions of former section, *see* the 2022 NMSA 1978 on *NMOneSource.com*.

40-10B-19. Repealed.

History: 1978 Comp., § 40-10B-19, as enacted by Laws 2020, ch. 51, § 7; repealed by Laws 2023, ch. 90, § 29.

ANNOTATIONS

Repeals. — Laws 2023, ch. 90, § 29 repealed 40-10B-19 NMSA 1978, as enacted by Laws 2020, ch. 51, § 7, relating to successor guardians, effective July 1, 2023. For provisions of former section, *see* the 2022 NMSA 1978 on *NMOneSource.com*.

40-10B-20. Repealed.

History: 1978 Comp., § 40-10B-20, as enacted by Laws 2020, ch. 51, § 8; repealed by Laws 2023, ch. 90, § 29.

ANNOTATIONS

Repeals. — Laws 2023, ch. 90, § 29 repealed 40-10B-20 NMSA 1978, as enacted by Laws 2020, ch. 51, § 8, relating to discontinuance of guardianship assistance payments, effective July 1, 2023. For provisions of former section, *see* the 2022 NMSA 1978 on *NMOneSource.com*.

40-10B-21. Repealed.

History: 1978 Comp., § 40-10B-21, as enacted by Laws 2020, ch. 51, § 9; repealed by Laws 2023, ch. 90, § 29.

ANNOTATIONS

Repeals. — Laws 2023, ch. 90, § 29 repealed 40-10B-21 NMSA 1978, as enacted by Laws 2020, ch. 51, § 9, relating to appeal of decisions, effective July 1, 2023. For provisions of former section, *see* the 2022 NMSA 1978 on *NMOneSource.com*.

ARTICLE 10C
Uniform Child Abduction Prevention

40-10C-1. Short title.

This act [40-10C-1 to 40-10C-12 NMSA 1978] may be cited as the "Uniform Child Abduction Prevention Act".

History: Laws 2013, ch. 156, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-2. Definitions.

As used in the Uniform Child Abduction Prevention Act:

A. "abduction" means the wrongful removal or wrongful retention of a child;

B. "child" means an unemancipated individual who is less than eighteen years of age;

C. "child-custody determination" means a judgment, decree or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. "Child-custody determination" includes a permanent, temporary, initial or modification order;

D. "child-custody proceeding" means a proceeding in which legal custody, physical custody or visitation with respect to a child is at issue. "Child-custody proceeding" includes a proceeding for divorce, dissolution of marriage, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights or protection from domestic violence;

E. "court" means an entity authorized pursuant to the law of a state to establish, enforce or modify a child-custody determination;

F. "petition" includes a motion or its equivalent;

G. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

H. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. "State" includes a federally recognized Indian nation, tribe or pueblo;

I. "travel document" means records relating to a travel itinerary, including travel tickets, passes, reservations for transportation or accommodations. "Travel document" does not include a passport or visa;

J. "wrongful removal" means the taking of a child, which taking breaches rights of custody or visitation given or recognized pursuant to the law of this state; and

K. "wrongful retention" means the keeping or concealing of a child, which keeping or concealing breaches rights of custody or visitation given or recognized pursuant to the law of this state.

History: Laws 2013, ch. 156, § 2.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-3. Cooperation and communication among courts.

Sections 40-10A-110 through 40-10A-112 NMSA 1978 apply to cooperation and communication among courts in proceedings pursuant to the Uniform Child Abduction Prevention Act.

History: Laws 2013, ch. 156, § 3.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-4. Actions for abduction prevention measures.

A. A court on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child.

B. A party to a child-custody determination or another individual or entity having a right pursuant to the law of this state or any other state to seek a child-custody determination for the child may file a petition seeking abduction prevention measures to protect the child pursuant to the Uniform Child Abduction Prevention Act.

C. A prosecutor or public authority designated pursuant to Section 40-10A-315 NMSA 1978 may seek a warrant to take physical custody of a child pursuant to Section 9 of the Uniform Child Abduction Prevention Act or other appropriate prevention measures.

History: Laws 2013, ch. 156, § 4.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-5. Jurisdiction.

A. A petition pursuant to the Uniform Child Abduction Prevention Act may be filed only in a court that has jurisdiction to make a child-custody determination with respect to the child at issue pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 to 40-10A-403 NMSA 1978].

B. A court of this state has temporary emergency jurisdiction pursuant to Section 40-10A-204 NMSA 1978 if the court finds a credible risk of abduction.

History: Laws 2013, ch. 156, § 5.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-6. Contents of petition.

A petition pursuant to the Uniform Child Abduction Prevention Act shall be verified and include a copy of any existing child-custody determination, if available. The petition shall specify the risk factors for abduction, including the relevant factors described in Section 7 of the Uniform Child Abduction Prevention Act. Subject to the provisions of Subsection (e) of Section 40-10A-209 NMSA 1978, and if the information is reasonably ascertainable, the petition shall contain:

A. the name, date of birth and gender of the child;

B. the customary address and current physical location of the child;

C. the identity, customary address and current physical location of the respondent;

D. a statement of whether a prior action to prevent abduction or domestic violence has been filed by a party or other individual or entity having custody of the child and the date, location and disposition of the action;

E. a statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking or child abuse or neglect and the date, location and disposition of the case;

F. a statement of whether a party or other individual having custody of the child has sought the assistance of a domestic violence shelter and, if known, the approximate date and name of the person seeking the assistance of the shelter; and

G. any other information required to be submitted to the court for a child-custody determination pursuant to Section 40-10A-209 NMSA 1978.

History: Laws 2013, ch. 156, § 6.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-7. Factors to determine risk of abduction.

A. In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent:

(1) has previously abducted or attempted to abduct the child;

(2) has threatened to abduct the child;

(3) has recently engaged in activities that may indicate a planned abduction, including:

(a) abandoning employment;

(b) selling a primary residence;

(c) terminating a lease;

(d) closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents or conducting any unusual financial activities;

(e) applying for a passport or visa or obtaining travel documents for the respondent, a family member or the child; or

(f) seeking to obtain the child's birth certificate or school or medical records;

(4) has engaged in domestic violence, stalking or child abuse or neglect;

(5) has refused to follow a child-custody determination;

(6) lacks strong familial, financial, emotional or cultural ties to the state or the United States;

(7) has strong familial, financial, emotional or cultural ties to another state or country;

(8) is likely to take the child to a country that:

(a) is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child;

(b) is a party to the Hague Convention on the Civil Aspects of International Child Abduction but: 1) the Hague Convention on the Civil Aspects of International Child Abduction is not in force between the United States and that country; 2) the country is noncompliant according to the most recent compliance report issued by the United States department of state; or 3) the country lacks legal mechanisms for immediately and effectively enforcing a return order pursuant to the Hague Convention on the Civil Aspects of International Child Abduction;

(c) poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;

(d) has laws or practices that would: 1) enable the respondent, without due cause, to prevent the petitioner from contacting the child; 2) restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status or religion; or 3) restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality or religion;

(e) is included by the United States department of state on a current list of state sponsors of terrorism;

(f) does not have an official United States diplomatic presence in the country; or

(g) is engaged in active military action or war, including a civil war, to which the child may be exposed;

(9) is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally;

(10) has had an application for United States citizenship denied;

(11) has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a federal social security card, a driver's license or other government-issued identification card or has made a misrepresentation to the United States government;

(12) has used multiple names to attempt to mislead or defraud; or

(13) has engaged in any other conduct the court considers relevant to the risk of abduction.

B. In the hearing on a petition pursuant to the Uniform Child Abduction Prevention Act, the court shall consider any evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child.

C. In applying the provisions of the Uniform Child Abduction Prevention Act, a court shall consider that parents abduct their children before as well as during and after custody litigation. The court shall also consider that some of the risk factors set forth in Subsection A of this section involve the same activities that might be undertaken by a victim of domestic violence who is trying to relocate or flee to escape violence. If the

evidence shows that the parent preparing to leave is fleeing domestic violence, the court shall consider that any order restricting departure or transferring custody may pose safety issues for the victim and the child.

History: Laws 2013, ch. 156, § 7.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-8. Provisions and measures to prevent abduction.

A. If a petition is filed pursuant to the Uniform Child Abduction Prevention Act, the court may enter an order that shall include:

(1) the basis for the court's exercise of jurisdiction;

(2) the manner in which notice and opportunity to be heard were given to the persons entitled to notice of the proceeding;

(3) a detailed description of each party's custody and visitation rights and residential arrangements for the child;

(4) a provision stating that a violation of the order may subject the party in violation to civil and criminal penalties; and

(5) identification of the child's country of habitual residence at the time of the issuance of the order.

B. If at a hearing on a petition pursuant to the Uniform Child Abduction Prevention Act or on the court's own motion, the court, after reviewing the evidence, finds a credible risk of abduction of the child, the court shall enter an abduction prevention order. The order shall include the provisions required by Subsection A of this section and measures and conditions, including those set forth in Subsections C, D and E of this section, that are reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties. The court shall consider the age of the child, the potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted and the reasons for the potential abduction, including evidence of domestic violence, stalking or child abuse or neglect.

C. An abduction prevention order may include one or more of the following:

(1) an imposition of travel restrictions that requires that a party traveling with the child outside a designated geographical area provide the other party with the following:

(a) the travel itinerary of the child;

(b) a list of physical addresses and telephone numbers at which the child can be reached at specified times; and

(c) copies of all travel documents;

(2) a prohibition of the respondent directly or indirectly:

(a) removing the child from this state, the United States or another geographic area without permission of the court or the petitioner's written consent;

(b) removing or retaining the child in violation of a child-custody determination;

(c) removing the child from school or a child care or similar facility; or

(d) approaching the child at any location other than a site designated for supervised visitation;

(3) a requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state;

(4) with regard to the child's passport:

(a) a direction that the petitioner place the child's name in the United States department of state's child passport issuance alert program;

(b) a requirement that the respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and

(c) a prohibition upon the respondent from applying on behalf of the child for a new or replacement passport or visa;

(5) as a prerequisite to exercising custody or visitation, a requirement that the respondent provide:

(a) to the United States department of state office of children's issues and the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child;

(b) to the court: 1) proof that the respondent has provided the information in Subparagraph (a) of this paragraph; and 2) an acknowledgment in a record from the relevant foreign consulate or embassy that no passport application has been made, nor passport issued, on behalf of the child;

(c) to the petitioner, proof of registration with the United States embassy or other United States diplomatic presence in the destination country and with the central authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that convention is in effect between the United States and the destination country, unless one of the parties objects; and

(d) a written waiver pursuant to the Privacy Act of 1974, 5 U.S.C. Section 552a, as amended, with respect to any document, application or other information pertaining to the child authorizing its disclosure to the court and the petitioner; and

(6) upon the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the United States.

D. In an abduction prevention order, the court may impose conditions on the exercise of custody or visitation that:

(1) limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and order the respondent to pay the costs of supervision;

(2) require the respondent to post a bond or provide other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorney fees and costs if there is an abduction; and

(3) require the respondent to obtain education on the potentially harmful effects to the child from abduction.

E. To prevent imminent abduction of a child, a court may:

(1) issue a warrant to take physical custody of the child pursuant to Section 9 of the Uniform Child Abduction Prevention Act;

(2) direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child or enforce a custody determination pursuant to the Uniform Child Abduction Prevention Act; or

(3) grant any other relief allowed pursuant to the law of this state other than the Uniform Child Abduction Prevention Act.

F. The remedies provided in the Uniform Child Abduction Prevention Act are cumulative and do not affect the availability of other remedies to prevent abduction.

G. A court shall not require the disclosure of a confidential communication that is protected by the Victim Counselor Confidentiality Act [31-25-1 to 31-25-6 NMSA 1978], the physician-patient privilege or the psychotherapist-patient privilege.

History: Laws 2013, ch. 156, § 8.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-9. Warrant to take physical custody of child.

A. If a petition pursuant to the Uniform Child Abduction Prevention Act contains allegations that the child is imminently likely to be wrongfully removed and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed, the court may issue an ex parte warrant to take physical custody of the child.

B. The respondent on a petition pursuant to Subsection A of this section shall be afforded an opportunity to be heard at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.

C. An ex parte warrant pursuant to Subsection A of this section to take physical custody of a child shall:

(1) recite the facts upon which a determination of a credible risk of imminent wrongful removal of the child is based;

(2) direct law enforcement officers to take physical custody of the child immediately;

(3) state the date and time for the hearing on the petition; and

(4) provide for the safe interim placement of the child pending further order of the court.

D. If feasible, before issuing a warrant and before determining the placement of the child after the warrant is executed, the court may order a search of the relevant databases of the national crime information center system and similar state databases to determine if either the petitioner or respondent has a history of domestic violence, stalking or child abuse or neglect.

E. The petition and warrant shall be served on the respondent when or immediately after the child is taken into physical custody.

F. A warrant to take physical custody of a child, issued by this state or another state, is enforceable throughout this state. If the court finds that a less intrusive remedy will not be effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law enforcement officers to make a forcible entry at any hour.

G. If the court finds, after a hearing, that a petitioner sought an ex parte warrant pursuant to Subsection A of this section for the purpose of harassment or in bad faith, the court may award the respondent reasonable attorney fees, costs and expenses.

H. The Uniform Child Abduction Prevention Act does not affect the availability of relief allowed pursuant to the law of this state other than that act.

History: Laws 2013, ch. 156, § 9.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-10. Duration of abduction prevention order.

An abduction prevention order remains in effect until the earliest of:

A. the time stated in the order;

B. the emancipation of the child;

C. the child's attaining eighteen years of age; or

D. the time the order is modified, revoked, vacated or superseded by a court with jurisdiction pursuant to Sections 40-10A-201 through 40-10A-203 NMSA 1978.

History: Laws 2013, ch. 156, § 10.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-11. Uniformity of application and construction.

In applying and construing the Uniform Child Abduction Prevention Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2013, ch. 156, § 11.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

40-10C-12. Relation to Electronic Signatures in Global and National Commerce Act.

The Uniform Child Abduction Prevention Act modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History: Laws 2013, ch. 156, § 12.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 156, § 13 made the Uniform Child Abduction Prevention Act effective January 1, 2014.

ARTICLE 10D
Deployed Parents Custody and Visitation

40-10D-1. Short title.

This act [40-10D-1 to 40-10D-9 NMSA 1978] may be cited as the "Deployed Parents Custody and Visitation Act".

History: Laws 2014, ch. 4, § 1.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 4, § 10 made Laws 2014, ch. 4, §§ 1 through 9, the Deployed Parents Custody and Visitation Act, effective July 1, 2014.

40-10D-2. Definitions.

As used in the Deployed Parents Custody and Visitation Act:

A. "adult" means an individual who has attained eighteen years of age or is an emancipated minor;

B. "caretaking authority" means the right to live with and care for a child on a day-to-day basis. "Caretaking authority" includes physical custody, parenting time, right to access and visitation;

C. "child" means:

(1) an unemancipated individual who has not attained eighteen years of age; or

(2) an adult son or daughter by birth or adoption, or under law of this state other than the Deployed Parents Custody and Visitation Act, who is the subject of a court order concerning custodial responsibility;

D. "court" means a tribunal, including an administrative agency, authorized under law of this state other than the Deployed Parents Custody and Visitation Act, to make, enforce or modify a decision regarding custodial responsibility;

E. "custodial responsibility" includes all powers and duties relating to caretaking authority and decision-making authority for a child. "Custodial responsibility" includes physical custody, legal custody, parenting time, right to access, visitation and authority to grant limited contact with a child;

F. "decision-making authority" means the power to make important decisions regarding a child, including decisions regarding the child's education, religious training, health care, extracurricular activities and travel. "Decision-making authority" does not include the power to make decisions that necessarily accompany a grant of caretaking authority;

G. "deploying parent" means a service member who is deployed or has been notified of impending deployment and is:

(1) a parent of a child under law of this state other than the Deployed Parents Custody and Visitation Act; or

(2) an individual who has custodial responsibility for a child under law of this state other than the Deployed Parents Custody and Visitation Act;

H. "deployment" means the movement or mobilization of a service member for more than ninety days but less than eighteen months pursuant to uniformed service orders that:

(1) are designated as unaccompanied;

(2) do not authorize dependent travel; or

(3) otherwise do not permit the movement of family members to the location to which the service member is deployed;

I. "family member" means a sibling, aunt, uncle, cousin, stepparent or grandparent of a child or an individual recognized to be in a familial relationship with a child under law of this state other than the Deployed Parents Custody and Visitation Act;

J. "limited contact" means the authority of a nonparent to visit a child for a limited time. "Limited contact" includes authority to take the child to a place other than the residence of the child;

K. "nonparent" means an individual other than a deploying parent or other parent;

L. "other parent" means an individual who, in common with a deploying parent, is:

(1) a parent of a child under law of this state other than the Deployed Parents Custody and Visitation Act; or

(2) an individual who has custodial responsibility for a child under law of this state other than the Deployed Parents Custody and Visitation Act;

M. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

N. "return from deployment" means the conclusion of a service member's deployment as specified in uniformed service orders;

O. "service member" means a member of a uniformed service;

P. "sign" means with present intent to authenticate or adopt a record to:

(1) execute or adopt a tangible symbol; or

(2) attach to or logically associate with the record an electronic symbol, sound or process;

Q. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States; and

R. "uniformed service" means:

(1) active and reserve components of the army, navy, air force, space force, marine corps or coast guard of the United States;

(2) the United States merchant marine;

(3) the commissioned corps of the United States public health service;

(4) the commissioned corps of the national oceanic and atmospheric administration of the United States; or

(5) the national guard of a state.

History: Laws 2014, ch. 4, § 2; 2024, ch. 21, § 6.

ANNOTATIONS

The 2024 amendment, effective May 15, 2024, revised the definition of "uniformed service" to include the space force; and in Subsection R, Paragraph R(1), after "air force" added "space force".

40-10D-3. Residence unchanged by deployment.

A. If a court has issued a temporary order regarding custodial responsibility pursuant to the Deployed Parents Custody and Visitation Act, the residence of the deploying parent is not considered to be changed by reason of the deployment for the purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 to 40-10A-403 NMSA 1978] during the deployment.

B. If a court has issued a permanent order regarding custodial responsibility before notice of deployment and the parents modify that order temporarily by agreement pursuant to the Deployed Parents Custody and Visitation Act, the residence of the deploying parent is not considered to be changed by reason of the deployment for the purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act.

C. If a court in another state has issued a temporary order regarding custodial responsibility as a result of impending or current deployment, the residence of the deploying parent is not considered to be changed by reason of the deployment for the purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act.

History: Laws 2014, ch. 4, § 3.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 4, § 10 made Laws 2014, ch. 4, §§ 1 through 9, the Deployed Parents Custody and Visitation Act, effective July 1, 2014.

40-10D-4. Notification required of deploying parent.

A. Except as otherwise provided in Subsection D of this section and subject to Subsection C of this section, a deploying parent shall notify in a record the other parent of a pending deployment not later than seven days after receiving notice of deployment unless reasonably prevented from doing so by the circumstances of service.

B. Except as otherwise provided in Subsection D of this section and subject to Subsection C of this section, each parent shall provide in a record the other parent with a plan for fulfilling that parent's share of custodial responsibility during deployment. Each parent shall provide the plan as soon as reasonably possible after notification of deployment.

C. If a court order currently in effect prohibits disclosure of the address or contact information of the other parent, notification of deployment pursuant to Subsection A of this section or notification of a plan for custodial responsibility during deployment pursuant to Subsection B of this section may be made only to the issuing court. If the address of the other parent is available to the issuing court, the court shall forward the notification to the other parent. The court shall keep confidential the address or contact information of the other parent.

D. Notification in a record under Subsection A or B of this section is not required if the parents are living in the same residence and both parents have actual notice of the deployment or plan.

History: Laws 2014, ch. 4, § 4.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 4, § 10 made Laws 2014, ch. 4, §§ 1 through 9, the Deployed Parents Custody and Visitation Act, effective July 1, 2014.

40-10D-5. Duty to notify of change of address.

A. Except as otherwise provided in Subsection B of this section, an individual to whom custodial responsibility has been granted during deployment pursuant to the Deployed Parents Custody and Visitation Act shall notify the deploying parent and any other individual with custodial responsibility of a child of any change of the individual's mailing address or residence until the custodial responsibility is terminated.

B. If a court order currently in effect prohibits disclosure of the address or contact information of an individual to whom custodial responsibility has been granted, a notification pursuant to Subsection A of this section may be made only to the court that issued the order. The court shall keep confidential the mailing address or residence of the individual to whom custodial responsibility has been granted.

History: Laws 2014, ch. 4, § 5.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 4, § 10 made Laws 2014, ch. 4, §§ 1 through 9, the Deployed Parents Custody and Visitation Act, effective July 1, 2014.

40-10D-6. General consideration in custody proceeding of parent's military service.

In a proceeding for custodial responsibility of a child of a service member, a court shall not consider a parent's past deployment or possible future deployment in itself in determining the best interest of the child.

History: Laws 2014, ch. 4, § 6.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 4, § 10 made Laws 2014, ch. 4, §§ 1 through 9, the Deployed Parents Custody and Visitation Act, effective July 1, 2014.

40-10D-7. Agreement addressing custodial responsibility during deployment; form of agreement.

A. The parents of a child may enter into a temporary agreement granting custodial responsibility during deployment under the Deployed Parents Custody and Visitation Act.

B. A temporary agreement pursuant to Subsection A of this section shall be:

(1) in writing; and

(2) signed by both parents and any nonparent to whom custodial responsibility is granted.

History: Laws 2014, ch. 4, § 7.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 4, § 10 made Laws 2014, ch. 4, §§ 1 through 9, the Deployed Parents Custody and Visitation Act, effective July 1, 2014.

40-10D-8. Nature of authority created by agreement.

A. An agreement under the Deployed Parents Custody and Visitation Act is temporary and terminates pursuant to that act after the deploying parent returns from deployment, unless the agreement has been terminated before that time by court order. The agreement does not create an independent, continuing right to caretaking authority, decision-making authority or limited contact in an individual to whom custodial responsibility is given.

B. A nonparent who has caretaking authority, decision-making authority or limited contact by an agreement pursuant to the Deployed Parents Custody and Visitation Act has standing to enforce the agreement until it has been terminated by court order.

History: Laws 2014, ch. 4, § 8.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 4, § 10 made Laws 2014, ch. 4, §§ 1 through 9, the Deployed Parents Custody and Visitation Act, effective July 1, 2014.

40-10D-9. Expedited hearing.

If a motion to grant custodial responsibility is filed pursuant to the Deployed Parents Custody and Visitation Act before a deploying parent deploys, the court shall conduct an expedited hearing.

History: Laws 2014, ch. 4, § 9.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 4, § 10 made Laws 2014, ch. 4, §§ 1 through 9, the Deployed Parents Custody and Visitation Act, effective July 1, 2014.

ARTICLE 11
Uniform Parentage Act (Repealed.)

40-11-1. Repealed.

History: Laws 1986, ch. 47, § 1; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-1 NMSA 1978, as enacted by Laws 1986, ch. 47, § 1, relating to the short title of the act, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-2. Repealed.

History: Laws 1986, ch. 47, § 2; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-2 NMSA 1978, as enacted by Laws 1986, ch. 47, § 2, relating to definitions, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-3. Repealed.

History: Laws 1986, ch. 47, § 3; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-3 NMSA 1978, as enacted by Laws 1986, ch. 47, § 3, relating to relationships not dependent on marriage, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-4. Repealed.

History: Laws 1986, ch. 47, § 4; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-4 NMSA 1978, as enacted by Laws 1986, ch. 47, § 4, relating to how parent and child relationship is established, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-5. Repealed.

History: Laws 1986, ch. 47, § 5; 1989, ch. 56, § 1; 1993, ch. 287, § 3; 1997, ch. 237, § 17; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-5 NMSA 1978, as enacted by Laws 1986, ch. 47, § 5, relating to presumption of paternity, effective January 1, 2010.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-6. Repealed.

History: Laws 1986, ch. 47, § 6; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-6 NMSA 1978, as enacted by Laws 1986, ch. 47, § 6, relating to artificial insemination, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-7. Repealed.

History: Laws 1986, ch. 47, § 7; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-7 NMSA 1978, as enacted by Laws 1986, ch. 47, § 7, relating to determination of father and child relationship, who may bring action and when action may be brought, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-8. Repealed.

History: Laws 1986, ch. 47, § 8; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-8 NMSA 1978, as enacted by Laws 1986, ch. 47, § 8, relating to jurisdiction and venue, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-9. Repealed.

History: Laws 1986, ch. 47, § 9; 1993, ch. 287, § 4; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-9 NMSA 1978, as enacted by Laws 1986, ch. 47, § 9, relating to the parties in an action, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-10. Repealed.

History: Laws 1986, ch. 47, § 10; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-10 NMSA 1978, as enacted by Laws 1986, ch. 47, § 10, relating to pre-trial proceedings, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-11. Repealed.

History: Laws 1986, ch. 47, § 11; 1993, ch. 287, § 5; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-11 NMSA 1978, as enacted by Laws 1986, ch. 47, § 11, relating to pre-trial recommendations, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-12. Repealed.

History: Laws 1986, ch. 47, § 12; 1989, ch. 56, § 2; 1993, ch. 287, § 6; 1997, ch. 237, § 18; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-12 NMSA 1978, as enacted by Laws 1986, ch. 47, § 12, relating to blood and genetic tests, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-13. Repealed.

History: Laws 1986, ch. 47, § 13; 1989, ch. 56, § 3; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-13 NMSA 1978, as enacted by Laws 1986, ch. 47, § 13, relating to evidence relating to paternity, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-14. Repealed.

History: Laws 1986, ch. 47, § 14; 1997, ch. 237, § 1; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-14 NMSA 1978, as enacted by Laws 1986, ch. 47, § 14, relating to civil action, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-15. Repealed.

History: Laws 1986, ch. 47, § 15; 1989, ch. 56, § 4; 1993, ch. 287, § 7; 1997, ch. 237, § 20; 2001, ch. 215, § 1; 2004, ch. 41, § 4; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-15 NMSA 1978, as enacted by Laws 1986, ch. 47, § 15, relating to judgments or orders, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-16. Repealed.

History: Laws 1986, ch. 47, § 16; 1989, ch. 56, § 5; 2004, ch. 41, § 5; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-16 NMSA 1978, as enacted by Laws 1986, ch. 47, § 16, relating to costs of action and pretrial proceedings, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-17. Repealed.

History: Laws 1986, ch. 47, § 17; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-17 NMSA 1978, as enacted by Laws 1986, ch. 47, § 17, relating to enforcement of judgment or order, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-18. Repealed.

History: Laws 1986, ch. 47, § 18; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-18 NMSA 1978, as enacted by Laws 1986, ch. 47, § 18, relating to modification of judgment or order, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-19. Repealed.

History: Laws 1986, ch. 47, § 19; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-19 NMSA 1978, as enacted by Laws 1986, ch. 47, § 19, relating to right to counsel, and free transcript on appeal, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-20. Repealed.

History: Laws 1986, ch. 47, § 20; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-20 NMSA 1978, as enacted by Laws 1986, ch. 47, § 20, relating to hearings and records, and confidentiality, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-21. Repealed.

History: Laws 1986, ch. 47, § 21; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-21 NMSA 1978, as enacted by Laws 1986, ch. 47, § 21, relating to action to declare mother and child relationship, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-22. Repealed.

History: Laws 1986, ch. 47, § 22; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-22 NMSA 1978, as enacted by Laws 1986, ch. 47, § 22, relating to birth records, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

40-11-23. Repealed.

History: Laws 1986, ch. 47, § 23; 1989, ch. 56, § 6; 2004, ch. 41, § 6; repealed by Laws 2009, ch. 215, § 9.

ANNOTATIONS

Repeals. — Laws 2009, ch. 215, § 19 repealed 40-11-23 NMSA 1978, as enacted by Laws 1986, ch. 47, § 23, relating to limitations, effective January 1, 2010. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978.

ARTICLE 11A
New Mexico Uniform Parentage Act

ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

40-11A-101. Short title.

Sections 1-101 through 9-903 of this act may be cited as the "New Mexico Uniform Parentage Act".

History: Laws 2009, ch. 215, § 1-101.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Law reviews. — For Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

For annual survey of New Mexico family law, see 19 N.M.L. Rev. 692 (1990).

40-11A-102. Definitions.

As used in the New Mexico Uniform Parentage Act:

A. "acknowledged father" means a man who has established a father-child relationship pursuant to Article 3 of the New Mexico Uniform Parentage Act;

B. "adjudicated father" means a man who has been adjudicated by a court of competent jurisdiction to be the father of a child;

C. "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;

D. "assisted reproduction" means a method of causing pregnancy other than sexual intercourse. "Assisted reproduction" includes:

(1) intrauterine insemination;

(2) donation of eggs;

(3) donation of embryos;

(4) in-vitro fertilization and transfer of embryos; and

(5) intracytoplasmic sperm injection;

E. "bureau" means the vital records and health statistics bureau of the department of health;

F. "child" means a person of any age whose parentage may be determined pursuant to the New Mexico Uniform Parentage Act;

G. "commence" means to file the initial pleading seeking an adjudication of parentage in district court;

H. "determination of parentage" means the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity pursuant to Article 3 of the New Mexico Uniform Parentage Act or adjudication by the court;

I. "donor" means a person who produces eggs or sperm used for assisted reproduction, whether or not for consideration. "Donor" does not include:

(1) a husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife;

(2) a woman who gives birth to a child by means of assisted reproduction; or

(3) a parent pursuant to Article 7 of the New Mexico Uniform Parentage Act;

J. "ethnic or racial group" means, for purposes of genetic testing, a recognized group that a person identifies as all or part of the person's ancestry or that is so identified by other information;

K. "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;

L. "man" means a male person of any age;

M. "parent" means a person who has established a parent-child relationship pursuant to Section 2-201 of the New Mexico Uniform Parentage Act;

N. "parent-child relationship" means the legal relationship between a child and a parent of the child, including the mother-child relationship and the father-child relationship;

O. "paternity index" means the likelihood of paternity calculated by computing the ratio between:

(1) the likelihood that the tested man is the father, based on the genetic markers of the tested man, mother and child, conditioned on the hypothesis that the tested man is the father of the child; and

(2) the likelihood that the tested man is not the father, based on the genetic markers of the tested man, mother and child, conditioned on the hypothesis that the tested man is not the father of the child and that the father is of the same ethnic or racial group as the tested man;

P. "presumed father" means a man who, by operation of law pursuant to Section 2-204 of the New Mexico Uniform Parentage Act, is recognized as the father of a child until that status is rebutted or confirmed in a judicial proceeding;

Q. "probability of paternity" means the measure, for the ethnic or racial group to which the alleged father belongs, of the probability that the man in question is the father of the child, compared with a random, unrelated man of the same ethnic or racial group, expressed as a percentage incorporating the paternity index and a prior probability;

R. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

S. "signatory" means a person who signs or otherwise authenticates a record and is bound by its terms;

T. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States; and

U. "support-enforcement agency" means the human services department [health care authority department] designated pursuant to Section 27-2-27 NMSA 1978 as the single state agency for the enforcement of child and spousal support obligations

pursuant to Title IV D of the federal Social Security Act and any other public official or agency authorized to seek:

(1) enforcement of support orders or laws relating to the duty of support;

(2) establishment or modification of child support;

(3) determination of parentage; or

(4) location of child-support obligors and their income and assets.

History: Laws 2009, ch. 215, § 1-102.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Cross references. — For Title IV D of the federal Social Security Act, *see* 42 U.S.C. § 651 et seq.

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-103. Scope of act; choice of law.

A. The New Mexico Uniform Parentage Act applies to determination of parentage in New Mexico.

B. The district court shall apply the law of New Mexico to adjudicate the parent-child relationship. The applicable law does not depend on:

(1) the place of birth of the child; or

(2) the past or present residence of the child.

C. The New Mexico Uniform Parentage Act does not create, enlarge, modify or diminish parental rights or duties pursuant to the Children's Code [Chapter 32A NMSA 1978] or other law of New Mexico. 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 [Chapter 32A, Article 5 NMSA 1978] or other law of New Mexico.

History: Laws 2009, ch. 215, § 1-103.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Cross references. — For provisions relating to the determination of paternity when death occurs during proceedings for dissolution of marriage, separation, annulment of marriage or paternity, *see* 40-4-20 NMSA 1978.

For provisions relating to the establishment of a parent-child relationship for purposes of intestate succession, *see* 45-2-115 through 45-2-122 NMSA 1978 of the Uniform Probate Code.

40-11A-104. Jurisdiction.

The district court has jurisdiction to adjudicate parentage pursuant to the New Mexico Uniform Parentage Act. 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 [Chapter 40, Article 6A NMSA 1978].

History: Laws 2009, ch. 215, § 1-104.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-105. Protection of participants.

Proceedings pursuant to the New Mexico Uniform Parentage Act are subject to other laws of New Mexico governing the health, safety, privacy and liberty of a child or other person who could be jeopardized by disclosure of identifying information, including address, telephone number, place of employment, social security number and the child's daycare facility and school.

History: Laws 2009, ch. 215, § 1-105.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-106. Determination of maternity.

Provisions of the New Mexico Uniform Parentage Act relating to determination of paternity apply to determinations of maternity insofar as possible.

History: Laws 2009, ch. 215, § 1-106.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

ARTICLE 2
PARENT-CHILD RELATIONSHIP

40-11A-201. Establishment of parent-child relationship.

A. The mother-child relationship is established between a woman and a child by:

(1) the woman's having given birth to the child;

(2) an adjudication of the woman's maternity; or

(3) adoption of the child by the woman.

B. The father-child relationship is established between a man and a child by:

(1) an unrebutted presumption of the man's paternity of the child pursuant to Section 2-204 of the New Mexico Uniform Parentage Act;

(2) an effective acknowledgment of paternity by the man pursuant to Article 3 of the New Mexico Uniform Parentage Act, unless the acknowledgment has been rescinded or successfully challenged;

(3) an adjudication of the man's paternity;

(4) adoption of the child by the man; or

(5) the man's having consented to assisted reproduction by a woman pursuant to Article 7 of the New Mexico Uniform Parentage Act that resulted in the birth of the child.

History: Laws 2009, ch. 215, § 2-201.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Cross references. — For provisions relating to the determination of paternity when death occurs during proceedings for dissolution of marriage, separation, annulment of marriage or paternity, *see* 40-4-20 NMSA 1978.

For provisions relating to the establishment of a parent-child relationship for purposes of intestate succession, *see* 45-2-115 through 45-2-122 NMSA 1978 of the Uniform Probate Code.

Evidence establishing consent to assisted reproduction. — Where, in divorce proceedings, petitioner challenged respondent's standing to adjudicate parentage under the New Mexico Uniform Parentage Act (NMUPA), §§ 40-11A-101 to -903 NMSA 1978, because respondent was not biologically or genetically related to the children, and where petitioner also argued that respondent did not consent to petitioner's insemination procedure as required to establish parentage under the NMUPA's assisted reproduction provisions, the district court erred in ruling that respondent did not consent to assisted reproduction on the grounds that she failed to produce a signed record indicating that she consented to the specific assisted reproduction procedure that resulted in the birth of the children. Respondent signed numerous documents indicating her consent to previous insemination procedures, and the NMUPA does not prevent consideration of any documents signed by the parties before they conceive via assisted reproduction, so long as those documents manifest their intent to be a parent of the resulting child, and the NMUPA also indicates that consent, once given, can remain effective until it is withdrawn. *Soon v. Kammann*, 2022-NMCA-066, cert. granted.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born, 84 A.L.R.4th 655.

40-11A-202. No discrimination based on marital status.

A child born to parents who are not married to each other has the same rights pursuant to the law as a child born to parents who are married to each other.

History: Laws 2009, ch. 215, § 2-202.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-203. Consequences of establishment of parentage.

Unless parental rights are terminated or extinguished by relinquishment and decree of adoption pursuant to the Children's Code [Chapter 32A NMSA 1978], a parent-child relationship established pursuant to the New Mexico Uniform Parentage Act applies for all purposes, except determinations of parental rights pursuant to the Children's Code or as otherwise provided by other law of New Mexico.

History: Laws 2009, ch. 215, § 2-203.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

New evidence of paternity. — Where both a default judgment and a subsequent stipulated judgment determined that respondent was the child's parent and was obligated to pay child support; respondent had requested a paternity test when respondent was served with the petition to determine the child's parentage; respondent signed the stipulated judgment to obtain a driver's license; a paternity test that was administered several years after the stipulated judgment showed that respondent was not the child's biological parent; the child's biological parent had falsely represented to the human services department [health care authority department] that respondent was the child's biological parent, but at a hearing several years later, the biological parent named another person as the child's biological parent; the child's biological parents had been deported to Mexico; the child lived with the child's grandparent; and respondent had no personal relationship with the child, under the circumstances, the determination that respondent was not the child's biological parent after respondent's admission that respondent was the child's parent qualified as an extraordinary circumstance under Rule 1-060 NMRA sufficient to permit relief from respondent's obligations to pay accrued and prospective child support. *State ex rel. Human Services Dep't v. Rawls*, 2012-NMCA-052, 279 P.3d 766.

40-11A-204. Presumption of paternity.

A. A man is presumed to be the father of a child if:

(1) he and the mother of the child are married to each other and the child is born during the marriage;

(2) he 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;

(3) before the birth of the child, he 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;

(4) after the birth of the child, he 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 he voluntarily asserted his paternity of the child, and:

(a) the assertion is in an acknowledgement of paternity on a form provided by the bureau that is filed with the bureau;

(b) he agreed to be and is named as the child's father on the child's birth certificate; or

(c) he promised in a record to support the child as his own; or

(5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.

B. A presumption of paternity established pursuant to this section may be rebutted only by an adjudication pursuant to Article 6 of the New Mexico Uniform Parentage Act. 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 [Chapter 32A, Article 5 NMSA 1978].

History: Laws 2009, ch. 215, § 2-204.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

The "holding out" provision applies to women. — The statutory presumption that a man is presumed to be the natural father of a child if the man openly holds out the child as the man's natural child and has established a personal, financial or custodial relationship with the child applies to women. *Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283, *rev'g* 2011-NMCA-012,149 N.M. 625, 253 P.3d 915. (decided under Section 40-11-5 NMSA 1978, now repealed).

The "holding out" provision with regard to paternity applies to women. — Where petitioner and respondent, who both were women and who had a committed, long-term domestic relationship, agreed to bring a child into their relationship; respondent adopted a child; petitioner never adopted the child; petitioner supported respondent and the child financially, lived in the family home, held the child out as petitioner's natural child, and co-parented the child for a number of years before they dissolved their relationship; respondent sought to prevent petitioner from having any relationship with the child; and petitioner filed a petition to establish parentage and determine custody and timesharing

of the child, petitioner was an interested party and had standing to file an action under 40-11-12 NMSA 1978 (repealed, *see* 40-11A-601 and 40-11A-602 NMSA 1978) to declare the existence of a mother and child relationship with respect to the child because petitioner, by holding the child out as petitioner's natural child and providing financial and emotional support to the child, was presumed to be a natural parent of the child under Subsection A(4) of 40-11-5 NMSA 1978 (repealed, *see* 40-11A-204 NMSA 1978). *Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283, *rev'g* 2011-NMCA-012,149 N.M. 625, 253 P.3d 915.

The "holding out" provision with regard to paternity does not apply to women. *Chatterjee v. King*, 2011-NMCA-012, 149 N.M. 625, 253 P.3d 915, cert. granted, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where petitioner and respondent were in a committed relationship for several years, respondent adopted a child, petitioner did not adopt the child and petitioner held herself out as a parent of the child, the "holding out" provision with regard to paternity did not apply to petitioner, who was a woman, to establish parenthood in petitioner sufficient to grant her standing to bring a claim for custody of the child. *Chatterjee v. King*, 2011-NMCA-012, 149 N.M. 625, 253 P.3d 915, cert. granted, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

The New Mexico Uniform Parentage Act applied where petitioner alleged facts to establish the "holding out" presumption of parentage. — Where petitioner filed a petition to establish parentage, determine custody and time-sharing, and assess child support involving a minor child, and where the district dismissed the petition, determining that the New Mexico Uniform Parentage Act, 40-11A-101 to 40-11A-903 NMSA 1978, did not apply, apparently concluding that because the child was under two years old, petitioner could not have satisfied the two-year requirement in 40-11A-204(A)(5) NMSA 1978, the district court erred in dismissing the petition, because the court's finding regarding the child's age was clearly erroneous and petitioner alleged sufficient facts to establish that parentage was based on the requirements of the "holding out" provision of 40-11A-204(A)(5) NMSA 1978. *Barreras v. Archibeque*, 2024-NMCA-053.

Party's concession to not being a genetic or biological parent did not rebut the presumption of parentage. — The Uniform Parentage Act (UPA), 40-11A-101 to 40-11A-903 NMSA 1978, provides a presumption of parentage for a person married to the mother of a child if the child is born during the marriage, which can be rebutted by the results of genetic testing, but the UPA explicitly provides that genetic testing is not admissible to adjudicate parentage unless the genetic testing is performed with the consent of both the mother and the presumed, acknowledged or adjudicated parent or pursuant to an order of the district court, and in this case, there was no mutual consent to genetic testing and no district court order to conduct genetic tests, and neither party offered genetic test results, and therefore the district court erred in determining that the presumption of parentage was rebutted when respondent conceded to not being a genetic or biological parent of the children in this case. Moreover, the district court, by

circumventing the procedure established in the UPA regarding genetic testing, impermissibly failed to consider the best interest of the child. *Soon v. Kammann*, 2024-NMSC-018 *aff'g* 2022-NMCA-066, 521 P.3d 110.

Results of genetic testing are required to rebut the presumption of parentage. — Where, in divorce proceedings, petitioner challenged respondent's standing to adjudicate parentage under the New Mexico Uniform Parentage Act (NMUPA), §§ 40-11A-101 to -903 NMSA 1978, because respondent was not biologically or genetically related to the children, the district court erred in ruling in favor of petitioner and adjudicating respondent not to be a parent of the children, because, under this section, respondent is presumed to be a parent of the children by virtue of their birth during her marriage to petitioner, and petitioner failed to rebut this presumption by offering genetic testing results showing that respondent has no genetic relation to the children. Based on the NMUPA's plain language, history, and purpose, the evidentiary requirement, set out in § 40-11A-631(A) NMSA 1978, must be applied strictly, and a parentage presumption cannot be rebutted in the absence of admissible results of genetic testing. *Soon v. Kammann*, 2022-NMCA-066, cert. granted.

Sperm donor agreement. — Where the biological father and the mother of the child entered into an agreement, prior to conception of the child, that the father would donate sperm, act as a male role model for the child, and have no financial obligation for child support; the mother self-inseminated herself; and after the child was born, the father held himself out as the father of the child, had significant contacts with the child, and was registered as the child's father with the vital statistics bureau, the agreement was unenforceable and the father was liable for child support. *Mintz v. Zoernig*, 2008-NMCA-162, 145 N.M. 362, 198 P.3d 861, cert. denied, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

Collateral estoppel in contesting paternity. — Where paternity has been established in a divorce proceeding, an alleged father is barred under the doctrine of collateral estoppel from later questioning paternity in a proceeding under the Uniform Parentage Act. *Callison v. Naylor*, 1989-NMCA-055, 108 N.M. 674, 777 P.2d 913.

Parental preference doctrine. — The parental preference doctrine limits the district court's discretion to award custody to a non-parent and requires the court to award custody to the parent unless the parent is unfit or extraordinary circumstances are present.

Tran v. Bennett, 2018-NMSC-009, *rev'g* No. 32,677, mem. op. (N.M. Ct. App. May 28, 2014)(non-precedential).

Where the mother and biological father of a child appealed a district court order awarding joint legal custody to the mother, the biological father and the man that was married to the mother at the time the child was born ("co-parent"), and where the "co-parent" claimed that there was no court order determining paternity, the New Mexico Supreme Court held, under the former Uniform Parentage Act, §§ 40-11-1 to -23 NMSA

1978 (repealed), that there was no need to litigate the paternity issue where the district court order adopted a memorandum of agreement entered into by the parties which recognized the biological father as the child's legal father and which did not confer parental rights on the "co-parent", but only provided him third-party visitation rights. *Tran v. Bennett*, 2018-NMSC-009, *rev'g* No. 32,677, mem. op. (N.M. Ct. App. May 28, 2014) (non-precedential).

Law reviews. — For annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born, 84 A.L.R.4th 655.

ARTICLE 3
VOLUNTARY ACKNOWLEDGMENT OF PATERNITY

40-11A-301. Acknowledgment of paternity.

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.

History: Laws 2009, ch. 215, § 3-301.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-302. Execution of acknowledgment of paternity.

A. An acknowledgment of paternity shall:

(1) be on a form provided by the bureau;

(2) be signed or otherwise authenticated under penalty of perjury by the mother and by the man seeking to establish his paternity;

(3) state that the child whose paternity is being acknowledged:

(a) does not have a presumed father or has a presumed father whose full name is stated; and

(b) does not have another acknowledged or adjudicated father;

(4) state whether there has been genetic testing and, if so, that the acknowledging man's claim of paternity is consistent with the results of the testing; and

(5) state that the signatories understand that the acknowledgment is the equivalent of a judicial adjudication of paternity of the child and that a challenge to the acknowledgment is permitted only under limited circumstances and is barred after two years.

B. An acknowledgment of paternity is void if it:

(1) 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;

(2) states that another man is an acknowledged or adjudicated father; or

(3) falsely denies the existence of a presumed, acknowledged or adjudicated father of the child.

C. A presumed father may sign or otherwise authenticate an acknowledgment of paternity.

History: Laws 2009, ch. 215, § 3-302.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-303. Denial of paternity.

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 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 of the New Mexico Uniform Parentage Act or successfully challenged pursuant to Section 3-308 of the New Mexico Uniform Parentage Act; or

(2) been adjudicated to be the father of the child.

History: Laws 2009, ch. 215, § 3-303.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Collateral estoppel in contesting paternity. — Where paternity has been established in a divorce proceeding, an alleged father is barred under the doctrine of collateral estoppel from later questioning paternity in a proceeding under the Uniform Parentage Act. *Callison v. Naylor*, 1989-NMCA-055, 108 N.M. 674, 777 P.2d 913.

40-11A-304. Rules for acknowledgment and denial of paternity.

A. An acknowledgment of paternity and a denial of paternity may be contained in 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 a denial of paternity may be signed before or after the birth of the child.

C. Subject to Subsection A of this section, 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, whichever occurs later.

D. An acknowledgment of paternity or denial of paternity signed by a minor is valid if it is otherwise in compliance with the New Mexico Uniform Parentage Act.

History: Laws 2009, ch. 215, § 3-304.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-305. Effect of acknowledgment or denial of paternity.

A. Except as otherwise provided in Sections 3-307 and 3-308 [40-11A-307, 40-11A-308 NMSA 1978] of the New Mexico Uniform Parentage Act, a valid acknowledgment of paternity filed with the bureau is equivalent to an adjudication of paternity of a child.

B. Except as otherwise provided in Sections 3-307 and 3-308 of the New Mexico Uniform Parentage Act, 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 nonpaternity of the presumed father.

History: Laws 2009, ch. 215, § 3-305.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-306. No filing fee.

The bureau shall not charge for filing an acknowledgment of paternity or denial of paternity.

History: Laws 2009, ch. 215, § 3-306.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-307. Proceeding for rescission.

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 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.

History: Laws 2009, ch. 215, § 3-307.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-308. Challenge after expiration of period for rescission.

A. After the period for rescission pursuant to Section 3-307 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.

B. A party challenging an acknowledgment of paternity or denial of paternity has the burden of proof.

History: Laws 2009, ch. 215, § 3-308.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-309. Procedure for rescission or challenge.

A. 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.

B. For the purpose of rescission of or challenge to an acknowledgment of paternity or denial of paternity, a signatory submits to the personal jurisdiction of the district courts of this state by signing the acknowledgment or denial, effective upon the filing of the document with the bureau.

C. Except for good cause shown, during the pendency of a proceeding to rescind or challenge an acknowledgment of paternity or denial of paternity, the district court shall not suspend the legal responsibilities of a signatory arising from the acknowledgment, including the duty to pay child support.

D. 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 pursuant to Article 6 of the New Mexico Uniform Parentage Act.

E. At the conclusion of a proceeding to rescind or challenge an acknowledgment of paternity or denial of paternity, the court shall order the bureau to amend the birth record of the child, if appropriate.

History: Laws 2009, ch. 215, § 3-309.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-310. Ratification barred.

A court or administrative agency conducting a judicial or administrative proceeding shall not ratify an unchallenged acknowledgment of paternity.

History: Laws 2009, ch. 215, § 3-310.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-311. Full faith and credit; acknowledgement 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.

History: Laws 2009, ch. 215, § 3-311.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-312. Forms for acknowledgment and denial of paternity.

A. The bureau shall prescribe forms for the acknowledgment of paternity and the denial of paternity.

B. A valid acknowledgment of paternity or denial of paternity is not affected by a later modification of the prescribed form.

History: Laws 2009, ch. 215, § 3-312.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-313. Release of information.

The bureau may release information relating to the acknowledgment of paternity or denial of paternity to a signatory of the acknowledgment or denial and to courts and to other agencies as permitted pursuant to the provisions of Chapter 24, Article 14 NMSA 1978.

History: Laws 2009, ch. 215, § 3-313.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-314. Adoption of rules.

The bureau may adopt and promulgate rules and forms to implement the provisions of this article.

History: Laws 2009, ch. 215, § 3-314.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

ARTICLE 4
REGISTRY OF PATERNITY

40-11A-401. Establishment of registry.

The putative father registry established pursuant to the provisions of Section 32A-5-20 NMSA 1978 is also the registry of paternity established pursuant to the New Mexico Uniform Parentage Act.

History: Laws 2009, ch. 215, § 4-401.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

ARTICLE 5
GENETIC TESTING

40-11A-501. Scope of article.

This article governs genetic testing of a person to determine parentage, whether the person:

A. voluntarily submits to testing; or

B. is tested pursuant to an order of the district court or a support-enforcement agency.

History: Laws 2009, ch. 215, § 5-501.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-502. Order for testing.

A. Except as otherwise provided in this article and Article 6 of the New Mexico Uniform Parentage Act, the district court shall order the child and other designated persons to submit to genetic testing if the request for testing is supported by the sworn statement of a party to the proceeding:

(1) alleging paternity and stating facts establishing a reasonable probability of the requisite sexual contact between the persons; or

(2) denying paternity and stating facts establishing a possibility that sexual contact between the persons, if any, did not result in the conception of the child.

B. A support-enforcement agency may order genetic testing only if there is no presumed, acknowledged or adjudicated father.

C. If a request for genetic testing of a child is made before birth, the district court or support-enforcement agency shall not order in-utero testing.

D. If two or more men are subject to court-ordered genetic testing, the testing may be ordered concurrently or sequentially.

History: Laws 2009, ch. 215, § 5-502.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-503. Requirements for genetic testing.

A. Genetic testing shall be of a type reasonably relied upon by experts in the field of genetic testing and performed in a testing laboratory accredited by:

(1) the American association of blood banks or a successor to its functions;

(2) the American society for histocompatibility and immunogenetics or a successor to its functions; or

(3) an accrediting body designated by the federal secretary of health and human services.

B. A specimen used in genetic testing may consist of one or more samples, or a combination of samples, of blood, buccal cells, bone, hair or other body tissue or fluid. The specimen used in the testing need not be of the same kind for each person undergoing genetic testing.

C. Based on the ethnic or racial group of a person, the testing laboratory shall determine the databases from which to select frequencies for use in calculation of the probability of paternity. If there is disagreement as to the testing laboratory's choice, the following rules apply:

(1) the person objecting may require the testing laboratory, within thirty days after receipt of the report of the test, to recalculate the probability of paternity using an ethnic or racial group different from that used by the laboratory;

(2) the person objecting to the testing laboratory's initial choice shall:

(a) if the frequencies are not available to the testing laboratory for the ethnic or racial group requested, provide the requested frequencies compiled in a manner recognized by accrediting bodies; or

(b) engage another testing laboratory to perform the calculations; and

(3) the testing laboratory may use its own statistical estimate if there is a question regarding which ethnic or racial group is appropriate. If available, the testing laboratory shall calculate the frequencies using statistics for any other ethnic or racial group requested.

D. If, after recalculation using a different ethnic or racial group, genetic testing does not rebuttably identify a man as the father of a child pursuant to Section 5-505 [40-11A-505 NMSA 1978] of the New Mexico Uniform Parentage Act, a person who has been tested may be required to submit to additional genetic testing.

E. The retention of material used for genetic testing shall be governed by the provisions of Section 24-21-5 NMSA 1978.

History: Laws 2009, ch. 215, § 5-503.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-504. Report of genetic testing.

A. A report of genetic testing shall be in a record and signed under penalty of perjury by a designee of the testing laboratory. A report made pursuant to the requirements of this article is self-authenticating.

B. Documentation from the testing laboratory of the following information is sufficient to establish a reliable chain of custody that allows the results of genetic testing to be admissible without testimony:

(1) the names and photographs of the persons whose specimens have been taken;

(2) the names of the persons who collected the specimens;

(3) the places and dates the specimens were collected;

(4) the names of the persons who received the specimens in the testing laboratory;

(5) the dates the specimens were received; and

(6) the accreditation of the testing facility showing that it meets the requirements of Section 5-503 of the New Mexico Uniform Parentage Act.

History: Laws 2009, ch. 215, § 5-504.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-505. Genetic testing results; rebuttal.

A. Pursuant to the New Mexico Uniform Parentage Act, a man is rebuttably identified as the father of a child if the genetic testing complies with this article and the results disclose that:

(1) 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

(2) a combined paternity index of at least one hundred to one.

B. A man identified pursuant to Subsection A of this section as the father of the child may rebut the genetic testing results only by other genetic testing satisfying the requirements of this article that:

(1) excludes the man as a genetic father of the child; or

(2) identifies another man as the possible father of the child.

C. Except as otherwise provided in Section 5-510 of the New Mexico Uniform Parentage Act, if more than one man is identified by genetic testing as the possible father of the child, the court shall order them to submit to further genetic testing to identify the genetic father.

History: Laws 2009, ch. 215, § 5-505.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights, 87 A.L.R.4th 572.

40-11A-506. Costs of genetic testing.

A. Subject to assessment of costs pursuant to Article 6 of the New Mexico Uniform Parentage Act, the cost of initial genetic testing shall be advanced:

(1) by a support-enforcement agency in a proceeding in which the support-enforcement agency is providing services;

(2) by the person who made the request;

(3) as agreed by the parties; or

(4) as ordered by the district court.

B. In cases in which the cost is advanced by the support-enforcement agency, the agency may seek reimbursement from a man who is rebuttably identified as the father.

History: Laws 2009, ch. 215, § 5-506.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-507. Additional genetic testing.

Prior to a final adjudication, the district court or the support-enforcement agency shall order additional genetic testing upon the request of a party who contests the result of the original testing. If the previous genetic testing identified a man as the father of the child pursuant to Section 5-505 of the New Mexico Uniform Parentage Act, the court or agency shall not order additional testing unless the party provides advance payment for the testing.

History: Laws 2009, ch. 215, § 5-507.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-508. Genetic testing when specimens not available.

A. Subject to Subsection B of this section, if a genetic-testing specimen is not available from a man who may be the father of a child, upon notice and after an opportunity for a hearing, and for good cause and under circumstances the court considers to be just, the court may order the following persons to submit specimens for genetic testing:

(1) the parents of the man;

(2) brothers and sisters of the man;

(3) other children of the man and their mothers; and

(4) other relatives of the man necessary to complete genetic testing.

B. Issuance of an order pursuant to this section requires a finding that a need for genetic testing outweighs the legitimate interests of the person sought to be tested.

History: Laws 2009, ch. 215, § 5-508.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-509. Deceased person.

For good cause shown, the district court may order genetic testing of a deceased person.

History: Laws 2009, ch. 215, § 5-509.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-510. Identical brothers.

A. The district court may order genetic testing of a brother of a man identified as the father of a child 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.

B. If each brother satisfies the requirements as the identified father of the child pursuant to Section 5-505 of the New Mexico Uniform Parentage Act without consideration of another identical brother being identified as the father of the child, the district court may rely on nongenetic evidence to adjudicate which brother is the father of the child.

History: Laws 2009, ch. 215, § 5-510.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-511. Confidentiality of genetic testing.

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. A person who intentionally releases an identifiable specimen of another person for any purpose other than that relevant to the proceeding regarding parentage without a court order or the written permission of the person who furnished the specimen is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 2009, ch. 215, § 5-511.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

ARTICLE 6
PROCEEDING TO ADJUDICATE PARENTAGE

PART 1
Nature of Proceeding

40-11A-601. Proceeding authorized.

A civil proceeding may be maintained in the district court to adjudicate the parentage of a child. The proceeding is governed by the Rules of Civil Procedure for the District Courts [Rule1-001 NMRA]. The mother of the child and an alleged father or presumed father are competent to testify. Any witness may be compelled to testify.

History: Laws 2009, ch. 215, § 6-601.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Cross references. — For provisions relating to the determination of paternity when death occurs during proceedings for dissolution of marriage, separation, annulment of marriage or paternity, *see* 40-4-20 NMSA 1978.

For provisions relating to the establishment of a parent-child relationship for purposes of intestate succession, *see* 45-2-115 through 45-2-122 NMSA 1978 of the Uniform Probate Code.

Law Reviews. — For note, "Collateral Estoppel as a Bar to Post-Divorce Litigation of Paternity - *Tedford v. Gregory*," see 30 N.M.L. Rev. 95 (2000).

40-11A-602. Standing to maintain proceeding.

Subject to Article 3 and Sections 6-607 and 6-609 of the New Mexico Uniform Parentage Act, a proceeding to adjudicate parentage may be maintained by:

A. the child;

B. the mother of the child;

C. a man whose paternity of the child is to be adjudicated;

D. the support-enforcement agency;

E. an authorized adoption agency or licensed child-placing agency; or

F. a representative authorized by law to act for a person who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated or a minor.

History: Laws 2009, ch. 215, § 6-602.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

The "holding out" provision with regard to paternity applies to women. — Where petitioner and respondent, who both were women and who had a committed, long-term domestic relationship, agreed to bring a child into their relationship; respondent adopted a child; petitioner never adopted the child; petitioner supported respondent and the child financially, lived in the family home, held the child out as petitioner's natural child, and co-parented the child for a number of years before they dissolved their relationship; respondent sought to prevent petitioner from having any relationship with the child; and petitioner filed a petition to establish parentage and determine custody and timesharing of the child, petitioner was an interested party and had standing to file an action under 40-11-12 NMSA 1978 (repealed, *see* 40-11A-601 and 40-11A-602 NMSA 1978) to declare the existence of a mother and child relationship with respect to the child because petitioner, by holding the child out as petitioner's natural child and providing financial and emotional support to the child, was presumed to be a natural parent of the child under Subsection A(4) of 40-11-5 NMSA 1978 (repealed, *see* 40-11A-204 NMSA 1978). *Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283, *rev'g* 2011-NMCA-012,149 N.M. 625, 253 P.3d 915.

A personal representative of a decedent's estate has standing as a representative authorized by law to bring an action to adjudicate parentage under 40-11A-602 NMSA 1978. *Swift v. Bullington*, 2013-NMCA-090, cert. denied, 2013-NMCERT-008.

A personal representative has standing to bring an action to adjudicate parentage. — Where the decedent was the putative father of a child by respondent; the decedent died six months prior to the birth of the child; and petitioner was appointed as the personal representative of the estate of the decedent, petitioner had standing to bring an action to adjudicate the parentage of the child as a representative authorized by law to act for the decedent who would have been entitled to maintain a parentage proceeding. *Swift v. Bullington*, 2013-NMCA-090, cert. denied, 2013-NMCERT-008.

Standing to bring action. — Twenty-year-old child was "interest party" entitled to bring action for paternity and past child support under the Uniform Parentage Act. *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167.

Adult child. — The court was not required to apply the "best interests of the child" standard to an action for paternity and retroactive child support, where the child was over the age of majority and had not developed a close emotional bond with the presumed parent; moreover, the child, not the alleged father, is the party legally entitled to advance the "best interests" theory. *Tedford v. Gregory*, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105 .

Noncustodial parent not general guardian. — A mother who did not have custody was not a "general guardian" with standing to challenge her former husband's paternity. *Sparks ex rel. Haley v. Spark*s, 1992-NMCA-132, 114 N.M. 764, 845 P.2d 858 (decided under prior law).

40-11A-603. Parties to proceeding.

The following persons shall be joined as parties in a proceeding to adjudicate parentage:

A. the mother of the child; and

B. a man whose paternity of the child is to be adjudicated.

History: Laws 2009, ch. 215, § 6-603.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Child not automatically party. — Nothing in the statute indicates that a child is automatically a party by virtue of the fact that a child could benefit from the proceedings. *Webb v. Menix*, 2004-NMCA-048, 135 N.M. 531, 90 P.3d 989.

40-11A-604. Personal jurisdiction.

A. A person shall not be adjudicated to be a parent unless the district court has personal jurisdiction over the person.

B. A district court of this state having jurisdiction to adjudicate parentage may exercise personal jurisdiction over a nonresident person, or the guardian or conservator of the person, if the conditions prescribed in Section 40-6A-201 NMSA 1978 are fulfilled.

C. Lack of jurisdiction over one person does not preclude the district court from making an adjudication of parentage binding on another person over whom the district court has personal jurisdiction.

History: Laws 2009, ch. 215, § 6-604.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Party's concession to not being a genetic or biological parent did not rebut the presumption of parentage. — The Uniform Parentage Act (UPA), 40-11A-101 to 40-11A-903 NMSA 1978, provides a presumption of parentage for a person married to the mother of a child if the child is born during the marriage, which can be rebutted by the results of genetic testing, but the UPA explicitly provides that genetic testing is not admissible to adjudicate parentage unless the genetic testing is performed with the consent of both the mother and the presumed, acknowledged or adjudicated parent or pursuant to an order of the district court, and in this case, there was no mutual consent to genetic testing and no district court order to conduct genetic tests, and neither party offered genetic test results, and therefore the district court erred in determining that the presumption of parentage was rebutted when respondent conceded to not being a genetic or biological parent of the children in this case. Moreover, the district court, by circumventing the procedure established in the UPA regarding genetic testing, impermissibly failed to consider the best interest of the child. *Soon v. Kammann*, 2024-NMSC-018 *aff'g* 2022-NMCA-066, 521 P.3d 110.

40-11A-605. Venue.

Venue for a proceeding to adjudicate parentage is in the county of this state in which:

A. the child resides or is found;

B. the respondent resides or is found if the child does not reside in this state; or

C. a proceeding for probate or administration of the presumed, acknowledged or alleged father's estate is pending.

History: Laws 2009, ch. 215, § 6-605.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-606. No limitation; child having no presumed, acknowledged or adjudicated father.

A. A proceeding to adjudicate the parentage of a child having no presumed, acknowledged or adjudicated father may be commenced by the child 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.

History: Laws 2009, ch. 215, § 6-606.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Adult child. — Twenty-year-old child was "interested party" under 40-11-7 NMSA 1978, and therefore entitled to bring action for paternity and past child support under the Uniform Parentage Act. *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167.

This article authorizes an adult daughter to pursue a cause of action for retroactive child support against her alleged father, in conjunction with a paternity action, prior to her twenty-first birthday. *Tedford v. Gregory*, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105.

Suit need not commence before putative father's death. — Statute does not require children who were fathered outside of marriage to bring support action before their father died in order to make support claims against the estate. *Kesterson v. DeLara*, 2002-NMCA-004, 131 N.M. 430, 38 P.3d 198, cert. denied, 131 N.M. 564, 40 P.3d 1008.

Collateral estoppel. — Daughter's claim for paternity and retroactive child support was not barred by collateral estoppel, as she was neither a party to the divorce proceeding nor in privity with her mother as to the original decree; however, mother's husband was barred by collateral estoppel from asserting a claim for reimbursement of child support expenses. *Tedford v. Gregory*, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105.

Law reviews. — Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

40-11A-607. Limitation; general.

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 in another provision of the New Mexico Uniform Parentage Act, any proceeding to adjudicate the parentage of a child shall be commenced not later than three years after the child has reached the age of majority.

History: Laws 2009, ch. 215, § 6-607.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Applicability. — This article's twenty-one-year statute of limitations applies to claims for paternity and for claims for past child support based on such paternity. *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167.

Action for back child support. — The trial court erred in applying the "catch-all" statute of limitations of 37-1-4 NMSA 1978 to a cause of action for back child support. Rather, in order to effectuate the purposes of this act, the applicable statute of limitations for support proceedings is that of this section. *Padilla v. Montano*, 1993-NMCA-127, 116 N.M. 398, 862 P.2d 1257.

Retroactive support. — This article authorized an adult daughter to pursue a cause of action for retroactive child support against her alleged father, in conjunction with a paternity action, prior to her twenty-first birthday. *Tedford v. Gregory*, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105.

Department without standing after child reaches majority. — The department's child support enforcement division could not bring action for paternity and past child support on behalf of twenty-year-old child; although such action could be maintained by the child, its outcome had no bearing upon the department, and therefore department

had no standing. *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167.

40-11A-608. Authority to deny motion for genetic testing.

A. In a proceeding to adjudicate the parentage of a child having a presumed father or to challenge the paternity of a child having an acknowledged father, the district court may deny a motion seeking an order for genetic testing of the mother, the child and the presumed or acknowledged father if the district court determines that:

(1) the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and

(2) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.

B. In determining whether to deny a motion seeking an order for genetic testing pursuant to this section, the district court shall consider the best interest of the child, including the following factors:

(1) 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;

(2) the length of time during which the presumed or acknowledged father has assumed the role of father of the child;

(3) the facts surrounding the presumed or acknowledged father's discovery of his possible nonpaternity;

(4) the nature of the relationship between the child and the presumed or acknowledged father;

(5) the age of the child;

(6) the harm that may result to the child if presumed or acknowledged paternity is successfully disproved;

(7) the nature of the relationship between the child and any alleged father;

(8) 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

(9) 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. In a proceeding involving the application of this section, a minor or incapacitated child shall be represented by a guardian ad litem.

D. Denial of a motion seeking an order for genetic testing shall be based on clear and convincing evidence.

E. If the district court denies a motion seeking an order for genetic testing, it shall issue an order adjudicating the presumed or acknowledged father to be the father of the child.

History: Laws 2009, ch. 215, § 6-608.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-609. Limitation; child having acknowledged or adjudicated father.

A. If a child has an acknowledged father, a signatory to the acknowledgment of paternity or denial of paternity may commence a proceeding seeking to rescind the acknowledgment or denial or challenge the paternity of the child only within the time allowed pursuant to Section 3-307 or 3-308 of the New Mexico Uniform Parentage Act.

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.

C. A proceeding pursuant to this section is subject to the application of the principles of estoppel established in Section 6-608 of the New Mexico Uniform Parentage Act.

History: Laws 2009, ch. 215, § 6-609.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-610. Joinder of proceedings.

A. Except as otherwise provided in Subsection B of this section, a proceeding to adjudicate parentage may be joined with a proceeding in the district court for adoption, termination of parental rights, child custody or visitation, child support, divorce, annulment, legal separation or separate maintenance, probate or administration of an estate or other appropriate proceeding.

B. A respondent shall not join a proceeding described in Subsection A of this section with a proceeding to adjudicate parentage brought pursuant to the Uniform Interstate Family Support Act.

History: Laws 2009, ch. 215, § 6-610.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-611. Proceeding before birth.

A proceeding to determine parentage may be commenced before the birth of the child, but shall not be concluded until after the birth of the child. The following actions may be taken before the birth of the child:

A. service of process;

B. discovery; and

C. except as prohibited by Section 5-502 of the New Mexico Uniform Parentage Act, collection of specimens for genetic testing.

History: Laws 2009, ch. 215, § 6-611.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-612. Child as party; representation.

A. A minor child is a permissible party, but is not a necessary party to a proceeding pursuant to this article.

B. The 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.

History: Laws 2009, ch. 215, § 6-612.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Child not automatically party. — Nothing in the statute indicates that a child is automatically a party by virtue of the fact that a child could benefit from the proceedings. *Webb v. Menix*, 2004-NMCA-048, 135 N.M. 531, 90 P.3d 989.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity or propriety of appointment of independent guardian for child who is subject to paternity proceedings, 70 A.L.R.4th 1033.

PART 2
Special Rules for Proceeding to Adjudicate Parentage

40-11A-621. Admissibility of results of genetic testing; expenses.

A. Except as otherwise provided in Subsection C of this section, 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. 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.

B. A party objecting to the results of genetic testing may call one or more genetic-testing 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.

C. If a child has a presumed, acknowledged or adjudicated father, the results of genetic testing are inadmissible to adjudicate parentage unless performed:

(1) with the consent of both the mother and the presumed, acknowledged or adjudicated father; or

(2) pursuant to an order of the district court pursuant to Section 5-502 of the New Mexico Uniform Parentage Act.

D. 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 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.

History: Laws 2009, ch. 215, § 6-621.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Admissibility of opinion testimony based on blood testing. — The human leukocyte antigen and red blood cell test procedures, together with the evidence of statistical probabilities drawn therefrom, are admissible as evidence in disputed paternity actions when a proper evidentiary foundation is established. *State ex rel. Human Servs. Dep't v. Coleman*, 1986-NMCA-074, 104 N.M. 500, 723 P.2d 971.

Foundation for admission of scientific evidence. — A prerequisite to eliciting scientific or specialized opinion testimony is a showing that the witness is qualified as an expert by knowledge, skill, training or education in the area in which the opinion is sought to be given and that the witness has sufficient facts upon which to accurately formulate his opinion. *State ex rel. Human Servs. Dep't v. Coleman*, 1986-NMCA-074, 104 N.M. 500, 723 P.2d 971.

Conclusiveness of evidence based on serologic testing. — Although scientific evidence based upon serologic testing is admissible in an action to establish paternity, this evidence, together with expert opinion testimony derived from the test results, is not conclusive upon the fact finder. *State ex rel. Human Servs. Dep't v. Coleman*, 1986-NMCA-074, 104 N.M. 500, 723 P.2d 971.

Law reviews. — Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

40-11A-622. Consequences of declining genetic testing.

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.

History: Laws 2009, ch. 215, § 6-622.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-623. Admission of paternity authorized.

A. A respondent in a proceeding to adjudicate parentage may admit to the paternity of a child by filing a pleading to that effect or by admitting paternity under penalty of perjury when making an appearance or during a hearing.

B. If the district court finds that the admission of paternity satisfies the requirements of this section and finds that there is no reason to question the admission, the district court shall issue an order adjudicating the child to be the child of the man admitting paternity.

History: Laws 2009, ch. 215, § 6-623.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-624. Temporary order.

A. In a proceeding pursuant to this article, the district court shall issue a temporary order for support of a child if the order is appropriate and the person ordered to pay support is:

(1) a presumed father of the child;

(2) petitioning to have his paternity adjudicated;

(3) identified as the father through genetic testing pursuant to Section 5-505 of the New Mexico Uniform Parentage Act;

(4) an alleged father who has declined to submit to genetic testing;

(5) shown by clear and convincing evidence to be the father of the child; or

(6) the mother of the child.

B. A temporary order may include provisions for custody and visitation as provided by other law of this state. A temporary order of support is subject to Section 6-636 of the New Mexico Uniform Parentage Act.

History: Laws 2009, ch. 215, § 6-624.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-625. Pretrial proceedings.

As soon as practicable after an action to declare the existence or nonexistence of a father-child relationship has been brought, and unless judgment by default has been entered, an informal hearing shall be held. The court may order that the hearing be held before a master. The public shall be barred from the hearing. A record of the proceeding or any portion of the proceeding shall be kept if any party requests or the court so orders. The rules of evidence shall not apply.

History: Laws 2009, ch. 215, § 6-625.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Law reviews. — Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

40-11A-626. Pretrial recommendations.

A. On the basis of the information produced at the pretrial hearing, the judge, hearing officer or master conducting the hearing shall evaluate the probability of determining the existence or nonexistence of a father-child relationship in a trial. On the basis of the evaluation, an appropriate recommendation for settlement shall be made to the parties. Based upon the evaluation, the judge, hearing officer or master may enter an order for temporary support consistent with the child-support guidelines as provided in Section 40-4-11.1 NMSA 1978.

B. If the parties accept a recommendation made in accordance with Subsection A of this section, judgment shall be entered accordingly.

C. If a party refuses to accept a recommendation made in accordance with Subsection A of this section and genetic testing has not been taken, the court shall require the parties to submit to genetic testing, if practicable. Thereafter, the judge, hearing officer or master shall make an appropriate final recommendation. If a party refuses to accept the final recommendation, the action shall be set for trial and a party's acceptance or rejection of the recommendation shall be treated as any other offer of settlement with respect to its admissibility as evidence in subsequent proceedings.

D. The child's guardian may accept or refuse to accept a recommendation under this section.

E. The informal hearing may be terminated and the action set for trial if the judge, hearing officer or master conducting the hearing finds it unlikely that all parties would accept a recommendation that the judge, hearing officer or master might make under Subsection A or C of this section.

History: Laws 2009, ch. 215, § 6-626.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

PART 3
Hearings and Adjudication

40-11A-631. Rules for adjudication of paternity.

The district court shall apply the following rules to adjudicate the paternity of a child:

A. the paternity of a child having 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. unless the results of genetic testing are admitted to rebut other results of genetic testing, a man identified as the father of a child pursuant to Section 5-505 of the New Mexico Uniform Parentage Act shall be adjudicated the father of the child;

C. if the district court finds that genetic testing pursuant to Section 5-505 of the New Mexico Uniform Parentage Act neither identifies nor excludes a man as the father of a child, the district court shall not dismiss the proceeding. In that event, the results of

genetic testing and other evidence are admissible to adjudicate the issue of paternity; and

D. unless the results of genetic testing are admitted to rebut other results of genetic testing, a man excluded as the father of a child by genetic testing shall be adjudicated not to be the father of the child.

History: Laws 2009, ch. 215, § 6-631.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Results of genetic testing are required to rebut the presumption of parentage. — Where, in divorce proceedings, petitioner challenged Respondent's standing to adjudicate parentage under the New Mexico Uniform Parentage Act (NMUPA), §§ 40-11A-101 to -903 NMSA 1978, because respondent was not biologically or genetically related to the children, the district court erred in ruling in favor of petitioner and adjudicating respondent not to be a parent of the children, because, under § 40-11A-204 NMSA 1978, respondent is presumed to be a parent of the children by virtue of their birth during her marriage to petitioner, and petitioner failed to rebut this presumption by offering genetic testing results showing that respondent has no genetic relation to the children. Based on the NMUPA's plain language, history, and purpose, the evidentiary requirement, set out in Subsection A of this section, must be applied strictly, and a parentage presumption cannot be rebutted in the absence of admissible results of genetic testing. *Soon v. Kammann*, 2022-NMCA-066, cert. granted.

Law reviews. — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

40-11A-632. Jury prohibited.

The district court, without a jury, shall adjudicate paternity of a child.

History: Laws 2009, ch. 215, § 6-632.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

No right to jury trial. — In a paternity proceeding the putative father is not entitled to a jury trial because such right did not exist at common law or by statute at the time the

New Mexico Constitution was adopted. *State ex rel. Human Servs. Dep't v. Aguirre*, 1990-NMCA-083, 110 N.M. 528, 797 P.2d 317.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

40-11A-633. Hearings; inspection of records.

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 district court for good cause.

C. The provisions of this section are subject to any rules established by the supreme court of New Mexico.

History: Laws 2009, ch. 215, § 6-633.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-634. Order on default.

The district court shall issue an order adjudicating the paternity of a man who:

A. after service of process, is in default; and

B. is found by the district court to be the father of a child.

History: Laws 2009, ch. 215, § 6-634.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-635. Dismissal for want of prosecution.

The district court may issue an order dismissing a proceeding commenced pursuant to the New Mexico Uniform Parentage Act for want of prosecution only without

prejudice. An order of dismissal for want of prosecution purportedly with prejudice is void and has only the effect of a dismissal without prejudice.

History: Laws 2009, ch. 215, § 6-635.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-636. Order adjudicating parentage.

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 shall 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 not exceeding three years from the date of the filing of the action 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 three 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 district 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 three 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 three 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.

History: Laws 2009, ch. 215, § 6-636; 2021, ch. 20, § 16.

ANNOTATIONS

The 2021 amendment, effective July 1, 2021, provided that fees related to adjudicating parentage not be ordered to be paid later than three years from the date of filing for child support, and provided that retroactive child support be limited to three years; and changed "twelve" to "three" throughout, after the next occurrence of "years", added "from the date of the filing of the action".

The Uniform Parentage Act applies where parentage has not previously been determined. — Where, before the child was born, the mother and the father filed a stipulation in a California court in which the father acknowledged paternity of the child; the California court expressly reserved the issue of child support; and the mother sought to amend the stipulation in New Mexico to recover retroactive child support, the district court erred in applying the Uniform Parentage Act and adjudicating the parentage of the child a second time and ordering the father to pay retroactive child support for an arrearage that accrued over twelve years. *Zabolzadeh v . Zabolzadeh*, 2009-NMCA-046, 146 N.M. 125, 207 P.3d 359.

Judgment awarding mother retroactive child support affirmed. — Where mother's conduct supports the determination that she waived child support by denying father's paternity, destroying the baby clothing he sent, and testifying that she did not want anything from him and mother knew she was entitled to child support from father, yet she did not seek support for twelve years from the child's birth in 1986, and she actively

denied father’s paternity, the evidence established the elements of waiver by acquiescence, and the court’s judgment awarding mother retroactive child support beginning December 1998 is affirmed. *Webb v. Menix*, 2004-NMCA-048, 135 N.M. 531, 90 P.3d 989.

Retroactive child support when an acknowledgment of paternity has established the parent-child relationship. — Where father was ordered to pay child support retroactive to the date of his separation from mother pursuant to the New Mexico Uniform Parentage Act (NMUPA), 40-11A-101 to -903 NMSA 1978, and where father argued that the NMUPA's retroactive child support provision does not apply to him because he acknowledged paternity before mother and the child support enforcement division petitioned for child support, the district court did not err in ordering father to pay retroactive child support, because the NMUPA authorizes district courts to order retroactive support either when an acknowledgement of paternity has established the parent-child relationship or when there has been an adjudication of paternity of a child. *N.M. Human Servs. Dep't v. Toney*, 2019-NMCA-035, cert. denied.

Scope of appellate review. — Appellate court will review the district court’s findings and conclusions as to trial costs and reasonable attorney fees that relate to the nature of the proceedings, the complexity of the case, the abilities of the parties’ attorneys, and the parties’ economic disparities. *Webb v. Menix*, 2004-NMCA-048, 135 N.M. 531, 90 P.3d 989.

Action to avoid child support obligation against public policy. — Father's legal claims against mother, based on contraceptive fraud, to recover compensatory damages for the "economic injury" of supporting a child were not cognizable in New Mexico courts because they contravene the public policy of this state. *Wallis v. Smith*, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, cert. denied, 130 N.M. 254, 23 P.3d 929.

Court may grant grandparent's visitation privileges. — Under the Grandparent's Visitation Privileges Act (40-9-1 to 40-9-4 NMSA 1978), a court may grant visitation privileges in the rendering of a judgment as to the existence of a parent-child relationship pursuant to this article. *Lucero v. Hart*, 1995-NMCA-121, 120 N.M. 794, 907 P.2d 198.

Application to fathers not denying paternity. — Retroactive support provisions of Uniform Parentage Act apply to fathers who do not deny paternity of their children but never formally acknowledge their paternity or assume legal responsibility for their support. *Sisneroz v. Polanco*, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Deviations from child support guidelines. — In judgment for paternity and retroactive child support, trial court erred in departing from the statutory child support guidelines without first determining the amount due under the guidelines, in failing to clearly indicate how it arrived at its award, and in failing to explain its deviations from the guidelines. *Tedford v. Gregory*, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105.

Pregnancy and childbirth costs. — Trial court erred in holding that mother did not have standing to seek reimbursement of pregnancy and childbirth costs under this section; although not the real party in interest, mother had standing because she had incurred the costs. *Sisneroz v. Polanco*, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Right of retroactive support not waived by mother's inaction. — Because retroactive child support is for the benefit of the child as well as the custodial parent, the right to such retroactive support was not deemed to have been waived by the mother's failure to request child support or institute proceedings. *Sisneroz v. Polanco*, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Medical coverage alone not "child support." — Child support obligation was not met merely by father's provision of medical insurance for child, where such coverage was required by the Mandatory Medical Support Act, Chapter 40, Article 4C NMSA 1978, and was in addition to, not in lieu of, father's support obligations under the child support guidelines. *Sisneroz v. Polanco*, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Award of costs and fees to child. — Absent a showing of cause, it was error to deny costs and attorney's fees to daughter, who prevailed in action against father for paternity and retroactive child support, and presented evidence of her inability to pay these costs and her father's ability to do so. *Tedford v. Gregory*, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105.

Fee award held insufficient. — In light of financial disparity between mother and father, and the $1,890 in unpaid attorney's fees outstanding, it was error to only award her $600 in fees. *Sisneroz v. Polanco*, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Application to fathers not denying paternity. — Retroactive support provisions of Uniform Parentage Act apply to fathers who do not deny paternity of their children but never formally acknowledge their paternity or assume legal responsibility for their support. *Sisneroz v. Polanco*, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 A.L.R.4th 1170.

Liability of father for retroactive child support on judicial determination of paternity, 87 A.L.R.5th 361.

40-11A-637. Binding effect of determination of parentage.

A. Except as otherwise provided in Subsection B of this section, a determination of parentage is binding on:

(1) all signatories to an acknowledgment or denial of paternity as provided in Article 3 of the New Mexico Uniform Parentage Act; and

(2) all parties to an adjudication by a district court acting under circumstances that satisfy the jurisdictional requirements of Section 40-6A-201 NMSA 1978.

B. A child is not bound by a determination of parentage pursuant to the New Mexico Uniform Parentage Act unless:

(1) the determination was based on an unrescinded acknowledgment of paternity and the acknowledgment is consistent with the results of genetic testing;

(2) 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;

(3) the child was a party or was represented in the proceeding determining parentage by a guardian ad litem; or

(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.

C. In a proceeding to dissolve a marriage, the district court is deemed to have made an adjudication of the parentage of a child if the district court acts under circumstances that satisfy the jurisdictional requirements of Section 40-6A-201 NMSA 1978, and the final order:

(1) expressly identifies a child as a "child of the marriage", "issue of the marriage", "child of the parties" or similar words indicating that the husband is the father of the child;

(2) provides for support of the child by the husband unless paternity is specifically disclaimed in the order; or

(3) contains a stipulation or admission that the parties are the parents of the child.

D. Except as otherwise provided in Subsection B of this section, a determination of parentage may be a defense in a subsequent proceeding seeking to adjudicate parentage by a person who was not a party to the earlier proceeding.

E. A party to an adjudication of paternity may challenge the adjudication only pursuant to the laws of New Mexico relating to appeal, vacation of judgments or other judicial review.

History: Laws 2009, ch. 215, § 6-637.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-638. Full faith and credit; determination of parentage.

A court of this state shall give full faith and credit to a determination of parentage made by a court of another state.

History: Laws 2009, ch. 215, § 6-638

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-639. Enforcement of judgment or order.

A. If existence of the parental relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated under the New Mexico Uniform Parentage Act or under prior law, the obligation of the noncustodial parent may be enforced in the same or other proceedings by any interested party.

B. The court shall order child support payments to be made in accordance with Section 40-4A-4.1 NMSA 1978.

C. Willful failure to obey the judgment or order of the court is a civil contempt of the court. All remedies for the enforcement of judgments apply.

History: Laws 2009, ch. 215, § 6-639.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-640. Modification of judgment or order.

The court has continuing jurisdiction to modify or revoke a judgment or order for future support, except as otherwise specifically provided by the Uniform Interstate Family Support Act [Chapter 40, Article 6A NMSA 1978].

History: Laws 2009, ch. 215, § 6-640.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-641. Right to counsel; free transcript on appeal.

A. At the pretrial hearing and in further proceedings, any party may be represented by counsel. The court shall appoint counsel for any party who is unable to obtain counsel for financial reasons if, in the court's discretion, appointment of counsel is required in the interest of justice.

B. If a party is financially unable to pay the cost of a transcript, the court shall furnish on request a transcript for purposes of appeal.

History: Laws 2009, ch. 215, § 6-641.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-642. Hearings and records; confidentiality.

Notwithstanding any other laws concerning public hearings and records, any hearing or trial held under the provisions of the New Mexico Uniform Parentage Act may be held in closed court without admittance of any person other than those necessary to the action or proceeding. The court may order that certain papers and records pertaining to the action or proceeding, whether part of the permanent record of the court or any other file maintained by the state or elsewhere, are subject to inspection only upon consent of the court; provided, however, that nothing in this section shall infringe upon the right of the parties to an action or proceeding to inspect the court record. The provisions of this section are subject to any rules established by the New Mexico supreme court.

History: Laws 2009, ch. 215, § 6-642.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-643. Birth records.

A. Upon order of a court of this state or upon request of a court of another state, the bureau shall prepare a certificate of birth consistent with the findings of the court and shall substitute the certificate for the original certificate of birth.

B. The fact that the father-child relationship was declared after the child's birth shall not be ascertainable from the certificate prepared pursuant to Subsection A of this section, but the actual place and date of birth shall be shown.

C. The evidence upon which the certificate prepared pursuant to Subsection A of this section was made and the original birth certificate shall be kept in a sealed and confidential file and be subject to inspection only upon order of the court and consent of all interested parties, or in exceptional cases only upon an order of the court for good cause shown.

History: Laws 2009, ch. 215, § 6-643.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

ARTICLE 7
CHILD OF ASSISTED REPRODUCTION

40-11A-701. Scope of article.

This article does not apply to the birth of a child conceived by means of sexual intercourse.

History: Laws 2009, ch. 215, § 7-701.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-702. Parental status of donor.

Donors of eggs, sperm or embryos are not the parents of a child conceived by means of assisted reproduction.

History: Laws 2009, ch. 215, § 7-702.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-703. Parentage of child of assisted reproduction.

A person who provides eggs, sperm or embryos for or consents to assisted reproduction as provided in Section 7-704 of the New Mexico Uniform Parentage Act with the intent to be the parent of a child is a parent of the resulting child.

History: Laws 2009, ch. 215, § 7-703.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Evidence establishing consent to assisted reproduction. — Where, in divorce proceedings, petitioner challenged respondent's standing to adjudicate parentage under the New Mexico Uniform Parentage Act (NMUPA), §§ 40-11A-101 to -903 NMSA 1978, because respondent was not biologically or genetically related to the children, and where petitioner also argued that respondent did not consent to petitioner's insemination procedure as required to establish parentage under the NMUPA's assisted reproduction provisions, the district court erred in ruling that respondent did not consent to assisted reproduction on the grounds that she failed to produce a signed record indicating that she consented to the specific assisted reproduction procedure that resulted in the birth of the children. Respondent signed numerous documents indicating her consent to previous insemination procedures, and the NMUPA does not prevent consideration of any documents signed by the parties before they conceive via assisted reproduction, so long as those documents manifest their intent to be a parent of the resulting child, and the NMUPA also indicates that consent, once given, can remain effective until it is withdrawn. *Soon v. Kammann*, 2022-NMCA-066, cert. granted.

Sperm donor agreement. — Where the biological father and the mother of the child entered into an agreement, prior to conception of the child, that the father would donate sperm, act as a male role model for the child, and have no financial obligation for child support; the mother self-inseminated herself; and after the child was born, the father held himself out as the father of the child, had significant contacts with the child, and was registered as the child's father with the vital statistics bureau, the agreement was unenforceable and the father was liable for child support. *Mintz v. Zoernig*, 2008-NMCA-162, 145 N.M. 362, 198 P.3d 861, cert. denied, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

40-11A-704. Consent to assisted reproduction.

A. The intended parent or parents shall consent to the assisted reproduction in a record signed by them before the placement of the eggs, sperm or embryos. Donors shall also consent to an assisted reproduction before 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 of this section if the child is eighteen years of age or older.

History: Laws 2009, ch. 215, § 7-704.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Substantial compliance with written consent requirement. — In a proceeding for dissolution of marriage, although no signed document of consent to artificial insemination was introduced, verified pleadings by the husband and wife acknowledging the husband as the child's natural father constituted substantial compliance with the requirements of this section. *Lane v. Lane*, 1996-NMCA-023, 121 N.M. 414, 912 P.2d 290, cert. denied, 121 N.M. 375, 911 P.2d 883.

Evidence establishing consent to assisted reproduction. — Where, in divorce proceedings, petitioner challenged respondent's standing to adjudicate parentage under the New Mexico Uniform Parentage Act (NMUPA), §§ 40-11A-101 to -903 NMSA 1978, because respondent was not biologically or genetically related to the children, and where petitioner also argued that respondent did not consent to petitioner's insemination procedure as required to establish parentage under the NMUPA's assisted reproduction provisions, the district court erred in ruling that Respondent did not consent to assisted reproduction on the grounds that she failed to produce a signed record indicating that she consented to the specific assisted reproduction procedure that resulted in the birth of the children. Respondent signed numerous documents indicating her consent to previous insemination procedures, and the NMUPA does not prevent consideration of any documents signed by the parties before they conceive via assisted reproduction, so long as those documents manifest their intent to be a parent of the resulting child, and the NMUPA also indicates that consent, once given, can remain effective until it is withdrawn. *Soon v. Kammann*, 2022-NMCA-066, cert. granted.

Law reviews. — For annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

40-11A-705. Limitation on husband's dispute of paternity.

A. Except as otherwise provided in Subsection B of this section, the husband of a wife who gives birth to a child by means of assisted reproduction shall not challenge his paternity of the child unless:

(1) within two years after learning of the birth of the child, he commences a proceeding to adjudicate his paternity; and

(2) the district court finds that he did not consent to the assisted reproduction, before or after birth of the child.

B. A proceeding to adjudicate paternity may be maintained at any time if the district court determines that:

(1) the husband did not provide sperm for or, before or after the birth of the child, consent to assisted reproduction by his wife;

(2) the husband and the mother of the child have not cohabited since the probable time of assisted reproduction; and

(3) the husband never openly held out the child as his own.

C. The limitation provided in this section applies to a marriage dissolved or declared invalid after assisted reproduction.

History: Laws 2009, ch. 215, § 7-705.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-706. Effect of dissolution of marriage or withdrawal of consent.

A. If a marriage is dissolved 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.

B. 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 pursuant to this section is not a parent of the resulting child.

History: Laws 2009, ch. 215, § 7-706.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-707. Parental status of deceased person.

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.

History: Laws 2009, ch. 215, § 7-707.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

ARTICLE 8
GESTATIONAL AGREEMENTS

40-11A-801. Gestational agreements not authorized or prohibited.

A. The New Mexico Uniform Parentage Act does not authorize or prohibit an agreement between a woman and the intended parents:

(1) in which the woman relinquishes all rights as the parent of a child to be conceived by means of assisted reproduction; and

(2) that provides that the intended parents become the parents of the child.

B. If a birth results pursuant to a gestational agreement pursuant to Subsection A of this section and the agreement is unenforceable under other law of New Mexico, the parent-child relationship shall be determined pursuant to Article 2 of the New Mexico Uniform Parentage Act.

History: Laws 2009, ch. 215, § 8-801.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

Law reviews. — For comment, "Stopping the Baby-Trade: Affirming the Value of Human Life Through the Invalidation of Surrogacy Contracts: A Blueprint for New Mexico," see 29 N.M.L. Rev. 407 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of surrogate parenting agreement, 77 A.L.R.4th 70.

Rights and obligations resulting from human artificial insemination, 83 A.L.R.4th 295.

Determination of status as legal or natural parents in contested surrogacy births, 77 A.L.R.5th 567.

ARTICLE 9
MISCELLANEOUS PROVISIONS

40-11A-901. Uniformity of application and construction.

In applying and construing the Uniform Parentage Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2009, ch. 215, § 9-901.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-902. Severability.

If any provision of the New Mexico Uniform Parentage Act or its application to a person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the New Mexico Uniform Parentage Act that can be given effect without the invalid provision or application, and to this end, the provisions of the New Mexico Uniform Parentage Act are severable.

History: Laws 2009, ch. 215, § 9-902.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

40-11A-903. Transitional provision.

A proceeding to adjudicate parentage that was commenced before the effective date of the New Mexico Uniform Parentage Act is governed by the law in effect at the time the proceeding was commenced.

History: Laws 2009, ch. 215, § 9-903.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 215, § 20 made the New Mexico Uniform Parentage Act effective January 1, 2010.

ARTICLE 12
Domestic Relations Mediation

40-12-1. Short title.

Chapter 40, Article 12 NMSA 1978 may be cited as the "Domestic Relations Mediation Act".

History: Laws 1987, ch. 153, § 1; 2009, ch. 201, § 1.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, changed the reference of the act to the chapter and article of NMSA 1978.

Law reviews. — For comment, "District Court Review of Judicial Officers in New Mexico Domestic Violence and Domestic Relations Cases: Rethinking the Rules," see 36 N.M.L. Rev. 487 (2000).

40-12-2. Purpose.

The purpose of the Domestic Relations Mediation Act is to assist the court, parents and other interested parties in determining the best interests of the children involved in domestic relations cases.

History: Laws 1987, ch. 153, § 2.

40-12-3. Definitions.

As used in the Domestic Relations Mediation Act:

A. "advisory consultation" means 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;

B. "counselor" means a person who by training or experience is qualified to work with individuals in a mediation situation and to perform assessments;

C. "domestic relations mediation program" means the provision of services to the court and parents, including advisory consultations, priority consultations, evaluations and mediation;

D. "evaluation" means a complete assessment that may include multiple interviews with parents and children, psychological testing, home visits and conferences with other appropriate professionals;

E. "fund" means the domestic relations mediation fund of the judicial district;

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; and

G. "priority consultation" means that the court has requested specific information and brief assessment regarding the parenting situation and suggestions regarding temporary arrangements.

History: Laws 1987, ch. 153, § 3.

40-12-4. District court domestic relations mediation fund created.

A judicial district shall create a "domestic relations mediation fund" of the judicial district. Money in the fund shall be used to offset the cost of operating the domestic relations mediation program and the supervised visitation program. Deposits to the fund shall include payments made through the imposition of a sliding fee scale pursuant to Sections 40-12-5 and 40-12-5.1 NMSA 1978, distributions pursuant to Section 34-6-40 NMSA 1978 and the collection of the surcharge provided for in Section 40-12-6 NMSA 1978.

History: Laws 1987, ch. 153, § 4; 2001, ch. 201, § 1.

ANNOTATIONS

The 2001 amendment, effective June 15, 2001, deleted "that establishes a domestic relations mediation program pursuant to Section 5 of the Domestic Relations Mediation Act" following "A judicial district"; inserted "and the supervised visitation program" at the

end of the second sentence; substituted "Sections 40-12-5 and 40-12-5.1 NMSA 1978, distributions pursuant to Section 34-6-40 NMSA 1978" for "Section 5 of the Domestic Relations Mediation Act"; and substituted "Section 40-12-6 NMSA 1978" for "Section 6 of that act".

40-12-5. Domestic relations mediation program.

A. A judicial district may establish a domestic relations mediation program by court rule approved by the supreme court. The district court may employ or contract with a counselor to provide consultations, evaluations and mediation in domestic relations cases involving children.

B. Parents may request of the court the services of the domestic relations mediation program for consultations, evaluation or mediation. Parents shall enter the program when ordered to do so by the court.

C. Parents shall pay the cost of the domestic relations mediation program pursuant to a sliding fee scale approved by the supreme court. The sliding fee scale shall be based on ability to pay for the specific service rendered by the counselor. The fees shall be paid to the district court to be credited to the fund.

History: Laws 1987, ch. 153, § 5.

ANNOTATIONS

Cross references. — For rules relating to domestic relations mediation, *see* LR5-401, LR6-401, and LR11-402.

40-12-5.1. Supervised visitation program.

A. A judicial district may establish a "safe exchange and supervised visitation program" by local court rule approved by the supreme court. The safe exchange and supervised visitation program shall be used when, in the opinion of the court, the best interests of the child are served if confrontation or contact between the parents is to be avoided during exchanges of custody or if contact between a parent and a child should be supervised. In a safe exchange and supervised visitation program, the district court may employ or contract with a person:

(1) with whom a child may be left by one parent for a short period while waiting to be picked up by the other parent; or

(2) to supervise visits among one or both parents and the child.

B. A parent may request the services of the safe exchange and supervised visitation program or the court may order that the program be used.

C. Parents shall pay the cost of the safe exchange and supervised visitation program pursuant to a sliding fee scale approved by the supreme court. The sliding fee scale shall be based on ability to pay for the service. The fees shall be paid to the district court to be credited to the fund.

History: Laws 2001, ch. 201, § 2; 2009, ch. 201, § 2.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Subsection A, in the first sentence, after "judicial district may establish a", added "safe exchange and"; in the second sentence, added "safe exchange and"; and in the last sentence, added "safe exchange and"; in Subsection B, after "request the services of the", added "safe exchange and"; and in Subsection C, after "pay the cost of the", deleted "neutral corner" and added "safe exchange and supervised visitation".

40-12-6. Domestic relations mediation fees; district court clerk to collect.

In addition to fees collected pursuant to Section 34-6-40 NMSA 1978 for the docketing of civil cases, in any judicial district which has established a domestic relations mediation program, the district court clerk shall collect a surcharge of thirty dollars ($30.00) on all new and reopened domestic relations cases.

History: Laws 1987, ch. 153, § 6.

ARTICLE 13
Family Violence Protection

40-13-1. Short title.

Chapter 40, Article 13 NMSA 1978 may be cited as the "Family Violence Protection Act".

History: Laws 1987, ch. 286, § 1; 1999, ch. 142, § 1.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, substituted "Chapter 40, Article 13 NMSA 1978" for "this act".

Law reviews. — For comment, "District Court Review of Judicial Officers in New Mexico Domestic Violence and Domestic Relations Cases: Rethinking the Rules," see 36 N.M.L. Rev. 487 (2000).

40-13-1.1. Legislative findings; state policy; dual arrests.

The legislature finds that domestic abuse incidents are complex and require special training on the part of law enforcement officers to respond appropriately to domestic abuse incidents. The state of New Mexico discourages dual arrests of persons involved in incidents of domestic abuse. A law enforcement officer, in making arrests for domestic abuse, shall seek to identify and shall consider whether one of the parties acted in self defense.

History: Laws 2002, ch. 34, § 2 and Laws 2002, ch. 35, § 2.

ANNOTATIONS

Duplicate laws. — Laws 2002, ch. 34, § 2 and Laws 2002, ch. 35, § 2 enacted identical new sections of law effective March 4, 2002. Both were compiled as 40-13-1.1 NMSA 1978.

40-13-2. Definitions.

As used in the Family Violence Protection Act:

A. "continuing personal relationship" means a dating or intimate relationship;

B. "co-parents" means persons who have a child in common, regardless of whether they have been married or have lived together at any time;

C. "court" means the district court of the judicial district where an alleged victim of domestic abuse resides or is found;

D. "domestic abuse":

(1) means an incident of stalking or sexual assault whether committed by a household member or not;

(2) means an incident by a household member against another household member consisting of or resulting in:

(a) physical harm;

(b) severe emotional distress;

(c) bodily injury or assault;

(d) a threat causing imminent fear of bodily injury by any household member;

(e) criminal trespass;

(f) criminal damage to property;

(g) repeatedly driving by a residence or work place;

(h) telephone harassment;

(i) harassment;

(j) strangulation;

(k) suffocation; or

(l) harm or threatened harm to children as set forth in this paragraph; and

(3) does not mean the use of force in self-defense or the defense of another;

E. "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion or the frame or receiver of any such weapon;

F. "household member" means a spouse, former spouse, parent, present or former stepparent, present or former parent-in-law, grandparent, grandparent-in-law, child, stepchild, grandchild, co-parent of a child or a person with whom the petitioner has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for purposes of this section;

G. "law enforcement officer" means a public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes;

H. "mutual order of protection" means an order of protection that includes provisions that protect both parties;

I. "order of protection" means an injunction or a restraining or other court order granted for the protection of a victim of domestic abuse;

J. "protected party" means a person protected by an order of protection;

K. "restrained party" means a person who is restrained by an order of protection;

L. "strangulation" has the same meaning as set forth in Section 30-3-11 NMSA 1978; and

M. "suffocation" has the same meaning as set forth in Section 30-3-11 NMSA 1978.

History: Laws 1987, ch. 286, § 2; 1993, ch. 109, § 1; 1995, ch. 23, § 3; 2008, ch. 40, § 2; 2010, ch. 85, § 2; 2018, ch. 30, § 4; 2019, ch. 253, § 2.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, defined "firearm" and "law enforcement officer" as used in the Family Violence Protection Act; added new Subsection E and redesignated former Subsection E as Subsection F; and added Subsection G and redesignated former Subsections F through K as Subsections H through M, respectively.

The 2018 amendment, effective July 1, 2018, included "strangulation" and "suffocation" within the definition of "domestic abuse", and added definitions of "strangulation" and "suffocation" to the Family Violence Protection Act; in Subsection D, added new Subparagraphs D(2)(j) and D(2)(k) and redesignated former Subparagraph D(2)(j) as D(2)(l); and added Subsections J and K.

The 2010 amendment, effective July 1, 2010, added Subsection A; in Subsection E, after "former spouse", deleted "family member, including a relative"; after second instance of "present or former", added "parent"; after "parent in-law", added "grandparent, grandparent-in-law"; and after "grandparent-in-law, child", added "stepchild, grandchild".

The 2008 amendment, effective July 1, 2008, added Paragraphs (1) and (3) of Subsection C and Subsections E, G and H; deleted "stalking" in Paragraph (2) of Subsection C; and added "a injunction and restraining order" in Subsection F.

The 1995 amendment, effective June 16, 1995, in the first sentence in Subsection D, inserted "parent, present or former step-parent, present or former in-law" following "relative" and inserted "or" preceding "co-parent".

The 1993 amendment, effective June 18, 1993, in Subsection C, inserted "by a household member against another household member" in the introductory language, added the paragraph designations, added Paragraphs (2) and (5) through (11), and made several minor stylistic changes; and, in Subsection D, substituted "including a relative, child" for "present or former household member or", added "or a person with whom the petitioner has had a continuing personal relationship" at the end of the first sentence, and added the last sentence.

Domestic abuse. — Where the facts of a case, taken as a whole, show repeated incidents that come within the terms of Subsection C (now D) of this section, the evidence does make out a case of domestic abuse. *Lujan v. Casados-Lujan*, 2004-NMCA-036, 135 N.M. 285, 87 P.3d 1067, cert. denied, 2004-NMCERT-003 135 N.M. 319, 88 P.3d 261.

Meaning of "severe emotional distress" interpreted. — "Severe emotional distress" is characterized by great harm to a person's mental health and well-being. *Best v. Marino*, 2017-NMCA-073, cert. denied.

Respondent's conduct constituted "severe emotional distress". — Where respondent appealed the district court's finding that respondent violated an order of protection that prohibited her from contacting petitioner and from committing further acts of abuse or threats of abuse against petitioner, evidence that respondent posted on the internet numerous photos of petitioner snorting prescription drugs, which were accompanied by statements claiming that petitioner was a "junkie", "a drug-addled imbecile", and a "drug-addicted hypocrite", and testimony from petitioner regarding the adverse effects, including nightmares and thoughts of suicide, that respondent's conduct had on petitioner's life, there was sufficient evidence to support a finding that respondent's online activity caused petitioner severe emotional distress. *Best v. Marino*, 2017-NMCA-073, cert. denied.

Trial in metropolitan court. — All acts of domestic abuse as defined in Subsection C (now D) should be tried on-record in the metropolitan court. *State ex rel. Schwartz v. Sanchez*, 1997-NMSC-021, 123 N.M. 165, 936 P.2d 334.

40-13-3. Petition for order of protection; contents; standard forms.

A. A victim of domestic abuse may petition the court under the Family Violence Protection Act for an order of protection.

B. The petition shall be made under oath or shall be accompanied by a sworn affidavit setting out specific facts showing the alleged domestic abuse.

C. The petition shall state whether any other domestic action is pending between the petitioner and the respondent.

D. If any other domestic action is pending between the petitioner and the respondent, the parties shall not be compelled to mediate any aspect of the case arising from the Family Violence Protection Act unless the court finds that appropriate safeguards exist to protect each of the parties and that both parties can fairly mediate with such safeguards.

E. An action brought under the Family Violence Protection Act is independent of any proceeding for annulment, separation or divorce between the parties.

F. Remedies granted pursuant to the Family Violence Protection Act are in addition to and shall not limit other civil or criminal remedies available to the parties.

G. Standard simplified petition forms with instructions for completion shall be available to all parties. Law enforcement agencies shall keep such forms and make them available upon request to alleged victims of domestic abuse.

History: Laws 1987, ch. 286, § 3; 1993, ch. 109, § 2; 2008, ch. 40, § 3.

ANNOTATIONS

The 2008 amendment, effective July 1, 2008, deleted former Subsection G that authorized the court to permit a petitioner to proceed as an indigent.

The 1993 amendment, effective June 18, 1993, in Subsection C, deleted the following language which formerly appeared at the beginning of the subsection: "No petitioner is required to file for annulment, separation or divorce as a prerequisite to obtaining an order of protection. However, the", inserted "The" at the beginning of the subsection, and deleted the former last sentence which read "If an action is pending, the petition shall be filed in the court which has jurisdiction over the pending action"; added Subsections D, E, and F and redesignated the remaining subsections accordingly; and substituted "respondent" for "alleged perpetrator of the domestic abuse" in the second sentence of Subsection G.

Availability of simple forms for victims. — Because the legislature has recognized that many people who are the victims of domestic violence are unable to obtain counsel, it has mandated that simplified forms be available for such people to use. *Lujan v. Casados-Lujan*, 2004-NMCA-036, 135 N.M. 285, 87 P.3d 1067, cert. denied, 2004-NMCERT-003 135 N.M. 319, 88 P.3d 261.

40-13-3.1. Forbearance of costs associated with domestic abuse offenses.

A. An alleged victim of domestic abuse shall not be required to bear the cost of:

(1) the prosecution of a misdemeanor or felony offense arising out of an incident of domestic abuse, including costs associated with filing a criminal charge against the alleged perpetrator of the abuse;

(2) the filing, issuance or service of a warrant;

(3) the filing, issuance or service of a witness subpoena;

(4) the filing, issuance or service of a petition for an order of protection;

(5) the filing, issuance or service of an order of protection; or

(6) obtaining law enforcement reports or photographs or copies of photographs relating to the alleged abuse or pattern of abuse.

B. No witness fee shall be charged where prohibited by federal law.

History: Laws 1995, ch. 176, § 1; 2008, ch. 40, § 4; 2011, ch. 8, § 1.

ANNOTATIONS

Cross references. — For provisions regarding forbearance of costs for alleged victims of domestic abuse, stalking or sexual assault, *see* 30-1-15 NMSA 1978.

For domestic violence offender fund, *see* 31-12-12 NMSA 1978.

For provisions regarding district court cost and fees, *see* 34-6-40 NMSA 1978.

The 2011 amendment, effective June 17, 2011, allowed alleged victims of domestic abuse to obtain photographs relating to the alleged abuse without cost.

The 2008 amendment, effective July 1, 2008, provided for cost-free prosecution of a misdemeanor or felony domestic abuse offense and the filing of a warrant, witness subpoena and petition for a protection order; added Paragraphs (4) and (6) of Subsection A; and added Subsection B.

40-13-3.2. Ex parte emergency orders of protection.

A. The district court may issue an ex parte written emergency order of protection when a law enforcement officer states to the court in person, by telephone or via facsimile and files a sworn written statement, setting forth the need for an emergency order of protection, and the court finds reasonable grounds to believe that the alleged victim or the alleged victim's child is in immediate danger of domestic abuse following an incident of domestic abuse. The written statement shall include the location and telephone number of the alleged perpetrator, if known.

B. A law enforcement officer who receives an emergency order of protection, whether in writing, by telephone or by facsimile transmission, from the court shall:

(1) if necessary, pursuant to the judge's oral approval, write and sign the order on an approved form;

(2) if possible, immediately serve a signed copy of the order on the restrained party and complete the appropriate affidavit of service;

(3) immediately provide the protected party with a signed copy of the order; and

(4) provide the original order to the court by the close of business on the next judicial day.

C. The court may grant the following relief in an emergency order of protection upon a probable cause finding that domestic abuse has occurred:

(1) enjoin the restrained party from threatening to commit or committing acts of domestic abuse against the protected party or any designated household members;

(2) enjoin the restrained party from any contact with the protected party, including harassing, telephoning, contacting or otherwise communicating with the protected party; and

(3) grant temporary custody of any minor child in common with the parties to the protected party, if necessary.

D. A district judge shall be available as determined by each judicial district to hear petitions for emergency orders of protection.

E. An emergency order of protection expires seventy-two hours after issuance or at the end of the next judicial day, whichever time is latest. The expiration date shall be clearly stated on the emergency order of protection.

F. A person may appeal the issuance of an emergency order of protection to the court that issued the order. An appeal may be heard as soon as the judicial day following the issuance of the order.

G. Upon a proper petition, a district court may issue a temporary order of protection that is based upon the same incident of domestic abuse that was alleged in an emergency order of protection.

H. Emergency orders of protection are enforceable in the same manner as other orders of protection issued pursuant to the provisions of the Family Violence Protection Act.

History: Laws 1999, ch. 142, § 2; 2008, ch. 40, § 5.

ANNOTATIONS

The 2008 amendment, effective July 1, 2008, changed "petitioner" to "protected party" and "respondent" to "restrained party".

40-13-4. Temporary order of protection; hearing; dismissal.

A. Upon the filing of a petition for order of protection, the court shall:

(1) immediately grant an ex parte temporary order of protection without bond if there is probable cause from the specific facts shown by the affidavit or by the petition to give the judge reason to believe that an act of domestic abuse has occurred;

(2) cause the temporary order of protection together with notice of hearing to be served immediately on the alleged perpetrator of the domestic abuse; and

(3) within ten days after the granting of the temporary order of protection, hold a hearing on the question of continuing the order; or

(4) if an ex parte order is not granted, serve notice to appear upon the parties and hold a hearing on the petition for order of protection within seventy-two hours after the filing of the petition; provided if notice of hearing cannot be served within seventy-two hours, the temporary order of protection shall be automatically extended for ten days.

B. If the court grants a temporary order of protection, it may award temporary custody and visitation of any children involved when appropriate.

C. Except for petitions alleging stalking or sexual assault, if the court finds that the alleged perpetrator is not a household member, the court shall dismiss the petition.

History: Laws 1987, ch. 286, § 4; 2008, ch. 40, § 6.

ANNOTATIONS

The 2008 amendment, effective July 1, 2008, added Subsections B and C.

40-13-5. Order of protection; contents; remedies; title to property not affected; mutual order of protection.

A. Upon finding that domestic abuse has occurred or upon stipulation of the parties, the court shall enter an order of protection ordering the restrained party to:

(1) refrain from abusing the protected party or any other household member; and

(2) if the order is issued pursuant to this section and if the court also determines that the restrained party presents a credible threat to the physical safety of the household member after the restrained party has received notice and had an opportunity to be heard or by stipulation of the parties, to:

(a) deliver any firearm in the restrained party's possession, care, custody or control to a law enforcement agency, law enforcement officer or federal firearms licensee while the order of protection is in effect; and

(b) refrain from purchasing, receiving, or possessing or attempting to purchase, receive or possess any firearm while the order of protection is in effect.

B. In an order of protection entered pursuant to Subsection A of this section, the court shall specifically describe the acts the court has ordered the restrained party to do or refrain from doing. As a part of any order of protection, the court may:

(1) grant sole possession of the residence or household to the protected party during the period the order of protection is effective or order the restrained party to provide temporary suitable alternative housing for the protected party and any children to whom the restrained party owes a legal obligation of support;

(2) award temporary custody of any children involved when appropriate and provide for visitation rights, child support and temporary support for the protected party on a basis that gives primary consideration to the safety of the protected party and the children;

(3) order that the restrained party shall not initiate contact with the protected party;

(4) restrain a party from transferring, concealing, encumbering or otherwise disposing of the other party's property or the joint property of the parties except in the usual course of business or for the necessities of life and require the parties to account to the court for all such transferences, encumbrances and expenditures made after the order is served or communicated to the restrained party;

(5) order the restrained party to reimburse the protected party or any other household member for expenses reasonably related to the occurrence of domestic abuse, including medical expenses, counseling expenses, the expense of seeking temporary shelter, expenses for the replacement or repair of damaged property or the expense of lost wages;

(6) order the restrained party to participate in, at the restrained party's expense, professional counseling programs deemed appropriate by the court, including counseling programs for perpetrators of domestic abuse, alcohol abuse or abuse of controlled substances; and

(7) order other injunctive relief as the court deems necessary for the protection of a party, including orders to law enforcement agencies as provided by this section.

C. The order of protection shall contain notice that violation of any provision of the order of protection is a violation of state law and that federal law, 18 U.S.C. 922, et seq., prohibits possession of firearms by certain persons.

D. If the order of protection supersedes or alters prior orders of the court pertaining to domestic matters between the parties, the order shall say so on its face. If an action relating to child custody or child support is pending or has concluded with entry of an order at the time the petition for an order of protection was filed, the court may enter an initial order of protection, but the portion of the order dealing with child custody or child support will then be transferred to the court that has or continues to have jurisdiction over the pending or prior custody or support action.

E. A mutual order of protection shall be issued only in cases where both parties have petitioned the court and the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense.

F. No order issued under the Family Violence Protection Act shall affect title to any property or allow a party to transfer, conceal, encumber or otherwise dispose of another party's property or the joint or community property of the parties.

G. Either party may request a review hearing to amend an order of protection. An order of protection involving child custody or support may be modified without proof of a substantial or material change of circumstances.

H. An order of protection shall not be issued unless a petition or a counter petition has been filed.

History: Laws 1987, ch. 286, § 5; 1993, ch. 109, § 3; 2001, ch. 15, § 1; 2008, ch. 40, § 7; 2019, ch. 253, § 3.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, revised the required contents of an order of protection; in Subsection A, added Paragraph A(2); in Subsection B, in the introductory clause, added "In an order of protection entered pursuant to Subsection A of this section"; deleted former Subsection B; added a new Subsection C and redesignated former Subsections C through G as Subsections D through H, respectively.

The 2008 amendment, effective July 1, 2008, changed "petitioner" to "protected party" and "respondent" to "restrained party" and added Subsections D and G.

The 2001 amendment, effective July 1, 2001, inserted Paragraphs A(5) and (6), which add provisions for financial remedies and counseling programs for victims of domestic abuse, and renumbered the remaining paragraph accordingly.

The 1993 amendment, effective June 18, 1993, in Subsection A, in the first sentence of the introductory paragraph, deleted "an act of" preceding "domestic abuse" and deleted "household member" following "respondent", substituted "the acts" for "in clear language understandable to the respondent the behavior" in the second sentence of the introductory paragraph, made a minor stylistic change in Paragraph (2), and inserted "require the parties" in Paragraph (4); added the second sentence in Subsection C; and added the second sentence in Subsection E.

Petitioners are not required to provide a showing of imminent danger in seeking an order of protection. — The district court erred in adopting the hearing officer's order dismissing petitioner's petition for order of protection and domestic abuse on the basis

that petitioner failed to demonstrate that respondent posed an ongoing and present danger, because the plain language of NMSA 1978, § 40-13-5(A) requires the district court to enter an order of protection upon a finding that domestic abuse has occurred. There is no language that indicates a petition must state why a petitioner needs the order, or even language that requires proof of a petitioner's need for that order. *Nguyen v. Bui*, 2023-NMSC-020.

Child custody. — As far as child custody matters are concerned, the Family Violence Protection Act is to be used only in emergency situations and as a temporary remedy that is limited in scope. *Lucero v. Pino*, 1997-NMCA-089, 124 N.M. 28, 946 P.2d 232, cert. denied, 123 N.M. 626, 944 P.2d 274.

Expiration of custody order. — Issue of whether an order transferring child custody under the Family Violence Protection Act should have been declared void under Rule 1-060B (4) NMRA was moot since the order had expired. *Lucero v. Pino*, 1997-NMCA-089, 124 N.M. 28, 946 P.2d 232, cert. denied, 123 N.M. 626, 944 P.2d 274.

Respondent's conduct constituted "severe emotional distress". — Where respondent appealed the district court's finding that respondent violated an order of protection that prohibited her from contacting petitioner and from committing further acts of abuse or threats of abuse against petitioner, evidence that respondent posted on the internet numerous photos of petitioner snorting prescription drugs, which were accompanied by statements claiming that petitioner was a "junkie", a "drug-addled imbecile" and a "drug-addicted hypocrite", and testimony from petitioner regarding the adverse effects, including nightmares and thoughts of suicide, that respondent's conduct had on petitioner's life, there was sufficient evidence to support a finding that respondent's online activity caused petitioner severe emotional distress. *Best v. Marino*, 2017-NMCA-073, cert. denied.

Order of protection did not violate respondent's due process rights. — Where respondent was found in criminal contempt for her violation of an order of protection, which expressly prohibited respondent from engaging in conduct that would cause petitioner to suffer severe emotional distress, and where respondent repeatedly posted on the internet photos of petitioner snorting prescription drugs, implying that petitioner had a substance abuse problem, accompanied by statements claiming that petitioner was a "junkie" a "drug-addled imbecile" and a "drug-addicted hypocrite", respondent's due process rights were not violated, because the order provided respondent with sufficient notice that her online activity would constitute a violation. *Best v. Marino*, 2017-NMCA-073, cert. denied.

Order of protection's restriction of respondent's ability to access the internet was unconstitutionally overbroad. — Where the district court issued an order of protection based on respondent's sustained pattern of stalking and harassment of petitioner, the court's restriction of respondent's ability to access the internet was a clear prior restraint on respondent's first amendment rights and was not the least restrictive means by which to address the harm in this case, and therefore the district court's restriction was

unconstitutionally overbroad and violated respondent's first amendment rights. *Best v. Marino*, 2017-NMCA-073, cert. denied.

Double jeopardy. — Where provision in order prohibiting domestic violence (OPDV) prohibiting "battering in any manner" contained all elements of the statutorily defined offense of battery, a criminal prosecution for battery following a contempt proceeding for violating the OPDV violated defendant's right against double jeopardy. *State v. Powers*, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454, cert. denied, 127 N.M. 392, 981 P.2d 1210.

40-13-5.1. Extended order of protection.

A. In the sentencing proceeding for a person convicted of criminal sexual penetration pursuant to Section 30-9-11 NMSA 1978, a prosecutor may request that the criminal court grant the victim an order of protection to remain in effect for the duration of the criminal court's jurisdiction over the person.

B. At any time after the expiration of a criminal court's jurisdiction over a person against whom an order of protection was granted pursuant to a request pursuant to Subsection A of this section, the victim may:

(1) file a petition for an order of protection against the person; and

(2) submit evidence of the person's conviction for criminal sexual penetration, including out-of-state, as cause for the court to grant the order of protection.

C. Based on evidence submitted pursuant to Subsection B of this section, a court may take judicial notice of the facts that led to a person's conviction for criminal sexual penetration and a victim shall not be required to appear before the court on the victim's petition for an order of protection; provided, however, that another person may appear on the victim's behalf.

D. A court may grant an order of protection pursuant to this section for any length of time, including for a victim's lifetime.

E. Notwithstanding the provisions of Subsection C of Section 40-13-6 NMSA 1978, an order of protection granted pursuant to this section shall continue until the expiration provided in the order, if any, or until modified or rescinded upon a motion by the victim.

History: Laws 2016, ch. 32, § 1 and Laws 2016, ch. 33, § 1.

ANNOTATIONS

Effective dates. — Laws 2016 , ch. 32, § 2 and Laws 2016, ch. 33, § 2 made Laws 2016, ch. 32, § 1 and Laws 2016, ch. 33, § 1 effective July 1, 2016.

Compiler's notes. — Laws 2016, ch. 32, § 1 and Laws 2016, ch. 33, § 1, both effective July 1, 2016, enacted identical new sections. The section was set out as enacted by Laws 2016, ch. 33, § 1. *See* 12-1-8 NMSA 1978.

40-13-6. Service of order; duration; penalty; remedies not exclusive.

A. An order of protection granted under the Family Violence Protection Act shall be filed with the clerk of the court, and a copy shall be sent by the clerk to the local law enforcement agency. The order shall be personally served upon the restrained party, unless the restrained party or the restrained party's attorney was present at the time the order was issued. The order shall be filed and served without cost to the protected party.

B. A local law enforcement agency receiving an order of protection from the clerk of the court that was issued under the Family Violence Protection Act shall have the order entered in the national crime information center's order of protection file within seventy-two hours of receipt. This does not include temporary orders of protection entered pursuant to the provisions of Section 40-13-4 NMSA 1978.

C. An order of protection granted by the court involving custody or support shall be effective for a fixed period of time not to exceed six months. The order may be extended for good cause upon motion of the protected party for an additional period of time not to exceed six months. Injunctive orders shall continue until modified or rescinded upon motion by either party or until the court approves a subsequent consent agreement entered into by the parties.

D. A peace officer may arrest without a warrant and take into custody a restrained party whom the peace officer has probable cause to believe has violated an order of protection that is issued pursuant to the Family Violence Protection Act or entitled to full faith and credit.

E. A restrained party convicted of violating an order of protection granted by a court under the Family Violence Protection Act is guilty of a misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978. Upon a second or subsequent conviction, an offender shall be sentenced to a jail term of not less than seventy-two consecutive hours that shall not be suspended, deferred or taken under advisement.

F. In addition to any other punishment provided in the Family Violence Protection Act, the court shall order a person convicted to make full restitution to the party injured by the violation of an order of protection and shall order the person convicted to participate in and complete a program of professional counseling, at the person's own expense, if possible.

G. In addition to charging the person with violating an order of protection, a peace officer shall file all other possible criminal charges arising from an incident of domestic abuse when probable cause exists.

H. The remedies provided in the Family Violence Protection Act are in addition to any other civil or criminal remedy available to the protected party or the state.

History: Laws 1987, ch. 286, § 6; 1993, ch. 109, § 4; 1995, ch. 176, § 3; 1997, ch. 59, § 1; 1999, ch. 48, § 1; 2007, ch. 81, § 1; 2008, ch. 40, § 8; 2013, ch. 47, § 10.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, deleted provisions that provided for the enforcement of orders of protection issued by tribal courts and courts of other states; in Subsection D, after "A peace officer", deleted "shall" and added "may"; and deleted former Subsection E, which required state courts to give full faith and credit to protection orders issued by tribal courts and courts in other states, unless the protection order was not based on a pleading seeking a protection order or findings that each party was entitled to a protection order.

The 2008 amendment, effective July 1, 2008, changed "petitioner" to "protected party" and "respondent" to "restrained party".

The 2007 amendment, effective June 15, 2007, adds a new Subsection B to require local law enforcement agencies to enter orders of protection in the national crime information center’s order of protection file within 72 hours of receipt.

The 1999 amendment, effective July 1, 1999, in Subsection D added "and orders of protection issued by the courts and other states" at the end of the first sentence, added the second sentence, and added Paragraphs (1) and (2).

The 1997 amendment, effective June 20, 1997, inserted "filed and" preceding "served" in the last sentence of Subsection A.

The 1995 amendment, effective July 1, 1995, deleted the first part of the last sentence of Subsection A which read, "If the petitioner has been found by the court to be unable to pay court costs", and substituted "abuse" for "violence" in Subsection G.

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted "local law enforcement agency" for "to the state police or to the municipal police of the city in which the court is located" in the first sentence; in Subsection B, in the first sentence, inserted "involving custody or support" and substituted "six" for "three", substituted "six" for "three" in the second sentence, and added the third sentence; added Subsections D through G and redesignated former Subsection D as present Subsection H.

Knowledge is an element of the crime of violating an order of protection which requires the state to prove knowledge of the protective order and the presence of the protected person within the protected zone. *State v. Ramos*, 2013-NMSC-031.

Where defendant was tried for violating a protection order; the district court refused defendant's jury instruction that required the jury to find that defendant "knowingly" violated the protection order; and the district court granted defendant's alternative request to give the jury the general criminal intent instruction consistent with UJI 14-141 NMRA, the general criminal intent instruction was insufficient because knowledge and intent are separate, not synonymous, elements and the district court erred in failing to instruct the jury of a knowing violation. *State v. Ramos*, 2013-NMSC-031.

Double jeopardy. — Where defendant had been convicted of contempt, a misdemeanor, for violating a domestic violence protective order and sentenced to jail time, double jeopardy did not bar prosecution of defendant for the offenses of stalking and harassment stemming from the same conduct that gave rise to the contempt adjudication. *State v. Gonzales*, 1997-NMCA-039, 123 N.M. 337, 940 P.2d 185.

Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the order prohibiting domestic violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. *State v. Powers*, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454, cert. denied, 127 N.M. 392, 981 P.2d 1210.

Where the order of protection clearly and unambiguously ordered defendant not to "contact" victim, each and every time defendant called victim on two separate dates in the same year, he made a "contact" with victim in violation of the order of protection. Because the legislature has made its intent clear that each violation will be punished separately, defendant's right to be free from double jeopardy in sentencing was not violated. *State v. McGee*, 2004-NMCA-014, 135 N.M. 73, 84 P.3d 690, cert denied, 2004-NMCERT-001 135 N.M. 160, 85 P.3d 802.

Intent of act. — The Family Violence Protection Act clearly reflects its intent that each violation shall be subject to a separate prosecution and punishment. *State v. McGee*, 2004-NMCA-014, 135 N.M. 73, 84 P.3d 690, cert denied, 2004-NMCERT-001 135 N.M. 160, 85 P.3d 802.

Law reviews. — For article, "The New Mexico Law Review Presents a Symposium on Enforcing the Judgments of Tribal Courts: A Different Kind of Symmetry," see 34 N.M.L. Rev. 263 (2004).

40-13-7. Law enforcement officers; emergency assistance; limited liability; providing notification to victims when an alleged perpetrator is released from detention; statement in judgment and sentence document.

A. A person who allegedly has been a victim of domestic abuse may request the assistance of a local law enforcement agency.

B. A local law enforcement officer responding to the request for assistance shall be required to take whatever steps are reasonably necessary to protect the victim from further domestic abuse, including:

(1) advising the victim of the remedies available under the Family Violence Protection Act; the right to file a written statement, a criminal complaint and a request for an arrest warrant; and the availability of domestic violence shelters, medical care, counseling and other services;

(2) upon the request of the victim, providing or arranging for transportation of the victim to a medical facility or place of shelter;

(3) upon the request of the victim, accompanying the victim to the victim's residence to obtain the victim's clothing and personal effects required for immediate needs and the clothing and personal effects of any children then in the care of the victim;

(4) upon the request of the victim, assist in placing the victim in possession of the dwelling or premises or otherwise assist in execution, enforcement or service of an order of protection;

(5) arresting the alleged perpetrator when appropriate and including a written statement in the attendant police report to indicate that the arrest of the alleged perpetrator was, in whole or in part, premised upon probable cause to believe that the alleged perpetrator committed domestic abuse against the victim and, when appropriate, indicate that the party arrested was the predominant aggressor; and

(6) advising the victim when appropriate of the procedure for initiating proceedings under the Family Violence Protection Act or criminal proceedings and of the importance of preserving evidence.

C. The jail or detention center shall make a reasonable attempt to notify the arresting law enforcement agency or officer when the alleged perpetrator is released from custody. The arresting law enforcement agency shall make a reasonable attempt to notify the victim that the alleged perpetrator is released from custody.

D. Any law enforcement officer responding to a request for assistance under the Family Violence Protection Act is immune from civil liability to the extent allowed by law. Any jail, detention center or law enforcement agency that makes a reasonable attempt to provide notification that an alleged perpetrator is released from custody is immune from civil liability to the extent allowed by law.

E. A statement shall be included in a judgment and sentence document to indicate when a conviction results from the commission of domestic abuse.

History: Laws 1987, ch. 286, § 7; 1995, ch. 54, § 1; 2008, ch. 40, § 9.

ANNOTATIONS

The 2008 amendment, effective July 1, 2008, changed "petitioner" to "victim" and "abusing household member" to "alleged perpetrator"; in Paragraph (1) of Subsection B, authorized a law enforcement officer to file a criminal complaint; and in Paragraph (5) of Subsection B, authorized a law enforcement officer to indicate that the party arrested was the predominant aggressor.

The 1995 amendment, effective July 1, 1995, added "providing notification to victims when an abusing household member is released from detention; statement in judgment and sentence document" in the section heading, added the language beginning "and including a written statement" at the end in Paragraph (5) of Subsection B, added Subsections C and E, redesignated former Subsection C as Subsection D, and added the second sentence in Subsection D.

Provisions of Article not to be pretext for search. — An arrest under the Family Violence Protection Act was not authorized where the victim of abuse was no longer in danger and the arrest of the alleged abuser was a mere pretext to search for drugs. *State v. Miller*, 1997-NMCA-060, 123 N.M. 507, 943 P.2d 541.

Family Violence Protection Act does not circumvent warrant requirement. — Where officers responded to a domestic violence call made by defendant's girlfriend, who had been staying at defendant's apartment for a few days, the officers' entry into the apartment and subsequent discovery and seizure of drug paraphernalia was not valid under the community caretaker doctrine or any other exception to the warrant requirement, because defendant had already left the apartment and the officers did not have credible and specific information that a victim was likely to be located at a particular place and in need of immediate aid to avoid great bodily harm or death, and although the Family Violence Protection Act contemplates law enforcement assistance to protect a victim of domestic violence from further abuse when retrieving items from inside the victim's residence, it does not circumvent the requirement that only a genuine emergency will justify entering and searching a residence without a warrant and without consent, and in this case there was no indication of an emergency inside the apartment justifying a warrantless entry. *State v. Ramos*, 2017-NMCA-041.

Arrest without a warrant. — A law enforcement officer may arrest, without a warrant, an offender who commits a misdemeanor domestic violence offense and leaves the scene prior to the officer's arrival, provided that the arrest is reasonably prompt and reasonably necessary to protect the victim. 2005 Op. Att'y Gen. No. 05-05.

40-13-7.1. Medical personnel; documentation of domestic abuse.

A. When medical personnel who are interviewing, examining, attending or treating a person:

(1) receive a report from the person of an act of domestic abuse, the medical personnel shall document the nature of the abuse and the name of the alleged perpetrator of the abuse in the person's medical file and shall provide the person with information and referral to services for victims of domestic abuse; or

(2) may have reason to believe or suspect that the person is a victim of domestic abuse, the medical personnel shall provide the person with information and referral to services for victims of domestic abuse.

B. Medical and other health care related information or communications concerning domestic abuse of a person obtained by or from medical personnel during the course of an interview, examination, diagnosis or treatment are confidential communications unless released:

(1) with the prior written consent of the person;

(2) pursuant to a court order; or

(3) when necessary to provide treatment, payment and operations in accordance with the federal Health Insurance Portability and Accountability Act.

C. As used in this section, "medical personnel" means:

(1) licensed health care practitioners;

(2) licensed emergency medical technicians;

(3) health care practitioners who interview, examine, attend or treat a person and who are under the guidance or supervision of licensed health care practitioners; and

(4) residents and interns.

History: Laws 2005, ch. 281, § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 281, § 2, made this section effective July 1, 2005.

40-13-8. Repealed.

History: Laws 1992, ch. 107, § 1; repealed Laws 2005, ch. 30, § 3.

ANNOTATIONS

Repeals. — Laws 2005, ch. 30, § 3 repealed 40-13-8 NMSA 1978, as enacted by Laws 1992, ch. 107, § 1, relating to a domestic violence pilot program, effective July 1, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

40-13-9. Domestic violence special commissioners; appointment; qualifications.

A. A domestic violence special commissioner shall be appointed by and serve at the pleasure of the chief judge of the judicial district to which the officer is assigned.

B. A domestic violence special commissioner shall:

(1) be an attorney licensed to practice law in New Mexico;

(2) have a minimum of three years experience in the practice of law and be knowledgeable in the area of domestic relations and domestic violence matters; and

(3) conform to Canons 21-100 through 21-500 and 21-700 of the Code of Judicial Conduct as adopted by the supreme court. Violation of any such canon shall be grounds for dismissal of any domestic violence special commissioner.

History: Laws 2005, ch. 30, § 1.

ANNOTATIONS

Cross references. — For domestic violence special commissioners duties, *see* Rule 1-053.1 NMRA.

Effective dates. — Laws 2005, ch. 30, § 4, made this section effective July 1, 2005.

40-13-10. Special commissioners; powers; duties.

A. A domestic violence special commissioner shall perform the following duties in carrying out the provisions of the Family Violence Protection Act:

(1) review petitions for orders of protection and motions to enforce, modify or terminate orders of protection;

(2) if deemed necessary, interview petitioners. Any interview shall be on the record;

(3) conduct hearings on the merits of petitions for orders of protection and motions to enforce, modify or terminate orders of protection; and

(4) prepare recommendations to the district court regarding petitions for orders of protection and motions to enforce, modify or terminate orders of protection.

B. All orders must be signed by a district court judge before the recommendations of a domestic violence special commissioner become effective.

History: Laws 2005, ch. 30, § 2.

ANNOTATIONS

Cross references. — For domestic violence special commissioners duties, *see* Rule 1-053.1 NMRA.

Effective dates. — Laws 2005, ch. 30, § 4, made this section effective July 1, 2005.

Law reviews. — For comment, "District Court Review of Judicial Officers in New Mexico Domestic Violence and Domestic Relations Cases: Rethinking the Rules," see 36 N.M.L. Rev. 487 (2006).

40-13-11. Repealed.

History: Laws 2007, ch. 131, § 1; repealed by Laws 2018, ch. 40, § 10.

ANNOTATIONS

Repeals. — Laws 2018, ch. 40, § 10 repealed 40-13-11 NMSA 1978, as enacted by Laws 2007, ch. 131, § 1, relating to substitute address, effective July 1, 2018. For provisions of former section, *see* the 2017 NMSA 1978 on *NMOneSource.com*.

40-13-12. Limits on internet publication.

A state agency, court or political subdivision of the state, including a magistrate or municipal court, judicial district, law enforcement agency, county, municipality or home-rule municipality, shall not make available publicly on the internet any information that would likely reveal the identity or location of the party protected under an order of protection. A state agency, court or political subdivision may share court-generated and law enforcement-generated information contained in secure, government registries for protection order enforcement purposes.

History: Laws 2008, ch. 40, § 10.

ANNOTATIONS

Effective dates. — Laws 2008, ch. 40, § 11 made this section effective July 1, 2008.

40-13-13. Relinquishment of firearms; penalty.

A. After the court has issued notice that the restrained party is subject to the provisions of Paragraph (2) of Subsection A of Section 40-13-5 NMSA 1978, the restrained party shall relinquish all firearms in the restrained party's immediate possession or control or subject to the restrained party's possession or control in a safe manner to a law enforcement officer, a law enforcement agency or federal firearms licensee within forty-eight hours of service of the order.

B. A law enforcement officer or law enforcement agency shall take possession of all firearms subject to the order of protection that are relinquished by the restrained party or are in plain sight or are discovered pursuant to a lawful search.

C. A law enforcement officer or law enforcement agency that takes temporary possession of a firearm pursuant to this section shall:

(1) prepare a receipt identifying all firearms that have been relinquished or taken;

(2) provide a copy of the receipt to the restrained party;

(3) provide a copy of the receipt to the petitioner within seventy-two hours of taking possession of the firearm;

(4) file the original receipt with the court that issued the order of protection within seventy-two hours of taking possession of the firearm; and

(5) ensure that the law enforcement agency retains a copy of the receipt.

D. An order of protection issued pursuant to Section 40-13-5 NMSA 1978 shall include:

(1) a statement that the restrained party shall not purchase, receive, transport, possess or have custody or control of a firearm while the order of protection is in effect;

(2) a description of the requirements for the relinquishment of firearms as provided in this section;

(3) a statement that within seventy-two hours of the issuance of the order of protection the restrained party must file with the court issuing the order:

(a) a receipt identifying all firearms that have been relinquished or taken by a law enforcement officer or law enforcement agency; or

(b) a declaration of non-relinquishment;

(4) the expiration date of relinquishment;

(5) the address of the court that issued the order of protection; and

(6) a statement that violation of any provision of the order of protection is a violation of state law and that federal law, 18 U.S.C. 922, et seq., prohibits possession of firearms by certain persons.

E. If the respondent is present at the hearing on the order of protection, the court shall provide the respondent with a receipt form to identify all firearms to be surrendered or, if the respondent has no firearms to relinquish, a declaration of non-relinquishment. The court shall accept the completed form from the respondent for immediate filing.

F. Evidence establishing ownership or possession of a firearm pursuant to this section shall not be admissible as evidence in any criminal proceeding.

G. The law enforcement agency or federal firearms licensee with custody of a surrendered or seized firearm shall make the firearm available to a formerly restrained party within three business days of receipt of a request from a formerly restrained party who is then currently eligible to own and possess a firearm.

H. A formerly restrained party who has surrendered or had firearms taken by a law enforcement officer or law enforcement agency pursuant to this section who does not wish the firearm returned or who is no longer eligible to possess a firearm may sell or transfer the firearm to a federal firearms licensee. The law enforcement agency shall not release the firearm to a federal firearms licensee until:

(1) the federal firearms licensee has displayed proof that the formerly restrained party has transferred the firearm to the licensee; and

(2) the law enforcement agency has verified the transfer with the formerly restrained party.

I. A law enforcement agency holding a firearm relinquished pursuant to this section may dispose of the firearm twelve months from the date of proper notice to the formerly restrained party of the intent to dispose of the firearm, unless another person claiming to be the lawful owner presents written proof of ownership. If the firearm remains unclaimed after twelve months from the date of notice, no party shall assert ownership and the law enforcement agency may dispose of the firearm. For the purposes of this subsection, "dispose" means to destroy a firearm or sell or transfer the firearm to a federal firearms licensee.

J. The provisions of this section shall not be interpreted to require a federal firearms licensee to purchase or accept possession of a firearm from a restrained party.

K. The administrative office of the courts shall develop a standard receipt form and declaration of non-relinquishment form for use under this section.

History: Laws 2019, ch. 253, § 4.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 253, § 5 made Laws 2019, ch. 253, § 4 effective July 1, 2019.

ARTICLE 13A
Uniform Interstate Enforcement of Domestic Violence Protection Orders

40-13A-1. Short title.

Sections 1 through 9 [40-13A-1 to 40-13A-9 NMSA 1978] of this act may be cited as the "Uniform Interstate Enforcement of Domestic Violence Protection Orders Act".

History: Laws 2013, ch. 47, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 47, § 11 provided that the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was effective July 1, 2013.

40-13A-2. Definitions.

As used in the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act:

A. "foreign protection order" means a protection order issued by a tribunal of another state;

B. "issuing state" means the state whose tribunal issues a protection order;

C. "mutual foreign protection order" means a foreign protection order that includes provisions in favor of both the protected individual seeking enforcement of the order and the respondent;

D. "protected individual" means a person protected by a protection order;

E. "protection order" means an injunction or other order, issued by a tribunal under the domestic violence, family violence or antistalking laws of the issuing state, to prevent a person from engaging in a violent or threatening act against, harassment of, contact or communication with or physical proximity to another person;

F. "respondent" means the person against whom enforcement of a protection order is sought;

G. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. "State" includes an Indian pueblo, tribe, nation or band that has jurisdiction to issue protection orders; and

H. "tribunal" means a court, agency or other entity authorized by law to issue or modify a protection order.

History: Laws 2013, ch. 47, § 2.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 47, § 11 provided that the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was effective July 1, 2013.

40-13A-3. Judicial enforcement of a foreign protection order.

A. A person may seek enforcement of a valid foreign protection order in a New Mexico tribunal. The tribunal shall enforce the terms of the order, including terms that provide relief that a New Mexico tribunal would lack power to provide but for this section. The tribunal shall enforce the order, whether the order was obtained by independent action or in another proceeding, if it is an order issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection. In a proceeding to enforce a foreign protection order, the tribunal shall follow New Mexico procedures for the enforcement of protection orders.

B. A New Mexico tribunal shall not enforce a foreign protection order issued by a tribunal of a state that does not recognize the standing of a protected individual to seek enforcement of the order.

C. A New Mexico tribunal shall enforce the provisions of a valid foreign protection order governing custody and visitation, if the order was issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation orders in the issuing state.

D. A foreign protection order is valid if it:

(1) identifies the protected individual and the respondent;

(2) is currently in effect;

(3) was issued by a tribunal that had jurisdiction over the parties and subject matter under the law of the issuing state; and

(4) was issued after the respondent was given reasonable notice and had an opportunity to be heard before the tribunal issued the order or, in the case of an ex parte order, the respondent was given notice and has had or will have an opportunity to be heard within a reasonable time after the order was issued in a manner consistent with the due process rights of the respondent.

E. A foreign protection order valid on its face is prima facie evidence of its validity.

F. Absence of any of the criteria for validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order.

G. A New Mexico tribunal may enforce provisions of a mutual foreign protection order only if:

(1) both parties filed a written pleading seeking a protection order from the tribunal of the issuing state; and

(2) the tribunal of the issuing state made specific findings that each party was entitled to a protection order.

History: Laws 2013, ch. 47, § 3.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 47, § 11 provided that the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was effective July 1, 2013.

40-13A-4. Nonjudicial enforcement of foreign protection order.

A. A New Mexico law enforcement officer, upon determining that there is probable cause to believe that a valid foreign protection order exists and that the order has been violated, shall enforce the order as if it were the order of a New Mexico tribunal. Presentation of a foreign protection order that identifies both the protected individual and the respondent and that, on its face, appears to be in effect constitutes probable cause to believe that a valid foreign protection order exists. For the purposes of this section, a protection order may be inscribed on a tangible medium or may have been stored in an electronic or other medium if it is retrievable in perceivable form. Presentation of a certified copy of a protection order is not required for enforcement.

B. If a foreign protection order is not presented, a New Mexico law enforcement officer may consider other information in determining whether there is probable cause to believe that a valid foreign protection order exists.

C. If a New Mexico law enforcement officer determines that an otherwise valid foreign protection order cannot be enforced because the respondent has not been notified or served with the order, the officer shall inform the respondent of the order,

make a reasonable effort to serve the order upon the respondent and allow the respondent a reasonable opportunity to comply with the order before enforcing the order.

D. Registration or filing of a foreign protection order in New Mexico is not required for the enforcement of a valid foreign protection order pursuant to the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

History: Laws 2013, ch. 47, § 4.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 47, § 11 provided that the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was effective July 1, 2013.

40-13A-5. Registration of foreign protection order.

A. A person may register a foreign protection order in New Mexico. To register a foreign protection order, a person shall present to the clerk of the district court:

(1) a copy of the foreign protection order that has been certified by the issuing tribunal; and

(2) an affidavit by the protected individual stating that, to the best of the protected individual's knowledge, the foreign protection order is currently in effect.

B. The clerk shall register the foreign protection order in accordance with this section. After the foreign protection order is registered, the clerk shall furnish to the person registering the order a certified copy of the registered order and shall send a copy of the registered order to the local law enforcement agency. The clerk shall not notify the respondent that the foreign protection order has been registered in New Mexico unless requested to do so by the protected individual.

C. A registered foreign protection order that is inaccurate or is not currently in effect shall be corrected or removed from the tribunal's records in accordance with New Mexico law.

D. A foreign protection order registered under the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act may be entered in any state or federal registry of protection orders in accordance with applicable law.

E. A fee shall not be charged for the registration of a foreign protection order.

History: Laws 2013, ch. 47, § 5.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 47, § 11 provided that the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was effective July 1, 2013.

40-13A-6. Limits on internet publication.

A state agency, court or political subdivision of the state, including a magistrate or municipal court, judicial district, law enforcement agency, county, municipality or home-rule municipality, shall not make available publicly on the internet any information regarding the registration of, filing of a petition for or issuance of a protection order, restraining order or injunction pursuant to the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, whether the filing or issuance occurred in New Mexico or any other state. However, the provisions of the preceding sentence shall not apply to a filing or issuance on the New Mexico state judiciary's statewide case management and e-filing system, but the address of a protected person shall be redacted from any such filing or issuance. A state agency, court or political subdivision may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

History: Laws 2013, ch. 47, § 6.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 47, § 11 provided that the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was effective July 1, 2013.

40-13A-7. Other remedies.

A protected individual who pursues remedies under the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act is not precluded from pursuing other legal or equitable remedies against the respondent.

History: Laws 2013, ch. 47, § 7.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 47, § 11 provided that the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was effective July 1, 2013.

40-13A-8. Uniformity of application and construction.

In applying and construing the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact that act.

History: Laws 2013, ch. 47, § 8.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 47, § 11 provided that the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was effective July 1, 2013.

40-13A-9. Transitional provision.

The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act applies to protection orders issued before July 1, 2013 and to continuing actions for enforcement of foreign protection orders commenced before July 1, 2013. A request for enforcement of a foreign protection order made on or after July 1, 2013 for violations of a foreign protection order occurring before July 1, 2013 is governed by the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

History: Laws 2013, ch. 47, § 9.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 47, § 11 provided that the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was effective July 1, 2013.

ARTICLE 13B
Confidential Substitute Address

40-13B-1. Short title.

Chapter 40, Article 13B NMSA 1978 may be cited as the "Confidential Substitute Address Act".

History: Laws 2018, ch. 40, § 1; 2023, ch. 39, § 92.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, provided the statutory reference for the Confidential Substitute Address Act; deleted "This act" and added "Chapter 40, Article 13B NMSA 1978".

40-13B-2. Definitions.

As used in the Confidential Substitute Address Act:

A. "agency" means an agency of the state or of a political subdivision of the state;

B. "applicant" means a person who submits an application to participate in the confidential substitute address program;

C. "application assistant" means a person who works or volunteers for a domestic violence or sexual assault program and who assists in preparing an application for the confidential substitute address program;

D. "confidential substitute address" means an address designated for a participant by the secretary of state pursuant to the Confidential Substitute Address Act;

E. "delivery address" means the address where an applicant or a participant receives mail, and it may be the same as the person's residential address;

F. "domestic violence" means "domestic abuse", as defined in the Family Violence Protection Act [Chapter 40, Article 13 NMSA 1978];

G. "participant" means a person certified to participate in the confidential substitute address program pursuant to the Confidential Substitute Address Act;

H. "public record" means "public records", as defined in the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978]; and

I. "residential address" means the street address where an applicant or participant resides or will relocate.

History: Laws 2018, ch. 40, § 2.

ANNOTATIONS

Effective dates. — Laws 2018, ch. 40, § 11 made Laws 2018, ch. 40, § 2 effective July 1, 2018.

40-13B-3. Confidential substitute address program; application.

A. The "confidential substitute address program" is created in the office of the secretary of state to provide a process by which a victim of domestic violence may protect the confidentiality of the victim's residential and delivery addresses in public records.

B. An applicant, with the assistance of an application assistant, shall submit an application to the secretary of state on a form prescribed by the secretary of state. The application assistant's signature shall serve as recommendation that the applicant participate in the confidential substitute address program.

C. An application shall be signed and dated by the applicant and the application assistant and shall include:

(1) the applicant's name;

(2) the applicant's statement that the applicant fears for the safety of the applicant, the applicant's child or another person in the applicant's household because of a threat of immediate or future harm;

(3) the applicant's statement that the disclosure of the applicant's residential or delivery address would endanger the applicant, the applicant's child or another person in the applicant's household;

(4) the applicant's statement that the applicant has confidentially relocated in the past ninety days or will relocate within the state in the next ninety days;

(5) a designation of the secretary of state as the applicant's agent for the purpose of receiving mail, deliveries and service of process, notice or demand;

(6) the names and ages of those persons in the applicant's household who will also be participants in the program if the applicant is admitted into the program. Each person in an applicant's household listed in the application shall be considered a separate participant in the program;

(7) the applicant's residential and delivery addresses, if different, the confidentiality of which the applicant seeks to protect;

(8) the applicant's telephone number and email address; and

(9) the applicant's statement under penalty of perjury that the information contained in the application is true.

History: Laws 2018, ch. 40, § 3; 2023, ch. 39, § 93.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, amended the confidential substitute address program to include members of an applicant's household; and in Subsection C, added a new Paragraph C(6) and redesignated former Paragraphs C(6) through C(8) as Paragraphs C(7) through C(9), respectively.

40-13B-4. Secretary of state; duties; service on participant.

A. The secretary of state shall:

(1) certify applicants whose applications comply with the requirements of the Confidential Substitute Address Act to participate in the confidential substitute address program;

(2) upon certification with respect to each participant:

(a) issue a confidential substitute address identification card;

(b) designate a confidential substitute address that shall be used in place of the participant's residential or delivery address by state and local government agencies;

(c) receive mail and deliveries sent to a participant's confidential substitute address and forward the mail and deliveries to the participant's delivery address at no charge to the participant;

(d) accept service of process, notice or demand that is required or permitted by law to be served on the participant and immediately forward the process, notice or demand to the participant's delivery address at no charge to the participant; and

(e) maintain records of the following that are received and forwarded by the secretary of state: 1) a participant's certified and registered mail; and 2) any process, notice or demand that is served on a participant; and

(3) administer the provisions of the Intimate Partner Violence Survivor Suffrage Act [1-6C-1 to 1-6C-9 NMSA 1978] to ensure that a participant who is eligible to vote in this state is able to be securely registered to vote and to automatically receive a ballot for each election.

B. Service made pursuant to the provisions of this section is perfected three days after it is accepted by the secretary of state.

History: Laws 2018, ch. 40, § 4; 2019, ch. 226, § 10.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, required the secretary of state to implement the provisions of the Intimate Partner Violence Survivor Suffrage Act; added Paragraph A(3).

40-13B-5. Agencies; use of confidential substitute address; public records.

A. A participant shall:

(1) contact each agency that requests or uses an address; and

(2) provide the agency with a copy of the participant's confidential substitute address identification card.

B. Agencies that receive copies of confidential substitute address identification cards submitted pursuant to this section shall use the participant's confidential substitute address for all purposes.

C. A school district shall use a participant's confidential substitute address as the participant's address of record and, if necessary, shall verify a student's enrollment eligibility with the secretary of state.

D. A county clerk shall transfer all records related to a participant's voter registration to the secretary of state pursuant to the provisions of the Intimate Partner Violence Survivor Suffrage Act [1-6C-1 to 1-6C-9 NMSA 1978].

E. A participant's residential or delivery address, telephone number and email address that are maintained by an agency are not public records and shall not be disclosed pursuant to the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978] while a person is a participant.

History: Laws 2018, ch. 40, § 5; 2019, ch. 226, § 11.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, required the county clerk to transfer all records related to a participant’s voter registration to the secretary of state pursuant to the provisions of the Intimate Partner Violence Survivor Suffrage Act; added a new Subsection D and redesignated former Subsection D as Subsection E.

40-13B-6. Change of participant name, address or telephone number; requirements.

A. A participant shall notify the secretary of state within ten days of legally changing the participant's name and shall provide the secretary of state with a certified copy of documentation of the legal name change.

B. A participant shall notify the secretary of state within ten days of a change to the participant's residential address, delivery address, telephone number or email address.

C. A participant shall notify the secretary of state within ten days if a new person in the participant's household needs to become a participant in the program.

History: Laws 2018, ch. 40, § 6; 2023, ch. 39, § 94.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, provided that a participant in the confidential substitute address program shall notify the secretary of state within ten days if a new person in the participant's household needs to become a participant in the program; and added Subsection C.

40-13B-7. Participant decertification.

A. A participant shall be decertified from the confidential substitute address program if:

(1) the participant submits a request to withdraw from the confidential substitute address program to the secretary of state;

(2) the participant fails to notify the secretary of state of a legal name change or a change to the participant's residential address, delivery address, telephone number or email address;

(3) mail that is forwarded by the secretary of state to the participant's delivery address is returned as undeliverable; or

(4) the participant does not comply with the provisions of the Intimate Partner Violence Survivor Suffrage Act [1-6C-1 to 1-6C-9 NMSA 1978].

B. If the secretary of state determines that one or more of the causes for decertification provided in Subsection A of this section exist, the secretary of state shall send notice of the participant's decertification to the participant's delivery and residential addresses and shall attempt to notify the participant by telephone and email. The participant shall be given ten days from the date of decertification to appeal the decertification.

C. A person who is decertified from the confidential substitute address program shall not continue to use the person's confidential substitute address.

D. For six months after a participant has been decertified, the secretary of state shall forward mail and deliveries to an address provided by the former participant. Upon receipt of mail and deliveries pursuant to this subsection, a former participant shall provide an updated address to the sender.

History: Laws 2018, ch. 40, § 7; 2023, ch. 39, § 95.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, provided that a participant in the confidential substitute address program shall be decertified if the participant does not comply with the provisions of the Intimate Partner Violence Survivor Suffrage Act; and in Subsection A, added Paragraph A(4).

40-13B-8. Participant records; confidentiality; disclosure prohibited.

A. The secretary of state and an agency shall not disclose the residential address, delivery address, telephone number or email address of a participant unless the information is required to be disclosed pursuant to a court order. A person or agency

that receives a participant's residential address, delivery address, telephone number or email address pursuant to a court order shall not in turn disclose that information unless pursuant to a court order or unless the person who was a participant has been decertified.

B. The secretary of state shall maintain the confidentiality of all records relating to an applicant for or participant in the confidential substitute address program while the person is a participant and shall:

(1) store all tangible copies of program records in locked equipment;

(2) store all electronic copies of program records in a password-protected system;

(3) restrict access to all program records to secretary of state staff members who are approved to access the records as provided in this section; and

(4) release program records only on a court's order.

C. The secretary of state shall establish a system for restricting access to program records to approved staff members. Before being approved and granted access to program records, the staff member shall:

(1) submit to a criminal background check performed by the department of public safety;

(2) not have a record of a sex offense, felony or a misdemeanor violation related to domestic violence or sexual assault on the results of the person's criminal background check; and

(3) complete forty hours of training, including a domestic violence training course provided by the children, youth and families department and sexual assault training provided by the department of health or the crime victims reparation commission or its successor.

D. The secretary of state shall appoint a person to be the administrator of the election component of the confidential substitute address program in accordance with the Intimate Partner Violence Survivor Suffrage Act [1-6C-1 to 1-6C-9 NMSA 1978]. The administrator shall meet the requirements of Subsection C of this section, and administration of the Intimate Partner Violence Survivor Suffrage Act shall conform to the requirements of Subsections A and B of this section and Subsection E of Section 40-13B-5 NMSA 1978.

History: Laws 2018, ch. 40, § 8; 2019, ch. 226, § 12; 2023, ch. 39, § 96.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, in Subsection A, after "unless the person", added "who was a participant".

The 2019 amendment, effective July 1, 2019, required the secretary of state to appoint an administrator of the election component of the confidential substitute address program in accordance with the Intimate Partner Violence Survivor Suffrage Act, and directed the appointed administrator to administer the Intimate Partner Violence Survivor Suffrage Act in conformity with certain provisions of the Confidential Substitute Address Act; and added Subsection D.

40-13B-9. Rules.

The secretary of state shall promulgate rules, including rules regarding records and confidentiality retention, to implement the provisions of the Confidential Substitute Address Act.

History: Laws 2018, ch. 40, § 9.

ANNOTATIONS

Effective dates. — Laws 2018, ch. 40, § 11 made Laws 2018, ch. 40, § 9 effective July 1, 2018.

ARTICLE 14
Adult Adoptions

40-14-1. Short title.

This act [40-14-1 to 40-14-15 NMSA 1978] may be cited as the "Adult Adoption Act".

History: Laws 1993, ch. 296, § 1.

ANNOTATIONS

Cross references. — For the Adoption Act, *see* Chapter 32A, Article 5 NMSA 1978.

40-14-2. [Definitions.]

As used in the Adult Adoption Act:

A. "adoptee" means any adult who is the subject of an adoption petition;

B. "adult" means any individual who is eighteen years of age or older;

C. "court" means the district court;

D. "parent" means the biological or adoptive parent;

E. "person" means an individual;

F. "petitioner" means any person who signs a petition to adopt under the Adult Adoption Act; and

G. "resident" means a person who, immediately prior to filing an adoption petition, has lived in the state for at least six months or a person who has become domiciled in the state by establishing legal residence with the intention of maintaining the residence indefinitely.

History: Laws 1993, ch. 296, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

40-14-3. Jurisdiction.

The court shall have original jurisdiction over proceedings arising under the Adult Adoption Act.

History: Laws 1993, ch. 296, § 3.

40-14-4. Venue.

A. A petition for adoption may be filed in any county where:

(1) a petitioner resides; or

(2) the adoptee resides.

B. A court that has jurisdiction under the Adult Adoption Act may decline to exercise jurisdiction any time before entering a decree if the court finds that under the circumstances of the case it is an inconvenient forum to make a determination. In that case, the court shall transfer the proceedings on any conditions that are just.

History: Laws 1993, ch. 296, § 4.

40-14-5. Who may be adopted; who may adopt.

A. Any adult may be adopted.

B. Residents who are one of the following may adopt:

(1) any adult who has been approved by the court as a suitable adoptive parent pursuant to the provisions of the Adult Adoption Act; or

(2) a married adult, without the spouse of the married adult joining in the adoption if:

(a) the non-joining spouse is a parent of the adoptee;

(b) the adult who is adopting and the non-joining spouse are legally separated; or

(c) the failure of the non-joining spouse to join in the adoption is excused for reasonable circumstances as determined by the court.

History: Laws 1993, ch. 296, § 5.

40-14-6. Consent to the adoption.

A. Consent to the adoption shall be required of the adoptee or a person legally authorized to consent on behalf of the adoptee if the adoptee is incapacitated and unable to consent to the adoption.

B. A consent shall be in writing, signed by the adoptee and shall state 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) the name of the petitioner;

(4) that the adoptee has been advised of the legal consequences of the adoption by independent legal counsel or a judge;

(5) that consent to an adoption cannot be withdrawn;

(6) that the adoptee is voluntarily and unequivocally consenting to the adoption; and

(7) that the adoptee has received or been offered a copy of the consent.

C. In cases when the consent is in English and English is not the first language of the consenting person, the person taking the consent shall certify in writing that the document has been read and explained to the person whose consent is being taken in that person's first language, by whom the document was read and explained and that

the meaning and implications of the document are fully understood by the person giving the consent.

D. A consent to adoption shall be signed before and approved by a judge who has jurisdiction over adoption proceedings, within or without this state, and who is in the jurisdiction in which the adoptee or the petitioner resides.

E. The consent shall be filed with the court in which the petition for adoption has been filed before adjudication of the petition.

F. In its discretion, the court may order counseling.

G. A consent to adoption shall not be withdrawn prior to the entry of a decree of adoption unless the court finds, after notice and an opportunity to be heard is given to the petitioner and the adoptee, that the consent was obtained by fraud. In no event shall a consent or relinquishment be withdrawn after the entry of a decree of adoption.

History: Laws 1993, ch. 296, § 6.

40-14-7. Petition; content.

A petition for adoption shall be filed and verified by the petitioner and shall allege:

A. the full 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;

C. the birth name of the adoptee, any other names by which the adoptee has been known and the adoptee's proposed new name;

D. where the adoptee is residing at the time of the filing of the petition;

E. that the petitioner desires to establish a parent and child relationship between himself and the adoptee;

F. the relationship, if any, of the petitioner to the adoptee;

G. whether the adoptee is foreign born, and if so, copies of the adoptee's passport and United States visa shall be attached as exhibits to the petition;

H. the length and nature of the relationship between the petitioner and the adoptee and the degree of kinship, if any;

I. the reason the adoption is sought;

J. the names and addresses of any living parents or children of the adoptee;

K. a statement as to why the adoption would be in the best interests of the petitioner, the adoptee and the public; and

L. whether the petitioner or the petitioner's spouse has previously adopted any other adult person and, if so, the name of the person and the date and place of the adoption.

History: Laws 1993, ch. 296, § 7.

40-14-8. Petition; caption.

The caption of a petition for adoption shall be styled "In the Matter of the Adoption Petition of (Petitioner's Name)".

History: Laws 1993, ch. 296, § 8.

40-14-9. Notice of petition; service; waiver.

A. A copy of the petition for adoption shall be served by the petitioner on the following individuals, unless receipt of a copy of the petition has been previously waived in writing:

(1) the adoptee;

(2) the parents of the adoptee;

(3) the legally appointed conservator or guardian of the adoptee;

(4) the spouse of any petitioner who has not joined in the petition;

(5) the spouse of the adoptee;

(6) the surviving parent of a deceased parent of the adoptee; and

(7) any other person designated by the court.

B. The notice shall state that the person served shall respond to the petition within twenty days if the person intends to contest the adoption and shall also state that failure to respond in a timely manner will be treated as a default.

C. Provision of notice for the adoptee and the legally appointed conservator or guardian of the adoptee shall be made pursuant to the Rules of Civil Procedure for the District Courts.

D. As to any other person for whom notice is required under Subsection A of this section, service by certified mail, return receipt requested, is sufficient. If the service cannot be completed after two attempts, the court shall issue an order providing for service by publication.

E. The notice required by this section may be waived in writing by the person entitled to notice.

F. Proof of service of the notice on all persons for whom notice is required shall be filed with the court prior to any hearing that affects the rights of those persons.

History: Laws 1993, ch. 296, § 9.

40-14-10. Response to petition.

A. Any person who responds to a notice of petition for adoption shall file a verified response to the petition within the time limits set forth in Section 12 of the Adult Adoption Act.

B. The verified response shall be made pursuant to the Rules of Civil Procedure for the District Courts and, in addition, shall allege the relationship, if any, of the respondent to the adoptee.

History: Laws 1993, ch. 296, § 10.

40-14-11. Appointment of attorney for incompetent adoptee.

Upon motion of any party, or upon the court's own motion, the court may appoint an attorney for an adoptee whom the court finds to be incompetent. Payment for the appointed attorney shall be assessed against the parties in the court's discretion.

History: Laws 1993, ch. 296, § 11.

40-14-12. Adjudication; disposition; decree of adoption.

A. The court shall conduct a hearing on the petition for adoption. The petitioner and the adoptee shall attend the hearing, unless the court waives a party's appearance for good cause shown by the party. As used in this subsection, "good cause" includes burdensome travel requirements.

B. The petitioner shall present and prove each allegation set forth in the petition for adoption by clear and convincing evidence.

C. The court shall grant a decree of adoption if it finds that 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 consented to the adoption;

(3) service of the petition for adoption has been made or dispensed with as to all persons entitled to notice;

(4) at least thirty days have passed since the filing of the petition for adoption;

(5) the petitioner is a suitable adoptive parent and the best interests of the petitioner, adoptee and the public are served by the adoption; and

(6) if the adoptee is foreign born, the adoptee is legally free for adoption.

D. In addition to the findings set forth in Subsection C of this section, the court, in any decree of adoption, shall make findings with respect to each allegation of the petition.

E. If the court determines that any of the findings for a decree of adoption have not been met or that the adoption is not in the best interests of the petitioner, adoptee or the public, the court shall deny the petition.

F. The decree of adoption shall include the new name of the adoptee and shall not include any other name by which the adoptee has been known or the names of the former parents. The decree of adoption shall order that from the date of the decree, the adoptee shall be the child of the petitioner and accorded the status set forth in Section 13 [40-14-13 NMSA 1978] of the Adult Adoption Act.

G. A decree of adoption shall be entered within six months of the filing of the petition.

H. A decree of adoption may not be attacked upon the expiration of one year from the date of the entry of the decree.

History: Laws 1993, ch. 296, § 12.

40-14-13. Status of adoption and petitioner upon entry of decree of adoption.

A. Once adopted, an adoptee shall take a name agreed upon by the petitioner and the adoptee and approved by the court.

B. After adoption, 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 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 rights and be subject to all duties of that relation, including the right of inheritance from and through the adoptee.

History: Laws 1993, ch. 296, § 13.

40-14-14. Birth certificates.

A. Within thirty days after an adoption decree is entered, the petitioner shall prepare an application for a birth certificate in the new name of the adoptee showing the petitioner as the adoptee's parent and shall provide the application to the clerk of the court. The clerk of the court shall forward the application:

(1) for a person born in the United States, to the appropriate vital statistics office of the place, if known, where the adoptee was born; or

(2) for all other persons, to the state registrar of vital statistics. In the case of the adoption of a person born outside the United States, if requested by the petitioner, the court shall make findings, based on evidence from the petitioner and other reliable state or federal sources, on the date and place of birth of the adoptee. The findings shall be certified by the court and included with the application for a birth certificate.

B. The state registrar of vital statistics shall prepare a birth record in the new name of the adoptee in accordance with vital statistics laws.

History: Laws 1993, ch. 296, § 14.

40-14-15. Recognition of foreign decrees.

Every judgment establishing the relationship of parent and child by adult adoption issued pursuant to due process of law by the tribunals of any other jurisdiction within or without the United States shall be recognized in this state, so that the rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the judgment were issued by the courts of this state.

History: Laws 1993, ch. 296, § 15.

ARTICLE 15
Family Preservation Act

40-15-1. Short title.

Sections 1 through 4 of this act [40-15-1 to 40-15-4 NMSA 1978] may be cited as the "Family Preservation Act".

History: Laws 2005, ch. 68, § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 68 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

40-15-2. Legislative purpose.

The purpose of the Family Preservation Act is to confirm the state's policy of support for the family and to emphasize the responsibilities of parents and the state in the healthy development of children and the family as an institution. The Family Preservation Act is also intended to serve as a benchmark against which other legislation may be measured to assess whether it furthers the goals of preserving and enhancing families in New Mexico.

History: Laws 2005, ch. 68, § 2.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 68 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

40-15-3. Family preservation goals; statement of policy.

It is the policy of the state that its laws and programs shall:

A. support intact, functional families and promote each family's ability and responsibility to raise its children;

B. strengthen families in crisis and at risk of losing their children, so that children can remain safely in their own homes when their homes are safe environments and in their communities;

C. promote the creation of well-paying, stable jobs so that families can provide for their basic needs, including health, education, food, clothing and shelter; and

D. help halt the breakup of the nuclear family, stabilize neighborhoods and strengthen communities.

History: Laws 2005, ch. 68, § 3.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 68 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

40-15-4. Parental and state responsibilities.

A. Parents have joint primary responsibility for the well-being of their family. Parents have the primary responsibility to:

(1) ensure that their children have adequate food, shelter, health care and a healthy environment;

(2) support their children in all ways possible to grow up to be responsible, caring members of society;

(3) ensure that their children receive quality education both in and out of school to prepare them for active and productive adult lives;

(4) protect their children from the serious dangers of narcotics, alcohol and other harmful substances; and

(5) protect their children from all forms of exploitation harmful to any aspect of their welfare.

B. The state has a responsibility to develop plans to:

(1) make available to families free, quality public primary and secondary education;

(2) provide public safety services so that family members are safe in their homes, schools, workplaces and recreational settings;

(3) make available social service programs that support vulnerable families and protect spouses and children in danger of physical or serious emotional harm;

(4) develop programs that build on the strengths of families and connect them with community resources;

(5) provide parents with access to the training and support they need to raise their children, function effectively as parents and play a key role in helping preschool and growing children learn; and

(6) assist parents in carrying out their primary responsibility of providing for the well-being of their family.

History: Laws 2005, ch. 68, § 4.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 68 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

ARTICLE 16
Termination of Parental Rights

40-16-1. Termination of parental rights; conception resulting from criminal sexual penetration.

A. At any time, a biological parent may petition the court for termination of the parental rights of a child's other biological parent, where that other biological parent has been convicted of criminal sexual penetration and where the criminal sexual penetration resulted in the conception and birth of the child. The court shall grant the petition if the court determines by clear and convincing evidence that the child was conceived as a result of the criminal sexual penetration for which the other biological parent was convicted.

B. In a proceeding that involves a child subject to the federal Indian Child Welfare Act of 1978, the grounds for any attempted termination shall be proved beyond a reasonable doubt and shall meet the requirements set forth in that act, and the court shall, in a termination order, make specific findings that those requirements were met.

C. A determination pursuant to Subsection A of this section or proof pursuant to Subsection B of this section creates a presumption that termination of parental rights is in the best interest of the child.

D. As used in this section, "criminal sexual penetration" means aggravated criminal sexual penetration in the first degree and criminal sexual penetration in the first, second or third degree pursuant to the laws of this state or an equivalent offense pursuant to the laws of another jurisdiction, territory or possession of the United States or an Indian nation, tribe or pueblo.

History: Laws 2017, ch. 121, § 1.

ANNOTATIONS

Effective dates. — Laws 2017, ch. 121, § 2 made Laws 2017, ch. 121, § 1 effective July 1, 2017.

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901, et seq.

ARTICLE 17
Extreme Risk Firearm Protection Order

40-17-1. Short title.

Sections 1 through 13 [40-17-1 to 40-17-13 NMSA 1978] of this act may be cited as the "Extreme Risk Firearm Protection Order Act".

History: Laws 2020, ch. 5, § 1.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

40-17-2. Definitions.

As used in the Extreme Risk Firearm Protection Order Act:

A. "court" means the district court in the county in which the respondent resides;

B. "extreme risk firearm protection order" means either a temporary extreme risk firearm protection order or a one-year extreme risk firearm protection order granted pursuant to the Extreme Risk Firearm Protection Order Act;

C. "firearm" means any weapon that is designed to expel a projectile by an explosion or the frame or receiver of any such weapon;

D. "law enforcement agency" means the police department of any city or town, the sheriff's office of any county, the New Mexico state police and a district attorney's office in the state and the office of the attorney general;

E. "law enforcement officer" means a public official or public officer vested by law with the power to maintain order, to make arrests for crime or to detain persons suspected of committing a crime, whether that duty extends to all crimes or is limited to specific crimes and includes an attorney employed by a district attorney or the attorney general;

F. "one-year extreme risk firearm protection order" means an extreme risk firearm protection order granted for up to one year following a hearing pursuant to the provisions of Section 7 [40-17-7 NMSA 1978] of the Extreme Risk Firearm Protection Order Act;

G. "petitioner" means a law enforcement officer who files an extreme risk firearm protection order petition;

H. "reporting party" means a person who requests that a law enforcement officer file a petition for an extreme risk firearm protection order and includes a spouse, former spouse, parent, present or former stepparent, present or former parent-in-law, grandparent, grandparent-in-law, co-parent of a child, child, person with whom a respondent has or had a continuing personal relationship, employer or public or private school administrator;

I. "respondent" means the person identified in or subject to an extreme risk firearm protection order petition; and

J. "temporary extreme risk firearm protection order" means an extreme risk firearm protection order issued prior to a hearing pursuant to the provisions of Section 6 [40-17-6 NMSA 1978] of the Extreme Risk Firearm Protection Order Act.

History: Laws 2020, ch. 5, § 2.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

"Reporting party" construed. — The plain language of the Extreme Risk Firearm Protection Order Act (Act), 40-17-1 to 40-17-13 NMSA 1978, shows that a "reporting party" is a person who requests that a law enforcement officer file a petition for an extreme risk firearm protection order, and the term "reporting party" includes, but is not limited to, those types of individuals specified in Subsection D of this section. The use of the word "includes" in the definition of "reporting party", to connect a general clause to a list of enumerated examples demonstrates a legislative intent to provide an incomplete list of examples. Moreover, an expansive interpretation of the term "reporting party" is consistent with the broad purpose of the act, which is to protect the public from those individuals who, through their potential operation of a firearm, pose an extreme risk to public health. *Extreme Risk Firearm Protection Order Act* (8/20/21), Att'y Gen. Adv. Ltr. 2021-08.

40-17-3. Forbearance of costs associated with extreme risk firearm protection orders.

A reporting party who requests that a petitioner seek an extreme risk firearm protection order shall not be required to bear the cost of:

A. the filing, issuance or service of a petition for an extreme risk firearm protection order;

B. the filing, issuance or service of a warrant;

C. the filing, issuance or service of a witness subpoena;

D. service of an extreme risk firearm protection order;

E. obtaining law enforcement reports or photographs or copies of photographs relating to the allegations in the petition; or

F. any cost associated with the confiscation, storage or destruction of a firearm.

History: Laws 2020, ch. 5, § 3.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

"Reporting party" construed. — The plain language of the Extreme Risk Firearm Protection Order Act (act), 40-17-1 to 40-17-13 NMSA 1978, shows that a "reporting party" as used in this section, is a person who requests that a law enforcement officer file a petition for an extreme risk firearm protection order, and the term "reporting party" includes, but is not limited to, those types of individuals specified in 40-17-3(D) NMSA 1978. The use of the word "includes" in the definition of "reporting party" to connect a general clause to a list of enumerated examples demonstrates a legislative intent to provide an incomplete list of examples. Moreover, an expansive interpretation of the term "reporting party" is consistent with the broad purpose of the act, which is to protect the public from those individuals who, through their potential operation of a firearm, pose an extreme risk to public health. *Extreme Risk Firearm Protection Order Act* (8/20/21), Att'y Gen. Adv. Ltr. 2021-08.

40-17-4. Extreme risk firearm protection orders; venue.

Proceedings pursuant to the Extreme Risk Firearm Protection Order Act shall be filed, heard and determined in the district court for the county in which the respondent resides.

History: Laws 2020, ch. 5, § 4.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

40-17-5. Petition for extreme risk firearm protection order; contents.

A. A petition for an extreme risk firearm protection order shall be filed only by a law enforcement officer employed by a law enforcement agency; provided that, if the respondent is a law enforcement officer, the petition shall be filed by the district attorney or the attorney general.

B. A petitioner may file a petition with the court requesting an extreme risk firearm protection order that shall enjoin the respondent from having in the respondent's possession, custody or control any firearm and shall further enjoin the respondent from purchasing, receiving or attempting to purchase, possess or receive any firearm while the order is in effect.

C. If a law enforcement officer declines to file a requested petition for an extreme risk firearm protection order, the law enforcement officer shall file with the sheriff of the county in which the respondent resides a notice that the law enforcement officer is declining to file a petition pursuant to this section.

D. A law enforcement officer shall file a petition for an extreme risk firearm protection order upon receipt of credible information from a reporting party that gives the agency or officer probable cause to believe that a respondent poses a significant danger of causing imminent personal injury to self or others by having in the respondent's custody or control or by purchasing, possessing or receiving a firearm.

E. A petition for an extreme risk firearm protection order shall state the specific statements, actions or facts that support the belief that the respondent poses a significant danger of causing imminent personal injury to self or others by having in the respondent's custody or control or by purchasing, possessing or receiving a firearm.

F. A petition for an extreme risk firearm protection order shall be made under oath and shall be accompanied by a sworn affidavit signed by the reporting party setting forth specific facts supporting the order.

G. A petition for an extreme risk firearm protection order shall include:

(1) the name and address of the reporting party;

(2) the name and address of the respondent;

(3) a description of the number, types and locations of firearms or ammunition that the petitioner believes the respondent has custody of, controls, owns or possesses;

(4) a description of the relationship between the reporting party and the respondent; and

(5) a description of any lawsuit, complaint, petition, restraining order, injunction or other legal action between the reporting party and the respondent.

History: Laws 2020, ch. 5, § 5.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

"Reporting party" construed. — The plain language of the Extreme Risk Firearm Protection Order Act (act), 40-17-1 to 41-17-13 NMSA 1978, shows that a "reporting party" as used in this section, is a person who requests that a law enforcement officer file a petition for an extreme risk firearm protection order, and the term "reporting party" includes, but is not limited to, those types of individuals specified in 40-17-3(D) NMSA 1978. The use of the word "includes" in the definition of "reporting party" to connect a general clause to a list of enumerated examples demonstrates a legislative intent to provide an incomplete list of examples. Moreover, an expansive interpretation of the term "reporting party" is consistent with the broad purpose of the act, which is to protect the public from those individuals who, through their potential operation of a firearm, pose an extreme risk to public health. *Extreme Risk Firearm Protection Order Act* (8/20/21), Att'y Gen. Adv. Ltr. 2021-08.

40-17-6. Petition for temporary extreme risk firearm protection order; temporary orders; proceedings.

A. Upon the filing of a petition pursuant to the Extreme Risk Firearm Protection Order Act, the court may enter a temporary extreme risk firearm protection order if the court finds from specific facts shown by the petition that there is probable cause to believe that the respondent poses a significant danger of causing imminent personal injury to self or others by having in the respondent's custody or control or by purchasing, possessing or receiving a firearm before notice can be served and a hearing held.

B. If the court finds probable cause pursuant to Subsection A of this section, the court shall issue a temporary extreme risk firearm protection order enjoining the respondent from having in the respondent's possession, custody or control a firearm and shall further enjoin the respondent from purchasing, receiving or attempting to purchase or receive a firearm while the order is in effect.

C. The court shall conduct a hearing within ten days of the issuance of a temporary extreme risk firearm protection order to determine if a one-year extreme risk firearm protection order should be issued pursuant to this section.

D. A temporary extreme risk firearm protection order shall include:

(1) a statement of the grounds supporting the issuance of the order;

(2) the date and time the order was issued;

(3) a statement that the order shall continue until the earlier of ten days or such time as a court considers the petition at a hearing, unless an extension is granted at the request of the respondent pursuant to Subsection E of this section;

(4) the address of the court that issued the order and in which any responsive pleading should be filed; and

(5) the date and time of the scheduled hearing, to be held within ten days of the issuance of the order.

E. The court may continue the hearing at the request of the respondent, but the hearing shall be set within thirty days of the respondent's request for continuance.

F. A temporary extreme risk firearm protection order shall be served by the petitioner along with supporting documents that formed the basis of the order, the notice of hearing and the petition for a one-year extreme risk firearm protection order.

G. If the court declines to issue a temporary extreme risk firearm protection order, the court shall enter an order that includes the reasons for the denial.

History: Laws 2020, ch. 5, § 6.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

40-17-7. Hearings on petition; grounds for issuance; contents of order.

In determining whether grounds for any extreme risk firearm protection order exist, the court shall consider, at a minimum, the following:

A. any recent act or threat of violence by the respondent against self or others, regardless of whether the act or threat involved a firearm;

B. a pattern of acts or threats of violence by the respondent within the past twelve months, including acts or threats of violence against self or others;

C. the respondent's mental health history;

D. the respondent's abuse of controlled substances or alcohol;

E. the respondent's previous violations of any court order;

F. previous extreme risk firearm protection orders issued against the respondent;

G. the respondent's criminal history, including arrests and convictions for violent felony offenses, violent misdemeanor offenses, crimes involving domestic violence or stalking;

H. the respondent's history of the use, attempted use or threatened use of physical violence against another person; of stalking another person; or of cruelty to animals; and

I. any recent acquisition or attempts at acquisition of a firearm by the respondent.

History: Laws 2020, ch. 5, § 7.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

40-17-8. One-year extreme risk firearm protection order; grounds for issuance; contents of order; termination; expiration; renewal of orders.

A. If, after hearing the matter, the court finds by a preponderance of the evidence that the respondent poses a significant danger of causing imminent personal injury to self or others by having in the respondent's custody or control or by purchasing, possessing or receiving a firearm, the court shall issue a one-year extreme risk firearm protection order.

B. A one-year extreme risk firearm protection order shall include:

(1) a statement of the grounds supporting the issuance of the order;

(2) the date and time the order was issued;

(3) the date and time the order expires;

(4) information pertaining to any recommendation by the court for mental health or substance abuse evaluations, if applicable;

(5) the address of the court that issued the order; and

(6) notice that the respondent is entitled to request termination of the order prior to the expiration of the order.

C. If the court declines to issue a one-year extreme risk firearm protection order, the court shall state in writing the reasons for the court's denial and shall order the return of any firearms to the respondent.

D. A respondent may request that the court terminate a one-year extreme risk firearm protection order at any time prior to the expiration of the order.

E. At any time not less than one month prior to the expiration of a one-year extreme risk firearm protection order, a petitioner may petition the court to extend the order. Each extension of the order shall not exceed one year. A petition filed pursuant to this subsection shall comply with the provisions of Subsections E and F of Section 5 [40-17-5 NMSA 1978] of the Extreme Risk Firearm Protection Order Act and shall be served on the respondent as provided in Section 9 [40-17-9 NMSA 1978] of that act.

F. A one-year extreme risk firearm protection order is a final, immediately appealable order.

History: Laws 2020, ch. 5, § 8.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

40-17-9. Service of extreme risk firearm protection orders.

A one-year extreme risk firearm protection order issued pursuant to the Extreme Risk Firearm Protection Order Act shall be personally served upon the respondent by the sheriff's office in the county in which the respondent resides; provided that if the respondent resides in a city or town that has a police department, the police department shall serve the order.

History: Laws 2020, ch. 5, § 9.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

40-17-10. Relinquishment of firearms.

A. A respondent who receives a temporary or one-year extreme risk firearm protection order shall relinquish all firearms in the respondent's possession, custody or control or subject to the respondent's possession, custody or control in a safe manner to a law enforcement officer, a law enforcement agency or a federal firearms licensee within forty-eight hours of service of the order or sooner at the discretion of the court.

B. A law enforcement officer, law enforcement agency or federal firearms licensee that takes temporary possession of a firearm pursuant to this section shall:

(1) prepare a receipt identifying all firearms that have been relinquished or taken;

(2) provide a copy of the receipt to the respondent;

(3) provide a copy of the receipt to the petitioner within seventy-two hours of taking possession of the firearms;

(4) file the original receipt with the court that issued the temporary or one-year extreme risk firearm protection order within seventy-two hours of taking possession of the firearms; and

(5) ensure that the law enforcement agency retains a copy of the receipt.

History: Laws 2020, ch. 5, § 10.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

40-17-11. Penalties.

A person who fails to relinquish, or who possesses or has custody or control over, any firearm or who purchases, receives or attempts to purchase, possess or receive any firearm, in violation of a temporary extreme risk firearm protection order or a one-year extreme risk firearm protection order is guilty of a misdemeanor punishable pursuant to Section 31-19-1 NMSA 1978.

History: Laws 2020, ch. 5, § 11.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

40-17-12. Extreme risk firearm protection order; reporting of orders; availability of data.

A. The clerk of the court shall provide a copy of a one-year extreme risk firearm protection order or temporary extreme risk firearm protection order issued pursuant to the Extreme Risk Firearm Protection Order Act to any law enforcement agency designated to provide information to the national instant criminal background check system.

B. The clerk of the court shall forward a copy of any order issued, renewed or terminated pursuant to the Extreme Risk Firearm Protection Order Act to the petitioner and to the law enforcement agency specified in Subsection A of this section.

C. Upon receipt of a copy of a one-year extreme risk firearm protection order or temporary extreme risk firearm protection order, the law enforcement agency specified in Subsection A of this section shall enter the order into:

(1) the national instant criminal background check system;

(2) all federal or state computer-based systems and databases used by law enforcement or others to identify prohibited purchasers of firearms; and

(3) all computer-based criminal intelligence information systems and databases available in this state used by law enforcement agencies.

D. An extreme risk firearm protection order shall remain in each state system for the period stated in the order. Entry into the computer-based criminal intelligence information system constitutes notice to all law enforcement agencies of the existence of the order. The extreme risk firearm protection order shall be fully enforceable in any county, city or town in the state.

E. Upon the expiration of or upon receiving notice of the termination of an extreme risk firearm protection order issued pursuant to the Extreme Risk Firearm Protection Order Act, the law enforcement agency specified in Subsection A of this section shall promptly remove the order from any state computer-based system into which it was entered pursuant to Subsection C of this section and shall notify the national instant criminal background check system and all federal computer-based systems and databases used by law enforcement or others to identify prohibited purchasers of firearms.

F. Following the expiration or termination of an order issued pursuant to the Extreme Risk Firearm Protection Order Act and upon written request, the law enforcement agency specified in Subsection A of this section shall provide a sworn affidavit to the respondent affirming that the information contained within the order has been removed from all state databases and systems identified in Subsection C of this section and any other state databases into which information about the order was

entered and that the law enforcement agency has notified the national instant criminal background check system and all federal computer-based systems and databases used by law enforcement or others to identify prohibited purchasers of firearms. The affidavit shall be provided to the respondent within five days of the receipt of the request.

G. If any extreme risk firearm protection order is terminated before its expiration date, the clerk of the court shall forward a copy of the termination order to the office of the attorney general and the petitioner.

H. Aggregate statistical data indicating the number of extreme risk firearm protection orders issued, renewed, denied or terminated shall be maintained by the issuing court and the administrative office of the courts and shall be available to the public upon request.

History: Laws 2020, ch. 5, § 12.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

40-17-13. Extreme risk firearm protection orders; firearms return; disposition.

A. Any firearm relinquished in accordance with the Extreme Risk Firearm Protection Order Act shall be returned to the respondent within ten days following the expiration or termination of an extreme risk firearm protection order.

B. A respondent shall not be required to acquire any court order granting the return of relinquished firearms.

C. The law enforcement agency in possession of the firearms shall conduct a national criminal records check and shall return the firearms if the agency determines that the respondent is not prohibited from possessing firearms pursuant to state or federal law.

D. Upon written request of the respondent, the law enforcement agency storing a firearm shall transfer possession of the respondent's firearm to a federally licensed firearms dealer or lawful private party purchaser designated by the respondent; provided that the transfer is the result of a sale, that the transferee is the actual owner of the firearm thereafter and, except in the case of a federally licensed firearms dealer, the law enforcement agency has conducted a national criminal records check and determined that the transferee is not prohibited from possessing a firearm pursuant to state or federal law.

E. No fee shall be charged for background checks required pursuant to Subsections C and D of this section.

F. The law enforcement agency transferring possession of a firearm to a transferee shall notify the transferee that it is unlawful to transfer or return the firearm to the respondent while the extreme risk firearm protection order is in effect. A transferee who violates this subsection is guilty of a misdemeanor and may be punished pursuant to Section 31-19-1 NMSA 1978.

History: Laws 2020, ch. 5, § 13.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

ARTICLE 18
Special Immigrant Juvenile Classification

40-18-1. Short title.

This act [40-18-1 to 40-18-4 NMSA 1978] may be cited as the "Special Immigrant Juvenile Classification Act".

History: Laws 2023, ch. 134, § 1.

ANNOTATIONS

Emergency clauses. — Laws 2023, ch. 134, § 6 contained an emergency clause and was approved April 5, 2023.

Applicability. — Laws 2023, ch. 134, § 5 provided that the provisions of Laws 2023, ch. 134 shall apply retroactively to any child deemed by a state court order to be an abused child, neglected child or abandoned child from the time the child received the order; provided that the petition is subject to denial or revocation by a federal immigration agency based on the child’s dependency status or age when the special findings were issued.

40-18-2. Definitions.

As used in the Special Immigrant Juvenile Classification Act:

A. "abandoned child" means a child who is left without provision for reasonable and necessary care or supervision;

B. "abused child" means a child:

(1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian;

(2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian or custodian;

(3) who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian;

(4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health; or

(5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child;

C. "child" means any unmarried, foreign-born person under the age of twenty-one;

D. "court" means any court in this state with jurisdiction to make decisions concerning the protection, well-being, care or custody of a child;

E. "dependent on the court" means subject to the jurisdiction of a court competent to make decisions concerning the protection, well-being, care and custody of a child, to make findings and issue orders or referrals to support the health, safety and welfare of a child or to remedy the effects on a child of abuse, neglect, abandonment or similar circumstances;

F. "neglected child" means a child:

(1) who has been abandoned by the child's parent, guardian or custodian;

(2) who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, guardian or custodian or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them;

(3) who has been physically or sexually abused, when the child's parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;

(4) whose parent, guardian or custodian is unable to discharge that person's responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity; or

(5) who has been placed for care or adoption in violation of the law; provided that nothing in the Special Immigrant Juvenile Classification Act shall be construed to imply that a child who is being provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof is for that reason alone a neglected child within the meaning of the Special Immigrant Juvenile Classification Act; and further provided that no child shall be denied the protection afforded to all children under any other provision of law; and

G. "similar circumstances" means a similar basis under state law that demonstrates similar harm or effects of those of an abused child, neglected child or abandoned child, including but not limited to the death of a parent, deportation of a parent or incarceration of a parent.

History: Laws 2023, ch. 134, § 2.

ANNOTATIONS

Emergency clauses. — Laws 2023, ch. 134, § 6 contained an emergency clause and was approved April 5, 2023.

Applicability. — Laws 2023, ch. 134, § 5 provided that the provisions of Laws 2023, ch. 134 shall apply retroactively to any child deemed by a state court order to be an abused child, neglected child or abandoned child from the time the child received the order; provided that the petition is subject to denial or revocation by a federal immigration agency based on the child's dependency status or age when the special findings were issued.

40-18-3. Applications and petitions for classification as a special immigrant juvenile.

A. A request may be made by a petitioner pursuant to this section for classification as a special immigrant juvenile as provided in 8 U.S.C. Section 1101(a)(27)(J), in conjunction with a petition for any determination on the care and custody of a child.

B. The application or petition for classification as a special immigrant juvenile shall set forth the facts necessary to establish eligibility pursuant to this section.

History: Laws 2023, ch. 134, § 3.

ANNOTATIONS

Emergency clauses. — Laws 2023, ch. 134, § 6 contained an emergency clause and was approved April 5, 2023.

Applicability. — Laws 2023, ch. 134, § 5 provided that the provisions of Laws 2023, ch. 134 shall apply retroactively to any child deemed by a state court order to be an abused child, neglected child or abandoned child from the time the child received the order; provided that the petition is subject to denial or revocation by a federal immigration agency based on the child's dependency status or age when the special findings were issued.

40-18-4. Jurisdiction of the court; standards; procedures.

A. The court has jurisdiction to make findings of fact and determinations of law in the best interests of the child for classification as a special immigrant juvenile pursuant to 8 U.S.C. Section 1101(a)(27)(J) in all matters and proceedings that involve an abused child, a neglected child or an abandoned child, including but not limited to child custody, guardianship and abuse and neglect proceedings.

B. A court acting pursuant to the Special Immigrant Juvenile Classification Act acts as a juvenile court as defined in 8 C.F.R. Section 204.11(a).

C. Upon review of an application or petition for classification as a special immigrant juvenile pursuant to 8 U.S.C. Section 1101(a)(27)(J), supporting affidavits and any other evidence, the court shall issue findings of fact and rulings of law to determine whether:

(1) the child is dependent on the court;

(2) the child is an abused child, neglected child or abandoned child or has suffered similar circumstances;

(3) the child may not be viably reunified with one or both of the child's parents because the child is an abused child, neglected child or abandoned child or has suffered similar circumstances; and

(4) it is not in the child's best interests to be returned to the child's or parent's country of nationality or country of last habitual residence.

D. A court shall hear and adjudicate an application or petition and issue findings of fact and rulings of law as soon as it is administratively feasible but before the child reaches the age of twenty-one.

E. Nothing in the Special Immigrant Juvenile Classification Act shall preclude the district court from issuing findings of fact and rulings of law similar to the provisions of Subsection C of this section in any other proceeding.

History: Laws 2023, ch. 134, § 4.

ANNOTATIONS

Emergency clauses. — Laws 2023, ch. 134, § 6 contained an emergency clause and was approved April 5, 2023.

Applicability. — Laws 2023, ch. 134, § 5 provided that the provisions of Laws 2023, ch. 134 shall apply retroactively to any child deemed by a state court order to be an abused child, neglected child or abandoned child from the time the child received the order; provided that the petition is subject to denial or revocation by a federal immigration agency based on the child's dependency status or age when the special findings were issued.