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.

Cross-references. - As to marriage settlement and separation contracts, see 40-2-4 to 40-2-7 NMSA 1978. As to dissolution of marriage, see 40-4-1 NMSA 1978 et seq. As to jurisdiction of children's court to authorize marriage of minor, see 32-1-9 NMSA 1978. As to magistrates solemnizing contract of marriage, see 35-3-2 NMSA 1978.

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

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, 87 N.M. 29, 528 P.2d 888 (1974).

And 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 County Comm'rs, 75 N.M. 125, 401 P.2d 109 (1965), overruled on other grounds, Panzer v. Panzer, 87 N.M. 29, 528 P.2d 888 (1974).

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

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 County Comm'rs, 75 N.M. 125, 401 P.2d 109 (1965), overruled on other grounds, Panzer v. Panzer, 87 N.M. 29, 528 P.2d 888 (1974).

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. Section 40-1-2 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, 38 N.M. 392, 34 P.2d 672, 94 A.L.R. 980 (1934).

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, 89 N.M. 659, 556 P.2d 345 (1976); Merrill v. Davis, 100 N.M. 552, 673 P.2d 1285 (1983).

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, 89 N.M. 659, 556 P.2d 345 (1976).

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. 1957-58 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 symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 52 Am. Jur. 2d Marriage §§ 4, 6, 7.
Duress exercised by third person as affecting validity of marriage, 4 A.L.R. 870; 62 A.L.R. 1477.
Validity of common-law marriage in American jurisdiction, 39 A.L.R. 538; 60 A.L.R. 541; 94 A.L.R. 1000; 133 A.L.R. 758.
Corroboration as to fact of marriage of testimony of plaintiff in divorce suit, 65 A.L.R. 186.
Duress, marriage to which consent of one party was obtained by, as void or voidable, 91 A.L.R. 414.
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.
55 C.J.S. Marriage § 18.

§ 40-1-2. Clergymen or civil magistrates may solemnize; fees.

A. It is lawful, valid and binding to all intents and purposes for those who may so desire to solemnize the contract of matrimony by means of any ordained clergyman or authorized representative of a federally recognized Indian tribe, without regard to the sect to which he may belong or the rites and customs he may practice.

B. Judges, justices and magistrates of any of the courts established by the constitution of New Mexico and laws of the state are civil magistrates having authority to solemnize contracts of matrimony.

C. Civil magistrates solemnizing contracts of matrimony 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.

Cross-references. - As to magistrates solemnizing contract of marriage, see 35-3-2 NMSA 1978.

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.

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, 38 N.M. 392, 34 P.2d 672, 94 A.L.R. 980 (1934).

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, 89 N.M. 659, 556 P.2d 345 (1976); Merrill v. Davis, 100 N.M. 552, 673 P.2d 1285 (1983).

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, 41 N.M. 356, 68 P.2d 928 (1937).

Federal magistrates not included. - United States commissioners and district judges, although they are civil magistrates under federal law, are not included in those authorized to perform marriage ceremonies. 1914 Op. Att'y Gen. 255.

Nor county clerk. - Since county clerk is not a civil magistrate he cannot perform a marriage ceremony. 1941-42 Op. Att'y Gen. No. 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. 1941-42 Op. Att'y Gen. No. 4028.

And police judge. - A police judge may legally perform a marriage ceremony in this state since he is a "civil magistrate." 1941-42 Op. Att'y Gen. No. 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.

A magistrate judge cannot perform a marriage ceremony outside of his district. 1988 Op. Att'y Gen. No. 88-36.

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. 1943-44 Op. Att'y Gen. No. 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. 1917-18 Op. Att'y Gen. 65; 1929-30 Op. Att'y Gen. 40; 1931-32 Op. Att'y Gen. 31.

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, 6 N.M. 173, 27 P. 488 (1891); United States v. de Lujan, 6 N.M. 179, 27 P. 489 (1891); United States v. Chaves, 6 N.M. 180, 27 P. 489 (1891).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 52 Am. Jur. 2d Marriage § 40.
Effect of coverture upon the criminal responsibility of a woman, 4 A.L.R. 266; 71 A.L.R. 1116.
Executrix' or administratrix' authority as terminated by marriage, 8 A.L.R. 175.
Declaratory judgment as to validity of marriage, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 92 A.L.R.2d 1102.
Fraud or mistake as to the marriage relationship of legatee or devisee as affecting will, 17 A.L.R. 247.
Damages for wrongful death of spouse as affected by remarriage between death and trial, 30 A.L.R. 121.
Expulsion or suspension from private school or college because of marriage, 50 A.L.R. 1497.
Fraud in promises of future marriage, 51 A.L.R. 46; 68 A.L.R. 635; 91 A.L.R. 1295; 125 A.L.R. 879.
Marriage speculation contracts as insurance, 63 A.L.R. 711; 100 A.L.R. 1449; 119 A.L.R. 1241.
Validity of agreement to promote marriage between third persons, 72 A.L.R. 1113.
Right to attack validity of marriage after death of a party, 76 A.L.R. 769; 47 A.L.R.2d 1393.
Admissibility of evidence in prosecution for false pretense by promise of marriage of similar attempt on other occasion, 80 A.L.R. 1306; 78 A.L.R.2d 1359.
Marriage of teacher as ground for discharge, 81 A.L.R. 1033; 118 A.L.R. 1092.
Debtor's marriage after levy or service of process to reach property as entitling him to exemption enjoyed by married debtor, 82 A.L.R. 739.
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 tribe to celebrate marriage conformably with its rites and customs, and the secretary of the society or the person presiding over the society or federally recognized Indian tribe shall make and transmit a transcript to the county clerk certifying 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.

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

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).

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 County Comm'rs, 75 N.M. 125, 401 P.2d 109 (1965), overruled on other grounds, Panzer v. Panzer, 87 N.M. 29, 528 P.2d 888 (1974).

§ 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.

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. Fellin v. Estate of Lamb, 99 N.M. 157, 655 P.2d 1001 (1982).

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, 79 N.M. 549, 445 P.2d 970 (1968).

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. Bivians v. Denk, 98 N.M. 722, 652 P.2d 744 (Ct. App. 1982).

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, 79 N.M. 549, 445 P.2d 970 (1968).

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. Fellin v. Estate of Lamb, 99 N.M. 157, 655 P.2d 1001 (1982).

But New Mexico law applies as to evidence required. - 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. Bivians v. Denk, 98 N.M. 722, 652 P.2d 744 (Ct. App. 1982).

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. Bivians v. Denk, 98 N.M. 722, 652 P.2d 744 (Ct. App. 1982).

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. Bivians v. Denk, 98 N.M. 722, 652 P.2d 744 (Ct. App. 1982).

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, 79 N.M. 549, 445 P.2d 970 (1968).

Even if 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, 79 N.M. 549, 445 P.2d 970 (1968).

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.
Validity of common-law marriage in American jurisdictions, 39 A.L.R. 538; 60 A.L.R. 541; 94 A.L.R. 1000; 133 A.L.R. 758.
Validity of marriage celebrated or contracted on board a vessel, 61 A.L.R. 1528.
Foreign marriage recognized as valid because valid by law of state where it was celebrated, 104 A.L.R. 1294.

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. Minors; consent of [parent or] guardian necessary.

No person under the age of majority can marry, unless he obtains the consent of his parent, guardian or of the person under whose charge he is, and for that purpose the presence of those parties, or of a certificate in writing authenticated before competent authority, is required. No person under the age of sixteen years may marry, with or without the consent of his parent or guardian, unless the marriage is authorized under the provisions of Subsection B of Section 40-1-6 NMSA 1978.

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.

Cross-references. - As to age of majority, 18 years, see 28-6-1 NMSA 1978.

Consent should be acknowledged or witnessed. - The consent of parent or guardian to a marriage when sent as separate instrument should be acknowledged or witnessed. 1937-38 Op. Att'y Gen. 137.

Consent of father where minor living with both parents. - Consent of a parent to the marriage of a minor child must come from the father if the minor child is living with both parents, and if the father is competent to consent. 1964 Op. Att'y Gen. No. 64-135 (rendered under former law).

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.

Where minor in custody of one parent. - In instances where a minor child, younger than the minimum age for marriage without parental consent, is in the custody of only one parent, then the consent of that parent alone is necessary and sufficient. 1964 Op. Att'y Gen. No. 64-135.

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 § 15.
Infancy of defendant as affecting civil or criminal action for seduction, 85 A.L.R. 123.
Ratification of marriage by one under age, upon attaining marriageable age, 159 A.L.R.

104.
55 C.J.S. Marriage § 23.

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

A. No person authorized by the laws of this state to celebrate marriages shall knowingly unite in marriage:

(1) any person under the age of eighteen years without the consent of his parent or guardian; or

(2) any person under the age of sixteen years with or without the consent of his parent or guardian.

B. The children's or family court division of the district court may authorize the marriage of persons under the ages stated in Subsection A of this section in settlement of proceedings to compel support and establish parentage, or where the female is under the age of consent and is pregnant, if the marriage would not be incestuous.

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.

Cross-references. - As to age of majority, 18 years, see 28-6-1 NMSA 1978. As to jurisdiction of children's court to authorize marriage of minor, see 32-1-9 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, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504 (1910).

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, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504 (1910).

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.
Contract for consent to marriage of child, 72 A.L.R. 1113.

Attack on marriage of a child after his death, 76 A.L.R. 769; 47 A.L.R.2d 1393.
Foreign marriage of infant recognized as valid became valid by law of state where celebrated as subject to annulment under law of forum for failure to obtain required consent of parents, 104 A.L.R. 1294.
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 grandfathers and grandchildren of all degrees, between half brothers and sisters, as also of full blood; between uncles and nieces, aunts and nephews, are hereby declared incestuous and absolutely void. This section shall extend to illegitimate as well as to legitimate children.

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.

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."

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 et seq.
Incestuous marriage, attack after death of party, 76 A.L.R. 769; 47 A.L.R.2d 1393.
Invalidity ab initio of marriage between persons in prohibited degrees of relationship, 117 A.L.R. 179.
Relationship created by adoption as within statute prohibiting marriage between parties in specified relationships, 151 A.L.R. 1146.
55 C.J.S. Marriage § 16.

§ 40-1-8. [Contracting or performing ceremony for unlawful marriage; penalty.]

If any person prohibited from contracting marriage by the foregoing sections, shall violate the provisions thereof by contracting marriage contrary to the provisions of said sections, he or they shall be punished by fine on conviction thereof, in any sum not less than fifty dollars [($50.00)]; and every person authorized under the laws of this state to celebrate marriages, who shall unite in wedlock any of the persons whose marriage is

declared invalid by the previous sections of this chapter, on conviction thereof, shall be fined in any sum not less than fifty dollars [($50.00)].

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.

Compiler's notes. - The first provision of this section, insofar as it relates to incestuous marriages prohibited by 40-1-7 NMSA 1978, was in conflict with Laws 1876, ch. 31, § 4 and was deemed superseded by 40-7-3, 1953 Comp. (now repealed), which read: "If any person within the degrees of consanguinity, in which marriages are declared invalid by this chapter, shall contract marriage, one with the other, or shall cohabit dissolutely and lasciviously, one with the other, they or any one of them, shall be punished on conviction thereof by imprisonment in the state penitentiary for not more than one year, or by fine of not less than fifty dollars."

The 1915 Code compilers deleted the words "of this act" following the words "foregoing sections" and substituted the word "chapter" for the word "act." The latter referred to 40-1-6 and 40-1-7 NMSA 1978, but the substitution of the word "chapter" would appear to extend the reference to the "foregoing sections" and the "previous sections" to 40-1-1 to 40-1-7 NMSA 1978.

Section not repealed by subsequent enactment. - This section directed against the uniting of persons in marriage under age was not repealed by 40-1-9 NMSA 1978, enacted by the same legislature, providing that such marriages should be declared void only by court decree. Territory v. Harwood, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504 (1910).

Knowledge of age not an element. - This section, penalizing officiating officers for uniting in marriage females under age of 15 years, prohibited by 40-1-6 NMSA 1978 (before its amendment), did not make knowledge of the girl's age or an intent to marry a person under age a necessary element. Territory v. Harwood, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504 (1910).

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. - Power of legislature to provide punishment for those solemnizing marriage contrary to statutory commands, 114 A.L.R. 1117.
55 C.J.S. Marriage § 30.

§ 40-1-9. Prohibited marriages; annulment.

No marriage between relatives within the prohibited degrees or between or with infants

under the prohibited ages, shall be declared void, except by a decree of the district court upon proper proceedings being had therein. A cause of action may be instituted by the minor, by next friend, by either parent or legal guardian of such 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 such marriage void; but such minor may do so, and the court may in its discretion grant alimony until the minor becomes of age or remarries. All children of marriage so declared void as aforesaid shall be deemed and held as legitimate with the right of inheritance from both parents; and also in the case of minors, if the parties should live together until they arrive at the age under which marriage is prohibited [permitted] by statute, then and in that case, such 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.

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, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504 (1910).

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, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504 (1910).

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, 45 N.M. 143, 112 P.2d 821 (1941).

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, 87 N.M. 29, 528 P.2d 888 (1974).

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, 87 N.M. 29, 528 P.2d 888 (1974).

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 et seq.; 52 Am. Jur. 2d Marriage §§ 6, 72 to 77, 148, 149.
Constitutionality of marriage statutes as affected by discriminations or exceptions, 3 A.L.R. 1568.
Validity of marriage contract executed under duress exercised by a third party, 4 A.L.R. 870; 62 A.L.R. 1477.
Right to alimony, counsel fees or suit money in case of invalid marriage, 4 A.L.R. 926; 110 A.L.R. 1283.
Epilepsy as ground for avoiding marriage, 7 A.L.R. 1503; 31 A.L.R. 148.
Validity and enforceability of agreement designed to prevent or end annulment proceedings, 11 A.L.R. 277.
Right to annulment of marriage induced by false claim that husband was cause of existing pregnancy, 11 A.L.R. 931; 19 A.L.R. 80.
Division of property upon annulment of marriage, 11 A.L.R. 1394.
Concealment of pregnancy as ground for annulment of marriage, 13 A.L.R. 1435.
Misrepresentation or mistake as to identity or condition in life of one of the parties as affecting validity of marriage, 14 A.L.R. 121; 75 A.L.R. 663; 50 A.L.R.3d 1295.
Necessity of appointment of guardian ad litem as a party in annulment of marriage of minor, 17 A.L.R. 900.
Meaning of "voluntary cohabitation" within statute relating to annulment of marriage, 26 A.L.R. 1068.
Legitimation by subsequent marriage annulled under a statute declaring that certain marriages shall be void from the time their nullity is declared, 27 A.L.R. 1121.
Mental capacity to marry, 28 A.L.R. 635; 57 A.L.R.2d 1250; 82 A.L.R.2d 1040.
Effect of intoxication on mental capacity to marry, 28 A.L.R. 648; 57 A.L.R.2d 1250; 82 A.L.R.2d 1040.
Concealment of insanity or diseased mental condition as ground for annulment of marriage, 39 A.L.R. 1345.
Right of competent party to annulment of marriage because of incompetency of other party, 51 A.L.R. 852.
Right of heir, next of kin, or other person interested in decedent's estate to attack his marriage on ground of his mental incompetency, 57 A.L.R. 131.
Admissibility and probative force on question of mental capacity to marry, of evidence that one had been adjudged incompetent, 68 A.L.R. 1318.
What constitutes a "marriage" within meaning of statute legitimating issue of all marriages null in law, 84 A.L.R. 499.
Marriage to which consent of one party was obtained by duress as void or only

voidable, 91 A.L.R. 414.
Validity of marriage celebrated while spouse by former marriage of one of the parties was living and undivorced in reliance upon presumption from lapse of time of death of spouse, 93 A.L.R. 345; 144 A.L.R. 747.
Representation that proposed marriage could and would be dissolved by annulment or divorce as ground for annulment, 93 A.L.R. 705.
Construction of statute which in effect, under prescribed conditions, validates, after removal of impediment, marriage celebrated while former spouse of one of the parties was living and undivorced, 95 A.L.R. 1292.
Remarriage to a third person after interlocutory decree of divorce as ground for refusing to make decree absolute, 109 A.L.R. 1009; 174 A.L.R. 519.
Death of party as not precluding attack on marriage as void ab initio, 117 A.L.R. 179.
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.
False representations and unfulfilled promises concerning religion as ground for annulment, 25 A.L.R.2d 939.
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; 81 A.L.R.3d 281.
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.
Power of incompetent spouse's guardian, committee, or next friend to sue for annulment of marriage, 6 A.L.R.3d 681.

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.
Amount of compensation of attorney for services in annulment proceedings in absence of contract or statute fixing amount, 57 A.L.R.3d 475; 57 A.L.R.3d 550; 57 A.L.R.3d 584; 58 A.L.R.3d 201; 58 A.L.R.3d 235; 58 A.L.R.3d 317; 59 A.L.R.3d 152.
Annulment as affecting will previously executed by husband or wife, 71 A.L.R.3d 1297.
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.
55 C.J.S. Marriage §§ 35, 36.

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

Each couple desiring to marry in New Mexico shall obtain a license from a county clerk and file the same for recording in the county issuing the license, following the marriage ceremony. Except as provided in Section 40-1-6 NMSA 1978, a county clerk shall issue no license for the marriage of any person under the age of majority without the consent of his parent or guardian. It shall be the duty of each county clerk to require the affidavit of at least two reliable persons who are acquainted with the age of the applicant for license, as to the age of whom a county clerk may be in doubt, and the failure of any county clerk to perform his duty under this section shall be grounds for the removal of the county clerk from office, in the manner provided for the removal from office of county officers for misfeasance or malfeasance in office.

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.

Cross-references. - As to validation of marriages in 1905 where no license obtained, see 40-1-20 NMSA 1978. As to removal of local officers, see 10-4-1 NMSA 1978 et seq. As to age of majority, 18 years, see 28-6-1 NMSA 1978.

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. Bivians v. Denk, 98 N.M. 722, 652 P.2d 744 (Ct. App. 1982).

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.

Where minor in custody of only one parent. - In instances where a minor child, younger than the minimum age for marriage without parental consent, is in the custody of only

one parent, then the consent of that parent alone is necessary and sufficient. 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. 1961-62 Op. Att'y Gen. No. 61-104.

And 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. 1961-62 Op. Att'y Gen. No. 61-104.

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 County Comm'rs, 75 N.M. 125, 401 P.2d 109 (1965), overruled on other grounds, Panzer v. Panzer, 87 N.M. 29, 528 P.2d 888 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 52 Am. Jur. 2d Marriage §§ 33, 34.
Overcoming presumption as to marriage license, 34 A.L.R. 464; 77 A.L.R. 729.
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. Certificate required.

A. Before any county clerk issues any marriage license, each applicant for a marriage license shall file with the county clerk a certificate from a physician licensed to practice medicine, which certificate shall state that the applicant has had those tests and examinations as required by regulation of the health and environment department. Such tests and examinations shall be made not more than thirty days prior to the date of application for license. The certificate shall state that medical evaluation or that treatment, as indicated, has been made such that there is no bar to marriage, as specified by the regulations of the health and environment department.

B. The certificate of the physician shall be on a form to be provided and distributed by the health services division to all officers authorized to issue marriage licenses and to all physicians within the state.

C. The secretary of health and environment shall make rules and regulations and employ personnel necessary to effectuate the purposes of Sections 40-1-11 through 40-1-13 NMSA 1978. If regulations require a laboratory test, it shall be done in a laboratory approved by the secretary of health and environment.

D. A county clerk shall accept, in lieu of the physician's certificate, a certificate from any other state having premarital laws, if issued within the time limits prescribed in Subsection A of this section and if such laws meet the regulations of the secretary of health and environment.

E. 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.

Cross-references. - As to county clerks, see N.M. Const., art. VI, § 22 and 4-40-1 NMSA 1978 et seq. As to the state treasurer, see N.M. Const., art. V, § 1 and 8-6-1 NMSA 1978. As to county treasurers, see 4-43-1 NMSA 1978. As to the health and environment department, see 9-7-1 NMSA 1978 et seq. As to the secretary of health and environment, see 9-7-5 NMSA 1978. As to the children's trust fund, see 24-19-1 NMSA 1978 et seq.

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 (now health and environment department) and is not confined in its operation to laboratories operated directly by the department. 1957-58 Op. Att'y Gen. No. 58-140.

But serological tests during pregnancy must be made at laboratory operated directly by state health department (now health and environment department), although premarital blood tests may be processed by any approved laboratory. 1957-58 Op. Att'y Gen. No. 58-140.

§ 40-1-12. Exceptions.

On application to a judge of a court of record, the court for good cause shown may order the provisions of Section 1 [40-1-11 NMSA 1978] waived and a certified copy of said order shall be filed with the county clerk.

History: 1953 Comp., § 57-1-10.2, enacted by Laws 1957, ch. 33, § 2.

Cross-references. - As to county clerks, see N.M. Const., art. VI, § 22 and 4-40-1 NMSA 1978 et seq.

Either district judge or probate judge may waive requirement of a blood test before a marriage license can be issued. 1969 Op. Att'y Gen. No. 69-77.

But neither magistrate court nor municipal court may waive requirement of a blood test before a marriage license can be issued. 1969 Op. Att'y Gen. No. 69-77.

§ 40-1-13. Penalty.

Failure of any county clerk to perform his duty under Section 1 [40-1-11 NMSA 1978] shall be grounds for removal, in the manner provided for removal from office of county officers for misfeasance or malfeasance in office.

History: 1953 Comp., § 57-1-10.3, enacted by Laws 1957, ch. 33, § 3.

Cross-references. - As to county clerks, see N.M. Const., art. VI, § 22 and 4-40-1 NMSA 1978 et seq. As to removal and suspension of public officers, see 10-4-1 NMSA 1978 et seq.

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

All persons authorized to solemnize marriage shall require the parties contemplating marriage to produce a license signed and sealed by the county clerk authorizing said marriage. Nothing in this chapter shall excuse any person from exercising the same care in satisfying himself as to the legal qualifications of any parties desiring him to perform the marriage ceremony, now required of him by law, in addition to the authority conferred by the license aforesaid.

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

Meaning of "this chapter". - The words "this chapter" were substituted for the words "this act" by the 1915 Code compilers and refer to chapter 72 of the 1915 Code which is compiled herein as 40-1-1 to 40-1-10, 40-1-14 to 40-1-17, 40-1-19 and 40-1-20 NMSA 1978.

Magistrate may receive marriage license applications. - A justice of the peace (now magistrate) can perform a marriage ceremony outside of his precinct, and may receive applications for marriage licenses, which he must transmit to the county clerk. 1915-16 Op. Att'y Gen. 156 (rendered under former law).

But has no authority to pass on their validity. - A justice of the peace has no authority to pass upon the validity of an application for marriage, or the qualification of the applicants to be married. 1915-16 Op. Att'y Gen. 354 (rendered under former law).

§ 40-1-15. [Certification of marriages; recording and indexing.]

It shall be the duty of all persons performing the marriage ceremony in this state as herein provided, to certify said marriage to the county clerk within ninety days from the date of marriage. The county clerk shall immediately upon receipt of said certificate cause the same to be properly recorded and indexed in a permanent record book kept for that purpose as a part of the county records.

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

Cross-references. - As to county clerks, see N.M. Const., art. VI, § 22 and 4-40-1 NMSA 1978 et seq. As to recording fees, see 14-8-12 NMSA 1978.

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. 1943-44 Op. Att'y Gen. No. 4225.

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 County Comm'rs, 75 N.M. 125, 401 P.2d 109 (1965), overruled on other grounds, Panzer v. Panzer, 87 N.M. 29, 528 P.2d 888 (1974).

§ 40-1-16. [Application of law.]

Nothing in this chapter shall be construed to in any manner interfere with the records

kept by any civil magistrate, religious society or church organization, 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.

Meaning of "this chapter". - See same catchline in notes to 40-1-14 NMSA 1978.

§ 40-1-17. [Blank forms required for records.]

To insure a uniform system of records of all marriages hereafter contracted, and the better preservation of said record for future reference, the form of application, license and certificate provided herein shall be substantially as follows, each blank to be numbered consecutively corresponding with page number of the record book in the clerk's office; all such blanks to be provided free of cost by the county for public use.

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

Cross-references. - As to county clerks, see N.M. Const., art. VI, § 22 and 4-40-1 NMSA 1978 et seq.

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. 1943-44 Op. Att'y Gen. No. 4280.

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

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

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 Date of
Birth
..... Birth
.....
Place of Place of
Birth
..... Birth
.....
Present Present
Address
..... 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,
ss.
County of .....
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,
ss.
County of .....
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.

Cross-references. - As to recording fees, see 14-8-12 NMSA 1978.

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; penalty.]

Any county clerk, or person authorized by law to perform the marriage ceremony, who shall neglect or fail to comply with the provisions of the eight preceding sections, and any person who shall willfully violate the law by deceiving or attempting to deceive or mislead any officer or person authorized to perform the marriage ceremony in order to obtain a marriage license or to be married, contrary to law, shall be deemed guilty of a misdemeanor and upon conviction be fined in any sum not less than fifty dollars [($50.00)] nor more than one hundred dollars [($100)], or by imprisonment in the county jail for not less than ten days nor more than sixty days or by both fine and imprisonment, in the discretion of the court.

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

Cross-references. - As to county clerks, see N.M. Const., art. VI, § 22 and 4-40-1 NMSA 1978 et seq.

Compiler's notes. - The words "eight preceding sections" were substituted for the words "provisions of this act" by the 1915 Code compilers and now refer to 40-1-10 and 40-1-14 to 40-1-17 NMSA 1978.

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. 1961-62 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.

Cross-references. - As to 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.

Cross-references. - As to dissolution of marriage, see 40-4-1 NMSA 1978 et seq. As to reciprocal enforcement of support, see 40-6-1 NMSA 1978 et seq.

Duty of support is owed from husband to wife at common law and under this section. 1963-64 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. 1963-64 Op. Att'y Gen. No. 63-151.

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, 41 N.M. 155, 66 P.2d 260 (1937).

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, 60 N.M. 432, 292 P.2d 115 (1956).

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, 60 N.M. 432, 292 P.2d 115 (1956).

And 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, 60 N.M. 432, 292 P.2d 115 (1956).

Wife's support of infirm husband from separate property. - If there is no community property and the husband has no separate property, the wife is required to support her husband from her separate property if the husband is unable to do so because of his infirmity. 1959-60 Op. Att'y Gen. No. 60-37 (opinion rendered under former law).

Not admissible in action by wife against another. - Evidence that a wife supported her invalid husband is inadmissible in an action by the wife against another for personal injuries. Miranda v. Halama-Enderstein Co., 37 N.M. 87, 18 P.2d 1019 (1933) (decided under former law).

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, 44 N.M. 210, 100 P.2d 906 (1940) (decided under former law).

Where it appears husband failed to provide same. - 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, 44 N.M. 210, 100 P.2d 906 (1940) (decided under former law).

And 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, 54 N.M. 194, 217 P.2d 857 (1950) (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, 33 N.M. 93, 262 P. 173 (1927) (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, 34 N.M. 317, 281 P. 25 (1929) (decided under former law).

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.
Duty of husband to provide necessaries for wife as affected by her possession of independent means, 18 A.L.R. 1131.
Furniture and household goods as necessaries for which husband is liable, 24 A.L.R. 1483.
Liability of husband for necessaries as affected by question whether or not they were purchased on his credit, 27 A.L.R. 554.
Right to recover from husband for support furnished wife after clandestine marriage, 30 A.L.R. 802.
Wearing apparel as necessaries for which husband is liable, 60 A.L.R. 1185.
Reimbursement of wife by husband for expenditures for support of herself or family, made while they were living together in a marriage relation, 101 A.L.R. 442.
Liability of husband in absence of decree of divorce or separation, to reimburse wife or her estate for money expended by her for her support after separation, 117 A.L.R. 1181.
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.

I. General Consideration.
II. Confidential Relationship; Undue Influence.
III. Transmutation of Property.

I. General Consideration.

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

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, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250 (1938), overruled on other grounds, Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952).

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, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949).

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, 18 N.M. 579, 139 P. 140 (1914).

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, 12 N.M. 111, 75 P. 41 (1904) (decided under former law).

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, 48 N.M. 240, 149 P.2d 535 (1944).

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. New York Life Ins. Co., 40 N.M. 253, 58 P.2d 1175 (1936).

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, 60 N.M. 43, 287 P.2d 238 (1955).

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, 36 N.M. 335, 15 P.2d 229 (1932).

But may be 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, 60 N.M. 43, 287 P.2d 238 (1955).

And 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, 60 N.M. 43, 287 P.2d 238 (1955).

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, 24 N.M. 256, 171 P. 793 (1917).

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, 83 N.M. 236, 490 P.2d 678 (1971).

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, 83 N.M. 236, 490 P.2d 678 (1971).

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 § 121.

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, 96 N.M. 719, 634 P.2d 1271 (1981).

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, 96 N.M. 719, 634 P.2d 1271 (1981).

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, 37 N.M. 296, 22 P.2d 119 (1933).

Where 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, 37 N.M. 296, 22 P.2d 119 (1933).

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, 37 N.M. 296, 22 P.2d 119 (1933).

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, 37 N.M. 296, 22 P.2d 119 (1933).

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, 56 N.M. 695, 248 P.2d 683 (1952).

Where 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, 56 N.M. 695, 248 P.2d 683 (1952).

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, 25 N.M. 459, 185 P. 780 (1919).

Where burden upon husband to show full disclosure, etc. - 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 $4000, 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, 25 N.M. 459, 185 P. 780 (1919).

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, 98 N.M. 652, 651 P.2d 1296 (1982).

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, 56 N.M. 393, 244 P.2d 781, 30 A.L.R.2d 1236 (1952).

But 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, 56 N.M. 393, 244 P.2d 781, 30 A.L.R.2d 1236 (1952).

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, 64 N.M. 445, 329 P.2d 1027 (1958).

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, 72 N.M. 433, 384 P.2d 699 (1963).

§ 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.

Where 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, 64 N.M. 121, 325 P.2d 709 (1958).

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.

Cross-references. - As to acknowledgement of land contracts, see 14-13-8, 14-13-9 NMSA 1978. As to signing of real estate conveyances, see 47-1-5 NMSA 1978 et seq.

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

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, 51 N.M. 416, 186 P.2d 390 (1947).

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, 100 N.M. 102, 666 P.2d 781 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Divorce and Separation §§ 817 to 863.
Applicability of Succession Tax Law to antenuptial contract, 4 A.L.R. 461; 44 A.L.R. 1475.
Intermarriage of parties as affecting contract for services, 14 A.L.R. 1013.
Marriage settlement or gift from one spouse to other as affected by marital misconduct, 29 A.L.R. 198.
Divorce or judicial separation as affecting marriage settlement, 47 A.L.R. 473; 95 A.L.R. 1469.
Validity of postnuptial agreement releasing or waiving rights of surviving spouse on death of other spouse, 49 A.L.R. 116.
When transfer by virtue of antenuptial agreement deemed to take effect in possession or enjoyment at or after death within Inheritance Tax Law, 49 A.L.R. 864; 67 A.L.R. 1247; 100 A.L.R. 1244; 121 A.L.R. 359; 155 A.L.R. 850; 167 A.L.R. 438.
Agreement not in contemplation of divorce for release of wife's right to support as contrary to public policy, 50 A.L.R. 351; 120 A.L.R. 1334.
Purchaser with notice of antenuptial agreement, from or through bona fide purchaser, as entitled to same protection as latter, 63 A.L.R. 1362.
What amounts to election by widow as between postnuptial settlement and husband's will of her rights under statute of descent and distribution, 117 A.L.R. 1001.
Income tax treatment of payment to spouse for relinquishment of inchoate marital rights in other's property, 1 A.L.R.2d 1037.
Validity of antenuptial contract as affected by provision for post-mortem payment or performance, 1 A.L.R.2d 1260.
Setting aside antenuptial contract or marriage settlement on ground of failure of spouse to make proper disclosure of property owned, 27 A.L.R.2d 883.
Separation agreement as estopping wife to claim inheritance rights in deceased

spouse's estate, 34 A.L.R.2d 1024.
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.
41 C.J.S. Husband and Wife §§ 75 to 118; 42 C.J.S. Husband and Wife §§ 591 to 629.

§ 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.

Cross-references. - As to county recorders, see 14-8-1 NMSA 1978. As to recording contracts affecting real property, see 14-9-1 NMSA 1978 et seq.

§ 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.

Cross-references. - As to 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.

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.

Cross-references. - As to suit for division of property, see 40-4-3, 40-4-4, 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, 94 N.M. 641, 615 P.2d 256 (1980), overruled on other grounds, Ellsworth v. Ellsworth, 97 N.M. 133, 637 P.2d 564 (1981).

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

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

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, 60 N.M. 43, 287 P.2d 238 (1955).

And 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, 60 N.M. 43, 287 P.2d 238 (1955).

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, 60 N.M. 43, 287 P.2d 238 (1955).

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, 51 N.M. 416, 186 P.2d 390 (1947).

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, 33 N.M. 132, 262 P. 1007 (1928).

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.

§ 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.

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, 43 N.M. 27, 85 P.2d 78 (1938); McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250 (1938), overruled on other grounds, Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952).

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.

Cross-references. - As to abolition of curtesy and dower, see 45-2-113 NMSA 1978.

Meaning of "this chapter". - 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, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949).

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, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949).

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, 44 N.M. 382, 103 P.2d 113 (1940).

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. Commissioner, 286 F.2d 258 (10th Cir. 1961).

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.

§ 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.

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, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949).

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).

Community is liable for community debts and there is a presumption that all debts contracted during the marriage are community debts. 1959-60 Op. Att'y Gen. No. 60-37.

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, rehearing denied, 405 U.S. 1033, 92 S. Ct. 1288, 31 L. Ed. 2d 941 (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).

Wife required to support infirm husband from her separate property. - If there is no community property and the husband has no separate property, the wife is required to support her husband from her separate property if the husband is unable to do so because of his infirmity. 1959-60 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.
41 C.J.S. Husband and Wife §§ 31 to 35, 462 to 538; 42 C.J.S. Husband and Wife §§ 539 to 590.

§ 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.

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. - 41 Am. Jur. 2d Husband and Wife §§ 34 to 36, 59 to 60.
Right of wife to exclude husband from possession, use, or enjoyment of family residence or homestead owned by her, 21 A.L.R. 745.
Replevin, right of husband or wife to maintain against other, 41 A.L.R. 1054.
Joining in subsequent instrument as ratification of or estoppel as to prior instrument affecting real property, ineffective for nonjoinder of spouse, 7 A.L.R.2d 299.
Division of community property between spouses into separate property as constituting gift within gift statutes, 19 A.L.R.2d 860.
41 C.J.S. Husband and Wife §§ 469 to 501, 503 to 508.

§ 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.

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, 105 N.M. 516, 734 P.2d 756 (1987).

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).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

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 §§ 517 to 521.

§ 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 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.

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.

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.

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 §§ 532 to 538.

§ 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.

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, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Status of real property is governed in this state by statute. Hollingsworth v. Hicks, 57 N.M. 336, 258 P.2d 724 (1953) (decided under former law).

Duty of court to divide equally property of the community. Fitzgerald v. Fitzgerald, 70 N.M. 11, 369 P.2d 398 (1962) (decided under former law).

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. New Mexico Dep't of Human Servs., 95 N.M. 196, 619 P.2d 1240 (Ct. App. 1979).

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. New Mexico Dep't of Human Servs., 95 N.M. 196, 619 P.2d 1240 (Ct. App. 1979).

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, 79 N.M. 245, 442 P.2d 203 (1968) (decided under former law).

Ownership of insurance proceeds paid during marriage determined by community. - Where a third person is the insured, and a spouse the beneficiary, the ownership of policy proceeds paid to the spouse during marriage is determined by the general

community property law. Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967) (decided under former law).

Insurance proceeds presumed community property. - Property acquired during marriage is presumed to be community property in absence of proof on the question. This presumption is applicable to insurance proceeds. Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967) (decided under former law).

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, 77 N.M. 683, 427 P.2d 36 (1967) (decided under former law).

Where policy was community property prior to divorce, the parties owned the policy as tenants in common after the divorce. Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967) (decided under former law).

And if rights were community property prior to divorce, such rights, after divorce, are owned as tenants in common. Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967) (decided under former law).

Where 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, 77 N.M. 683, 427 P.2d 36 (1967) (decided under former law).

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, 95 N.M. 207, 619 P.2d 1251 (Ct. App. 1980).

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.

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. "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 will be presumed to be held as community property unless such property is separate property within the meaning of Subsection A of this section.

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

D. 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.

E. 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.

I. General Consideration.
II. Separate Property.
III. Community Property.

I. General Consideration.

Cross-references. - As to determination of community property upon death of spouse, see 45-2-804 NMSA 1978.

"1984 amendments to this section". - The language "1984 amendments to this section," in Subsection E, refers to Laws 1984, ch. 122, § 1.

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, 94 N.M. 572, 613 P.2d 714 (Ct. App. 1980).

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

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, 98 N.M. 322, 648 P.2d 780 (1982).

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, 80 N.M. 331, 455 P.2d 642 (1969)

(decided under former law).

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

Relative amounts of separate property and community property which make up the commingled total is an important factor. Conley v. Quinn, 66 N.M. 242, 346 P.2d 1030 (1959) (decided under former law).

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, 89 N.M. 282, 551 P.2d 638 (1976); Shanafelt v. Holloman, 61 N.M. 147, 296 P.2d 752 (1956).

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, 95 N.M. 283, 621 P.2d 500 (1980); Bustos v. Bustos, 100 N.M. 556, 673 P.2d 1289 (1983).

And 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. United States 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, 89 N.M. 282, 551 P.2d 638 (1976).

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, 105 N.M. 263, 731 P.2d 959 (Ct. App. 1986).

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, 105 N.M. 263, 731 P.2d 959 (Ct. App. 1986).

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, 105 N.M. 263, 731 P.2d 959 (Ct. App. 1986).

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, 89 N.M. 282, 551 P.2d 638 (1976).

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, 94 N.M. 489, 612 P.2d 1300 (1980).

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, 80 N.M. 331, 455 P.2d 642 (1969) (decided under former law).

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) (decided under former law).

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, 84 N.M. 618, 506 P.2d 775 (1973).

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) (decided under former law); Stephens v. Stephens, 93 N.M. 1, 595 P.2d 1196 (1979).

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, 101 N.M. 570, 686 P.2d 260 (Ct. App. 1984).

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).

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.
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.
41 C.J.S. Husband and Wife §§ 31 to 35, 462 to 538; 42 C.J.S. Husband and Wife §§ 539 to 590.

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, 57 N.M. 336, 258 P.2d 724 (1953) (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, 106 N.M. 648, 748 P.2d 21 (Ct. App. 1987).

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, 106 N.M. 648, 748 P.2d 21 (Ct. App. 1987).

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, 83 N.M. 133, 489 P.2d 641 (1971) (decided under former law).

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, 98 N.M. 322, 648 P.2d 780 (1982).

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, 72 N.M. 433, 384 P.2d 699 (1963) (decided under former law); Corley v. Corley, 92 N.M. 716, 594 P.2d 1172 (1979).

And 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, 66 N.M. 242, 346 P.2d 1030 (1959) (decided under former law).

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, 57 N.M. 336, 258 P.2d 724 (1953) (decided under former law).

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, 105 N.M. 670, 735 P.2d 1176 (Ct. App. 1987).

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, 106 N.M. 27, 738 P.2d 899 (1987).

Where 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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

Or 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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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, 71 N.M. 495, 379 P.2d 784 (1963) (decided under former law).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law); Portillo v. Shappie, 97 N.M. 59, 636 P.2d 878 (1981).

But 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, 97 N.M. 59, 636 P.2d 878 (1981).

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, 97 N.M. 59, 636 P.2d 878 (1981).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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, 66 N.M. 242, 346 P.2d 1030 (1959) (decided under former law).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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, 100 N.M. 556, 673 P.2d 1289 (1983).

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, 60 N.M. 348, 291 P.2d 636 (1955) (decided under former law).

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, 72 N.M. 433, 384 P.2d 699 (1963) (decided under former law).

Income from husband's investments, owned by him prior to marriage, is his separate property. Moore v. Moore, 71 N.M. 495, 379 P.2d 784 (1963) (decided under former law).

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, 84 N.M. 618, 506 P.2d 775 (1973).

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) (decided under former law).

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, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

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, 94 N.M. 572, 613 P.2d 714 (Ct. App. 1980).

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, 91 N.M. 81, 570 P.2d 912 (1977).

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, rehearing denied, 405 U.S. 1033, 92 S. Ct. 1288, 31 L. Ed. 2d 941 (1972) (decided under former law).

Where ranch owned before marriage, 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, 71 N.M. 495, 379 P.2d 784 (1963) (decided under former law).

But income therefrom 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, 71 N.M. 495, 379 P.2d 784 (1963) (decided under former law).

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, 92 N.M. 716, 594 P.2d 1172 (1979).

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, 96 N.M. 712, 634 P.2d 1264 (1981).

III. Community Property.

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, 71 N.M. 495, 379 P.2d 784 (1963) (decided under former law).

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, 71 N.M. 495, 379 P.2d 784 (1963) (decided under former law).

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, 98 N.M. 742, 652 P.2d 1193 (1982).

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, 98 N.M. 322, 648 P.2d 780 (1982).

Where 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, 105 N.M. 139, 730 P.2d 1 (Ct. App. 1986).

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, 98 N.M. 322, 648 P.2d 780 (1982).

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

Interest of each member of community is existing interest, and not merely an expectancy. United States Fid. & Guar. Co. v. Chavez, 126 F. Supp. 227 (D.N.M. 1954) (decided under former law).

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, 92 N.M. 716, 594 P.2d 1172 (1979).

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. 1959-60 Op. Att'y Gen. No. 59-70 (rendered under former law).

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, 83 N.M. 133, 489 P.2d 641 (1971) (decided under former law).

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. New Mexico Dep't of Human Servs. Income Support Div., 93 N.M. 245, 599 P.2d 398 (Ct. App. 1979).

But proceeds under covenant not to compete are not. - 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, 95 N.M. 283, 621 P.2d 500 (1980).

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, 84 N.M. 14, 498 P.2d 1357 (1972) (decided 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. 1955-56 Op. Att'y Gen. No. 6499 (rendered under former law).

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) (decided under former law).

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, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

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, 106 N.M. 133, 740 P.2d 127 (Ct. App. 1987).

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 $7500 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, 89 N.M. 282, 551 P.2d 638 (1976).

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, 99 N.M. 320, 657 P.2d 1169 (1983).

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, 104 N.M. 205, 719 P.2d 432 (Ct. App.), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986).

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, 89 N.M. 282, 551 P.2d 638 (1976).

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, 80 N.M. 331, 455 P.2d 642 (1969) (decided under former law).

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) (decided under former law).

Military retirement pay is community property in New Mexico. Norris v. Saueressig, 104 N.M. 76, 717 P.2d 52 (1986).

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

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, 101 N.M. 504, 684 P.2d 1169 (Ct. App. 1984).

§ 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.

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. 1959-60 Op. Att'y Gen. No. 60-37 (rendered under former law).

Obligation to maintain does not disclose intent as to ownership. Control, like maintenance, is separate from ownership. Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967) (decided under former law).

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. United States Fid. & Guar. Co. v. Chavez, 126 F. Supp. 227 (D.N.M. 1954) (decided under former law).

And therefore 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. United States Fid. & Guar. Co. v. Chavez, 126 F. Supp. 227 (D.N.M. 1954) (decided under former law).

Claims 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 belongs 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. Rodgers v. Ferguson, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

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, 106 N.M. 133, 740 P.2d 127 (Ct. App. 1987).

But medical expenses could be community or separate debt. - The medical expenses allegedly incurred as a result of the personal injury of the husband may have been incurred as a community indebtedness or they may have been incurred as a separate indebtedness of the husband. Rodgers v. Ferguson, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Wife may sue separately for personal injuries. - 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) (decided under former law).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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., 95 N.M. 257, 620 P.2d 1282 (1980).

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. 1955-56 Op. Att'y Gen. No. 6499 (rendered under former law).

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, 95 N.M. 145, 619 P.2d 821 (1980).

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. 1955-56 Op. Att'y Gen. No. 6499 (rendered under former law).

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, 106 N.M. 36, 738 P.2d 908 (Ct. App. 1987).

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. - 41 Am. Jur. 2d Husband and Wife §§ 323 to 328, 425, 426.
Liability of community property for antenuptial debts and obligations, 68 A.L.R.4th 877.
41 C.J.S. Husband and Wife §§ 50 to 64, 305 to 366, 525 to 528.

§ 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 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. 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.

C. 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.

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. United States Fid. & Guar. Co. v. Chavez, 126 F. Supp. 227 (D.N.M. 1954) (decided under former law).

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 & Social Servs., 92 N.M. 331, 587 P.2d 1342 (Ct. App. 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. United States Fid. & Guar. Co. v. Chavez, 126 F. Supp. 227 (D.N.M. 1954) (decided under former law).

And therefore, 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. United States Fid. & Guar. Co. v. Chavez, 126 F. Supp. 227 (D.N.M. 1954) (decided under former law).

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, 101 N.M. 612, 686 P.2d 954 (1984).

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, 106 N.M. 50, 738 P.2d 922 (Ct. App. 1987).

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. New Mexico Dep't of Human Servs., 95 N.M. 196, 619 P.2d 1240 (Ct. App. 1979).

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., 95 N.M. 257, 620 P.2d 1282 (1980).

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.

§ 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.

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 this section and those fees that the wife incurred as a result of litigating the issue of child support likewise constituted a communal expense. Busots v. Gilroy, 106 N.M. 808, 751 P.2d 188 (Ct. App. 1988).

§ 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 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. 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.

C. 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.

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).

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, 106 N.M. 50, 738 P.2d 922 (Ct. App. 1987).

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.

I. General Consideration.
II. Presumption of Community Property.

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, 61 N.M. 147, 296 P.2d 752 (1956) (decided under former law).

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, 98 N.M. 652, 651 P.2d 1296 (1982).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

Wife was indispensable party in action brought by husband to quiet title to realty deeded to both husband and wife. Brown v. Gurley, 58 N.M. 153, 267 P.2d 134 (1954) (decided under former law).

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. United States Fid. & Guar. Co. v. Chavez, 126 F. Supp. 227 (D.N.M. 1954) (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, 106 N.M. 648, 748 P.2d 21 (Ct. App. 1987).

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, 106 N.M. 648, 748 P.2d 21 (Ct. App. 1987).

Wife required to support infirm husband from separate property. - If there is no community property and the husband has no separate property, the wife is required to support her husband from her separate property if the husband is unable to do so because of his infirmity. 1959-60 Op. Att'y Gen. No. 60-37 (rendered under former law).

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, 79 N.M. 245, 442 P.2d 203 (1968) (decided under former law).

Earnings of wife belong to community where working for husband's partnership. - Dale v. Dale, 57 N.M. 593, 261 P.2d 438 (1953) (decided under former law).

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, 101 N.M. 570, 686 P.2d 260 (Ct. App. 1984).

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

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, 96 N.M. 719, 634 P.2d 1271 (1981).

Military retirement not community where no domicile in New Mexico. - Subsection C of 40-4-5 NMSA 1978 relates only to the jurisdictional requirement of residence for the maintenance of an action for the dissolution of the bonds of matrimony; it did not confer domicile on husband stationed in state so as to make the relevant portion of his retirement income community property. Roebuck v. Roebuck, 87 N.M. 96, 529 P.2d 762 (1974) (cf., Espinda v. Espinda, 96 N.M. 712, 634 P.2d 1264 (1981), holding nondisability military retirement pay to be separate property of spouse entitled to it).

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.

II. Presumption of Community Property.

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, 85 N.M. 470, 513 P.2d 713 (1973).

The presumption of community property arises from the naked fact that it was acquired during marriage. Hollingsworth v. Hicks, 57 N.M. 336, 258 P.2d 724 (1953) (decided under former law).

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, 98 N.M. 742, 652 P.2d 1193 (1982).

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). Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957).

General presumption of community property is certainly not conclusive. Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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, 62 N.M. 135, 306 P.2d 258 (1956) (decided under former law).

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, 61 N.M. 147, 296 P.2d 752 (1956) (decided under former law).

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, 57 N.M. 336, 258 P.2d 724 (1953) (decided under former law).

Showing that community earning exceeded community expenses, even though the excess be slight, supports a finding of community property. Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

Relative amounts of separate property and community property which make up commingled total is an important factor. Conley v. Quinn, 66 N.M. 242, 346 P.2d 1030 (1959) (decided under former law).

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, 66 N.M. 242, 346 P.2d 1030 (1959) (decided under former law).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

Where the acquisition of property is involved, the presumption of community property may be overcome by a preponderance of evidence. Shanafelt v. Holloman, 61 N.M. 147, 296 P.2d 752 (1956) (decided under former law); Hughes v. Hughes, 96 N.M. 719, 634 P.2d 1271 (1981).

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, 66 N.M. 242, 346 P.2d 1030 (1959) (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, 104 N.M. 205, 719 P.2d 432 (Ct. App.), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986); Arch, Ltd. v. Yu, 108 N.M. 67, 766 P.2d 911 (1988).

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, 105 N.M. 600, 734 P.2d 1283 (Ct. App. 1987).

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, 104 N.M. 205, 719 P.2d 432 (Ct. App.), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986).

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, 108 N.M. 67, 766 P.2d 911 (1988).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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, 62 N.M. 330, 310 P.2d 266 (1957) (decided under former law).

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, 108 N.M. 67, 766 P.2d 911 (1988).

§ 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 co-tenants 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 co-tenants in joint tenancy or tenancy in common if the initial term of the lease, together with any option or extension contained therein or provided for contemporaneously, may exceed 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 co-tenants 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 above, 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.

History: 1953 Comp., § 57-4A-7, enacted by Laws 1973, ch. 320, § 8; 1975, ch. 246, § 5.

Cross-references. - For necessity of joinder of spouses in contracts of indemnity, see 40-3-4 NMSA 1978.

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, 93 N.M. 508, 601 P.2d 1204 (1979); Jeffers v. Martinez, 99 N.M. 351, 658 P.2d 426 (1982).

Husband and wife must join in all deeds and mortgages affecting community real property. Pickett v. Miller, 76 N.M. 105, 412 P.2d 400 (1966) (decided under former law).

"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, 92 N.M. 444, 589 P.2d 1035 (1979).

Neither husband nor wife can transfer 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, 85 N.M. 470, 513 P.2d 713 (1973).

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, 92 N.M. 444, 589 P.2d 1035 (1979).

Federal coal leases are real community property, and a husband cannot effectively convey them without his wife's signature. Padilla v. Roller, 94 N.M. 234, 608 P.2d 1116 (1980).

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, 76 N.M. 105, 412 P.2d 400 (1966) (decided under former law).

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, 106 N.M. 27, 738 P.2d 899 (1987).

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, 76 N.M. 105, 412 P.2d 400 (1966) (decided under former law).

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, 79 N.M. 245, 442 P.2d 203 (1968) (decided under former law).

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).

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, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

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, 100 N.M. 98, 666 P.2d 777 (1983).

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, 96 N.M. 33, 627 P.2d 875 (1981).

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, 96 N.M. 33, 627 P.2d 875 (1981).

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, 108 N.M. 67, 766 P.2d 911 (1988).

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, 108 N.M. 67, 766 P.2d 911 (1988).

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, 62 N.M. 135, 306 P.2d 258 (1956) (decided under former law).

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, 71 N.M. 454, 379 P.2d 443 (1963) (decided under former law).

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, 85 N.M. 695, 516 P.2d 666 (1973).

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, 95 N.M. 145, 619 P.2d 821 (1980).

Thus, 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, 95 N.M. 145, 619 P.2d 821 (1980).

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, 108 N.M. 67, 766 P.2d 911 (1988).

Law reviews. - For comment, "Regional Planning - Subdivision Control - New Mexico's New Municipal Code," see 6 Nat. Resources J. 135 (1966).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 41 Am. Jur. 2d Husband and Wife §§ 140, 142, 147, 149, 151, 154 to 157, 160 to 162, 164, 170, 179, 185 to 187, 190, 191.
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 §§ 319, 324.

§ 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.

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 & Social Servs., 92 N.M. 331, 587 P.2d 1342 (Ct. App. 1978).

Spouse's signature is effective to create community obligation payable from the community's personal property. Shadden v. Shadden, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

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, 93 N.M. 571, 603 P.2d 310 (Ct. App. 1979).

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, 93 N.M. 571, 603 P.2d 310 (Ct. App. 1979).

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. Shadden v. Shadden, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

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, 95 N.M. 207, 619 P.2d 1251 (Ct. App. 1980).

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

For note, "Coal Leases Held Real Property," see 21 Nat. Resources J. 415 (1981).

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 §§ 29, 32 to 34, 37, 46, 48, 53, 80 to 102, 109, 110, 113, 116 to 123, 140, 156, 158, 160, 238, 252. Presumption of ownership of personal property as between husband and wife, 111

A.L.R. 1374.
Leasehold interest as within statutes relating to community real estate, 122 A.L.R. 652.
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 §§ 273, 534.

§ 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.

Cross-references. - As to 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.

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.

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.

Severability clauses. - Laws 1973, ch. 320, § 15, provides 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 45-5-408, 45-5-409 and 45-5-424 NMSA 1978.

Article 4

Dissolution of Marriage

Sec.

§ 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.

I. General Consideration.

Cross-references. - As to annulment, see 40-1-9 NMSA 1978.

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, 85 N.M. 575, 514 P.2d 851 (1973); Buckner v. Buckner, 95 N.M. 337, 622 P.2d 242 (1981).

Husband or wife may sue for division of property without dissolution of marriage. - Where husband and wife have permanently separated, either may have a choice of suing for division of property or for disposition of the children without a dissolution of marriage bonds or of filing suit for absolute divorce, in which case facts sufficient to warrant separation might be sufficient to sustain a decree for total divorce. Poteet v. Poteet, 45 N.M. 214, 114 P.2d 91 (1941) (decided under former 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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Divorce and Separation §§ 25 to 164.
Sufficiency of allegation of adultery in suit for divorce, 2 A.L.R. 1621.
Desertion as affected by element of remonstrance or resistance, 3 A.L.R. 503.
Forcing spouse to get rid of child by former marriage as cruelty constituting ground for divorce, 3 A.L.R. 803.
Abuse by relatives of other spouse as cruelty constituting ground for divorce, 3 A.L.R. 993.
Conduct amounting to treatment endangering life within statute defining grounds for divorce, 5 A.L.R. 712.
Venereal disease as ground for divorce, 5 A.L.R. 1016; 8 A.L.R. 1540.
Desertion as affected by intimations of a possible consent to the renewal of marital relations in the future, 12 A.L.R. 1391.
Concealment of pregnancy as ground for divorce, 13 A.L.R. 1435.
Misrepresentation or mistake as to identity or condition in life of one of the parties as affecting validity of marriage, 14 A.L.R. 121; 75 A.L.R. 663.
Constitutionality of discrimination as between husband and wife as to grounds of divorce, 17 A.L.R. 793.
Divorce: offer after lapse of statutory period of desertion to resume marital relations, 18 A.L.R. 630.
Divorce for desertion predicated upon conduct subsequent to a decree of separation, 25 A.L.R. 1047; 61 A.L.R. 1268.
Adultery by deserted spouse after desertion, as ground of divorce in favor of other spouse, 25 A.L.R. 1051.
Refusal of one spouse to live with relatives of other as affecting desertion as ground of divorce or separation, 38 A.L.R. 338; 47 A.L.R. 687.
Charges, in divorce suits, of marital misconduct as cruelty within statute defining grounds of divorce, 51 A.L.R. 1188.
Necessity that drunkenness to constitute ground for divorce shall continue until commencement of suit or later, 54 A.L.R. 331.
Individual acts of cohabitation between husband and wife as breaking continuity of desertion or separation, or as condonation thereof, 155 A.L.R. 132.
Association or conduct of spouse with other persons of opposite sex as cruelty or abuse of treatment justifying divorce or separation, 157 A.L.R. 631.
Divorce on ground of husband's gifts of his property to third persons, 160 A.L.R. 620.
Validity and construction of statute respecting divorce in favor of spouse whose husband or wife has obtained a divorce in another state, 175 A.L.R. 293.
Refusal of sexual intercourse as ground for divorce, 175 A.L.R. 708; 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.
27A C.J.S. Divorce §§ 13-70.

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, 85 N.M. 324, 512 P.2d 84 (1973).

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, 85 N.M. 575, 514 P.2d 851 (1973).

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 this issue. State ex rel. DuBois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973).

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, 85 N.M. 575, 514 P.2d 851 (1973).

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, 85 N.M. 324, 512 P.2d 84 (1973); State ex rel. DuBois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973).

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, 56 N.M. 739, 250 P.2d 487 (1952).

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, 49 N.M. 288, 162 P.2d 782 (1945).

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, 39 N.M. 480, 50 P.2d 264 (1935).

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, 20 N.M. 13, 145 P. 1075 (1915).

Where 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, 23 N.M. 627, 170 P. 745 (1918).

§ 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.

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, 85 N.M. 324, 512 P.2d 84 (1973).

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 this issue. State ex rel. DuBois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973).

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, 85 N.M. 324, 512 P.2d 84 (1973).

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, 105 N.M. 571, 734 P.2d 811 (Ct. App. 1987).

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.

Cross-references. - As to 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, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949).

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, 34 N.M. 98, 278 P. 202 (1929).

Power of court in suit for absolute divorce. - In suit for absolute divorce, the court had no power to decree a limited divorce or legal separation. Hodges v. Hodges, 22 N.M. 192, 159 P. 1007 (1916).

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, 106 N.M. 788, 750 P.2d 1114 (Ct. App. 1988).

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, 45 N.M. 214, 114 P.2d 91 (1941).

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, 25 N.M. 459, 185 P. 780 (1919).

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, 44 N.M. 214, 100 P.2d 908 (1940).

And rights not forfeited by any wrongs. - 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, 25 N.M. 459, 185 P. 780 (1919).

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, 34 N.M. 98, 278 P. 202 (1929).

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, 79 N.M. 245, 442 P.2d 203 (1968).

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, 82 N.M. 779, 487 P.2d 481 (1971).

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, 82 N.M. 779, 487 P.2d 481 (1971).

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, 96 N.M. 401, 631 P.2d 307 (1981).

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, 96 N.M. 401, 631 P.2d 307 (1981).

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, 79 N.M. 298, 442 P.2d 788 (1968).

Children not deprived of trust benefits as punishment of delinquent mother. - Where the court has set aside a portion of 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 delinquent mother. Fullen v. Fullen, 21 N.M. 212, 153 P. 294 (1915).

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. - Unchastity of wife as affecting prior separation agreement, 8 A.L.R. 1452.
Jurisdiction of action by mother or child for support of child born after divorce in another state or country, 32 A.L.R. 659.
Effect of reconciliation on separation agreement or decree, 40 A.L.R. 1227; 35 A.L.R.2d 707; 36 A.L.R.4th 502.
Retrospective modification of, or refusal to enforce, decree for separate maintenance, 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, 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.
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.
42 C.J.S. Husband and Wife § 625.

§ 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.

Meaning of "this chapter". - "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, 53 N.M. 458, 210 P.2d 942 (1949).

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, 77 N.M. 303, 422 P.2d 38 (1967).

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, 64 N.M. 445, 329 P.2d 1027 (1958).

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, 64 N.M. 21, 322 P.2d 1075 (1958).

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, 77 N.M. 303, 422 P.2d 38 (1967).

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, 79 N.M. 494, 445 P.2d 97 (1968).

But divorce not bar to independent action. - 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, 79 N.M. 245, 442 P.2d 203 (1968).

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, 53 N.M. 458, 210 P.2d 942 (1949).

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, 64 N.M. 445, 329 P.2d 1027 (1958).

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, 75 N.M. 566, 408 P.2d 143 (1965).

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, 64 N.M. 21, 322 P.2d 1075 (1958).

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 §§ 259, 950.
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, 54 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.
27A C.J.S. Divorce §§ 99, 111; 27B C.J.S. Divorce § 511; 42 C.J.S. Husband and Wife § 615.

§ 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.

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, 95 N.M. 517, 624 P.2d 26 (1981).

By "actual resident in good faith" this section contemplates a residence of a permanent and fixed character, an actual residence substantially like that attributable to the term "domicil." Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948) (decided under former law).

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, 77 N.M. 369, 423 P.2d 410 (1967) (decided under former law).

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, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

This section addresses subject matter jurisdiction and is not concerned with personal jurisdiction over an absent spouse. Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).

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, 77 N.M. 369, 423 P.2d 410 (1967) (decided under former law).

This statute grounds jurisdiction on strength of facts connecting the parties to the state of the forum. Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

Right to apply for or obtain divorce is accorded only by statute. Heckathorn v. Heckathorn, 77 N.M. 369, 423 P.2d 410 (1967) (decided under former law).

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, 53 N.M. 66, 201 P.2d 782 (1949) (decided under former law).

Domicile is prerequisite to divorce jurisdiction necessary for recognition under the full faith and credit clause. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954) (decided under former law).

And where statute's residence requirement was not met, the trial court lacked jurisdiction and the decree of divorce was void. Heckathorn v. Heckathorn, 77 N.M. 369, 423 P.2d 410 (1967) (decided under former law).

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, 77 N.M. 369, 423 P.2d 410 (1967) (decided under former law).

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, 95 N.M. 517, 624 P.2d 26 (1981).

Divorce jurisdiction can be founded on circumstances other than domicile. Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

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, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

It is within the power of the legislature to establish reasonable bases of jurisdiction for divorce other than domicile. Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

Court has no discretionary right to deny divorce where statutory ground is shown to exist. Buckner v. Buckner, 95 N.M. 337, 622 P.2d 242 (1981).

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, 77 N.M. 369, 423 P.2d 410 (1967) (decided under former law).

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, 105 N.M. 571, 734 P.2d 811 (Ct. App. 1987).

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, 23 N.M. 627, 170 P. 745 (1918) (decided under former law).

Mere employment by United States does not make resident. - Mere presence within the state in employment of the United States does not make a person an "actual resident in good faith" under provision of the New Mexico constitution. Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948) (decided under former law).

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, 53 N.M. 66, 201 P.2d 782 (1949) (decided under former law).

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, 77 N.M. 303, 422 P.2d 38 (1967) (decided under former law).

More than mere physical presence of divorcing couple within state should underlie divorce jurisdiction. Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

Existence of residence with domiciliary intent for divorce purposes is centered upon the "integrity" of the intent of the parties concerned. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954) (decided under former law).

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, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

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, 77 N.M. 369, 423 P.2d 410 (1967) (decided under former law).

Including attack in another state. - Since the appellant in a divorce action submitted to the jurisdiction of the court he would not be allowed to attack the decree collaterally in another state. Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

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, 17 N.M. 503, 131 P. 493 (1913) (decided under former law).

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, 52 N.M. 174, 194 P.2d 270 (1948) (decided under former law).

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, 99 N.M. 300, 657

P.2d 627 (1982), 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, 106 N.M. 36, 738 P.2d 908 (Ct. App. 1987).

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, 58 N.M. 597, 274 P.2d 127 (1954).

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, 58 N.M. 411, 272 P.2d 319 (1954) (decided under former law).

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, 58 N.M. 597, 274 P.2d 127 (1954) (decided under former law).

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, 58 N.M. 597, 274 P.2d 127 (1954) (decided under former law).

Upon proof of continuous station pursuant to this section, a conclusive presumption of domicile arises. Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

And state has substantial interest. - When service families have resided in this jurisdiction for one year, the state has a substantial interest in their domestic relations. Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958) (decided under former law).

Continuously stationed deemed resident with domiciliary intent. - A member of the military "continuously stationed" at a base in New Mexico for one year, 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, 58 N.M. 597, 274 P.2d 127 (1954) (decided under former law).

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, 58 N.M. 597, 274 P.2d 127 (1954) (decided under former law).

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 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, 58 N.M. 597, 274 P.2d 127 (1954) (decided under former law).

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, 87 N.M. 96, 529 P.2d 762 (1974).

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 §§ 238 to 260.
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, 39 A.L.R. 677; 1 A.L.R.2d 1385; 28 A.L.R.2d 1303.
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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; alimony; support of children; division of property.

A. In any proceeding for the dissolution of marriage, division of property, disposition of children or alimony, 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 separate property, or such a reasonable sum of money to be paid by either spouse, either in a single sum, or in installments, as alimony, as under the circumstances of the case may seem just and proper;

(2) may modify and change any order in respect to alimony allowed either spouse, whenever the circumstances render such change proper;

(3) may set apart out of the property of the respective parties, such portion thereof, for the maintenance and education of their minor children, as may seem just and proper; 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 modify and change any 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, and with reference to the property decreed or funds created for their maintenance and education, so long as they, or any of them remain minors. If any of the property decreed or funds created for the maintenance and education of the children shall remain on hand and be undisposed of at the time the minor children reach the age of majority, the same may be disposed of by the court as it may deem just and proper.

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.

I. General Consideration.

II. Restraining Property Use.
III. Allowing and Modifying Alimony.
IV. Granting and Modifying Child Custody and Support.
V. Expenses of Proceeding.

I. General Consideration.

Cross-references. - For determination of award of child support, see 40-4-11 NMSA 1978.

This section does not apply to annulment actions. Panzer v. Panzer, 87 N.M. 29, 528 P.2d 888 (1974).

This section has no reference to actions to annul an invalid marriage. Prince v. Freeman, 45 N.M. 143, 112 P.2d 821 (1941).

This section complies with state equal rights amendment since it speaks of "either party" and "either spouse," and treats husband and wife with exact equality in all its provisions. Schaab v. Schaab, 87 N.M. 220, 531 P.2d 954 (1974).

Where 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, 60 N.M. 43, 287 P.2d 238 (1955).

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, 64 N.M. 445, 329 P.2d 1027 (1958).

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. Smith v. Smith, 98 N.M. 468, 649 P.2d 1381 (1982).

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, 89 N.M. 291, 551 P.2d 981 (1976).

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).

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, 99 N.M. 300, 657 P.2d 627 (1982), 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, 82 N.M. 223, 478 P.2d 551 (1970).

Court should consider tax consequences when deciding a property settlement upon dissolution of marriage. Cunningham v. Cunningham, 96 N.M. 529, 632 P.2d 1167 (1981).

It is the duty of court to divide equally property of community. Michelson v. Michelson, 86 N.M. 107, 520 P.2d 263 (1974); Fitzgerald v. Fitzgerald, 70 N.M. 11, 369 P.2d 398 (1962); Ellsworth v. Ellsworth, 97 N.M. 133, 637 P.2d 564 (1981).

Where 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, 82 N.M. 624, 485 P.2d 735 (1971).

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, 66 N.M. 134, 343 P.2d 838 (1959).

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, 60 N.M. 441, 292 P.2d 121 (1956).

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, 60 N.M. 441, 292 P.2d 121 (1956).

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, 60 N.M. 43, 287 P.2d 238 (1955).

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, 86 N.M. 648, 526 P.2d 790 (1974).

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, 60 N.M. 43, 287 P.2d 238 (1955).

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, 81 N.M. 59, 463 P.2d 35 (1969).

In divorce proceedings, an owner is entitled to give opinion as to value of community property. Lahr v. Lahr, 82 N.M. 223, 478 P.2d 551 (1970).

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, 82 N.M. 223, 478 P.2d 551 (1970).

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, 82 N.M. 223, 478 P.2d 551 (1970).

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, 81 N.M. 59, 463 P.2d 35 (1969).

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, 25 N.M. 459, 185 P. 780 (1919).

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, 35 N.M. 601, 4 P.2d 918 (1931); Hodges v. Hodges, 22 N.M. 192, 159 P. 1007 (1916).

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, 89 N.M. 282, 551 P.2d 638 (1976).

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, 91 N.M. 339, 573 P.2d 1194 (1978).

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, 52 N.M. 353, 198 P.2d 444 (1948).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 54 N.M. 194, 217 P.2d 857 (1950).

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, 64 N.M. 21, 322 P.2d 1075 (1958).

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. New Mexico Educators Fed. Credit Union v. Woods, 102 N.M. 16, 690 P.2d 1010 (1984).

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, 89 N.M. 282, 551 P.2d 638 (1976).

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, 89 N.M. 282, 551 P.2d 638 (1976).

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, 94 N.M. 345, 610 P.2d 749 (1980); Cunningham v. Cunningham, 96 N.M. 529, 632 P.2d 1167 (1981).

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, 89 N.M. 282, 551 P.2d 638 (1976).

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 $7500 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, 89 N.M. 282, 551 P.2d 638 (1976).

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, 94 N.M. 345, 610 P.2d 749 (1980).

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, 96 N.M. 719, 634 P.2d 1271 (1981).

Military retirement benefits are community property for purposes of distribution of property upon divorce. Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (1983).

The 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).

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, 96 N.M. 712, 634 P.2d 1264 (1981).

That part of Espinda v. Espinda, 96 N.M. 712, 634 P.2d 1264 (1981), 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, 100 N.M. 484, 672 P.2d 657 (1983).

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, 25 N.M. 459, 185 P. 780 (1919).

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, 64 N.M. 445, 329 P.2d 1027 (1958).

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, 101 N.M. 764, 688 P.2d 1268 (Ct. App. 1984).

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

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Divorce and Separation §§ 520 et seq., 864 et seq., 1018 et seq.
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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.
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.
27B C.J.S. Divorce §§ 306 et seq., 508 et seq.; 27C C.J.S. Divorce, § 611 et seq.

II. 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, 72 N.M. 78, 380 P.2d 825 (1963).

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, 64 N.M. 21, 322 P.2d 1075 (1958).

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, 72 N.M. 78, 380 P.2d 825 (1963).

III. Allowing and Modifying Alimony.

Need is first criteria in determining alimony. Weaver v. Weaver, 100 N.M. 165, 667 P.2d 970 (1983).

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, 90 N.M. 23, 559 P.2d 400 (1976); Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

The right of alimony is a continuation of the right to support, and is a personal and not a property right. Hazelwood v. Hazelwood, 89 N.M. 659, 556 P.2d 345 (1976); Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

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, 91 N.M. 423, 575 P.2d 607 (1978).

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, 85 N.M. 517, 514 P.2d 36 (1973).

Alimony is the support which a court decrees in favor of a wife as a substitute for, and in lieu of, the common-law or statutory right to marital support during coverture. Chavez v. Chavez, 82 N.M. 624, 485 P.2d 735 (1971).

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, 92 N.M. 711, 594 P.2d 1167 (1979).

Authority to modify alimony award depends on law of jurisdiction which granted the award. Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

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, 86 N.M. 107, 520 P.2d 263 (1974); Michelson v. Michelson, 89 N.M. 282, 551 P.2d 638 (1976).

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, 99 N.M. 606, 661 P.2d 884 (1982); Howard v. Howard, 100 N.M. 105, 666 P.2d 1252 (1983).

On appeal, appellate court examines the record only to determine if the trial court abused its discretion in fixing an amount of alimony which was contrary to all reason. Gallemore v. Gallemore, 78 N.M. 434, 432 P.2d 399 (1967).

As to the power to grant alimony, on appeal the supreme court examines the evidence only to determine whether the trial court abused its discretion in fixing an amount which was contrary to all reason. Sloan v. Sloan, 77 N.M. 632, 426 P.2d 780 (1967); Chrane v. Chrane, 98 N.M. 471, 649 P.2d 1384 (1982).

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, 99 N.M. 320, 657 P.2d 1169 (1983).

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, 60 N.M. 43, 287 P.2d 238 (1955).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

Awarding of alimony or child support rests within sound discretion of court. Muckleroy v. Muckleroy, 84 N.M. 14, 498 P.2d 1357 (1972); Hurley v. Hurley, 94 N.M. 641, 615 P.2d 256 (1980).

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, 97 N.M. 133, 637 P.2d 564 (1981).

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, 51 N.M. 2, 177 P.2d 167 (1947).

Alimony is not intended as penalty against husband. Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

But 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, 94 N.M. 641, 615 P.2d 256 (1980).

Where 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, 85 N.M. 517, 514 P.2d 36 (1973).

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, 77 N.M. 632, 426 P.2d 780 (1967); Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

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, 86 N.M. 107, 520 P.2d 263 (1974); Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979); Hurley v. Hurley, 94 N.M. 641, 615 P.2d 256 (1980); Ellsworth v. Ellsworth, 97 N.M. 133, 637 P.2d 564 (1981).

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, 99 N.M. 320, 657 P.2d 1169 (1983).

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, 104 N.M. 205, 719 P.2d 432 (Ct. App.), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986).

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, 99 N.M. 320, 657 P.2d 1169 (1983).

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, 97 N.M. 133, 637 P.2d 564 (1981).

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, 97 N.M. 133, 637 P.2d 564 (1981).

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, 101 N.M. 648, 687 P.2d 83 (1984).

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 SCRA 1986. Gruber v. Gruber, 86 N.M. 327, 523 P.2d 1353 (1974).

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, 104 N.M. 205, 719 P.2d 432 (Ct. App.), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986).

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, 60 N.M. 43, 287 P.2d 238 (1955).

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, 94 N.M. 345, 610 P.2d 749 (1980).

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, 99 N.M. 606, 661 P.2d 884 (1982).

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, 101 N.M. 665, 687 P.2d 100 (Ct. App. 1984).

Settlement contracts which provide for payments in lieu of alimony are subject to inquiry and modification by the trial court. Ferret v. Ferret, 55 N.M. 565, 237 P.2d 594 (1951).

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, 95 N.M. 229, 620 P.2d 883 (1980).

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, 64 N.M. 339, 328 P.2d 595 (1958).

And it 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, 27 N.M. 256, 199 P. 1010 (1921).

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) SCRA 1986 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, 89 N.M. 291, 551 P.2d 981 (1976).

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, 94 N.M. 345, 610 P.2d 749 (1980).

Where 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, 86 N.M. 648, 526 P.2d 790 (1974).

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, 54 N.M. 194, 217 P.2d 857 (1950).

Lump sum alimony, once awarded, cannot be modified. Michaluk v. Burke, 105 N.M. 670, 735 P.2d 1176 (Ct. App. 1987).

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, 105 N.M. 670, 735 P.2d 1176 (Ct. App. 1987).

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, 98 N.M. 471, 649 P.2d 1384 (1982).

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, 91 N.M. 409, 575 P.2d 99 (1978).

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, 97 N.M. 133, 637 P.2d 564 (1981).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 91 N.M. 423, 575 P.2d 607 (1978).

Trial court did not abuse its discretion in awarding wife $2500 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 $30.00 per week as a waitress. Redman v. Redman, 64 N.M. 339, 328 P.2d 595 (1958).

An award of alimony of $4000 in a lump sum out of an estate of $8000, 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, 41 N.M. 356, 68 P.2d 928 (1937).

Award not abuse of discretion. - An award of $75.00 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, 67 N.M. 415, 356 P.2d 231 (1960).

Changes in circumstances of divorced parties may warrant reducing or terminating alimony obligations. Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

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, 106 N.M. 451, 744 P.2d 924 (Ct. App. 1987).

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, 91 N.M. 737, 580 P.2d 958 (1978).

Authority to modify alimony award depends on law of jurisdiction which granted the award. Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 104 N.M. 295, 720 P.2d 1236 (1986).

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, 92 N.M. 711, 594 P.2d 1167 (1979).

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, 92 N.M. 711, 594 P.2d 1167 (1979).

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, 79 N.M. 494, 445 P.2d 97 (1968).

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, 92 N.M. 711, 594 P.2d 1167 (1979).

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, 79 N.M. 494, 445 P.2d 97 (1968).

Where district court reserved jurisdiction to modify alimony provision, it could modify it by increasing, diminishing, or abating it entirely. Mindlin v. Mindlin, 41 N.M. 155, 66 P.2d 260 (1937); Lord v. Lord, 37 N.M. 24, 16 P.2d 933 (1932), modified, 37 N.M. 454, 24 P.2d 292 (1933).

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, 89 N.M. 659, 556 P.2d 345 (1976).

Generally a court cannot retroactively modify a support order that has accrued and become vested. Mask v. Mask, 95 N.M. 229, 620 P.2d 883 (1980); Chrane v. Chrane, 98 N.M. 471, 649 P.2d 1384 (1982).

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, 92 N.M. 412, 589 P.2d 196 (1979).

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, 89 N.M. 659, 556 P.2d 345 (1976).

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, 82 N.M. 624, 485 P.2d 735 (1971).

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, 82 N.M. 624, 485 P.2d 735 (1971).

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, 60 N.M. 432, 292 P.2d 115 (1956).

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, 60 N.M. 432, 292 P.2d 115 (1956).

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, 60 N.M. 432, 292 P.2d 115 (1956).

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, 60 N.M. 432, 292 P.2d 115 (1956).

Some court action is necessary to abate alimony where wife marries. Mindlin v. Mindlin, 41 N.M. 155, 66 P.2d 260 (1937).

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, 89 N.M. 282, 551 P.2d 638 (1976).

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, 37 N.M. 24, 16 P.2d 933 (1932), modified, 37 N.M. 454, 24 P.2d 292 (1933).

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, 82 N.M. 624, 485 P.2d 735 (1971).

Power to retroactively abate alimony payments 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, 89 N.M. 659, 556 P.2d 345 (1976).

Improper basis for alimony reduction. - Voluntary assumption of excessive financial burdens is not a proper basis for alimony reduction. Russell v. Russell, 101 N.M. 648, 687 P.2d 83 (1984).

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, 92 N.M. 710, 594 P.2d 1166 (1979).

But 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, 92 N.M. 711, 594 P.2d 1167 (1979).

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. - See 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, 92 N.M. 711, 594 P.2d 1167 (1979).

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, 101 N.M. 380, 683 P.2d 62 (Ct. App. 1984).

IV. Granting and Modifying Child Custody and Support.

Awarding of child support rests within sound discretion of court. Spingola v. Spingola, 91 N.M. 737, 580 P.2d 958 (1978).

Support obligations are for benefit of children, and the court should not punish the children for the wrongdoing of the mother. Barela v. Barela, 91 N.M. 686, 579 P.2d 1253 (1978).

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, 91 N.M. 686, 579 P.2d 1253 (1978).

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, 100 N.M. 424, 671 P.2d 1135 (1983).

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, 100 N.M. 424, 671 P.2d 1135 (1983).

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, 100 N.M. 424, 671 P.2d 1135 (1983).

Court cannot provide for children who have passed the age of majority. Psomas v. Psomas, 99 N.M. 606, 661 P.2d 884 (1982).

Trial court does not have jurisdiction over post-minority education for children. Christiansen v. Christiansen, 100 N.M. 102, 666 P.2d 781 (1983).

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, 102 N.M. 354, 695 P.2d 838 (Ct. App. 1985).

District court has jurisdiction to modify and change existing orders regarding visitation rights and support obligations. Barela v. Barela, 91 N.M. 686, 579 P.2d 1253 (1978).

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, 96 N.M. 401, 631 P.2d 307 (1981).

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, 104 N.M. 763, 727 P.2d 71 (Ct. App. 1986).

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, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982).

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, 89 N.M. 291, 551 P.2d 981 (1976).

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, 77 N.M. 369, 423 P.2d 410 (1967).

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).

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, 98 N.M. 678, 652 P.2d 228 (1982).

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, 34 N.M. 98, 278 P. 202 (1929).

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, 85 N.M. 62, 509 P.2d 254 (1973).

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, 56 N.M. 578, 247 P.2d

162 (1952).

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, 93 N.M. 598, 603 P.2d 708 (1979).

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, 21 N.M. 212, 153 P. 294 (1915).

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, 67 N.M. 415, 356 P.2d 231 (1960).

No abuse of discretion where 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, 78 N.M. 743, 438 P.2d 153 (1968).

And 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, 79 N.M. 351, 443 P.2d 741 (1968).

Thus, 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, 79 N.M. 258, 442 P.2d 570 (1968).

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, 82 N.M. 113, 476 P.2d 772 (1970); Murphy v. Murphy, 96 N.M. 401, 631 P.2d 307 (1981).

Court required to give full force and effect to Missouri decree. - Where the trial court found that $3900 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 $1500 and deferred payment on the remaining $2400, 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 $3900 in delinquent alimony and made a finding on delinquent child support. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 63 N.M. 414, 320 P.2d 1020 (1958).

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, 63 N.M. 414, 320 P.2d 1020 (1958).

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, 89 N.M. 291, 551 P.2d 981 (1976).

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, 67 N.M. 304, 355 P.2d 123 (1960).

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, 79 N.M. 258, 442 P.2d 570 (1968).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 63 N.M. 414, 320 P.2d 1020 (1958).

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, 49 N.M. 405, 165 P.2d 125 (1946).

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, 78 N.M. 743, 438 P.2d 153 (1968).

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, 79 N.M. 351, 443 P.2d 741 (1968).

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, 79 N.M. 258, 442 P.2d 570 (1968).

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, 66 N.M. 134, 343 P.2d 838 (1959).

Controlling inquiry of the trial court in settling any custody dispute is the best interests of the child. Schuermann v. Schuermann, 94 N.M. 81, 607 P.2d 619 (1980).

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, 80 N.M. 294, 454 P.2d 776 (1969).

And 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, 87 N.M. 490, 535 P.2d 1341 (1975).

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, 90 N.M. 466, 565 P.2d 337 (1977).

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, 87 N.M. 490, 535 P.2d 1341 (1975).

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, 87 N.M. 490, 535 P.2d 1341 (1975).

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, 95 N.M. 189, 619 P.2d 1233 (1980).

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, 91 N.M. 686, 579 P.2d 1253 (1978).

Local district court guidelines should be consulted in determining modifications of child support payments. Spingola v. Spingola, 91 N.M. 737, 580 P.2d 958 (1978).

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, 95 N.M. 288, 621 P.2d 505 (1980); Henderson v. Lekvold, 99 N.M. 269, 657 P.2d 125 (1983).

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, 91 N.M. 737, 580 P.2d 958 (1978).

But 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, 93 N.M. 598, 603 P.2d 708 (1979).

Past child support payments not modifiable. - Under Subsection C, 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, 92 N.M. 310, 587 P.2d 963 (1978), overruled on other grounds, Montoya v. Montoya, 95 N.M. 189, 619 P.2d 1233 (1980).

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, 95 N.M. 229, 620 P.2d 883 (1980).

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, 91 N.M. 737, 580 P.2d 958 (1978); Schuermann v. Schuermann, 94 N.M. 81, 607 P.2d 619 (1980).

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, 94 N.M. 81, 607 P.2d 619 (1980).

Both parents on equal footing. - In a custody case in which the parents are opposed or in one 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, 87 N.M. 490, 535 P.2d 1341 (1975).

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, 95 N.M. 288, 621 P.2d 505 (1980).

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, 87 N.M. 490, 535 P.2d 1341 (1975).

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, 79 N.M. 351, 443 P.2d 741 (1968).

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, 60 N.M. 404, 292 P.2d 96 (1956).

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, 49 N.M. 405, 165 P.2d 125 (1946).

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, 49 N.M. 405, 165 P.2d 125 (1946).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 67 N.M. 304, 355 P.2d 123 (1960).

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, 82 N.M. 113, 476 P.2d 772 (1970).

Trial courts are vested with wide discretion in determining whether a custodial decree should be modified. Cole v. Adler, 82 N.M. 599, 485 P.2d 355 (1971).

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, 66 N.M. 134, 343 P.2d 838 (1959).

And 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, 66 N.M. 134, 343 P.2d 838 (1959).

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, 68 N.M. 1, 357 P.2d 335 (1960).

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, 82 N.M. 113, 476 P.2d 772 (1970); Bell v. Odil, 60 N.M. 404, 292 P.2d 96 (1956).

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, 49 N.M. 405, 165 P.2d 125 (1946).

Change of custody is impermissible except upon showing of change of circumstances. Stone v. Stone, 79 N.M. 351, 443 P.2d 741 (1968).

Even where decree provided otherwise. - 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 where decree provided otherwise. Specter v. Specter, 85 N.M. 112, 509 P.2d 879 (1973).

With 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, 50 N.M. 349, 176 P.2d 915 (1947).

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, 104 N.M. 783, 727 P.2d 91 (Ct. App. 1986).

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, 83 N.M. 787, 498 P.2d 674 (1972).

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, 98 N.M. 468, 649 P.2d 1381 (1982).

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, 98 N.M. 468, 649 P.2d 1381 (1982).

Retroactive application of increase. - A child support increase should not apply retroactively where the trial court is dealing with present needs. Chavez v. Chavez, 98 N.M. 678, 652 P.2d 228 (1982).

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, 98 N.M. 678, 652 P.2d 228 (1982).

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, 98 N.M. 468, 649 P.2d 1381 (1982).

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, 86 N.M. 648, 526 P.2d 790 (1974).

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, 91 N.M. 737, 580 P.2d 958 (1978); Henderson v. Lekvold, 95 N.M. 288, 621 P.2d 505 (1980).

As to 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, 69 N.M. 291, 366 P.2d 141 (1961).

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, 105 N.M. 373, 733 P.2d 4 (Ct. App. 1987).

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, 108 N.M. 319, 772 P.2d 353 (Ct. App. 1988).

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, 108 N.M. 319, 772 P.2d 353 (Ct. App. 1988).

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, 105 N.M. 459, 734 P.2d 237 (Ct. App. 1986).

Totality of circumstances needs considered in modifying child support award. Henderson v. Lekvold, 95 N.M. 288, 621 P.2d 505 (1980).

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, 105 N.M. 608, 735 P.2d 326 (Ct. App. 1987).

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, 91 N.M. 737, 580 P.2d 958 (1978).

But 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, 95 N.M. 288, 621 P.2d 505 (1980).

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, 95 N.M. 288, 621 P.2d 505 (1980).

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, 91 N.M. 737, 580 P.2d 958 (1978).

Also whether custodial parent fostering good relations between noncustodial parent and children. - 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, 91 N.M. 737, 580 P.2d 958 (1978).

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, 92 N.M. 310, 587 P.2d 963 (1978), overruled on other grounds, Montoya v. Montoya, 95 N.M. 189, 619 P.2d 1233 (1980).

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, 91 N.M. 737, 580 P.2d 958 (1978); Henderson v. Lekvold, 95 N.M. 288, 621 P.2d 505 (1980).

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, 98 N.M. 744, 652 P.2d 1195 (1982).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 45 N.M. 429, 115 P.2d 1011 (1941); Lord v. Lord, 37 N.M. 24, 16 P.2d 933 (1932), modified, 37 N.M. 454, 24 P.2d 292 (1933).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 75 N.M. 317, 404 P.2d 140 (1965).

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, 50 N.M. 349, 176 P.2d 915 (1947).

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, 34 N.M. 98, 278 P. 202 (1929).

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, 82 N.M. 599, 485 P.2d 355 (1971).

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, 34 N.M. 98, 278 P. 202 (1929).

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, 91 N.M. 737, 580 P.2d 958 (1978).

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, 91 N.M. 737, 580 P.2d 958 (1978).

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, 108 N.M. 319, 772 P.2d 353 (Ct. App. 1988).

V. Expenses of Proceeding.

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, 100 N.M. 102, 666 P.2d 781 (1983).

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, 70 N.M. 11, 369 P.2d 398 (1962).

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, 85 N.M. 517, 514 P.2d 36 (1973).

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, 89 N.M. 282, 551 P.2d 638 (1976).

Even where 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, 37 N.M. 454, 24 P.2d 292 (1933).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 60 N.M. 441, 292 P.2d 121 (1956).

Awards of attorney's fees in divorce actions are to the wife, not the attorney. Dunne v. Dunne, 83 N.M. 377, 492 P.2d 994 (1972).

And 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, 83 N.M. 377, 492 P.2d 994 (1972).

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, 5 N.M. 373, 23 P. 773 (1890) (decided under former law).

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, 67 N.M. 415, 356 P.2d 231 (1960).

An award of attorneys' fees was inappropriate where 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, 86 N.M. 648, 526 P.2d 790 (1974).

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, 89 N.M. 291, 551 P.2d 981 (1976).

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, 71 N.M. 495, 379 P.2d 784 (1963).

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, 89 N.M. 282, 551 P.2d 638 (1976).

Where 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, 35 N.M. 509, 2 P.2d 310 (1931).

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, 28 N.M. 163, 208 P. 886 (1922), aff'd, 28 N.M. 619, 216 P. 497 (1923).

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, 96 N.M. 497, 632 P.2d 732 (1981).

Award reversed absent findings to support it. - Award of costs to father in the amount of $3,000.00 was reversed, where there were no findings on the factors necessary to support the award. Newhouse v. Chavez, 108 N.M. 319, 772 P.2d 353 (Ct. App. 1988).

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, 106 N.M. 451, 744 P.2d 924 (Ct. App. 1987).

§ 40-4-8. Contested custody; appointment of guardian ad litem.

In any proceeding for the dissolution of marriage or disposition of children, where custody of minor children is contested by both spouses, the court may appoint an attorney at law as guardian ad litem on the court's motion or upon application of either party to appear for and represent the minor children. Expenses and attorney's fees for the guardian ad litem shall be a community debt of both spouses as defined in Section 40-3-9 NMSA 1978.

History: 1953 Comp., § 22-7-7, enacted by Laws 1977, ch. 286, § 1.

Cross-references. - As to guardian ad litem for infant defendant, see 38-4-10 NMSA 1978. As to failure to apply for appointment of guardian ad litem, see 38-4-11 NMSA 1978. As to liability of guardian ad litem for costs, see 38-4-12 NMSA 1978. As to appointment of guardian ad litem to defend suit, see 38-4-15 NMSA 1978. As to compromise by guardian ad litem, see 38-4-16 NMSA 1978. As to costs paid by guardian ad litem, see 38-4-17 NMSA 1978. As to guardians of minors, see 45-5-201 NMSA 1978 et seq. As to guardians of incapacitated persons, see 45-5-301 NMSA 1978 et seq. As to protection of property of persons under disability and minors, see 45-5-401 NMSA 1978 et seq.

Compiler's notes. - The catchline 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.

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, 97 N.M. 332, 639 P.2d 1186 (1981).

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, 101 N.M. 493, 684 P.2d 1158 (Ct. App. 1984).

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.

Cross-references. - For notes regarding determination of child custody, see "IV. GRANTING AND MODIFYING CHILD CUSTODY" in notes following 40-4-7 NMSA 1978.

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) SCRA 1986. Fitzsimmons v. Fitzsimmons, 104 N.M. 420, 722 P.2d 671 (Ct. App. 1986).

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, 80 N.M. 35, 450 P.2d 921 (1969) (decided under former law).

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, 101 N.M. 493, 684 P.2d 1158 (Ct. App. 1984).

Law reviews. - For note, "Domestic Relations - Racial Factors in Change of Custody Determinations: Palmore v. Sidoti," see 15 N.M.L. Rev. 511 (1985).

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.
Nonresidence as affecting one's right to temporary visits by child, 15 A.L.R.2d 469.
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.
Attorney's fee in proceeding to open or modify divorce decree as to custody or support of child not provided for in the decree, 71 A.L.R.2d 1410.
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.
Necessity of notice of application for temporary custody of child, 31 A.L.R.3d 1398.
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.
Rights and remedies of parents inter se with respect to the names of their children, 92 A.L.R.3d 1091.
Validity, construction, and application of Uniform Child Custody Jurisdiction Act, 96 A.L.R.3d 968.
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.
Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 54 A.L.R.4th 1170.
Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.
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.
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 interest 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 his or her 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; and

(8) willingness or ability of the parent to communicate, cooperate or agree on issues regarding the child's needs.

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 interest 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 interest. 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 of the New Mexico rules of evidence or Rule 53 of the rules of civil procedure for the district court.

H. Notwithstanding any other provisions of law, access to records and information pertaining to a minor child, including but not limited to 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 shall 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) a requirement 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 of the Rules of Civil Procedure for the District Courts [Rule 1-053 SCRA 1986]; 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 18;

(2) "custody" means the authority and responsibility to make major decisions in a child's best interest in the areas of residence, medical and dental treatment, education or child care, religion and recreation;

(3) "joint custody" means an order of the court awarding custody of a child to two parents. Joint custody does not imply an equal division of the child's time between the parents, or an equal division of financial responsibility for the child;

(4) "parent" means a natural parent, adoptive parent or person who is acting as a parent who has or shares legal custody of a child or who claims a right to have or share legal custody;

(5) "parenting plan" means a document submitted for approval of the court setting forth the responsibilities of each parent individually and the parents jointly in a joint custody arrangement;

(6) "period of responsibility" is 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 the definition of joint custody;

(7) "sole custody" means an order of the court awarding custody of a child to one parent; and

(8) "visitation" is 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.

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, 105 N.M. 373, 733 P.2d 4 (Ct. App. 1987).

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, 104 N.M. 793, 727 P.2d 558 (Ct. App. 1986).

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, 107 N.M. 159, 754 P.2d 536 (Ct. App. 1988) (decided under pre-1986 version of section).

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, 98 N.M. 788, 653 P.2d 164 (1982).

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, 103 N.M. 145, 703 P.2d 922 (Ct. App. 1985).

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, 101 N.M. 639, 686 P.2d 981 (Ct. App. 1984).

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, 98 N.M. 788, 653 P.2d 164 (1982).

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, 98 N.M. 788, 653 P.2d 164 (1982).

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, 108 N.M. 319, 772 P.2d 353 (Ct. App. 1988).

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).

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, 54 A.L.R.4th 1170.

§ 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.

Cross-references. - As to appointment of guardian ad litem to defend suit for incapacitated person, see 38-4-15 NMSA 1978. As to guardians of incapacitated person, see 45-5-301 NMSA 1978 et seq. As to protection of property of persons under disability and minors, see 45-5-401 NMSA 1978 et seq.

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, 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.

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.

Compiler's notes. - Laws 1988, ch. 87, § 1 amends 40-4-11 NMSA 1978 as amended by Laws 1987, ch. 340, § 1, and Laws 1988, ch. 87, § 3 repeals and reenacts 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.

§ 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, 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.

Repeals and reenactments. - Laws 1988, ch. 87, § 3 repeals former 40-4-11 NMSA 1978, as amended by Laws 1987, ch. 340, § 1, and enacts the above section, effective March 8, 1988.

Compiler's notes. - Laws 1988, ch. 87, § 1 amends 40-4-11 NMSA 1978 as amended by Laws 1987, ch. 340, § 1, and Laws 1988, ch. 87, § 3 repeals and reenacts 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.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

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, 91 N.M. 737, 580 P.2d 958 (1978); Blake v. Blake, 102 N.M. 354, 695 P.2d 838 (Ct. App. 1985).

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, 104 N.M. 793, 727 P.2d 558 (Ct. App. 1986).

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, 91 N.M. 737, 580 P.2d 958 (1978).

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, 91 N.M. 737, 580 P.2d 958 (1978).

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, 91 N.M. 737, 580 P.2d 958 (1978).

And educational needs. - 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, 91 N.M. 737, 580 P.2d 958 (1978).

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, 91 N.M. 737, 580 P.2d 958 (1978).

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, 100 N.M. 424, 671 P.2d 1135 (1983).

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, 91 N.M. 504, 576 P.2d 1135 (1978).

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, 75 N.M. 317, 404 P.2d 140 (1965).

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, 104 N.M. 793, 727 P.2d 558 (Ct. App. 1986).

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.
Support provisions of judicial decree or order as limit of father's liability for expenses of child, 7 A.L.R.2d 491.
Death of parent as affecting decree of support of child, 18 A.L.R.2d 1126.
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.
Attorney's fee in proceeding to open or modify divorce decree as to custody or support of child not provided for in the decree, 71 A.L.R.2d 1410.
Allocation or apportionment of previous combined award of alimony and child support, 78 A.L.R.2d 110.
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.

§ 40-4-11.1. Child support; guidelines. (Effective until June 30, 1991.)

A. In any action to establish or modify permanent child support, the child support

guidelines as set forth in this section 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 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 under-employed. 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, prizes and alimony or maintenance received, provided:

(a) "gross income" shall not include benefits received from means-tested public assistance programs or 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 does 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 these guidelines to calculate the support for the subsequent children.

D. As used in this section:

(1) "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 a natural or adopted child or children of only one of the parties;

(2) "basic visitation" means a custody arrangement whereby one parent has physical custody and the other parent has visitation with the children of the parties less than thirty percent of the time. Such arrangements can exist where the parties share responsibilities pursuant to Section 40-4-9.1 NMSA 1978;

(3) "shared responsibility" means a custody arrangement whereby each parent provides a suitable home for the children of the parties, when the children spend at least thirty percent of the year in each home and the parents significantly share the duties, responsibilities and expenses of parenting;

(4) "equal responsibility" means a custody arrangement identical to shared responsibility situations, except that the children of the parties spend a minimum of forty-five percent of the year in each home; and

(5) "split responsibility" means a custody arrangement whereby each parent has physical custody of at least one of the children of the parties.

E. The basic child support obligation shall be calculated based on the combined income of both parents and shall be paid by them proportionately pursuant to Subsections I and J of this section.

F. Physical custody adjustments shall be made as follows:

(1) for basic visitation situations, the basic child support obligation shall be calculated using Table A, Worksheet A and instructions contained in Subsection I of this section. The court may provide for a partial abatement of child support for visitations of one month or longer; and

(2) for other custody arrangements, the basic child support obligation shall be calculated using Table B, Worksheet B and instructions contained in Subsection J of this section as follows:

(a) in shared responsibility situations, the parent with more responsibility retains seventy-five percent of the direct expenses and the parent with less responsibility

retains twenty-five percent of his share of the basic child support obligation;

(b) in equal responsibility situations, each parent retains one-half of his share of the basic child support obligation for direct expenses; and

(c) in split custody situations, each parent retains the percentage of the basic child support obligation for direct expenses equal to the number of children of the parties in his care divided by the total number of the children of the parties.

G. 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 his income, in addition to the basic obligation.

H. 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.

I.

TABLE A - BASIC VISITATION. -

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

Both Parents' BASIC CHILD SUPPORT OBLIGATION AMOUNTS
Combined
Gross Monthly Number of children
Income 1 2 3 4 5 6
For gross monthly income less than $600,
use case-by-case determination with minimums of
$ 50 75 85 95 105 115
$ 600 89 109 119 134 138 141
700 157 187 199 224 228 232
800 171 265 279 314 318 323
900 184 286 359 404 408 414
1000 198 307 385 434 473 505
1100 210 327 410 463 504 538

1200 223 346 434 490 534 570
1300 235 366 459 517 563 602
1400 248 385 483 544 593 634
1500 260 404 506 570 622 665
1600 271 422 528 595 649 695
1700 282 440 550 620 676 724
1800 293 457 572 645 704 753
1900 305 475 595 671 731 782
2000 318 494 619 698 761 814
2100 330 513 642 725 790 845
2200 343 531 666 752 819 876
2300 355 550 690 779 849 907
2400 368 569 714 806 878 939
2500 380 588 738 833 908 970
2600 392 606 761 859 936 1001
2700 404 625 784 885 965 1031
2800 415 644 808 911 994 1062
2900 427 662 831 937 1023 1092
3000 439 681 855 964 1052 1123
3100 451 700 878 990 1080 1154
3200 463 718 901 1016 1109 1183
3300 474 737 925 1042 1138 1215
3400 486 756 948 1068 1167 1245
3500 498 775 972 1095 1196 1276
3600 508 790 990 1115 1218 1301
3700 516 802 1005 1132 1237 1320
3800 524 814 1020 1149 1255 1340
3900 532 826 1035 1166 1274 1360
4000 540 838 1050 1183 1292 1380
4100 548 850 1065 1201 1310 1399
4200 556 862 1080 1218 1329 1419
4300 564 875 1096 1235 1347 1439
4400 572 887 1111 1252 1366 1458
4500 580 899 1126 1269 1384 1478
4600 588 911 1141 1286 1402 1498
4700 596 923 1156 1303 1421 1517
4800 604 935 1172 1320 1439 1537
4900 612 947 1186 1337 1458 1557
5000 620 959 1201 1354 1476 1577
5100 628 971 1216 1372 1494 1596
5200 636 983 1231 1389 1513 1616
5300 644 996 1247 1406 1531 1636
5400 652 1008 1262 1423 1550 1655
5500 660 1020 1277 1440 1568 1675
5600 663 1032 1292 1457 1586 1695
5700 676 1044 1307 1474 1605 1714

5800 684 1056 1322 1491 1623 1734
5900 692 1053 1337 1508 1642 1754
6000 700 1080 1352 1525 1660 1774
6100 707 1092 1366 1543 1677 1793
6200 713 1101 1378 1556 1692 1808
6300 719 1110 1389 1569 1706 1824
6400 724 1119 1401 1582 1721 1839
6500 730 1128 1413 1595 1735 1854
6600 735 1137 1424 1608 1750 1869
6700 741 1146 1436 1621 1764 1884
6800 747 1155 1447 1634 1779 1900
6900 752 1164 1459 1647 1793 1915
7000 758 1173 1471 1660 1808 1930
7100 763 1182 1482 1673 1822 1945
7200 769 1191 1494 1686 1837 1960
7300 775 1200 1505 1699 1851 1976
7400 780 1209 1517 1712 1866 1991
7500 786 1218 1529 1725 1880 2006
7600 791 1227 1540 1738 1895 2021
7700 797 1236 1552 1751 1909 2036
7800 803 1245 1563 1764 1924 2052
7900 808 1254 1575 1777 1938 2067
8000 814 1263 1587 1790 1953 2082
8100 819 1272 1598 1803 1967 2097
8200 825 1281 1610 1816 1982 2112
8300 831 1290 1621 1829 1996 2128
For gross monthly income greater than $8300,
multiply gross by the following percentages:
10.0% 15.5% 19.5% 22.0% 23.9% 25.6%

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

WORKSHEET A - BASIC VISITATION
_____ JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO
NO. _____
_____,
Petitioner,
vs.
_____,
Respondent.

MONTHLY CHILD SUPPORT OBLIGATION

PLEASE REFER TO NEW MEXICO STATUTES 1978 FOR THE CORRECT FORM.

BASIC VISITATION

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

INSTRUCTIONS FOR WORKSHEET A
Line 1. Gross monthly income:
Includes all income, except AFDC, 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 his percentage of combined income.
Line 4. Basic Support:
Fill in number of children on worksheet (Line 3). Round combined income to nearest one hundred dollars ($100). Look at Table A. In the far left-hand column of Table A, 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 his column on Line 6. Add the cost for both parents and enter in the combined column on Line 6.
Line 7. Total Support:
Add amounts in the combined column on Lines 4, 5 and 6, and enter total in combined column on Line 7.
Line 8. Each Parent's Obligation:
Multiply the total child support amount on Line 7 by each parent's percentage share on Line 2, and enter each parent's dollar share under his column on Line 8.
Line 9. Enter Total of Lines 5 and 6:

For each parent, total the amount paid by him for insurance and child care (Lines 5 and 6). Enter the total in that parent's column on Line 9.
Line 10. Each Parent's Obligation:
For each parent, subtract the amount on Line 9 from the amount on Line 8. Enter the difference for each parent in his column on Line 10. The amount in the box is what the other parent pays to the custodial parent each month. Do not subtract the amount on the custodial parent's Line 10 from the amount in the box. The custodial parent is presumed to use the amount in his column on Line 10 for the children.

J. TABLE B - SHARED, EQUAL OR SPLIT RESPONSIBILITY. -

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

Both Parents' BASIC CHILD SUPPORT OBLIGATION AMOUNTS

Combined Gross Monthly Income	Number of children 1	2	3	4	5	6
For gross monthly income less than $600, use case-by-case determination with minimums of	$ 50	75	85	95	105	115
$ 600	127	156	170	192	197	202
700	225	267	285	320	326	332
800	245	379	399	449	455	462
900	263	409	513	578	583	592
1000	283	439	551	621	676	722
1100	300	468	586	662	721	769
1200	319	495	621	701	764	815
1300	336	523	656	739	805	861
1400	355	551	691	778	848	907
1500	372	578	724	815	889	951
1600	388	603	755	851	928	994
1700	403	629	787	887	967	1035
1800	419	654	818	922	1007	1077
1900	436	679	851	960	1045	1118
2000	455	706	885	998	1088	1164
2100	472	734	918	1037	1130	1208
2200	490	759	952	1075	1171	1253
2300	508	787	987	1114	1214	1297
2400	526	814	1021	1153	1256	1343
2500	543	841	1055	1191	1298	1387
2600	561	867	1088	1228	1338	1431
2700	578	894	1121	1266	1380	1474
2800	593	921	1155	1303	1421	1519
2900	611	947	1188	1340	1463	1562

3000 628 974 1223 1379 1504 1606
3100 645 1001 1256 1416 1544 1650
3200 662 1027 1288 1453 1586 1692
3300 678 1054 1323 1490 1627 1737
3400 695 1081 1356 1527 1669 1780
3500 712 1108 1390 1566 1710 1825
3600 726 1130 1416 1594 1742 1860
3700 738 1147 1437 1619 1769 1888
3800 749 1164 1459 1643 1795 1916
3900 761 1181 1480 1667 1822 1945
4000 772 1198 1502 1692 1848 1973
4100 784 1216 1523 1717 1873 2001
4200 795 1233 1544 1742 1900 2029
4300 807 1251 1567 1766 1926 2058
4400 818 1268 1589 1790 1953 2085
4500 829 1286 1610 1815 1979 2114
4600 841 1303 1632 1839 2005 2142
4700 852 1320 1653 1863 2032 2169
4800 864 1337 1676 1888 2058 2198
4900 875 1354 1696 1912 2085 2227
5000 887 1371 1717 1936 2111 2255
5100 898 1389 1739 1962 2136 2282
5200 909 1406 1760 1986 2164 2311
5300 921 1424 1783 2011 2189 2339
5400 932 1441 1805 2035 2217 2367
5500 944 1459 1826 2059 2242 2395
5600 948 1476 1848 2084 2268 2424
5700 967 1493 1869 2108 2295 2451
5800 978 1510 1890 2132 2321 2480
5900 990 1506 1912 2156 2348 2508
6000 1001 1544 1933 2181 2374 2537
6100 1011 1562 1953 2206 2398 2564
6200 1020 1574 1971 2225 2420 2585
6300 1028 1587 1986 2244 2440 2608
6400 1035 1600 2003 2262 2461 2630
6500 1044 1613 2021 2281 2481 2651
6600 1051 1626 2036 2299 2503 2673
6700 1060 1639 2053 2318 2523 2694
6800 1068 1652 2069 2337 2544 2717
6900 1075 1665 2086 2355 2564 2738
7000 1084 1677 2104 2374 2585 2760
7100 1091 1690 2119 2392 2605 2781
7200 1100 1703 2136 2411 2627 2803
7300 1108 1716 2152 2430 2647 2826
7400 1115 1729 2169 2448 2668 2847
7500 1124 1742 2186 2467 2688 2869

7600 1131 1755 2202 2485 2710 2890
7700 1140 1767 2219 2504 2730 2911
7800 1148 1780 2235 2523 2751 2934
7900 1155 1793 2252 2541 2771 2956
8000 1164 1806 2269 2560 2793 2977
8100 1171 1819 2285 2578 2813 2999
8200 1180 1832 2303 2597 2834 3020

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

WORKSHEET B - SHARED RESPONSIBILITY
_____ JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO
NO. _____
_____,
Petitioner,
vs.
_____,
Respondent.

PLEASE REFER TO NEW MEXICO STATUTES 1978 FOR THE CORRECT FORM.

SHARED RESPONSIBILITY

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

INSTRUCTIONS FOR WORKSHEET B
Part 1 - Basic Support:
_____
Line 1. Gross Monthly Income:
Includes all income, except AFDC, 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 his 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 one hundred dollars ($100). Look at Table B. In the far left-hand column of Table B, 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. Each Parent's Share:
Multiply the support amount on Line 4 by each parent's percentage share on Line 2, and enter each parent's dollar share under his column on Line 5.
Line 6. Each Parent's Time of Care for Children:
There are only two shared or equal responsibility categories: 50/50% and 25/75%. If the category is 50/50%, enter 50 percent in each parent's column on Line 6. If the category is 25/75%, enter 75 percent on Line 6 in the column of the parent with the greater share of time, and 25 percent on Line 6 in the column of the parent with the lesser share of time.
Line 7. Amount Retained:
Under shared and equal responsibility arrangements, each parent will retain a percentage of his share of the basic child support obligation to cover some of the expenses of having care of the children. Multiply each parent's share of basic support (Line 5) by that percentage in that parent's Line 6 and enter the result on that parent's Line 7.
Line 8. Each Parent's Basic Obligation:
Subtract the amount retained by each parent for direct expenses (Line 7) from his basic obligation (Line 5) and enter the difference on his Line 8.
Line 9. Amount Transferred for Basic Support:
In shared and equal 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 8 from the larger amount on Line 8 to arrive at a net amount transferred for basic support.
Part 2 - Additional Expenses:
_____
Line 10. 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 10. Add costs paid by each parent and enter under the combined column on Line 10.
Line 11. 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 his column on Line 11. Add the cost for both parents and enter in combined column on Line 11.
Line 12. Enter Total of Lines 10 and 11:
For each parent, total the amount paid by him for insurance and child care (Lines 10 and 11). Enter the total in that parent's column on Line 12 and the total of both parents' expenses under the combined column on Line 12.
Line 13. Each Parent's Obligation:

Multiply the total additional payments (combined column on Line 12) by each parent's percentage share of income on Line 2, and enter each parent's dollar share of the additional payments on his Line 13.
Line 14. Amount Transferred:
Subtract each parent's obligation for additional expenses (his Line 13) from the total additional payments made by that parent (his Line 12). The parent with a "minus" figure pays the other parent the amount on [Line 14.]
Part 3 - Net Amount Transferred:
_____
Line 15. Combine Lines 9 and 14:
Combine the amount owed by one parent to the other for basic support (Line 9) and the amount owed by one parent to the other for additional payments (Line 14). If the same parent owes for both obligations, add Lines 9 and 14, and enter the total on Line 15. 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 15. 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.

Delayed repeals. - Laws 1988, ch. 87, § 4 repeals 40-4-11.1 NMSA 1978, as enacted by Laws 1988, ch. 87, § 2, relating to child support guidelines, effective June 30, 1991.

Effective dates. - Laws 1988, ch. 87, § 5 makes the act effective March 8, 1988.

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.

§ 40-4-11.2. Grounds for deviation from child support guidelines.

Any deviation from the child support guideline amounts set forth in Section 40-4-11.1 NMSA 1978 shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate. 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.

History: 1978 Comp., § 40-4-11.2, enacted by Laws 1989, ch. 36, § 1.

Effective dates. - Laws 1989, ch. 36 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

§ 40-4-11.3. Review of child support guidelines.

Within four years of the effective date of this section and every four years thereafter, the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 shall be reviewed as to their appropriateness by an appropriate executive or legislative commission or executive department.

History: 1978 Comp., § 40-4-11.3, enacted by Laws 1989, ch. 36, § 2.

Effective dates. - Laws 1989, ch. 36 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

§ 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.

Cross-references. - For notes regarding alimony, see "III. 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, 57 N.M. 776, 264 P.2d 673 (1953).

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, 94 N.M. 345, 610 P.2d 749 (1980).

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, 94 N.M. 345, 610 P.2d 749 (1980).

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, 54 N.M. 194, 217 P.2d 857 (1950).

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, 94 N.M. 345, 610 P.2d 749 (1980).

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, 35 N.M. 601, 4 P.2d 918 (1931) (decided under former law).

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, 54 N.M. 194, 217 P.2d 857 (1950).

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, 89 N.M. 282, 551 P.2d 638 (1976).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Divorce and Separation § 631.
Right to alimony, counsel fees or suit money in case of invalid marriage, 4 A.L.R. 926; 110 A.L.R. 1283.
Earning capacity or prospective earnings of husband as basis of alimony, 6 A.L.R. 192; 139 A.L.R. 207.
Writ of ne exeat to prevent decree for alimony from becoming ineffective, 8 A.L.R. 327.
Statute expressly or impliedly denying power to enforce by process of contempt, order, judgment or decree, for money, as applicable to order or decree for alimony, 8 A.L.R. 1156.
Death of husband as affecting alimony, 18 A.L.R. 1040; 39 A.L.R.2d 1406.
Constitutionality and construction of statute providing for sequestration of property in suit for divorce or separation, 38 A.L.R. 1084.

Bankruptcy as affecting alimony, 39 A.L.R. 1283.
Divorce upon constructive service as affecting power to allow alimony upon subsequently obtaining personal jurisdiction over former husband, 42 A.L.R. 1385; 28 A.L.R.2d 1378.
Liability of alimony for wife's debts, 55 A.L.R. 361; 10 A.L.R. Fed. 881.
Garnishment or attachment of property to enforce order or decree for alimony or allowance in suit for divorce or separation, 56 A.L.R. 841.
Concealment or misrepresentation of financial condition by husband or wife as ground for relief where no alimony given, 152 A.L.R. 190.
Power of court to award alimony in divorce suit as affected by failure of pleading or notice to make a claim, 152 A.L.R. 445.
Propriety and effect of anticipatory provision in decree for alimony in respect of remarriage or other change of circumstances, 155 A.L.R. 609.
Power of court to modify decree for alimony as affected by agreement or release executed after entry decree, 166 A.L.R. 370.
Divorce payment of alimony to trustee, 170 A.L.R. 253.
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.
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.
Income tax as factor in fixing alimony, 51 A.L.R.3d 461.
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.
27B C.J.S. Divorce § 398; 42 C.J.S. Husband and Wife § 625.

§ 40-4-13. Money allowance to constitute lien on real estate.

The decree making the allowance for alimony to either spouse shall be a lien on the real estate of the other spouse from the date of filing for record a certified copy of the decree in the office of the county clerk of each county where any of the property is situated.

History: 1941 Comp., § 25-717, enacted by Laws 1947, ch. 16, § 2; 1953 Comp., § 22-7-14; Laws 1973, ch. 319, § 10.

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, 34 N.M. 98, 278 P. 202 (1929) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Divorce and Separation §§ 774 to 782.
Right of wife to dispose of property awarded to her as support for herself and child, 8 A.L.R. 651.
Decree for payment for support or alimony as a lien or the subject of declaration of lien, 59 A.L.R.2d 656.
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 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.

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. Money allowance to children to constitute lien on real and personal property.

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 party who must furnish the child support from the date of filing for record a certified copy of the decree in the office of the county clerk of each county where any of the property may be situated.

History: 1941 Comp., § 25-719, enacted by Laws 1947, ch. 16, § 4; 1953 Comp., § 22-7-16; Laws 1985, ch. 105, § 15.

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, 76 N.M. 474, 416 P.2d 144 (1966).

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.

Cross-references. - As to execution and foreclosure, see 39-4-1 NMSA 1978 et seq.

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.

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. - Inherent power of court to secure future payment of alimony and support money, 165 A.L.R. 1243.
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.

Compiler's notes. - Laws 1901, ch. 62, §§ 28 and 29, referred to in this section, were repealed by Laws 1947, ch. 16, § 10.

"Effective date of this act". - 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.

Cross-references. - As to execution and foreclosure, see 39-4-1 NMSA 1978 et seq. As to attachment and garnishment, see 42-9-1 NMSA 1978 et seq.

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, 100 N.M. 424, 671 P.2d 1135 (1983).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 100 N.M. 424, 671 P.2d 1135 (1983).

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, 103 N.M. 157, 703 P.2d 934 (Ct. App. 1985).

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, 82 N.M. 324, 481 P.2d 403 (1971).

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. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 89 N.M. 769, 558 P.2d 38 (1977).

Court's 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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

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, 89 N.M. 235, 549 P.2d 1070 (1976).

Thus, court obliged to give full force and effect to accrued support. - Where the trial court found that $3900 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 $1500 and deferred payment on the remaining $2400, 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 $3900 in delinquent alimony and made a

finding on delinquent child support. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

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 §§ 749 to 816.
Present inability to pay as defense to contempt proceedings to enforce payment of past installments of alimony, nonpayment of which was inexcusable, 9 A.L.R. 265.
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.

Repeals. - Laws 1985, ch. 105, § 21 repeals 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 provisions of former sections, see 1983 Replacement Pamphlet. For present comparable provisions, see Article 4A of Chapter 40.

§ 40-4-20. Failure to divide property on dissolution of marriage.

The failure to divide the property on dissolution of marriage 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, which could have been litigated in the original proceeding for dissolution of the marriage.

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.

Cross-references. - As to proceeding for division of property, see 40-4-3 NMSA 1978.

Property divided pursuant to this section must be divided in an independent action. Lewis v. Lewis, 106 N.M. 105, 739 P.2d 974 (Ct. App. 1987).

Where 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, 79 N.M. 494, 445 P.2d 97 (1968).

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, 105 N.M. 139, 730 P.2d 1 (Ct. App. 1986).

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, 95 N.M. 789, 626 P.2d 1286 (1981).

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, 68 N.M. 258, 360 P.2d 920 (1961) (decided under former law).

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, 68 N.M. 258, 360 P.2d 920 (1961).

If rights were community property prior to divorce, such rights, after divorce, are owned as tenants in common. Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967).

Existing present interest in 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, 44 N.M. 214, 100 P.2d 908 (1940); Beals v. Ares, 25 N.M. 459, 185 P. 780 (1919).

Wife's interest in community property not affected by adultery. Beals v. Ares, 25 N.M. 459, 185 P. 780 (1919).

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, 89 N.M. 340, 552 P.2d 471 (1976).

Since policy was community property prior to divorce, the parties owned the policy as tenants in common after the divorce. Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967).

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, 77 N.M. 683, 427 P.2d 36 (1967).

Where 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, 77 N.M. 683, 427 P.2d 36 (1967).

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, 103 N.M. 761, 713 P.2d 1017 (Ct. App. 1986).

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, 106 N.M. 105, 739 P.2d 974 (Ct. App. 1987).

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, 106 N.M. 105, 739 P.2d 974 (Ct. App. 1987).

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, 105 N.M. 383, 733 P.2d 14 (Ct. App. 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, 103 N.M. 761, 713 P.2d 1017 (Ct. App. 1986).

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, 95 N.M. 789, 626 P.2d 1286 (1981) (but see Espinda v. Espinda, 96 N.M. 712, 634 P.2d 1264 (1981), holding nondisability military retirement pay to be separate property of spouse entitled to receive it).

New action to modify property division. - Even though the court which entered the original divorce decree no longer had jurisdiction under Rule 1-060, 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, 103 N.M. 327, 706 P.2d 869 (Ct. App. 1985).

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.
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.

Meaning of "this act". - 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.

§ 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 1-053A 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;

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, 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; and

(4) public assistance payments;

F. "notice of delinquency" means the notice of delinquency as provided for in Section 4 [40-4A-4 NMSA 1978] of the Support Enforcement Act;

G. "notice to withhold income" means a notice which 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; provided, however, a foreign order must be certified and filed in the registry of foreign support orders established pursuant to Section 40-6-36 NMSA 1978; 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 said support;

(3) payment of delinquency; or

(4) reimbursement of said 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;

M. "public office" means the elected official or state or local agency which is responsible by law for enforcement or collection of payment under an order for support including, but not limited to, district attorneys, the department and the clerk of the district court.

History: Laws 1985, ch. 105, § 2.

Cross-references. - As to the human services department, see 9-8-1 NMSA 1978 et seq. As to district court clerks, see 34-6-19 NMSA 1978. As to district attorneys, see N.M. Const., art. VI, § 24 and 36-1-1 NMSA 1978 et seq.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

§ 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 in an amount equal to at least one month's support obligation, the obligee or public office may prepare and serve upon the obligor a copy of a verified notice of delinquency together with a form petition to stay service of the notice to withhold income, as provided for in Section 7 [40-4A-7 NMSA 1978] of the Support Enforcement Act.

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 avoid income withholding;

(5) state that, unless the obligor complies with the procedures to avoid 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 said notice by prepaid certified mail addressed to the obligor at his or her 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.

§ 40-4A-5. Notice to withhold income.

A. 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.

B. If the procedure to avoid income withholding has not been instituted, the obligee or public office shall file an affidavit with the clerk of the district court showing that:

(1) notice of delinquency has been duly served upon the obligor; and

(2) the procedure to avoid income withholding pursuant to Section 40-4A-7 NMSA 1978 has occurred.

C. Upon filing of the affidavit required by Subsection B 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.

D. A conformed copy of the notice to withhold income shall be mailed to the obligor at his last known address.

E. 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 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 a public office to ensure accurate recordkeeping.

F. 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.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

§ 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.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

§ 40-4A-7. Procedure to avoid income withholding.

The obligor may prevent a notice to withhold income from being served by filing a petition to stay service with the clerk of the district court within twenty days after service of the notice of delinquency. Grounds for the petition to stay service 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 to stay service. The court shall hold such hearing pursuant to the provisions of Section 40-4A-9 NMSA 1978.

History: Laws 1985, ch. 105, § 7; 1987, ch. 26, § 2.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

§ 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 which is payable to the obligor after expiration of fourteen days following service of the notice to withhold income and shall pay the amount withheld to the designated public office on the date payment otherwise would have been made to the obligor. 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 designated public office.

C. Upon request, the payor shall inform the obligee of the last known address of the obligor and any subsequent payor, if known.

D. 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 witholding [withholding] against a single obligor pursuant to the Support Enforcement Act, 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 D of Section 9 [40-4A-9 NMSA 1978] of the Support Enforcement Act.

E. No payor shall discharge, discipline, refuse to hire or otherwise penalize any obligor because of the duty to withold [withhold] income.

F. 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.

History: Laws 1985, ch. 105, § 8.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

§ 40-4A-9. Petitions to stay service or to modify, suspend or terminate notice of withholding.

A. When an obligor files a petition to stay service 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, obligee or 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. At any time, an obligor may petition the court 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.

D. Where there is more than one notice to withhold income against a single obligor pursuant to the Support Enforcement Act, an obligee may seek an order reapportioning the distribution of the obligor's withheld income upon notice to all interested parties.

History: 1978 Comp., § 40-4A-9, enacted by Laws 1985, ch. 105, § 9; 1987, ch. 26, § 3.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

§ 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, 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.

C. Any public office which 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. 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.

History: Laws 1985, ch. 105, § 10; 1987, ch. 26, § 4.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

§ 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 E of Section 8 [40-4A-8 NMSA 1978] of that act, or otherwise fails to comply with any duty imposed by that act, the court, upon due notice and hearing:

A. shall enter judgment 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.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

§ 40-4A-12. Interstate withholding.

A. Upon registration of a foreign order for support in the registry of foreign support orders as provided for in Section 40-6-36 NMSA 1978, the clerk of the district court shall docket the case and inform the obligee of this action.

B. Registration of the order for support shall not confer jurisdiction on the courts of this state for any purpose other than income withholding, unless otherwise permitted by law.

C. If the obligor presents evidence which 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 9 [40-4A-9 NMSA 1978] of the Support Enforcement Act.

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.

H. An order of support registered pursuant to Subsection A of Section 12 [Subsection A of this section] of the Support Enforcement Act does not nullify and is not nullified by an order of support made by a court of this state pursuant to any other law or by an order of support made by a court of any other state; provided, however, a registered order of support may be modified or nullified as provided by the law of the originating jurisdiction. Amounts collected by any withholding of income shall be credited against the amounts accruing or accrued for any period under any support orders issued either by this state or by a sister state.

History: Laws 1985, ch. 105, § 12.

§ 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.

§ 40-4A-15. Consumer reporting agencies.

At the request of a consumer reporting agency and upon thirty days [days'] advance notice to the obligor, the department, in accordance with its regulations, may release information regarding the delinquency of an obligor if the delinquency of the obligor exceeds one thousand dollars ($1,000). The department may charge a reasonable fee to the consumer reporting agency.

History: Laws 1985, ch. 105, § 17.

§ 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.

Severability clauses. - Laws 1985, ch. 105, § 20 provides for the severability of the act if any part or application thereof is held invalid.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

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.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

§ 40-4B-2. Purpose.

The purpose of the Child Support Hearing Officer Act [40-4B-1 to 40-4B-10 NMSA 1978] 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.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

Title IV D of the federal Social Security Act. - Title IV D of the federal Social Security Act appears as 42 U.S.C. §§ 651 to 669.

§ 40-4B-3. Definitions.

As used in the Child Support Hearing Officer Act [40-4B-1 to 40-4B-10 NMSA 1978]:

A. "department" means the child support enforcement bureau of the human services department; and

B. "secretary" means the secretary of human services.

History: Laws 1988, ch. 127, § 3.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

§ 40-4B-4. Child support hearing officers; appointment; terms; qualifications; compensation.

A. Five 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 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 [40-4B-1 to 40-4B-10 NMSA 1978] 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. 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.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

Personnel Act. - See 10-9-1 NMSA 1978 and notes thereto.

"Title IV D program". - The phrase "Title IV D program" means a state program adopted pursuant to Title IV D, 42 U.S.C. §§ 651 to 659, of the federal Social Security Act, requiring a state plan and program to enforce child support obligations.

§ 40-4B-5. Reference.

Actions covered under the Child Support Hearing Officer Act [40-4B-1 to 40-4B-10 NMSA 1978] 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 and actions brought to modify existing support obligations; 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.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

"Title IV D program". - See note with same catchline following 40-4B-4 NMSA 1978.

§ 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, the Revised Uniform Reciprocal Enforcement of Support Act [40-6-1 to 40-6-41 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.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

Support Enforcement Act. - See 40-4A-1 NMSA 1978 and notes thereto.

"Title IV D agency". - The phrase "Title IV D agency" means an agency established pursuant to Title IV D, 42 U.S.C. §§ 651 to 669, of the federal Social Security Act to administer a state plan and program to enforce child support obligations. See 40-4B-5A NMSA 1978.

The bracketed "D" following "Subsection C" in the first sentence of Subsection E, was added by the compiler as the apparent intended reference.

§ 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.

Cross-references. - As to the New Mexico Rules of Civil Procedure, see Judicial Pamphlet 1.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

§ 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 must 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 record 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.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

§ 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.

Cross-references. - As to the Rules of Appellate Procedure, see Judicial Pamphlet 12.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

§ 40-4B-10. Child support standards and guidelines.

In establishing any support obligations pursuant to the Child Support Hearing Officer Act [40-4B-1 to 40-4B-10 NMSA 1978], 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.

Effective dates. - Laws 1988, ch. 127 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 18, 1988.

Article 5

Illegitimacy and Support

(Repealed by Laws 1985, ch. 105, § 21; Laws 1986, ch. 47, § 25.)

Sec.
40-5-1 to 40-5-26. Repealed.

§§ 40-5-1 to 40-5-26. Repealed.

Repeals. - Laws 1985, ch. 105, § 21 and Laws 1986, ch. 47, § 25 repeal 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. For provisions of former sections, see 1983 Replacement Pamphlet. For present comparable provisions, see 40-11-1 through 40-11-23 NMSA 1978.

Article 6

Reciprocal Enforcement of Support

§ 40-6-1. Purpose of act.

The purpose of this act [40-6-1 to 40-6-41 NMSA 1978] is to improve and extend by reciprocal legislation the enforcement of duties of support.

History: 1953 Comp., § 22-19-28, enacted by Laws 1969, ch. 242, § 1.

No denial of due process or equal protection under this article. - 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 section, 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, 80 N.M. 185, 453 P.2d 206 (1969).

As 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, 80 N.M. 185, 453 P.2d 206 (1969).

Law reviews. - For article, "Child Support Enforcement: The New Mexico Experience," see 9 N.M.L. Rev. 25 (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 article, "Arbitration of Domestic Relations Disputes in New Mexico," see 16 N.M.L. Rev. 321 (1986).

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. - 23 Am. Jur. 2d Desertion and Nonsupport §§ 117 to 149.
State statutes providing for reciprocal enforcement of duty to support dependents, 42 A.L.R.2d 768.
Stepparent's postdivorce duty to support stepchild, 44 A.L.R.4th 520.
42 C.J.S. Husband and Wife § 630; 67A C.J.S. Parent and Child §§ 165 to 177.

§ 40-6-2. Definitions.

As used in this act [40-6-1 to 40-6-41 NMSA 1978]:

A. "state" includes a state, territory or possession of the United States, the District of Columbia, the commonwealth of Puerto Rico and any foreign jurisdiction in which this or a substantially similar reciprocal law has been enacted;

B. "initiating state" means a state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced, and "initiating court" means the court in which a proceeding is commenced;

C. "responding state" means a state in which any responsive proceeding pursuant to the proceeding in the initiating state is commenced, and "responding court" means the court in which the responsive proceeding is commenced;

D. "court" means the district court of this state, and when the context requires means the court of any other state as defined in a substantially similar reciprocal law;

E. "law" includes both common and statutory law;

F. "duty of support" means a duty of support whether imposed or imposable by law or by order, decree or judgment of any court, whether interlocutory or final or whether incidental to an action for divorce, separation, separate maintenance or otherwise, and includes the duty to pay arrearages of support past due and unpaid;

G. "obligor" means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced;

H. "obligee" means a person, including a state or political subdivision, to whom a duty of support is owed or a person, including a state or political subdivision, that has commenced a proceeding for enforcement of an alleged duty of support or for registration of a support order. It is immaterial whether the person to whom a duty of support is owed is a recipient of public assistance;

I. "governor" includes any person performing the functions of governor or the executive authority of any state covered by this act;

J. "support order" means any judgment, decree or order of support in favor of an obligee, whether temporary or final or subject to modification, revocation or remission, regardless of the kind of action or proceeding in which it is entered;

K. "rendering state" means a state in which the court has issued a support order for which registration is sought or granted in the court of another state;

L. "prosecuting attorney" means the public official in the appropriate place who has the duty to enforce criminal laws relating to the failure to provide for the support of any person;

M. "registering court" means any court of this state in which a support order of a rendering state is registered; and

N. "register" means to file in the registry of foreign support orders.

History: 1953 Comp., § 22-19-29, enacted by Laws 1969, ch. 242, § 2.

"Duty of support". - The duty to support a spouse by way of alimony is a duty of support for purposes of this article. State ex rel. Benzing v. Benzing, 104 N.M. 129, 717 P.2d 105 (Ct. App. 1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 130.

§ 40-6-3. Remedies additional to those now existing.

The remedies herein provided are in addition to, and not in substitution for, any other remedies.

History: 1953 Comp., § 22-19-30, enacted by Laws 1969, ch. 242, § 3.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 135.

§ 40-6-4. Extent of duties of support.

Duties of support arising under the law of this state, when applicable under Section 7 [40-6-7 NMSA 1978], bind the obligor present in this state regardless of the presence or residence of the obligee.

History: 1953 Comp., § 22-19-31, enacted by Laws 1969, ch. 242, § 4.

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, 80 N.M. 185, 453 P.2d 206 (1969).

Law of state where respondent present applicable. - Under this section 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 of the petitioner-obligee. State ex rel. Alleman v. Shoats, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 131.
Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

§ 40-6-5. Interstate rendition.

The governor of this state may:

A. demand of the governor of another state the surrender of a person found in that state who is charged criminally in this state with failing to provide for the support of any person; or

B. surrender on demand by the governor of another state a person found in this state who is charged criminally in that state with failing to provide for the support of any person. Provisions for extradition of criminals not inconsistent with this act [40-6-1 to 40-6-41 NMSA 1978] apply to the demand even if the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and has not fled therefrom. The demand, the oath and any proceedings for extradition pursuant to this section need not state that the person whose surrender is demanded has fled from justice or, at the time of the commission of the crime, was in the demanding state.

History: 1953 Comp., § 22-19-32, enacted by Laws 1969, ch. 242, § 5.

Cross-references. - As to extradition generally, see 31-4-1 NMSA 1978 et seq.

Extradition provisions apply to reciprocal support provisions. - The real effect of this section is 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. 1953-54 Op. Att'y Gen. No. 5713 (rendered under former law).

§ 40-6-6. Conditions of interstate rendition.

A. Before making the demand upon the governor of another state for the surrender of a person charged criminally in this state with failing to provide for the support of a person, the governor of this state may require any prosecuting attorney of this state to satisfy him that at least sixty days prior thereto the obligee initiated proceedings for support under this act [40-6-1 to 40-6-41 NMSA 1978] or that any proceeding would be of no avail.

B. If, under a substantially similar act, the governor of another state makes a demand

upon the governor of this state for the surrender of a person charged criminally in that state with failure to provide for the support of a person, the governor may require any prosecuting attorney to investigate the demand and to report to him whether proceedings for support have been initiated or would be effective. If it appears to the governor that a proceeding would be effective but has not been initiated, he may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

C. If proceedings have been initiated and the person demanded has prevailed therein, the governor may decline to honor the demand. If the obligee prevailed and the person demanded is subject to a support order, the governor may decline to honor the demand if the person demanded is complying with the support order.

History: 1953 Comp., § 22-19-33, enacted by Laws 1969, ch. 242, § 6.

§ 40-6-7. Choice of law.

Duties of support applicable under this act [40-6-1 to 40-6-41 NMSA 1978] are those imposed under the laws of any state where the obligor was present for the period during which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

History: 1953 Comp., § 22-19-34, enacted by Laws 1969, ch. 242, § 7.

Law of state where respondent present applicable. - Under 40-6-4 NMSA 1978 and this section, 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 of the petitioner-obligee. State ex rel. Alleman v. Shoats, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984).

No absolute right of obligee to choose applicable law. - This choice of law provision was intended to prevent the obligee from having the absolute right to choose the applicable law as her interest might dictate. Altman v. Altman, 101 N.M. 380, 683 P.2d 62 (Ct. App. 1984).

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

§ 40-6-8. Remedies of state or political subdivision furnishing support.

If a state or a political subdivision furnishes support to an individual obligee, it has the same right to initiate a proceeding under this act [40-6-1 to 40-6-41 NMSA 1978] as the individual obligee for the purpose of securing reimbursement for support furnished and of obtaining continued support.

History: 1953 Comp., § 22-19-35, enacted by Laws 1969, ch. 242, § 8.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 134.

§ 40-6-9. How duties of support enforced.

All duties of support, including the duty to pay arrearages, are enforceable by a proceeding under this act [40-6-1 to 40-6-41 NMSA 1978], including a proceeding for civil contempt, and the defense that the parties are immune to suit because of their relationship as husband and wife or parent and child is not available to the obligor.

History: 1953 Comp., § 22-19-36, enacted by Laws 1969, ch. 242, § 9.

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, 84 N.M. 69, 499 P.2d 691 (1972).

Law reviews. - For article, "Child Support Enforcement: The New Mexico Experience," see 9 N.M.L. Rev. 25 (1978-79).

§ 40-6-10. Jurisdiction.

Jurisdiction of any proceeding under this act [40-6-1 to 40-6-41 NMSA 1978] is vested in the district court.

History: 1953 Comp., § 22-19-37, enacted by Laws 1969, ch. 242, § 10.

All that is needed for proper jurisdiction in proceeding under act is 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, 84 N.M. 69, 499 P.2d 691 (1972).

Status as Indian not shield where significant contacts with other jurisdictions. - 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, 84 N.M. 69, 499 P.2d 691 (1972).

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, 84 N.M. 69, 499 P.2d 691 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport §§ 132, 133, 136.

§ 40-6-11. Contents and filing of petition for support; venue.

A. The petition shall be verified and shall state the name and, so far as known to the obligee, the address and circumstances of the obligor and the persons for whom support is sought and all other pertinent information. The obligee may include in or attach to the petition any information which may help in locating or identifying the obligor, including a photograph of the obligor, a description of any distinguishing marks on his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints and his social security number.

B. The petition may be filed in the appropriate court of any state in which the obligee resides. The court shall not decline or refuse to accept and forward the petition on the ground that it should be filed with some other court of this or any other state where there is pending another action for divorce, separation, annulment, dissolution, habeas corpus, adoption or custody between the same parties or where another court has already issued a support order in some other proceeding and has retained jurisdiction for its enforcement.

History: 1953 Comp., § 22-19-38, enacted by Laws 1969, ch. 242, § 11.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport §§ 139, 140.

§ 40-6-12. Officials to represent obligee.

If this state is acting as an initiating state, the prosecuting attorney shall represent the obligee in any proceeding under this act [40-6-1 to 40-6-41 NMSA 1978]. If the prosecuting attorney neglects or refuses to represent the obligee, the attorney general may undertake the representation.

History: 1953 Comp., § 22-19-39, enacted by Laws 1969, ch. 242, § 12.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport §§ 139, 140.

§ 40-6-13. Petition for a minor.

A petition on behalf of a minor obligee may be executed and filed by a person having legal custody of the minor without appointment as guardian ad litem.

History: 1953 Comp., § 22-19-40, enacted by Laws 1969, ch. 242, § 13.

Cross-references. - As to age of majority, see 28-6-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 140.

§ 40-6-14. Duty of initiating court.

If the initiating court finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property, it shall so certify and cause three copies of the petition and its certificate and one copy of this act [40-6-1 to 40-6-41 NMSA 1978] to be sent to the responding court. Certification shall be in accordance with the requirements of the initiating state. If the name and address of the responding court is unknown, and the responding state has an information agency comparable to that established in the initiating state, it shall cause the copies to be sent to the state information agency or other proper official of the responding state with a request that the agency or official forward them to the proper court and that the court of the responding state acknowledge their receipt to the initiating court.

History: 1953 Comp., § 22-19-41, enacted by Laws 1969, ch. 242, § 14.

Duty of support need not have been adjudicated. - Reciprocal Enforcement of Support Act authorizes both finding and enforcement of a duty of child support by responding state, even where a duty of support has not been previously adjudicated in the initiating state. State ex rel. Alleman v. Shoats, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984).

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, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 141.

§ 40-6-15. Costs and fees.

An initiating court shall require payment of neither a filing fee nor other costs from the obligee but may request the responding court to collect fees and costs from the obligor. A responding court shall not require payment of a filing fee or other costs from the obligee, but it may direct that all fees and costs requested by the initiating court and incurred in this state when acting as a responding state, including fees for filing of pleadings, service of process, seizure of property, stenographic or duplication service or other service supplied to the obligor, be paid in whole or in part by the obligor. These costs or fees shall not have priority over amounts due to the obligee.

History: 1953 Comp., § 22-19-42, enacted by Laws 1969, ch. 242, § 15.

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, 99 N.M. 92, 654 P.2d 545 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 149.

§ 40-6-16. Jurisdiction by arrest.

If the court of this state believes that the obligor may flee, it may:

A. as an initiating court, request in its certificate that the responding court obtain the body of the obligor by appropriate process; or

B. as a responding court, obtain the body of the obligor by appropriate process. Thereupon it may release him upon his own recognizance or upon his giving a bond in an amount set by the court to assure his appearance at the hearing.

History: 1953 Comp., § 22-19-43, enacted by Laws 1969, ch. 242, § 16.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 148.

§ 40-6-17. State information agency.

A. The human services department is designated as the state information agency under this act [40-6-1 to 40-6-41 NMSA 1978], and it shall:

(1) compile a list of the courts and their addresses in this state having jurisdiction under this act and transmit it to the state information agency of every other state which has adopted this or a substantially similar act, and upon the adjournment of each session of the legislature the agency shall distribute copies of any amendments to the act and a statement of their effective date to all other state information agencies;

(2) maintain a register of lists of courts received from other states and transmit copies thereof promptly to every court in this state having jurisdiction under this act; and

(3) forward to the court in this state which has jurisdiction over the obligor or his property petitions, certificates and copies of the act it receives from courts or information agencies of other states.

B. If the state information agency does not know the location of the obligor or his property in the state, and no state location service is available, it shall use all means at its disposal to obtain this information, including examination of official records in the state and other sources such as telephone directories, real property records, vital statistics records, police records, requests for the name and address from employers who are able or willing to cooperate, records of motor vehicle license offices, requests made to the tax offices, both state and federal, where such offices are able to cooperate and requests made to the social security administration as permited [permitted] by the Social Security Act, as amended.

C. After the deposit of three copies of the petition and certificate and one copy of the act of the initiating state with the clerk of the appropriate court, if the state information agency knows or believes that the prosecuting attorney is not prosecuting the case diligently, it shall inform the attorney general who may undertake the representation.

History: 1953 Comp., § 22-19-44, enacted by Laws 1969, ch. 242, § 17; 1977, ch. 252, § 25.

Cross-references. - As to the human services department, see 9-8-1 NMSA 1978 et seq.

Social Security Act. - The federal Social Security Act, referred to in Subsection B, appears as 42 U.S.C. § 301 et seq.

§ 40-6-18. Duty of court and officials of this state as responding state.

A. After the responding court receives copies of the petition, certificate and act from the initiating court, the clerk of the court shall docket the case and notify the prosecuting attorney of his action.

B. The prosecuting attorney shall prosecute the case diligently. He shall take all action necessary in accordance with the laws of this state to enable the court to obtain jurisdiction over the obligor or his property and shall request the court to set a time and place for a hearing and give notice thereof to the obligor in accordance with law.

C. If the prosecuting attorney neglects or refuses to represent the obligee, the attorney general may undertake the representation.

History: 1953 Comp., § 22-19-45, enacted by Laws 1969, ch. 242, § 18.

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, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984).

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, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984).

§ 40-6-19. Further duties of court and officials in responding state.

A. The prosecuting attorney, on his own initiative, shall use all means at his disposal to locate the obligor or his property, and if, because of inaccuracies in the petition or otherwise, the court cannot obtain jurisdiction, the prosecuting attorney shall inform the court of what he has done and request the court to continue the case pending receipt of more accurate information or an amended petition from the initiating court.

B. If the obligor or his property is not found in the county, and the prosecuting attorney discovers by any means that the obligor or his property may be found in another county of this state or in another state, he shall so inform the court, and thereupon the clerk of the court shall forward the documents received from the court in the initiating state to a

court in the other county or to a court in the other state or to the information agency or other proper official of the other state with a request that the documents be forwarded to the proper court. All powers and duties provided by this act [40-6-1 to 40-6-41 NMSA 1978] apply to the recipient of the documents so forwarded. If the clerk of a court of this state forwards documents to another court, he shall forthwith notify the initiating court.

C. If the prosecuting attorney has no information as to the location of the obligor or his property, he shall so inform the initiating court.

History: 1953 Comp., § 22-19-46, enacted by Laws 1969, ch. 242, § 19.

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, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984).

§ 40-6-20. Hearing and continuance.

If the obligee is not present at the hearing and the obligor denies owing the duty of support alleged in the petition or offers evidence constituting a defense, the court shall, upon request of either party, continue the hearing to permit evidence relative to the duty to be adduced by either party by deposition or by appearing in person before the court. The court may designate the judge of the initiating court as a person before whom a deposition may be taken.

History: 1953 Comp., § 22-19-47, enacted by Laws 1969, ch. 242, § 20.

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, 99 N.M. 92, 654 P.2d 545 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 143.

§ 40-6-21. Immunity from criminal prosecution.

If, at the hearing, the obligor is called for examination as an adverse party and he declines to answer upon the ground that his testimony may tend to incriminate him, the court may require him to answer, in which event he is immune from criminal prosecution with respect to matters revealed by his testimony except for perjury committed in this testimony.

History: 1953 Comp., § 22-19-48, enacted by Laws 1969, ch. 242, § 21.

§ 40-6-22. Rules of evidence.

In any hearing for the civil enforcement of this act [40-6-1 to 40-6-41 NMSA 1978], the court shall be governed by the rules of evidence applicable to a civil action in the district court. If the action is based on a support order issued by another court, a certified copy of the order shall be received as evidence of the duty of support, subject only to any defenses available to an obligor with respect to paternity or available to a defendant in an action or proceeding to enforce a foreign money judgment. The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court.

History: 1953 Comp., § 22-19-49, enacted by Laws 1969, ch. 242, § 22.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 143.

§ 40-6-23. Order of support.

If the responding court finds a duty of support, it may order the obligor to furnish support or reimbursement therefor and subject the property of the obligor to the order. Support orders made pursuant to this act [40-6-1 to 40-6-41 NMSA 1978] shall require that payments be made to the clerk of the court of the responding state. The court and prosecuting attorney of any county where the obligor is present or has property have the same powers and duties to enforce the order as have those of the county where it was first issued. If enforcement is impossible or cannot be completed in the county where the order was issued, the prosecuting attorney shall send a certified copy of the order to the prosecuting attorney of any county where it appears that proceedings to enforce the order would be effective. The prosecuting attorney to whom the certified copy of the order is forwarded shall proceed with enforcement and report the results of the proceedings to the court first issuing the order.

History: 1953 Comp., § 22-19-50, enacted by Laws 1969, ch. 242, § 23.

Responding state may make independent finding as to necessary support. - The responding state in a support proceeding 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, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport §§ 145, 147.

§ 40-6-24. Responding court to transmit copies to initiating court.

The responding court shall cause a copy of all support orders to be sent to the initiating court.

History: 1953 Comp., § 22-19-51, enacted by Laws 1969, ch. 242, § 24.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 146.

§ 40-6-25. Additional powers of responding court.

In addition to the foregoing powers, a responding court may subject the obligor to any terms and conditions it deems proper to assure compliance with its orders, and in particular to:

A. require the obligor to furnish a cash deposit or a bond of a character and amount it deems proper to assure payment of any amount due;

B. require the obligor to report personally and to make payments at specified intervals to the clerk of the court; and

C. punish under the power of contempt the obligor who violates any order of the court.

History: 1953 Comp., § 22-19-52, enacted by Laws 1969, ch. 242, § 25.

§ 40-6-26. Paternity.

If the obligor asserts as a defense that he is not the father of the child for whom support is sought and it appears to the court that the defense is not frivolous, and if both of the parties are present at the hearing or the proof required in the case is such that the presence of either or both of the parties is not necessary, the court may adjudicate the paternity issue. Otherwise the court may adjourn the hearing until the paternity issue has been adjudicated.

History: 1953 Comp., § 22-19-53, enacted by Laws 1969, ch. 242, § 26.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

§ 40-6-27. Additional duties of responding court.

Through the clerk of the court, the responding court shall:

A. transmit to the initiating court any payment made by the obligor pursuant to any order of the court or otherwise; and

B. furnish to the initiating court upon request a certified statement of all payments made by the obligor.

History: 1953 Comp., § 22-19-54, enacted by Laws 1969, ch. 242, § 27.

§ 40-6-28. Additional duty of initiating court.

An initiating court shall receive and disburse forthwith all payments made by the obligor or sent by the responding court. This duty may be carried out through the clerk of the court.

History: 1953 Comp., § 22-19-55, enacted by Laws 1969, ch. 242, § 28.

§ 40-6-29. Proceedings not to be stayed.

A responding court shall not stay the proceeding or refuse a hearing under this act [40-6-1 to 40-6-41 NMSA 1978] because of any pending or prior action or proceeding for divorce, separation, annulment, dissolution, habeas corpus, adoption or custody in this or any other state. The court shall hold a hearing and may issue a support order pendente lite, and in aid thereof may require the obligor to give a bond for the prompt prosecution of the pending proceeding. If the other action or proceeding is concluded before the hearing in the instant proceeding, and if the judgment therein provides for the support demanded in the petition being heard, the court must conform its support order to the amount allowed in the other action or proceeding. Thereafter the court shall not stay enforcement of its support order because of the retention of jurisdiction for enforcement purposes by the court in the other action or proceeding.

History: 1953 Comp., § 22-19-56, enacted by Laws 1969, ch. 242, § 29.

§ 40-6-30. Application of payments.

A support order made by a court of this state pursuant to this act [40-6-1 to 40-6-41 NMSA 1978] shall neither nullify nor be nullified by a support order made by a court of this state pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court. Amounts paid for a particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this state.

History: 1953 Comp., § 22-19-57, enacted by Laws 1969, ch. 242, § 30.

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.

§ 40-6-31. Effect of participation in proceeding.

Participation in any proceeding under this act [40-6-1 to 40-6-41 NMSA 1978] does not confer upon any court jurisdiction over any of the parties thereto in any other proceeding.

History: 1953 Comp., § 22-19-58, enacted by Laws 1969, ch. 242, § 31.

§ 40-6-32. Intrastate application.

This act [40-6-1 to 40-6-41 NMSA 1978] applies if both the obligee and the obligor are in this state but in different counties. If the court of the county in which the petition is filed finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and finds that a court of another county in this state may obtain jurisdiction over the obligor or his property, the clerk of the court shall send the petition and a certification of the findings to the court of the county in which the obligor or his property is found. The clerk of the court of the county receiving these documents shall notify the prosecuting attorney of their receipt. The prosecuting attorney and the court in the county to which the copies are forwarded then have duties corresponding to those imposed upon them when acting for the state as a responding state.

History: 1953 Comp., § 22-19-59, enacted by Laws 1969, ch. 242, § 32.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 137.

§ 40-6-33. Appeals.

A. If the attorney general is of the opinion that a support order is erroneous and presents a question of law warranting an appeal in the public interest, he may:

(1) perfect an appeal to the supreme court if the support order was issued by a court of this state; or

(2) if the support order was issued in another state, cause the appeal to be taken to the proper appellate court in the other state.

B. In either case, expenses of appeal shall be paid from funds appropriated to the attorney general.

History: 1953 Comp., § 22-19-60, enacted by Laws 1969, ch. 242, § 33.

Cross-references. - As to appeals generally, see 39-3-1 NMSA 1978 et seq. As to when and how appeals taken, see Rules 12-201 to 12-203 SCRA 1986.

§ 40-6-34. Additional remedies.

If the duty of support is based on a foreign support order, the obligee has the additional remedies provided in Sections 35 through 39 [40-6-35 to 40-6-39 NMSA 1978] of this act.

History: 1953 Comp., § 22-19-61, enacted by Laws 1969, ch. 242, § 34.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 135.

§ 40-6-35. Registration.

The obligee may register the foreign support order in a court of this state in the manner, with the effect and for the purposes herein provided.

History: 1953 Comp., § 22-19-62, enacted by Laws 1969, ch. 242, § 35.

§ 40-6-36. Registry of foreign support orders.

The clerk of the court shall maintain a "registry of foreign support orders" in which he shall file foreign support orders.

History: 1953 Comp., § 22-19-63, enacted by Laws 1969, ch. 242, § 36.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 155.

§ 40-6-37. Official to represent obligee.

If this state is acting either as a rendering state or as a registering state, the prosecuting attorney shall represent the obligee in proceedings under Sections 35 through 39 [40-6-35 to 40-6-39 NMSA 1978] of this act.

History: 1953 Comp., § 22-19-64, enacted by Laws 1969, ch. 242, § 37.

§ 40-6-38. Registration procedure; notice.

A. An obligee seeking to register a foreign support order in a court of this state shall transmit to the clerk of the court:

(1) three certified copies of the order with all modifications thereof;

(2) one copy of the reciprocal enforcement of support act of the state in which the order was made; and

(3) a statement verified and signed by the obligee showing the post office address of the obligee, the last known place of residence and post office address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution and a list of the states in which the order is registered.

B. Upon receipt of these documents, the clerk of the court shall, without payment of a filing fee or other cost to the obligee, file them in the registry of foreign support orders. Such filing constitutes registration under this act [40-6-1 to 40-6-41 NMSA 1978].

C. Promptly upon registration, the clerk of the court shall send by certified or registered mail to the obligor at the address given a notice of the registration with a copy of the registered support order and the post office address of the obligee. He shall also docket the case and notify the prosecuting attorney of his action. The prosecuting attorney shall thereupon proceed diligently to enforce the order.

History: 1953 Comp., § 22-19-65, enacted by Laws 1969, ch. 242, § 38.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 155.

§ 40-6-39. Effect of registration; enforcement procedure.

A. Upon registration, the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a support order of this state and may be enforced and satisfied in like manner.

B. The obligor has twenty days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition, the registered support order is deemed confirmed.

C. At the hearing to enforce the registered support order, the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment, but if he shows to the court that an appeal from the order is pending or will be taken or that a stay of execution has been granted, the court shall stay enforcement of the order until the appeal is concluded, the time for appeal has expired or the order is vacated, upon satisfactory proof that the obligor has furnished security for payment of the support ordered as required by the rendering state. If he shows to the court any ground upon which enforcement of a support order of this state may be stayed, the court shall stay enforcement of the order for an appropriate period upon the obligor's furnishing the same security for payment of the support ordered that is required for a support order of this state.

History: 1953 Comp., § 22-19-66, enacted by Laws 1969, ch. 242, § 39.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport § 155.

§ 40-6-40. Uniformity of interpretation.

This act [40-6-1 to 40-6-41 NMSA 1978] shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: 1953 Comp., § 22-19-67, enacted by Laws 1969, ch. 242, § 40.

§ 40-6-41. Short title.

This act [40-6-1 to 40-6-41 NMSA 1978] may be cited as the "Revised Uniform Reciprocal Enforcement of Support Act."

History: 1953 Comp., § 22-19-68, enacted by Laws 1969, ch. 242, § 41.

Severability clauses. - Laws 1969, ch. 242, § 42, provides for the severability of the act if any part or application thereof is held invalid.

Article 7

Adoption

§§ 40-7-1 to 40-7-24. Repealed.

Repeals. - Laws 1981, ch. 171, § 12, repeals 40-7-20 NMSA 1978, as enacted by Laws 1975, ch. 349, § 3, relating to the minimum requirements for licensing child placement agencies, and repeals 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. For provisions of former sections, see 1978 Original Pamphlet.

Laws 1981, ch. 171, contains no effective date provision, but was enacted at the session which adjourned on March 21, 1981. See N.M. Const., art. IV, § 23.

Laws 1985, ch. 194, § 39 repeals 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 repeals 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. For provisions of former sections, see 1978 Original Pamphlet and 1984 Supplement. For present comparable provisions, see 40-7-29 to 40-7-61 NMSA 1978.

§§ 40-7-25 to 40-7-28. Recompiled.

Recompilations. - Laws 1985, ch. 194, § 38 recompiles 40-7-25 to 40-7-28 NMSA 1978 as 40-7-36 to 40-7-39 NMSA 1978; however, the sections have been 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. Short title.

Sections 1 through 35 [40-7-29 to 40-7-61 NMSA 1978] of this act may be cited as the "Adoption Act".

History: Laws 1985, ch. 194, § 1.

Compiler's notes. - Sections 34 and 35 of ch. 194, Laws 1985, appear as notes following 40-7-61 NMSA 1978.

Annotations to decisions under similar provisions of prior adoption acts appear in the annotations to this section.

The purpose of statutes for adoption is to make provision for the welfare of children and the legislation should be liberally construed to effect that purpose. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Adoption statutes accorded liberal construction. - Adoption statutes are enacted in favor of humanity and are to be accorded a liberal construction by the courts. Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308 (1946).

So as to promote welfare of children. - The proper construction of New Mexico adoption statutes is such as will promote the welfare of children. Nevelos v. Railston, 65 N.M. 250, 335 P.2d 573 (1959).

Jurisdictional requirements to be strictly followed. - The power to adopt children was unknown to the common law; it is a creation of statute which may prescribe the conditions under which adoption may be legally effected. Thus, the jurisdictional requirements of the statute for this special proceeding must be strictly followed. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Law reviews. - 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. - 2 Am. Jur. 2d Adoption §§ 3 to 7.
Required parties in adoption proceedings, 48 A.L.R.4th 860.
Action for wrongful adoption based on misrepresentation of child's mental or physical condition of parentage, 56 A.L.R.4th 375.
2 C.J.S. Adoption of Persons §§ 5 to 9.

§ 40-7-30. Definitions.

As used in the Adoption Act [40-7-29 to 40-7-61 NMSA 1978]:

A. "adoptee" means any person who is the subject of an adoption petition;

B. "adult" means any individual who is not a minor;

C. "agency" means any person certified, licensed or otherwise specially empowered by law to place minors in homes in this or any other state for the purpose of adoption;

D. "consent" means a document signed by a biological parent whereby the parent grants his consent to the adoption of his child by another or a document whereby the department or an agency grants its consent to the adoption of a child in its custody;

E. "court" means the children's court division of the district court;

F. "custody" means legal custody of an individual;

G. "department" means the human services department;

H. "identification" means the name, date and place of birth of the minor and the full name of one or both parents, together with a valid address or telephone number where the person may be contacted;

I. "minor" means an individual under the age of eighteen years;

J. "parent" means the biological or adoptive mother or the biological, presumed or adoptive father of the adoptee;

K. "parental rights" means all rights of a parent with reference to a minor, including parental right to control, to withhold consent to an adoption or to receive notice of a hearing on a petition for adoption;

L. "person" means any individual, corporation, government or governmental subdivision or agency, trust, partnership or association or any other legal entity;

M. "petitioner" means any person who signs a petition for placement or a petition to adopt under the Adoption Act;

N. "placement" means the selection of a family for an adoptee or matching of a family with an adoptee and physical transfer of the adoptee to the family;

O. "relinquishment" means the document by which a parent relinquishes his parental rights to the department or an agency to enable placement of his child for adoption; and

P. "resident" means a person who prior to filing an adoption petition has lived in the state for at least six months.

History: Laws 1985, ch. 194, § 2; 1989, ch. 341, § 1.

The 1989 amendment, effective June 16, 1989, added present Subsection D; redesignated former Subsections D to L as present Subsections E to M, inserting in Subsection M "for placement or a petition"; added present Subsections N and O; and redesignated former Subsection M as present Subsection P, therein deleting "is domiciled in the state and" preceding "prior to" and substituting "six months" for "ninety days".

§ 40-7-31. Jurisdiction.

The court shall have original jurisdiction over proceedings arising under the Adoption Act [40-7-29 to 40-7-61 NMSA 1978].

History: Laws 1985, ch. 194, § 3.

§ 40-7-32. Venue.

A. A petition for adoption may be filed in any county where:

(1) a petitioner resides or is in the military service;

(2) the adoptee is physically present at the time the petition is filed; or

(3) an office of the agency which placed the adoptee for adoption is located.

B. A court which has jurisdiction under the Adoption Act [40-7-29 to 40-7-61 NMSA 1978] may decline to exercise jurisdiction any time before entering a decree if it 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 1985, ch. 194, § 4.

§ 40-7-33. Who may be adopted; who may adopt.

A. Any individual, minor or adult may be adopted.

B. Only New Mexico residents who are one of the following may adopt:

(1) individuals married to each other, whether one or both are minors;

(2) an adult unmarried individual; or

(3) a married individual, adult or minor, without the spouse of the petitioning individual joining as a petitioner if:

(a) the nonjoining spouse is a parent of the individual to be adopted; or

(b) the adoptee is not the petitioner's spouse; and 1) the petitioner and the nonjoining spouse are legally separated; or 2) the failure of the nonjoining spouse to join in the petition is excused for reasonable circumstances as determined by the court.

C. Other persons meeting the criteria of Subsection B of this section may adopt in New

Mexico if the adoptee was placed by the department or an agency in this state.

D. Military personnel meeting the criteria of Subsection B of this section may adopt in New Mexico if they maintain New Mexico as their home state of residence and are eligible to vote in this state and if the child was placed from New Mexico for the purposes of adoption.

History: Laws 1985, ch. 194, § 5; 1989, ch. 341, § 2.

The 1989 amendment, effective June 16, 1989, added Subsections C and D.

Compiler's notes. - Annotations to decisions under similar provisions of prior adoption acts appear in the annotations to this section.

Provision requiring residence as mandatory. - The provision requiring adopting persons to be residents of the state was mandatory and it limited jurisdiction over adoption proceedings to those brought by residents of New Mexico. Heirich v. Howe, 50 N.M. 90, 171 P.2d 312 (1946).

Where petitioners for adoption are nonresidents, the district court lacks the necessary jurisdiction and petition to adopt must be dismissed. Heirich v. Howe, 50 N.M. 90, 171 P.2d 312 (1946).

§ 40-7-34. Placement for adoption.

A. No petition for adoption shall be granted by the court unless the minor sought to be adopted was placed for the purpose of adoption in the home of the proposed adopting parents by the department, by the appropriate public authority of another state or by a child placement agency that is licensed by either the department or the appropriate licensing authority of the other state where the agency is located. An affidavit shall be filed with the petition setting out the facts of the placement of the child in accordance with this section. Provided, however, that the placement restrictions contained in this section shall not apply to the case of:

(1) a child placed for adoption by his parent or, if the child's parent is deceased, by his grandparent; provided, however, that such placement shall be in accordance with the provisions of Subsection B of this section and Section 40-7-40 NMSA 1978;

(2) a child sought to be adopted by a stepparent, if, prior to the filing of the petition, the child has resided with the stepparent for at least one year since the marriage of the stepparent to the natural parent;

(3) a child sought to be adopted by a relative within the fifth degree of consanguinity or his spouse, if the child has resided with that relative for at least one year prior to the filing of the petition;

(4) a child sought to be adopted by a person named in a deceased parent's will to take care of that child; or

(5) a child sought to be adopted by a person who is his sponsor at baptism or confirmation in a recognized religious ceremony which occurred at least one year prior to the placement.

B. With the exception of those placements enumerated in Paragraphs (2), (3) and (4) of Subsection A of this section, no child may be placed in a prospective adoptive home unless an agency or an individual with the credentials set forth in Subsection D of Section 40-7-46 NMSA 1978 has completed a home study of the family as prescribed by department regulation and has approved the family as an adoptive family.

C. An affidavit setting forth the facts of the placement of the child in accordance with this section shall be filed:

(1) with the request for placement as provided in Subsection A of Section 40-7-40 NMSA 1978; or

(2) with the petition for adoption if the child is in the custody of an agency and the child has been placed by the agency in the home of the petitioner for the purpose of adoption.

History: Laws 1985, ch. 194, § 6; 1989, ch. 341, § 3.

The 1989 amendment, effective June 16, 1989, in Subsection A inserted "for adoption" near the beginning of the first sentence in the introductory paragraph, in Paragraph (1) substituted "of this section and Section 40-7-40 NMSA 1978" for "of section 6 and Section 12 of the Adoption Act", and in Paragraph (2) substituted "since the marriage of the stepparent" for "since his marriage"; in Subsection B, inserted "and" following "(3)", deleted "and (5)" following "(4)", and substituted "Section 40-7-46 NMSA 1978" for "Section 18 of the Adoption Act"; and added Subsection C.

Compiler's notes. - Annotations to decisions under similar provisions of prior adoption acts appear in the annotations to this section.

Legislative intent. - The obvious legislative intent is two-fold: (1) to restrict the unauthorized placement of children for adoption; and (2) to provide a means whereby the department or an authorized child placement agency could ensure the placement of adoptable children with individuals who have been found by competent authorities to be fit and proper as prospective adoptive parents. In re Doe, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982).

Electing to leave child with ex-spouse for extended period of time is not a "placement" for purposes of adoption. In re Doe, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982).

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

§ 40-7-35. Persons whose consents or relinquishments are required.

A. Consent to adoption by the petitioner or relinquishment of parental rights to the department or a licensed agency shall be required of the following:

(1) the adoptee, if over the age of ten years, except where the court finds that the adoptee does not have the mental capacity to give consent;

(2) the adoptee's mother;

(3) the presumed father of the adoptee, regardless of paternity, if:

(a) he and the adoptee's mother are or have been married to each other and the adoptee was born during the marriage or within three hundred days after a decree of separation was entered by a court or within three hundred days after the marriage was terminated by death, annulment, declaration of invalidity or divorce; or

(b) before the adoptee's birth, he and the adoptee's biological mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; and 1) if the attempted marriage could be declared invalid only by a court, the adoptee was born during the attempted marriage or within three hundred days after its termination by death, annulment, declaration of invalidity or divorce; or 2) if the attempted marriage is invalid without a court order, the adoptee was born within three hundred days after the termination of cohabitation;

(4) the adoptee's biological father, if:

(a) after the adoptee's birth, he and the adoptee's mother have married or attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; and 1) with his consent, he was named as the adoptee's father on the adoptee's birth certificate; or 2) he is obligated to support the adoptee under a written voluntary promise or by court order; or

(b) he has openly held out the adoptee as his own child and has established custodial, personal or financial relationship with the child; and

(5) the agency to whom the adoptee has been relinquished and which has placed the adoptee for adoption or the agency which has legal custody of the adoptee; provided, however, that the court may grant the adoption without the consent of the agency if the court finds the adoption is in the best interests of the adoptee and that the withholding of

consent by the agency is unreasonable.

B. In any adoption involving a child subject to the Indian Child Welfare Act, 25 U.S.C. Sections 1901 et seq., consent to adoption by the petitioner or relinquishment of parental rights shall be obtained from any "Indian custodian" as that term is defined in 25 U.S.C. Section 1903(a), as required by 25 U.S.C. Sections 1912(a) and 1913(a).

C. A consent or relinquishment executed by a parent who is a minor shall not be subject to avoidance or revocation solely by reason of his minority.

History: Laws 1985, ch. 194, § 7.

Compiler's notes. - Annotations to decisions under similar provisions of prior adoption acts appear in the annotations to this section.

Indian Child Welfare Act. - The term "Indian custodian", referred to in Subsection B, is defined at 25 U.S.C. § 1903(b), not 25 U.S.C. § 1903(a).

Consent required to alter parent-child relationship. - Courts are powerless to alter the natural parent-child relationship and create an artificial one in its stead without a consent agreement, unless circumstances exist under which consent is unnecessary or may be waived. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Since adoption may be refused to petitioners who have the strongest endorsement of the parents, it follows that the office of the requirement of consent for adoption is to indicate the willingness of the parents that the natural relationship be swept away and a new one created in its stead. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

A written consent to the proposed adoption, duly acknowledged before a notary public, is made the overt act by which the agreement of the parent to an adoption proceeding shall be manifested. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Consent may be implied where there is direct evidence of it. In re Garcia's Estate, 45 N.M. 8, 107 P.2d 866 (1940).

Consent to adoption not ineffective because of duress of circumstances. - See Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Consent binds no one unless court acts. - The giving of consent in an adoption case is indicative of the subjective state of mind of the parents - expressive only of the individuals and binding no one unless the court shall choose to act thereon. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

While parents have no property right in their children, as long as they properly discharge their responsibilities they are entitled to the custody and the natural affection and allegiance of their children, who should not be taken from them and given to others by

adoption unless the parents have manifested their wish and agreement to do so. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Consent of offending spouse after divorce. - Where a divorce decree is rendered on the ground of cruelty to a spouse who is granted the custody of children, with the right of visitation granted the offending spouse, the consent of the latter is a necessary prerequisite to entering a decree of adoption. Onsrud v. Lehman, 56 N.M. 289, 243 P.2d 600 (1952).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 2 Am. Jur. 2d Adoption §§ 23 to 47.
Necessity and sufficiency of consent to adoption by spouse of adopting parent, 38 A.L.R.4th 768.
2 C.J.S. Adoption of Persons §§ 51 to 72.

§ 40-7-36. Implied consent or relinquishment.

A. A consent to adoption or relinquishment of parental rights required by Section 7 [40-7-35 NMSA 1978] of the Adoption Act shall be implied by the court if the parent without justifiable cause has:

(1) left the adoptee without provision for his identification for a period of fourteen days; or

(2) left the adoptee with others, including the other parent or an agency, without provisions for support and without communication for a period of:

(a) three months if the adoptee was under the age of six years at the commencement of the three-month period; or

(b) six months if the adoptee was over the age of six years at the commencement of the six-month period.

B. A court shall not imply consent or relinquishment under this section unless the parents whose relinquishment or consent is to be implied have been served with notice setting forth the time and place of the hearing at which the consent or relinquishment may be implied. The implication of a consent or relinquishment under this section shall have the same effect as though the consent or relinquishment had been given voluntarily.

History: Laws 1985, ch. 194, § 8.

Compiler's notes. - Annotations to decisions under similar provisions of prior adoption acts appear in the annotations to this section.

Voluntary conduct toward child may forfeit right to consent. - The person whose consent is otherwise required may forfeit his right to withhold or grant consent upon the basis of his voluntary conduct toward the child. Since the entire right may be so lost, there is no reason why a portion of the right, the specification of the persons in whose favor consent to adoption is given, may not be the subject of voluntary waiver. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Abandonment consists of conduct on part of parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship. In re Doe, 89 N.M. 606, 555 P.2d 906 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

The two elements of the test of abandonment, parent's conduct as evidence of disregard for parental obligation and that disregard leading to destruction of parent-child relationship, are interdependent; both must be established if there is to be legal abandonment. In re Doe, 89 N.M. 606, 555 P.2d 906 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Abandonment is to be determined objectively, taking into account not only the verbal expressions of the natural parents but their conduct as parents as well. In re Doe, 89 N.M. 606, 555 P.2d 906 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Notice to parents required. - It is impossible to declare a child to be dependent and neglected and then place the child for adoption without notice to the parents. 1959-60 Op. Att'y Gen. No. 59-59 (rendered under former law).

Law reviews. - 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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adoption, 71 A.L.R.4th 305.

§ 40-7-37. Persons whose consents or relinquishments are not required.

The consent to adoption or relinquishment of parental rights required by Section 7 [40-7-35 NMSA 1978] of the Adoption Act shall not be required from:

A. a parent whose rights with reference to the adoptee have been terminated pursuant to law;

B. a parent who has been adjudged incompetent pursuant to law or whom the court finds to be mentally incapable of consenting or relinquishing and whose disability is likely to continue for so long a period that it would be detrimental to the adoptee to delay

adoption until restoration of the parent's competency or capacity. Such a parent shall have counsel appointed pursuant to Section 20 [40-7-48 NMSA 1978] of the Adoption Act;

C. a parent who has relinquished his child to an agency for an adoption;

D. a biological father of an adoptee conceived as a result of rape or incest; or

E. any person who has failed to respond pursuant to Subsection C of Section 16 [40-7-44 NMSA 1978] of this act.

History: Laws 1985, ch. 194, § 9.

Compiler's notes. - Annotations to decisions under similar provisions of prior adoption acts appear in the annotations to this section.

Fact that one parent has been adjudged to be mentally ill by a court of competent jurisdiction does not necessarily obviate the necessity of obtaining a consent for adoption from that parent. 1959-60 Op. Att'y Gen. No. 59-59.

Notice requirements must be complied with. - A dependent and neglected child of a person who has been declared to be mentally ill by a court of competent jurisdiction may be adopted without the consent of such person, but the notice requirements imposed by certain statutes must be complied with. 1959-60 Op. Att'y Gen. No. 59-59.

§ 40-7-38. Form of consent or relinquishment.

A. Except for a consent or relinquishment implied by Section 40-7-36 NMSA 1978, a consent or relinquishment shall be in writing, signed by the person consenting or relinquishing 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, if known, unless the document is a relinquishment of the adoptee to an agency, in which case, the name and address of the agency to whom the adoptee is relinquished;

(4) that the person executing the consent or relinquishment has been counseled regarding alternatives to adoptive placement and with this knowledge is voluntarily and unequivocally consenting to the adoption of the named adoptee, except that an alleged biological father, after being advised of his right to counseling and offered the counseling, may specifically decline such counseling in the consent or relinquishment;

the counseling shall be provided by a certified psychologist, psychiatrist or person with a master's degree in social work or by an agency or an individual with qualifications established by department regulation and the consent or relinquishment shall state the name of the person who provided the counseling and the nature and duration of the counseling;

(5) that the consent to or relinquishment for adoption cannot be withdrawn;

(6) that the person executing the consent or relinquishment has received or been offered a copy of the consent or relinquishment; and

(7) that the person executing the consent or relinquishment waives further notice of the adoption proceedings.

B. Agency or department consents required by Paragraph (5) of Subsection A of Section 40-7-35 NMSA 1978, 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; and

(3) the name of the petitioner.

C. A consent or relinquishment taken by an individual appointed to take consents or relinquishments by an agency shall be notarized, except that a consent or relinquishment signed in the presence of a judge need not be notarized.

D. No consent to adoption or relinquishment of parental rights shall be valid if executed within forty-eight hours after the adoptee's birth; provided, however, that a consent to adoption or relinquishment of parental rights involving a child subject to the Indian Child Welfare Act, 25 U.S.C. Sections 1901 et seq. shall comply with the more stringent requirements of that act.

E. The requirements of a consent to adoption or relinquishment of parental rights involving a child subject to the Indian Child Welfare Act, 25 U.S.C. Section 1901 et seq. and the rights of a parent of such a child to withdraw his consent or relinquishment shall be governed by the relevant provisions of the Indian Child Welfare Act.

F. A consent to or relinquishment for adoption shall not be withdrawn prior to the entry of a judgment of adoption unless the court finds, after notice and opportunity to be heard is afforded to the petitioner, to the person seeking the withdrawal and to the agency placing a minor for adoption, that the consent or relinquishment was obtained by fraud. In no event shall a consent or relinquishment be withdrawn after the entry of a final decree of adoption.

History: Laws 1985, ch. 194, § 10; 1989, ch. 341, § 4.

The 1989 amendment, effective June 16, 1989, near the beginning of Subsection A, substituted "Section 40-7-36 NMSA 1978" for "Section 8 of the Adoption Act" and deleted "and notarized" following "relinquishing"; in Paragraph (4) of Subsection A, inserted the language beginning "except that" and ending with "by department regulation and"; added present Subsections B and C; redesignated former Subsections B to D as present Subsections D to F; in Subsection D, substituted "forty-eight hours" for "seventy-two hours"; and, in Subsection F, added the last sentence.

§ 40-7-39. Persons who may take consents or relinquishments.

A. A consent to adoption or relinquishment of parental rights shall be signed before and approved by:

(1) a judge who has jurisdiction over adoption proceedings, within or without this state, and who is in the jurisdiction in which the minor is present or in which the parent resides at the time it is signed; or

(2) an individual appointed to take consents by any agency.

B. In cases where the consent or relinquishment is in English and English is not the first language of the consenting or relinquishing parent, the person taking the consent or relinquishment shall certify in writing that the document has been read and explained to the parent in the parent's first language, by whom the document was so read and explained and that the meaning and implications of the document are fully understood by the person giving the consent or relinquishment. The requirements of the Indian Child Welfare Act, 25 U.S.C. Section 1913(a), concerning the language in which the consent or relinquishment is written shall apply to all consents to adoption and relinquishments of parental rights involving children subject to the Indian Child Welfare Act, 25 U.S.C. Sections 1901 et seq.

C. The consent or relinquishment shall be filed with the court in which the petition for adoption has been filed before adjudication of the petition.

History: Laws 1985, ch. 194, § 11.

§ 40-7-40. Home study.

A. At least thirty days prior to an adoptive placement made pursuant to Paragraph (1) or (5) of Subsection A of Section 40-7-34 NMSA 1978, the petitioner shall file a request with the court to allow such placement. An order permitting such placement shall be obtained prior to actual placement of the child. A home study of the proposed adoptive home shall be performed and a report of the home study approving the family for

placement as required in Subsection B of Section 40-7-34 NMSA 1978 shall be filed with the court prior to the issuance of any placement order. This home study shall be performed by an agency or an individual with the credentials set out in Subsection D of Section 40-7-46 NMSA 1978 who may be selected from an approved list published by the department. Persons or agencies desiring to perform this function shall file with the department documents to verify their qualifications in accordance with Subsection D of Section 40-7-46 NMSA 1978. If necessary to defray additional costs associated with compiling the list, the department may assess a reasonable administrative fee to the entity being listed. Persons or agencies filing false documentation with the department are in violation of the Adoption Act [40-7-29 to 40-7-61 NMSA 1978] and subject to penalties as provided in Subsection B of Section 40-7-61 NMSA 1978. The home study shall be completed at the expense of the petitioner. A hearing on the request for placement shall be held within thirty days of the filing of the request. For good cause shown, the court may shorten the time for filing the request to twenty days and, in the event of a premature birth, may shorten the time for filing the request to five days. The department has the right to investigate the circumstances of such placement and to intervene in the action. Notice of the request and the name of the person doing the home study shall be sent to the department by the court clerk within one working day of its being filed with the court.

B. The home study shall be performed as prescribed by department regulation and shall include at a minimum the following:

(1) an individual interview with each petitioner;

(2) a joint interview with both petitioners;

(3) a home visit, which shall include an interview with any of the petitioner's children and any other permanent residents of the petitioner's home;

(4) an interview with the adoptee, if his age is appropriate, and the adoptee's biological parents;

(5) the initiation of a criminal records check of the petitioner;

(6) a medical certificate dated not more than one year prior to any adoptive placement certifying that the petitioner is free from communicable disease or physical or mental condition which would impair his ability to care for the adoptee;

(7) letters of reference from individuals named by the petitioner or memoranda of the dates and contents of personal contacts with such references;

(8) a written report containing:

(a) an evaluation of the capacity and readiness of the petitioner for parenthood and his emotional and physical health and ability to shelter, feed, clothe and educate the

adoptee; and

(b) verification of employment, financial resources and marital status;

(9) a report of a medical examination performed on the adoptee within the six months prior to the proposed adoptive placement;

(10) a statement documenting the adoptee's family background in as much detail as available, including verification of the child's date and place of birth as well as the circumstances of the relinquishment or consent; and

(11) a statement of the results of any prior home study or initiation of home study, if any, of the petitioners done by any party.

C. As part of any court order authorizing placement under this section, the court shall certify that the report documents compliance with Subsection B of this section and that the time requirements concerning placement have been met.

History: Laws 1985, ch. 194, § 12; 1989, ch. 341, § 5.

The 1989 amendment, effective June 16, 1989, rewrote the section to the extent that a detailed comparison would be impracticable.

§ 40-7-41. Petition; time of filing.

A petition for adoption shall be filed within sixty days of the child's placement into the proposed adoptive home for the purpose of adoption, if the child is under the age of one year. If the child is over the age of one year at the time of placement for the purpose of adoption, the petition shall be filed within four months of the placement. For good cause shown, the court may extend those time limits up to an additional five months and two months, respectively, if a request for extension is filed prior to the expiration of the initial time limits. If a petition is not timely filed, any person having knowledge of the proceeding shall notify the department, which may proceed as if the child were a neglected child.

History: Laws 1985, ch. 194, § 13; 1989, ch. 341, § 6.

The 1989 amendment, effective June 16, 1989, substituted "within sixty days" for "within one month" in the first sentence, and "any person having knowledge of the proceeding shall" for "the agency shall" and "may proceed" for "shall proceed" in the last sentence.

§ 40-7-42. 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, if known;

C. the birth name of the adoptee, any other names by which the adoptee has been known and the adoptee's proposed new name, provided that, in the case of an agency adoption, if the petitioner and the biological parents have not agreed to the release of the adoptee's identity to the other person, the birth name and any other names by which the adoptee has been known shall be filed with the court as separate documents at the time the petition is filed;

D. where the adoptee is residing at the time of the filing of the petition and, if the child is not in the custody of the petitioner, when he intends to acquire custody;

E. that the petitioner desires to establish a parent and child relationship between himself and the adoptee and that he is a fit and proper person able to care and provide for the adoptee's welfare;

F. the existence of any court orders which are known to the petitioner and which regulate custody, visitation or access to the adoptee, copies of which shall accompany and be attached to the petition as exhibits, if available;

G. the relationship, if any, of the petitioner to the adoptee;

H. the name and address of the placing agency, if any;

I. the names and addresses of all persons from whom consents or relinquishments are required, attaching copies of those obtained and alleging the facts which excuse or imply the consents or relinquishments of the others; provided that if either the petitioner or the biological parent has not agreed to the release of his identity to the other person, the names and addresses of all persons from whom consents or relinquishments are required shall be filed with the court as separate documents at the time the petition for adoption is filed;

J. whether the adoptee is subject to the Indian Child Welfare Act, 25 U.S.C. Sections 1901 et seq., and, if so, the petition shall allege:

(1) the tribal affiliation of the adoptee's parents;

(2) what specific actions have been taken and by whom to notify the parents' tribe and the results of such contact, including the names, addresses, titles and telephone numbers of the persons contacted. Copies of any correspondence with the tribe shall be attached as exhibits to the petition; and

(3) what specific efforts were made to comply with the placement preferences of the Indian Child Welfare Act, 25 U.S.C. Sections 1901 et seq. or the placement preferences of the appropriate Indian tribe;

K. whether the adoption is subject to the Interstate Compact on the Placement of Children [32-4-1 NMSA 1978] and what specific actions have been taken to comply with the Interstate Compact on the Placement of Children, including the names, addresses, titles and telephone numbers of all persons contacted. A copy of the Interstate Compact on the Placement of Children's approval shall be attached as exhibits to the petition;

L. whether the adoptee is foreign born; if so, copies of all documents demonstrating that the child is legally free for adoption, including the child's passport and United States visa, shall be attached as exhibits to the petition; and

M. the name, address and telephone number of the agency or person who has agreed to do the investigation in accordance with Section 40-7-46 NMSA 1978, if different than the agency or individual doing the home study in accordance with Section 40-7-40 NMSA 1978.

History: Laws 1985, ch. 194, § 14; 1989, ch. 341, § 7.

The 1989 amendment, effective June 16, 1989, in Subsection C, added the language beginning with "provided that"; in Subsection I, substituted "consents or relinquishments are required" for "consents to adoption or relinquishment of parental rights are required" and added the language beginning with "provided that"; in Subsection K, in the second sentence, substituted "A copy of the Interstate Compact on the Placement of Children's approval" for "Copies of any correspondence regarding interstate placement"; added Subsection M; and made minor stylistic changes throughout the section.

§ 40-7-43. 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 1985, ch. 194, § 15.

§ 40-7-44. Notice of petition; form of service; waiver.

A. Notice of pendency of the adoption proceeding shall be served by the petitioner on:

(1) any person, agency or institution whose consent or relinquishment is required by Section 40-7-35 NMSA 1978, unless the notice has been previously waived;

(2) any alleged or acknowledged father of the adoptee and any person listed as the father of the adoptee on the adoptee's birth certificate;

(3) the legally appointed custodian 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 parents of a deceased parent of the adoptee;

(7) any person known to the petitioner having custody of or visitation with the adoptee under a court order;

(8) any person in whose home the child has resided for at least two months within the preceding six months;

(9) the agency or individual authorized to investigate the adoption under Section 40-7-46 NMSA 1978; and

(10) any other person designated by the court.

B. Notice shall not be served on any person required to receive notice under Paragraph (1) or (2) of Subsection A of Section 40-7-44 NMSA 1978 if the parental rights of such person have been relinquished or terminated.

C. In any adoption in which the adoptee is a child subject to the Indian Child Welfare Act, 25 U.S.C. Sections 1901 et seq., in addition to the notice required by Subsection A of this section, notice of pendency of the adoption proceeding shall be served by the petitioner on the appropriate Indian tribe and on any "Indian custodian", as that term is defined by 25 U.S.C. Section 1903.

D. The notice shall state that the person served shall respond to the petition within twenty days if he intends to contest the adoption and shall state that the failure to so respond shall be treated as a default. Provided, however, that this provision shall not apply to an agency, the department or an individual doing the investigation required by Section 40-7-46 NMSA 1978; if an agency, the department or an individual doing that investigation wants to contest the adoption, they shall notify the court within twenty days after completion of the investigation.

E. Service on a parent shall be made in a manner appropriate under the rules of civil procedure for the service of process in a civil action in this state. If the identity or whereabouts of the parent is unknown or if the mother refuses to disclose the identity or whereabouts of the adoptee's father, the individual or agency charged with investigating the adoption under Section 40-7-46 NMSA 1978 shall investigate the identity and whereabouts of the parent and shall report the results of the investigation to the court.

Upon a finding by the court that information as to the identity or whereabouts of a biological parent has been sufficiently investigated and is still insufficient to effect service in accordance with Rule 4(e) or 4(k), the court shall issue an order providing for service by publication.

F. As to any other person for whom notice is required under Subsection A of this section, service by certified mail, return receipt requested, shall be sufficient. If such service cannot be completed after two attempts, the court shall issue an order providing for service by publication.

G. The notice required by this section may be waived in writing by the person entitled to notice.

H. Proof of service of the notice on all persons for whom notice is required by this section shall be filed with the court before any hearing adjudicating the rights of such persons.

I. Within twenty-four hours of the time a petition to adopt a minor is filed, the clerk of the court shall mail notice of the filing of the petition, together with a copy of the petition, to the department.

History: Laws 1985, ch. 194, § 16; 1989, ch. 341, § 8.

The 1989 amendment, effective June 16, 1989, in Subsection A, in Paragraph (1), substituted "Section 40-7-35 NMSA 1978" for "Section 7 of the Adoption Act" and, in Paragraph (9), inserted "or individual" and substituted "Section 40-7-46 NMSA 1978" for "Section 18 of the Adoption Act"; added present Subsection B and redesignated former Subsections B to H as present Subsections C to I; in Subsection D, added the second sentence; in the second sentence of Subsection E, deleted "the court shall issue an order requiring" preceding "the individual or agency" and substituted "Section 40-7-46 NMSA 1978 shall" for "Section 18 of the Adoption Act to"; and in the third sentence of Subsection E, substituted "Upon a finding by the court that" for "After an investigation has been made, if" and inserted "has been sufficiently investigated and".

Compiler's notes. - The reference to Rule 4(e) or 4(k) in the third sentence of Subsection E refers to the Rules of Civil Procedure for the District Courts. See Rule 1-004 SCRA 1986.

Substitute service of process by publication is inadequate in adoption proceedings. Normand ex rel. Normand v. Ray, 107 N.M. 346, 758 P.2d 296 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Required parties in adoption proceedings, 48 A.L.R.4th 860.

§ 40-7-45. Custody pending final decree.

Once the petitioner has received the adoptee into his home and an adoption placement agreement has been signed or a placement order issued, the petitioner shall have physical custody and control of the adoptee and shall be responsible for the care, maintenance and support of the adoptee, including all necessary medical, dental, psychological or surgical treatment, pending the further order of the court. Should the child be returned to the biological parents, this section shall not prohibit petitioners from seeking reimbursement for the child's expenses from the biological parents.

History: Laws 1985, ch. 194, § 17; 1989, ch. 341, § 9.

The 1989 amendment, effective June 16, 1989, in the first sentence, substituted "an adoption placement agreement has been signed or a placement order issued" for "a petition for adoption has been filed", and inserted "physical" and "dental, psychological", and added the second sentence.

§ 40-7-46. Investigation.

A. An agency or an individual with the credentials set out in Subsection D of this section shall file with the court a final written report of its investigation of the prospective adoptive home and the adoptee. The report shall be completed as prescribed by department regulation and shall include, at a minimum, a description of the following:

(1) the expressed desires of the parent as to the kind of adoptive family sought;

(2) whether the adoptive home is a suitable home for the proposed adoption;

(3) whether the adoption is in the best interest of the adoptee;

(4) the type and frequency of post-placement services given to the petitioner;

(5) any orders, judgments or decrees affecting the adoptee or any children of the petitioner;

(6) any property owned by the adoptee;

(7) the social and medical histories of the biological parents of the adoptee;

(8) the social and medical history of the adoptee;

(9) the costs, expenses and professional fees connected with the adoption; and

(10) any other circumstances which may be relevant to the adoption of the adoptee by the petitioner.

B. The report of the investigation shall contain an evaluation of the proposed adoption with a recommendation as to the granting of the petition for adoption and such other information as the court requires.

C. Unless directed by the court, an investigation and report is not required in cases in which:

(1) the person to be adopted is an adult; or

(2) the child is being adopted under the exceptions in Paragraphs (2) through (4) of Subsection A of Section 40-7-34 NMSA 1978.

D. The investigation shall be conducted by an agency or an individual who holds a master of social work degree from a school of social work accredited by the council of social work education or a degree in a related academic area as determined by department regulation. In addition to these educational requirements, the investigator shall have experience as determined by department regulation. This educational requirement shall not apply to agency personnel engaged in adoptive investigations on or before the effective date of the Adoption Act. The investigation shall be completed at the expense of the petitioner. The agency or individual doing the investigation will normally be but does not have to be the same as the agency or individual doing the home study required in Subsection A of Section 40-7-40 NMSA 1978 and they shall be maintained on the same list as that compiled for home studies under Subsection A of Section 40-7-40 NMSA 1978.

E. The investigator shall observe the adoptee and interview the petitioner in his home as soon as possible after the receipt of notice of the action, but in any event within thirty days after receipt of the notice.

F. The investigator shall complete and file his written report with the court within ninety days from receipt of notice of the proceeding and shall deliver a copy of the report to the petitioner's attorney or to the petitioner, if unrepresented by counsel, and to the department. Upon a showing of good cause and after notice to the petitioner, the court may grant extensions of time to the investigator to file his investigation report.

History: Laws 1985, ch. 194, § 18; 1989, ch. 341, § 10.

The 1989 amendment, effective June 16, 1989, in Subsection C, rewrote Paragraph (2); in Subsection D, inserted "an agency or" near the beginning of the first sentence and substituted "as determined by department regulation" for "with equivalent" at the end of the sentence, added "In addition to these educational requirements, the investigator shall have" at the beginning of the second sentence, and added the last sentence; and in Subsection F, substituted "ninety days" for "sixty days" in the first sentence.

"Effective date of the Adoption Act". - The "effective date of the Adoption Act", referred to in Subsection D, is July 1, 1985.

§ 40-7-47. Related proceedings.

If at any time during the pendency of the adoption proceeding, it is determined that any other action concerning the adoptee is pending in the courts of this state or any other state, any party to the adoption proceeding, or the court on its own motion, may move to consolidate such action with the adoption petition or to coordinate any out-of-state action with the adoption proceeding under the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978]. The court in which the adoption proceeding is pending shall have jurisdiction to adjudicate all such related proceedings.

History: Laws 1985, ch. 194, § 19.

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

§ 40-7-48. Appointment of attorney for the adoptee or other party.

Upon the motion of any party, or upon the court's own motion, the court may appoint independent counsel for the adoptee or for any incompetent or minor who is a party to the proceeding. In any contested proceeding, the court shall appoint independent counsel for the adoptee.

History: Laws 1985, ch. 194, § 20.

§ 40-7-49. Conduct of adjudication and disposition.

A. The court shall conduct hearings on the petition, upon motion of any party or upon the court's own motion, so as to determine the rights of the parties in a manner which protects confidentiality.

B. The petitioner shall present and prove each allegation set forth in the petition for adoption by clear and convincing evidence.

C. If any person who claims to be the biological father of the adoptee has appeared before the court and filed a written petition seeking custody of the adoptee, the court shall hear evidence as to the merits of the petition. If the court determines by a preponderance of the evidence that the person is not the biological father of the adoptee or that the child was conceived through an act of rape or incest, the petition shall be dismissed and he shall no longer be a party to the adoption. If the court determines that the person is the biological father of the adoptee, the court shall further determine whether the person qualifies as a presumed father whose consent is necessary for adoption pursuant to Section 40-7-35 NMSA 1978. If the court determines that the person is the biological father but does not qualify as a presumed father, the

court shall adjudicate his rights pursuant to that Act [40-7-29 to 40-7-61 NMSA 1978].

D. If the mother or father of the adoptee has appeared before the court and filed a written petition which alleges the invalidity of his own consent or relinquishment for adoption, the court shall hear evidence as to the merits of the petition. If the court determines that the allegations have not been proved by a preponderance of the evidence, the petition shall be dismissed. If the court determines that the allegations of the petition are true, the consent or relinquishment for adoption shall be held invalid, and the court shall determine, in the best interests of the adoptee, the person who shall have custody of the child.

History: Laws 1985, ch. 194, § 21; 1989, ch. 341, § 11.

The 1989 amendment, effective June 16, 1989, in the next-to-last sentence of Subsection C, substituted "Section 40-7-35 NMSA 1978" for "Section 7 of the Adoption Act".

Compiler's notes. - Annotations to decisions under similar provisions of prior adoption acts appear in the annotations to this section.

Jurisdiction to determine custody, adoption or other disposition. - Where court had jurisdiction of the petitions relating to certain children upon the basis they were abandoned children, it was within the jurisdiction of the court: (a) to return these children to the custody of their natural parents; or, (b) to grant the petitions for the adoption of the children; or, (c) to refuse either of the foregoing, and make other temporary or permanent disposition and provision for these children, all to be determined upon one single consideration - the welfare of the children. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Personal jurisdiction required. - An integral facet of a valid adoption is the requirement that personal jurisdiction must first be acquired by the court over the parties seeking to adopt the child, over the child, and over the parents of the child, and any guardian or agency having custody or control of the child. Smith v. Bradfield, 97 N.M. 611, 642 P.2d 214 (Ct. App. 1982).

Consent considered before merits of adoption. - The court has no right to consider the merits or demerits of an adoption petition insofar as it concerns the welfare of a child, unless it has in the first instance determined that the consent of a natural parent may be dispensed with. Nevelos v. Railston, 65 N.M. 250, 335 P.2d 573 (1959) (decided under former law).

Parents' knowledge of identity of petitioners not condition of jurisdiction. - As the court may or may not decree adoption in favor of persons recommended by the natural parents, it seems most unlikely the legislature intended to impose as a condition to the exercise of the court's jurisdiction knowledge of the identity of petitioners in adoption on the part of the natural parents because even when that circumstance exists, and

possibly the further circumstance that the natural parents have investigated the qualifications of the petitioners and given them their unqualified approval, the court may still refuse to decree adoption, the selection of a foster parent being a judicial act and the responsibility being that of the court. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957).

Child's welfare paramount. - The paramount issue in an adoption proceeding is the welfare of the child. Smith v. Bradfield, 97 N.M. 611, 642 P.2d 214 (Ct. App. 1982).

Welfare of child not measured altogether by economic factors. - In an adoption proceeding, the welfare and best interest of a child are not measured altogether by material and economic factors; parental love and affection must find some place in the scheme. Gutierrez v. New Mexico Dep't of Pub. Welfare, 74 N.M. 273, 393 P.2d 12 (1964).

Adoption denied where only for securing greater social security check. - Although there is no contention that the petitioner's home was not a proper one, nor is there any intimation that either the petitioner or the natural mother was not a proper person to have custody of the children, the adoption was denied as it was an adoption in name only, lacking all of the elements of the complete severance of the children's ties and relationship with their mother contemplated by the law and within the intent of New Mexico adoption statutes as it was only for the purpose of securing a greater social security check. Gutierrez v. New Mexico Dep't of Pub. Welfare, 74 N.M. 273, 393 P.2d 12 (1964).

Entry of order without effect where no adoption existed. - While an order of adoption may be entered nunc pro tunc to cure irregularities that do not affect the jurisdiction of the court, it cannot serve to bring into existence an adoption when no adoption could in fact be deemed to have existed before. Smith v. Bradfield, 97 N.M. 611, 642 P.2d 214 (Ct. App. 1982).

Authority of court after mother's consent declared invalid. - Where the mother's consent to adoption has been declared invalid in keeping with the best interests of the child, the trial court retains the power to determine custody in the absence of a legally valid consent, and it is within the authority of the trial court to continue the child in the custody of the couple seeking to adopt her. Although they lacked standing to petition the court for adoption, they were not left without remedy, since they did have standing to seek relief. In re Samantha D., 106 N.M. 184, 740 P.2d 1168 (Ct. App. 1987).

Death of child prior to final hearing. - The granting of an adoption where the child sought to be adopted has died prior to the final hearing has no effect, as the death deprives the trial court of jurisdiction. Smith v. Bradfield, 97 N.M. 611, 642 P.2d 214 (Ct. App. 1982).

Court may grant or refuse revocation of consent prior to decree. - Prior to the entry of an adoption decree, the court may grant or refuse revocation of consent, giving due consideration to the circumstances in the particular case, as, for example, the matters

giving rise to execution of consent in the first place, a showing or failure to show change of those matters; the situation of the proposed adoptive parents; the length of time which has elapsed since consent has been given; the extent to which the adoptive petitions have relied and acted upon the consent; and all those matters pertaining to the past, present and future welfare of the child. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957) (decided under former law).

But it may not be arbitrarily revoked. - All that New Mexico statutes require is that consent be filed in the proceedings. Consent may not be arbitrarily revoked prior to adoption, at least where the petitioners for adoption have acted upon the consent and taken the child into their home. Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957) (decided under former law).

Consent presumed in child's best interest, absent fraud. - Where natural mother pled on motion to revoke consent that the consent was involuntary in that it was signed too soon after birth, while in the hospital, and while in a state of emotional upset, such petition failed to state a claim upon which relief could be granted, since legislature, by enactment of this section, created a presumption that once there has been a consent by the natural parent, absent fraud, it is in the best interests of the child to proceed with the adoption. In re Doe, 87 N.M. 253, 531 P.2d 1226 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975).

§ 40-7-50. Fees and charges.

Prior to the final hearing on the petition, the petitioner shall file a full accounting of all disbursements of anything of value made or agreed to be made by or on behalf of the petitioner in connection with the adoption. The accounting report shall be signed under penalty of perjury. The accounting report shall be itemized in detail and shall show the services relating to the adoption or to the placement of the child for adoption which were received by the parents of the child, by the child, or by or on behalf of the petitioner. The report shall also include the dates of each payment, the names and addresses of each attorney, physician, hospital, licensed adoption agency or other person or organization who received any funds or any other thing of value from the petitioner in connection with the adoption or the placement of the child with them, or who participated in any way in the handling of such funds, either directly or indirectly.

History: Laws 1985, ch. 194, § 22.

§ 40-7-51. Disposition; final decree.

A. The court may grant a final decree of adoption if it finds that:

(1) the court has jurisdiction to enter a final decree of adoption affecting the adoptee;

(2) the adoptee has been in the actual custody of the petitioner for a period of ninety days if the adoptee is under the age of one year or for a period of one hundred eighty days if over the age of one year at the time of placement, unless, for good cause shown, the requirement is waived by the court;

(3) all necessary consents, relinquishments, terminations or waivers have been obtained;

(4) the report required by Section 40-7-46 NMSA 1978 has been filed with the court;

(5) service of the notice of pendency of the adoption proceeding has been made or dispensed with as to all persons entitled to notice under Section 40-7-44 NMSA 1978;

(6) at least ninety days have passed since the filing of the petition for adoption except the court may, in its discretion, shorten or waive this period of time in cases in which the child is being adopted under the exceptions listed in Paragraph (2) or (3) of Subsection A of Section 40-7-34 NMSA 1978;

(7) the petitioner is a suitable adoptive parent and that the best interests of the adoptee are served by the adoption;

(8) if the adoptee is a child subject to the Indian Child Welfare Act, 25 U.S.C. Sections 1901 et seq., the requirements of the Indian Child Welfare Act have been met;

(9) if the adoption involves the interstate placement of the adoptee, the requirements of the Interstate Compact on the Placement of Children [32-4-1 NMSA 1978] have been met;

(10) if the adoptee is foreign born, the child is legally free for adoption; and

(11) the results of the criminal records check required in Paragraph (5) of Subsection B of Section 40-7-40 NMSA 1978 have been received.

B. In addition to the findings required by Subsection A of this section, the court in any final decree of adoption shall make findings with respect to each allegation of the petition.

C. If the court determines that any of the requirements for a decree under Subsections A and B of this section has not been met or that the adoption is not in the best interests of the adoptee, the court shall deny the petition and determine, in the best interests of the adoptee, the person who shall have custody of the child.

D. The final 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 biological parents. The final decree 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

40-7-52 NMSA 1978.

E. A final order shall be entered within six months of the filing of the petition, eight months of the placement of the adoptee with the petitioners if the adoptee is under the age of one year at the time of placement, or twelve months if the adoptee is over the age of one year at the time of placement, except that the time may be extended by the court upon request of any of the parties or upon its own motion for good cause shown.

F. A final decree of adoption may not be attacked upon the expiration of one year from the entry of the decree; provided, however, that in any adoption involving a child subject to the Indian Child Welfare Act, 25 U.S.C. Sections 1901 et seq., the child's parent or Indian custodian may petition the court pursuant to 25 U.S.C. Section 1914 to invalidate the adoption.

G. In any adoption involving a child subject to the Indian Child Welfare Act, 25 U.S.C. Sections 1901 et seq., the clerk of the court shall provide the secretary of the interior with a copy of any final decree of adoption or adoptive placement order and other information as required by 25 U.S.C. Section 1951 (a).

H. In any adoption involving an agency or department placement, the court clerk shall provide the agency or the department with a copy of the decree within one week of its filing.

History: Laws 1985, ch. 194, § 23; 1989, ch. 341, § 12.

The 1989 amendment, effective June 16, 1989, in Subsection A, in Paragraph (4) substituted "Section 40-7-46 NMSA 1978" for "Section 18 of the Adoption Act", in Paragraph (5) substituted "Section 40-7-44 NMSA 1978" for "Section 16 of the Adoption Act", in Paragraph (6) added the language at the end beginning with "except the court may", and added Paragraph (11); in Subsection D, substituted "Section 40-7-52 NMSA 1978" for "Section 24 of the Adoption Act" at the end of the subsection; in Subsection E, inserted the language beginning with "eight months" and ending with "time of placement"; in Subsection F, deleted "collaterally" following "may not be" near the beginning and "at any time" following "petition the court" near the end; and added Subsection H.

§ 40-7-52. Name and status of adoptee.

Once adopted, a child shall take a name as agreed upon by the petitioner. After adoption, the child 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 child shall have all rights and be subject to all of the duties of that relation, including the right of inheritance from and through the petitioner.

History: Laws 1985, ch. 194, § 24.

Compiler's notes. - Annotations to decisions under similar provisions of prior adoption acts appear in the annotations to this section.

Adoption, by all tests, is a status like any other relational status. - It is created by acts of the parties plus the effect of law; it is a relationship which cannot be terminated by the sole will of the parties; it is the source of a bundle of rights, duties and obligations, and is of great interest to the state. It should, then, be treated by the courts in the same way they treat other types of domestic status. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Adopted children in same legal position as those begotten by marriage. - The legislature has evinced an understanding that adopted children should be placed in the same legal position and are to receive the same consideration as children begotten by the marriage. Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308 (1948).

Adopted child on level with natural child in construing will. - Wills must be construed in harmony with the public policy of placing an adopted child on a level with natural children. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

The public policy in New Mexico is to treat adopted children the same as natural children. An adopted child is grouped with lineal descendants in determining the amount of the decedent's estate which is exempt from inheritance tax, and also imposes an inheritance tax upon estates passing to parent or parents, husband, wife, lineal descendants or legally adopted child. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Both parents must join adoption application before child heir of both. - A child adopted does not become the heir of both adopting parents unless both join in the application. Dodson v. Ward, 31 N.M. 54, 240 P. 991 (1925).

Child adopted by stepfather may not inherit from natural paternal grandparent. - Where a child was adopted by her stepfather after her natural father's death, but before her natural paternal grandmother's death, the adopted child could not inherit from her natural grandmother. Commerce Bank & Trust v. Brady, 95 N.M. 412, 622 P.2d 1032 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 2 Am. Jur. 2d Adoption §§ 88 to 116. Adoption as precluding testamentary gift under natural relative's will, 71 A.L.R.4th 374. 2 C.J.S. Adoption of Persons §§ 140 to 154.

§ 40-7-53. Confidentiality of records.

A. After the petition is filed and prior to the entry of the final decree, the records in adoption proceedings shall be open to inspection only by the attorney for the petitioner, the department or the licensed placement agency, any attorney appointed for the

adoptee under Section 40-7-48 NMSA 1978, any attorney retained by the adoptee or other persons upon order of the court for good cause shown. Unless the petitioner and the biological parents agree to the release of his identity to the other person, the attorneys and the agency shall maintain confidentiality regarding the names of the parties.

B. All hearings in adoption proceedings shall be confidential and shall be held in closed court without admittance of any person other than interested parties and their counsel.

C. At any time, a biological parent may file in the court or with the placing agency a consent or refusal to consent to the release of his identity to the adoptee upon the adoptee making a request for such release after his eighteenth birthday or may file information regarding his location or changes in background information, whether medical or social. Such consent or refusal shall be considered by the court or by the placing agency in determining whether to grant a request for release of files under Subsection F of this section.

D. After the final decree of adoption has been entered, all court files containing records of judicial proceedings conducted under the Adoption Act [40-7-29 to 40-7-61 NMSA 1978] and social and medical records submitted to the court in such proceedings shall be kept in separate locked files withheld from public inspection. Upon application to the clerk of the court, such records shall be open to inspection by a biological parent or by an adoptee if the adoptee is eighteen years of age or older at the time application is made for inspection by the attorney of any such party or by any agency which has exercised guardianship over or legal custody of a child who was the adoptee in the particular proceeding; provided, however, that the identity of the biological parent and of the adoptee shall be kept confidential unless the biological parent and the adoptee have consented to the release of their identity. In the absence of such consents, the inspection shall be limited to the following nonidentifying information:

(1) health and medical histories of the adoptee's biological parents;

(2) health and medical history of the adoptee;

(3) adoptee's general family background, including ancestral information, without name references or geographical designations;

(4) physical descriptions; and

(5) length of time the adoptee was in the care and custody of one other than the petitioner.

E. At any time, an adoptee who is eighteen years of age or older may file with the court information regarding his location or a consent or refusal to opening his adoption file upon request by the biological parents.

F. All files of an agency or the court shall be confidential and shall be withheld from inspection except information disclosed in a written release on file with the placing agency or the court and executed by the biological parents, adoptive parents or the adoptee or on order of the court for good cause shown and upon such terms and conditions as it deems appropriate. Provided, however, that nonidentifying information in Paragraphs (1) through (5) of Subsection D of this section may be shared with the parties to the adoption at the discretion of the department or the agency having had custody of the adoptee or by the court.

History: Laws 1985, ch. 194, § 25; 1989, ch. 341, § 13.

The 1989 amendment, effective June 16, 1989, in Subsection A, substituted "Section 40-7-48 NMSA 1978" for "Section 20 of the Adoption Act" in the first sentence; in Subsection C, substituted "a biological parent may file in the court or with the placing agency a consent" for "the biological parents may file in the court a consent" near the beginning of the first sentence and, in the second sentence, inserted "or by the placing agency"; in Subsection F, inserted "information disclosed in a written release on file with the placing agency or the court and executed by the biological parents, adoptive parents or the adoptee or" in the first sentence and added the second sentence; and made minor stylistic changes.

§ 40-7-54. Removal of adoptee from county.

During the pendency of an adoption proceeding, the adoptee shall not be removed from the county in which the adoption is pending for a period longer than fifteen days without the permission of the court in which the adoption preceeding [proceeding] is pending.

History: Laws 1985, ch. 194, § 26.

§ 40-7-55. Appeal.

An appeal from any judgment rendered under the Adoption Act [40-7-29 to 40-7-61 NMSA 1978] may be taken to the court of appeals in the manner provided by law for the appeal of children's court cases.

History: Laws 1985, ch. 194, § 27.

§ 40-7-56. Birth certificates.

A. Within thirty days after an adoption decree becomes final, the clerk of the court shall prepare an application for a birth certificate in the new name of the adoptee showing the petitioner as the adoptee's biological parent and 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. These 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 the vital statistics laws but subject to the requirements of the Adoption Act [40-7-29 to 40-7-61 NMSA 1978] as to the confidentiality of adoption records.

History: Laws 1985, ch. 194, § 28.

§ 40-7-57. Recognition of foreign decrees.

Every judgment terminating the parent-child relationship or establishing the relationship of parent and child by 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 1985, ch. 194, § 29.

§ 40-7-58. Stepparent adoptions.

Any person may adopt his spouse's child in accordance with the provisions of the Adoption Act [40-7-29 to 40-7-61 NMSA 1978], except that:

A. no report of fees and charges under Section 22 [40-7-50 NMSA 1978] of that act shall be made unless ordered by the court; and

B. when adopted, the adoptee shall take the new name designated by the petitioner in the petition so long as the petitioner's spouse and the child, if over the age of ten years, consent to the new name.

History: Laws 1985, ch. 194, § 30.

§ 40-7-59. Adoption of adults.

A. An adult or a married or emancipated minor may be adopted by any other person according to the provisions of the Adoption Act [40-7-29 to 40-7-61 NMSA 1978], except that:

(1) the consent of the biological parents of the adoptee shall not be required, although they shall receive notice as required by Section 40-7-44 NMSA 1978;

(2) the adoptee shall appear at all hearings; and

(3) no investigation under Section 40-7-46 NMSA 1978 and no counseling of the adoptee under the Adoption Act shall occur unless ordered by the court.

B. In addition to the allegations required by Section 40-7-42 NMSA 1978, the petition for adoption shall state the length and nature of the relationship between the petitioner and the adoptee; the degree of kinship, if any; the reason the adoption is sought, together with a statement as to why the adoption would be in the best interest of the petitioner, the adoptee and the public; the names and addresses of any living parents or adult children of the proposed adoptee; and whether the petitioner or his spouse has previously adopted any other adult person and, if so, the names of such persons, together with the date and place of the adoption.

C. No person shall adopt more than one unrelated adult person within one year of his adoption of another unrelated adult, unless the person to be adopted is the sibling by birth of a person previously adopted pursuant to this section or unless the person to be adopted is disabled or physically handicapped. No person shall adopt an unrelated adult person within one year of any adoption of an unrelated adult by his or her spouse, unless the person to be adopted is the sibling by birth of a person previously adopted pursuant to this section.

D. A hearing with regard to the adoption of a person pursuant to this section may, in the discretion of the court, be open and public.

History: Laws 1985, ch. 194, § 31; 1989, ch. 341, § 14.

The 1989 amendment, effective June 16, 1989, in Subsection A, in Paragraph (1) substituted "Section 40-7-44 NMSA 1978" for "Section 15 of that act", in Paragraph (3) substituted "Section 40-7-46 NMSA 1978 and no counseling of the adoptee under the Adoption Act" for "Section 18 of that act"; and in Subsection B, substituted "Section 40-7-42 NMSA 1978" for "Section 14 of the Adoption Act".

§ 40-7-60. Periodic review.

A. Within six months of a judgment terminating parental rights under Sections 32-1-54 and 32-1-55 NMSA 1978, within six months of any voluntary relinquishment of parental

rights and at least every six months thereafter, the department shall petition the court for a review of the status of any child who remains in the custody of a person pursuant to Subsection I of Section 32-1-55 NMSA 1978. The court shall retain jurisdiction to conduct periodic review hearings as to each child until a final decree of adoption is entered. The review may be carried out by either of the following:

(1) a judicial review hearing conducted by the court; or

(2) a judicial review hearing conducted by special master or referee as appointed by the court; provided, however, that the court approve any findings made by the special master or referee.

At any judicial review hearing held pursuant to Paragraphs (1) and (2) of this subsection, the legal custodian shall demonstrate all reasonable efforts taken to implement the permanent plan established for the child.

B. No notice of a periodic review hearing shall be given to any parent whose rights have been terminated under Sections 32-1-54 and 32-1-55 NMSA 1978 or to any parent who has relinquished parental rights. Parents whose rights have been terminated or who have relinquished custody of a child shall not be permitted to participate in any way in a periodic review hearing.

C. The technical rules of evidence shall not apply to hearings held pursuant to this section.

History: Laws 1985, ch. 194, § 32.

§ 40-7-61. Penalties.

A. Any person other than an agency who, in the regular course of business, selects an adoptive family for a prospective adoptee or arranges for such selection is guilty of a misdemeanor and subject to imprisonment in the county jail for a definite term of less than one year or to the payment of a fine of not more than one thousand dollars ($1,000), or to both, such penalties in the discretion of the judge, for each occurrence; provided, however, that the exchange of information between persons regarding the existence of a potential adoptee or potential adoptive family shall not be a violation of this section.

B. Any person who violates any provision of the Adoption Act [40-7-29 to 40-7-61 NMSA 1978] is guilty of a misdemeanor and subject to imprisonment in the county jail for a definite term of less than one year or to the payment of a fine of not more than one thousand dollars ($1,000), or to both, such penalties in the discretion of the judge, for each occurrence.

History: Laws 1985, ch. 194, § 33; 1989, ch. 341, § 15.

The 1989 amendment, effective June 16, 1989, in both subsections, substituted "imprisonment in the county jail for a definite term of less than one year or to the payment of a fine of not more than one thousand dollars ($1,000), or to both, such penalties in the discretion of the judge" for "a fine of up to five hundred dollars ($500)".

§ 40-7-62. Construction of act.

Nothing in Sections 1 through 5 of this act shall be construed to effectuate a change in the procedures in the proceedings prescribed under the Adoption Act, Sections 40-7-1 to 40-7-11 and 40-7-13 to 40-7-17 NMSA (being Laws 1971, Chapter 222, Sections 1 through 8, Laws 1973, Chapter 261, Section 3 and Laws 1971, Chapter 222, Sections 10 through 16, as amended), nor shall it be construed to affect any child placement proceedings in process on the effective date of this act.

History: 1953 Comp., § 22-2-43, enacted by Laws 1975, ch. 349, § 8; 1978 Comp., § 40-7-25, recompiled as 1978 Comp., § 40-7-62 by Laws 1985, ch. 194, § 38.

Compiler's notes. - Laws 1985, ch. 194, § 38 recompiled this section as 40-7-36 NMSA 1978, effective July 1, 1985; however, the section was recompiled again as 40-7-62 NMSA 1978 to conform to the code assignation of the Adoption Act, 40-7-29 to 40-7-61 NMSA 1978.

Sections 40-7-1 to 40-7-11 and 40-7-13 to 40-7-17 NMSA 1978, referred to in this section, were repealed in 1985.

"Sections 1 through 5 of this act". - Sections 3 and 5 of Laws 1975, ch. 349 (40-7-20 and 40-7-22 NMSA 1978), referred to in this section, were repealed by Laws 1981, ch. 171, § 12. Sections 1, 2, and 4 of Laws 1975, ch. 349 (40-7-18, 40-7-19, and 40-7-21 NMSA 1978), also referred to in this section, were repealed by Laws 1985, ch. 194, § 39.

"Effective date of this act". - The "effective date of this act", referred to in this section, means the effective date of Laws 1975, ch. 349, which contained no effective date provision, but was enacted at a session which adjourned on March 22, 1975. See N.M. Const., art. IV, § 23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 2 Am. Jur. 2d Adoption §§ 5 to 7.

§ 40-7-63. Purpose.

It is the purpose of Sections 40-7-63 through 40-7-65 NMSA 1978 to encourage and promote the placement of children who are difficult to place in permanent homes through a subsidized program within the social services division of the human services department.

History: 1953 Comp., § 22-2-44, enacted by Laws 1975, ch. 154, § 1; 1978 Comp., § 40-7-26, recompiled as 1978 Comp., § 40-7-63 by Laws 1985, ch. 194, § 38; 1987, ch. 106, § 5.

Compiler's notes. - Laws 1985, ch. 194, § 38 recompiled this section as 40-7-37 NMSA 1978, effective July 1, 1985; however, the section was recompiled again as 40-7-63 NMSA 1978 to conform to the code assignation of the Adoption Act, 40-7-29 to 40-7-61 NMSA 1978.

§ 40-7-64. Eligibility.

A. The social services division of the human services department may make payments to permanent guardians, adoptive parents or to medical vendors on behalf of a child placed for adoption by the division or by a child placement agency licensed by the division when the division determines that:

(1) the child is difficult to place; and

(2) the permanent guardian or the adoptive family is capable of providing the permanent family relationship needed by the child in all respects, except that the needs of the child are beyond the economic resources and ability of the family.

B. As used in Sections 40-7-63 through 40-7-65 NMSA 1978, a "difficult to place child" means a child who is physically or mentally handicapped or emotionally disturbed or who is in special circumstances by virtue of age, sibling relationship or racial background.

History: 1953 Comp., § 22-2-45, enacted by Laws 1975, ch. 154, § 2; 1978 Comp., § 40-7-27, recompiled as 1978 Comp., § 40-7-64 by Laws 1985, ch. 194, § 38; 1987, ch. 106, § 6.

Compiler's notes. - Laws 1985, ch. 194, § 38 recompiled this section as 40-7-38 NMSA 1978, effective July 1, 1985; however, the section was recompiled again as 40-7-64 NMSA 1978 to conform to the code assignation of the Adoption Act, 40-7-29 to 40-7-61 NMSA 1978.

§ 40-7-65. Administration.

A. The social services division of the human services department shall promulgate all necessary regulations for the administration of the program of subsidized adoptions or placement with permanent guardians.

B. Subsidy payments may include but are not limited to payments to vendors for medical and surgical expenses and payments to the adoptive parents or permanent

guardians for maintenance and other costs incidental to the adoption, care, training and education of the child. Such payments in any category of assistance shall not exceed the cost of providing such assistance in foster care and shall not be made after the child reaches eighteen years of age.

C. A written agreement between the adoptive family or permanent guardians and the social services division shall precede the final decree of adoption or permanent guardianship. The agreement shall incorporate the terms and conditions of the subsidy plan based on the individual needs of the child within the permanent family. In cases of subsidies that continue for more than one year, there shall be an annual redetermination of the need for a subsidy. The social services division shall develop an appeal procedure whereby a permanent family may contest a division determination to deny, reduce or terminate a subsidy.

History: 1953 Comp., § 22-2-46, enacted by Laws 1975, ch. 154, § 3; 1978 Comp., § 40-7-28, recompiled as 1978 Comp., § 40-7-65 by Laws 1985, ch. 194, § 38; 1987, ch. 106, § 7.

Compiler's notes. - Laws 1985, ch. 194, § 38 recompiled this section as 40-7-39 NMSA 1978, effective July 1, 1985; however, the section was recompiled again as 40-7-65 NMSA 1978 to conform to the code assignation of the Adoption Act, 40-7-29 to 40-7-61 NMSA 1978.

Article 7A

Child Placement Agency Licensing

§ 40-7A-1. Short title.

Sections 1 through 8 [40-7A-1 to 40-7A-8 NMSA 1978] of this act may be cited as the "Child Placement Agency Licensing Act."

History: Laws 1981, ch. 171, § 1.

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 [40-7A-1 to 40-7A-8 NMSA 1978] 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 [40-7A-1 to 40-7A-8 NMSA 1978]:

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 human services department;

D. "division" means the social 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 abused, neglected, dependent or homeless and who is not placed for adoption;

F. "person" means any individual, partnership, unincorporated association or corporation; and

G. "secretary" means the secretary of human services.

History: Laws 1981, ch. 171, § 3.

Cross-references. - As to the human services department, see 9-8-1 NMSA 1978 et seq. As to the social services division, see 9-8-4 NMSA 1978. As to the secretary of human services, see 9-8-5 NMSA 1978.

§ 40-7A-4. Licensing; regulations; 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 regulations 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 one-year periods if the division is satisfied that the child

placement agency is in compliance with the division's regulations. No fee shall be charged for a license.

B. No person shall operate a child placement agency or foster home without first being licensed to operate the agency or home by the division. Placement of a child in the home of a relative or guardian shall not require a license from the division under the Child Placement Agency Licensing Act [40-7A-1 to 40-7A-8 NMSA 1978]. A person desiring to operate a foster home under the authority of a child placement agency shall obtain a license from the division through the child placement agency under which it will operate. The child placement agency shall certify to the division that the person is a suitable person to operate a foster home. The certification shall be on a form provided by the division and shall contain such information as the division requires. The division shall give notice of action taken upon a certification received from a child placement agency within thirty days from the receipt thereof, and shall state the reasons for any denial. No foster home shall be certified by more than one child placement agency. A certificate shall be renewed for successive one-year periods if the child placement agency is satisfied that the foster home is in compliance with the division's regulations. When certified by a child placement agency, a foster home may receive a child for care from sources other than the certifying agency upon the written consent of the certifying agency.

C. Upon certification by a child placement agency that a person is suitable to operate a foster home, the child placement agency may place a child for foster care pending licensing of the foster home by the division. If the division declines to license, the child placement agency shall promptly remove the child from the placement.

D. The division shall prescribe and publish minimum standards and other regulations for licensing of child placement agencies and certification of foster homes. The prescribed minimum standards and other regulations shall be promulgated by the division no later than six months after the effective date of the Child Placement Agency Licensing Act 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 or certificate 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 or certificate to provide care for the child served;

(4) the maintenance of records pertaining to the admission, progress, health and discharge of the child services [served]; and

(5) 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 provisions of the Child Placement Agency Licensing Act and regulations of the division.

G. Any person licensed or certified to operate a child placement agency or foster home under the provisions of the Child Placement Agency Licensing Act has the right to appeal any regulation which that person believes has been improperly applied by representatives of the division or which 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.

History: Laws 1981, ch. 171, § 4.

§ 40-7A-5. Variances.

Upon written application from a child placement agency or foster home, the division in exercise of its sole discretion may issue a variance which permits a noncompliance with the division's regulations. The variance shall be in writing and may be temporary or permanent. No variance shall be issued which is contrary to the Child Placement Agency Licensing Act [40-7A-1 to 40-7A-8 NMSA 1978]. There shall be no right to a variance.

History: Laws 1981, ch. 171, § 5.

§ 40-7A-6. Revocation or suspension of license; notice; reinstatement.

A. The division may deny, revoke, suspend, place on probation or refuse to renew the license of any child placement agency or foster home for failure to comply with the division's regulations. The holder of the license sought to be denied, revoked, suspended or placed on probation or which 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. Any 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 regulations has ceased.

B. A person adversely affected by a decision of the division denying, revoking, suspending, placing on probation or refusing to renew a license may obtain a review thereof by filing a petition, duly verified, with the clerk of the district court of the first judicial district within sixty days after entry of the decision. The petition shall set forth specifically the ground for review. A copy of the petition shall be served upon the division by registered mail, return receipt requested. Upon presentation of the petition, the district court may allow a writ of certiorari directed to the division to review its decision and shall prescribe the time in which a return shall be made. Within thirty days after receipt of the petition, the division shall certify and file with the clerk of the court the transcript of the record upon which the decision complained of was entered.

C. When any license is denied, suspended, revoked or not renewed, the care and custody of any child placed under the Child Placement Agency Licensing Act [40-7A-1 to 40-7A-8 NMSA 1978] shall be transferred to the certifying child placement agency or the division.

History: Laws 1981, ch. 171, § 6.

§ 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 [40-7A-1 to 40-7A-8 NMSA 1978] 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 to administer compact; rules and regulations.

The New Mexico human services 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 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.

Cross-references. - As to the authority of the human services department to conduct social services, see 9-8-13 NMSA 1978.

§ 40-7B-3. Supplementary agreements.

The compact administrator of the Interstate Compact on Adoption and Medical Assistance [40-7B-1 NMSA 1978] 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 [40-7B-1 NMSA 1978] 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 [40-7B-1 to 40-7B-6 NMSA 1978], 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.

Adoption Assistance and Child Welfare Act of 1980. - The federal Adoption Assistance and Child Welfare Act of 1980 appears as 42 U.S.C. § 602 et seq.

Social Security Act. - Titles IV(e) and XIX of the Social Security Act appear as 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.

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, if no sufficient cause is shown to the contrary, have his name changed or established by order of the court. The parent or guardian 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 and upon filing the notice required with proof of publication, if no sufficient cause is shown to the contrary, have the name of his 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, the required notice shall include notice to both legal parents. 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 him for that purpose.

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.

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".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Evidence §§ 1052 to 1055; 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, 92 A.L.R.3d 1091.

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. [Notice of petition; publication.]

Before making application to the court for changing or establishing a name as above provided, the applicant must cause a notice thereof, stating therein the nature of the application, the time and place, when and where the same will be made, to be published in the county where such application is to be made, and where said applicant resides, said notice to be published at least once each week for two consecutive weeks, in some newspaper printed in said county, and if there be no newspaper published in the county where said applicant resides, then said notice shall be published in a newspaper printed in a county nearest to the residence of said person, and having a circulation in the county where such person resides.

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.

Cross-references. - As to legal newspapers and publication of notice, see 14-11-2 NMSA 1978.

§ 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 to 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Duty and discretion of court in passing upon petition to change name of individual, 110 A.L.R. 583.
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

Visitation by Grandparents

§ 40-9-1. Dissolution of marriage or legal separation; parentage; judgment; visitation privileges.

In rendering a judgment of dissolution of marriage, legal separation or the existence of the parent and child relationship pursuant to the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978] or at any time after the entry of such decree, 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 privileges.

History: Laws 1979, ch. 13, § 1; 1987, ch. 33, § 1.

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.

§ 40-9-2. Children; visitation by grandparents.

A. If one or both parents of a minor child are deceased, any grandparent of the minor may petition the district court for visitation privileges with respect to the minor.

B. If a minor child has resided with a grandparent for a period of six months or more and is subsequently removed from the home by a parent, the grandparent may petition the district court for visitation privileges with respect to the child.

C. An adoption of a minor child by a stepparent pursuant to the Adoption Act [40-7-29 to 40-7-61 NMSA 1978] under which the rights of the natural parents are relinquished or terminated shall not act to preclude the biological grandparents of the minor child from receiving visitation rights.

History: Laws 1979, ch. 13, § 2; 1987, ch. 33, § 2.

Section inapplicable after termination of natural parents' rights. - Visitation rights under this section do not apply in adoption proceedings after the termination of the natural parents' rights. Christian Placement Serv. v. Gordon, 102 N.M. 465, 697 P.2d 148 (Ct. App. 1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Grandparents' visitation rights, 90 A.L.R.3d 222.

§ 40-9-3. Visitation; restrictions.

A. Under either Section 1 or 2 [40-9-1 or 40-9-2 NMSA 1978] of this act, the court may grant reasonable visitation privileges to a grandparent if the court determines that it is in the best interests and welfare of the child, and may issue any necessary order to enforce the visitation privileges and may modify such privileges or order upon a showing of good cause by any interested person.

B. Absent a showing of good cause, no grandparent may file a petition pursuant to this act more often than once a year.

C. If a petition is denied pursuant to this act [40-9-1 to 40-9-4 NMSA 1978], the court may award court costs and a reasonable attorney fee against the petitioning party.

History: Laws 1979, ch. 13, § 3.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Grandparents' visitation rights, 90 A.L.R.3d 222.

§ 40-9-4. Applicability.

Chapter 40, Article 9 NMSA 1978 shall apply to the statutory adoptions described in Paragraphs (2), (3), (4) and (5) of Subsection A of Section 40-7-34 NMSA 1978. If the petition made under Chapter 40, Article 9 NMSA 1978 is made during the pendency of the adoption proceedings, the petition shall be filed as part of the adoption proceedings. Chapter 40, Article 9 NMSA 1978 shall have no application in the event of a relinquishment or termination of parental rights in cases of other statutory adoption proceedings.

History: Laws 1979, ch. 13, § 4; 1987, ch. 33, § 3.

Section inapplicable where natural parent deceased. - This section did not apply to a case involving the death of the natural father and adoption of the children by the surviving parent's new spouse, where the deceased parent was the child of the petitioning grandparent; thus, the district judge had jurisdiction under this article to determine whether and under what conditions the grandparent's request for visitation should be granted. Pillars v. Thompson, 103 N.M. 704, 712 P.2d 1366 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Grandparents' visitation rights, 90 A.L.R.3d 222.

Article 10

Child Custody Jurisdiction

§ 40-10-1. Short title.

This act [40-10-1 to 40-10-24 NMSA 1978] may be cited as the "Child Custody Jurisdiction Act."

History: Laws 1981, ch. 119, § 1.

Inapplicable to cases arising before July 1, 1981. - This article does not apply to cases which arose before July 1, 1981. State ex rel. Valles v. Brown, 97 N.M. 327, 639 P.2d 1181 (1981).

But applies to cases pending on effective date. - The New Mexico Child Custody Jurisdiction Act applies to pending cases, even though these cases were filed before but decided after the effective date of the New Mexico act. Olsen v. Olsen, 98 N.M. 644, 651 P.2d 1288 (1982).

Effect on proceedings to terminate parental rights. - This act does not supersede or invalidate a proceeding to terminate parental rights brought under 32-1-54 NMSA 1978. Laurie R. v. New Mexico Human Servs. Dep't, 107 N.M. 529, 760 P.2d 1295 (Ct. App. 1988).

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, 98 N.M. 644, 651 P.2d 1288 (1982).

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, 98 N.M. 644, 651 P.2d 1288 (1982).

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, 98 N.M. 644, 651 P.2d 1288 (1982).

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, 98 N.M. 644, 651 P.2d 1288 (1982).

Court of original jurisdiction ordinarily retains continuing jurisdiction to modify a custody decree. Trask v. Trask, 104 N.M. 780, 727 P.2d 88 (Ct. App. 1986).

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 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. Department of Human Servs. v. Avinger, 104 N.M. 355, 721 P.2d 781 (Ct. App. 1985), aff'd, 104 N.M. 255, 720 P.2d 290 (1986).

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, 97 N.M. 327, 639 P.2d 1181 (1981).

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).

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. - 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, 54 A.L.R.4th 1170.

§ 40-10-2. Purpose.

It is the purpose of the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978] to:

A. avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

B. promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

C. assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

D. discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

E. deter abductions and other unilateral removals of children undertaken to obtain custody awards;

F. avoid relitigation of custody decisions of other states in this state, insofar as feasible;

G. facilitate the enforcement of custody decrees of other states;

H. promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

I. make the laws of New Mexico uniform with the laws of other states which enact similar laws.

History: Laws 1981, ch. 119, § 2.

Law reviews. - 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).

§ 40-10-3. Definitions.

As used in the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978]:

A. "contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

B. "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights, but it does not include a decision relating to child support or any other monetary obligation of any person;

C. "custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation;

D. "decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree;

E. "home state" means the state in which the child, immediately preceding the time involved, lived with his parents, a parent or a person acting as a parent for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the above-named persons are counted as part of the six-month period or any other period;

F. "initial decree" means the first custody decree concerning a particular child;

G. "modification decree" means a custody decree which modifies or replaces a prior custody decree, whether made by the court which rendered the prior decree or by another court;

H. "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

I. "physical custody" means actual possession and control of a child; and

J. "state" means any state, territory or possession of the United States, the commonwealth of Puerto Rico and the District of Columbia.

History: Laws 1981, ch. 119, § 3; 1986, ch. 93, § 1.

"Home state," as defined in Subsection E and used in 40-10-4A NMSA 1978, 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, 104 N.M. 780, 727 P.2d 88 (Ct. App. 1986).

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

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).

§ 40-10-4. Jurisdiction.

A. A district court of New Mexico which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial decree or modification decree of a prior decree of another court under the following circumstances if:

(1) New Mexico:

(a) is the home state of the child at the time of commencement of the proceeding; or

(b) had been the child's home state within six months before commencement of the proceeding and the child is absent from New Mexico because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in New Mexico;

(2) it is in the best interest of the child that a district court of New Mexico assume jurisdiction because:

(a) the child and his parents, or the child and at least one contestant, have a significant connection with New Mexico; and

(b) there is available in New Mexico substantial evidence concerning the child's present or future care, protection, training and personal relationships;

(3) the child is physically present in New Mexico and:

(a) the child has been abandoned; or

(b) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

(4) it appears that:

(a) no other state would have jurisdiction under prerequisites substantially in accordance with Paragraph (l), (2) or (3) of this subsection, or another state has declined to exercise jurisdiction on the ground that New Mexico is the more appropriate forum to determine the custody of the child; and

(b) it is in the best interest of the child that the New Mexico district court assume jurisdiction.

B. A district court of New Mexico which is competent to decide child custody matters has jurisdiction to make a child custody determination by modification decree of a prior New Mexico decree if, since the prior New Mexico custody determination, New Mexico has remained the residence of the child or any contestant in the prior custody determination.

C. Except as provided under Paragraphs (3) and (4) of Subsection A of this section, physical presence in New Mexico of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a district court of New Mexico to make a child custody determination.

D. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

History: Laws 1981, ch. 119, § 4; 1989, ch. 32, § 1.

The 1989 amendment, effective June 16, 1989, inserted "of a prior decree of another court" in the introductory paragraph of Subsection A, added present Subsection B, and redesignated former Subsections B and C as present Subsections C and D.

"Home state," as defined in 40-10-3E NMSA 1978 and used in Subsection A of this section, 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, 104 N.M. 780, 727 P.2d 88 (Ct. App. 1986).

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 to satisfy the jurisdictional requirement. Olsen v. Olsen, 98 N.M. 644, 651 P.2d 1288 (1982); Serna v. Salazar, 98 N.M. 648, 651 P.2d 1292 (1982).

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, 105 N.M. 567, 734 P.2d 807 (Ct. App. 1987).

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, 104 N.M. 780, 727 P.2d 88 (Ct. App. 1986).

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

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).

§ 40-10-5. Notice and opportunity to be heard.

Before making a decree under the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978], reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of the child. If any of these persons are outside New Mexico, notice and opportunity to be heard shall be given pursuant to Section 6 [40-10-6 NMSA 1978] of that act.

History: Laws 1981, ch. 119, § 5.

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, 104 N.M. 163, 717 P.2d 1132 (Ct. App. 1986).

§ 40-10-6. Notice to persons outside New Mexico; submission to jurisdiction.

A. Notice required for the exercise of jurisdiction over a person outside New Mexico shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) by personal delivery outside New Mexico in the manner prescribed for service of process within New Mexico;

(2) in the manner prescribed by the law of the place in which the service is made for

service of process in that place in an action in any of its courts of general jurisdiction;

(3) by certified mail, return receipt requested, addressed to the person to be served and requesting a receipt; or

(4) as directed by the district court including publication, if other means of notification are ineffective.

B. Notice under this section shall be served, mailed or delivered or last published at least twenty days before any hearing in New Mexico.

C. Proof of service outside New Mexico may be made by affidavit of the individual who made the service or in the manner prescribed by the law of New Mexico, the order pursuant to which the service is made or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

D. Notice is not required if a person submits to the jurisdiction of the district court.

History: Laws 1981, ch. 119, § 6.

§ 40-10-7. Simultaneous proceeding in other states.

A. A district court of New Mexico shall not exercise its jurisdiction under the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978] if at the time of filing the petition a proceeding concerning the custody of the same child was pending in a court of another state exercising jurisdiction substantially in conformity with the Child Custody Jurisdiction Act, unless the proceeding is stayed by the court of the other state because New Mexico is a more appropriate forum, or for other reasons.

B. Before hearing the petition in a custody proceeding, the district court shall examine the pleadings and other information supplied by the parties under Section 10 [40-10-10 NMSA 1978] of the Child Custody Jurisdiction Act and shall consult the child custody registry established under Section 17 [40-10-17 NMSA 1978] of that act, concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state, the court shall direct an inquiry to the state court administrator or other appropriate official of the other state.

C. If the district court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the New Mexico district court assumed jurisdiction, the court shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with Sections 20 through 23 [40-10-20 to 40-10-23 NMSA 1978] of the Child Custody Jurisdiction Act. If a court of New Mexico has made a custody decree

before being informed of a pending proceeding in a court of another state, it shall immediately inform that court of this fact. If the district court is informed that a proceeding was commenced in another state after the New Mexico court assumed jurisdiction, it shall likewise inform the other court, to the end that the issues may be litigated in the more appropriate forum.

History: Laws 1981, ch. 119, § 7.

§ 40-10-8. Inconvenient forum.

A. A district court which has jurisdiction under the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978] to make an initial decree or a modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

B. A finding of inconvenient forum may be made upon a district court's own motion or upon motion of a party or of a guardian ad litem or other representative of the child.

C. In order to determine whether it is an inconvenient forum, the court shall consider whether it is in the interest of the child that another state assume jurisdiction, and for this purpose may take into account the following factors, among others; whether:

(1) another state is or recently was the child's home state;

(2) another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(3) substantial evidence concerning the child's present or future care, protection, training and personal relationships is more readily available in another state;

(4) the parties have agreed on another forum which is no less appropriate;

(5) the parties have stipulated that New Mexico shall retain jurisdiction of custody matters;

(6) the out-of-state contestant has complied with any previous custody and visitation orders of the New Mexico court; and

(7) the exercise of jurisdiction by a court of New Mexico would contravene any of the purposes stated in Section 40-10-2 NMSA 1978.

D. Before determining whether to decline or retain jurisdiction, the district court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court, with a view to assuring that jurisdiction will be

exercised by the more appropriate court and that a forum will be available to the parties.

E. If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state, or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

F. The court may decline to exercise its jurisdiction under the Child Custody Jurisdiction Act if a custody determination is incidental to an action for dissolution of marriage or another proceeding, while retaining jurisdiction over the dissolution of marriage or other proceeding.

G. Whenever it appears to the court that it is clearly an inappropriate forum, it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in New Mexico, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

H. Upon dismissal or stay of proceedings under this section, the district court shall inform the court found to be the more appropriate forum of this fact or, if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

I. Any communication received from another state informing New Mexico of a finding of inconvenient forum because a district court of New Mexico is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction in the case, the court of New Mexico shall inform the original court of this fact.

History: Laws 1981, ch. 119, § 8; 1989, ch. 32, § 2.

The 1989 amendment, effective June 16, 1989, added present Subsections C(5) and C(6), and redesignated former Subsection C(5) as present Subsection C(7), while making a minor stylistic change therein.

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, 100 N.M. 773, 676 P.2d 1338 (Ct. App. 1984).

Attorneys' fees awardable if forum found inconvenient, even if not "clearly inappropriate". - Where trial court declines jurisdiction under this section, Subsection G can be the basis for awarding attorney fees on appeal even though trial court did not

find New Mexico "clearly inappropriate" under that subsection. Hester v. Hester, 100 N.M. 773, 676 P.2d 1338 (Ct. App. 1984).

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, 105 N.M. 567, 734 P.2d 807 (Ct. App. 1987).

§ 40-10-9. Jurisdiction declined by reason of conduct.

A. If the petitioner for an initial decree has wrongfully taken the child from another state, the district court in its discretion may decline to exercise jurisdiction.

B. Unless required in the interest of the child and subject to Subsection A of Section 15 [40-10-15 NMSA 1978] of the Child Custody Jurisdiction Act, the district court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state, the court in its discretion and subject to Subsection A of Section 15 of that act may decline to exercise jurisdiction.

C. In appropriate cases a district court dismissing a petition under this section may charge the petitioner with necessary travel expenses and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

History: Laws 1981, ch. 119, § 9.

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.

§ 40-10-10. Information under oath to be submitted to the court.

A. Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last three years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit, every party shall further declare under oath whether he:

(1) has participated as a party, witness or in any other capacity in any other litigation concerning the custody of the same child in New Mexico or any other state;

(2) has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(3) knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

B. If the declaration pursuant to Subsection A of this section is in the affirmative, the declarant shall give additional information under oath as required by the court. The district court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

C. Each party has a continuing duty to inform the court of any custody proceeding concerning the child in New Mexico or any other state of which he has obtained information during this proceeding.

History: Laws 1981, ch. 119, § 10.

§ 40-10-11. Additional parties.

Whenever the district court learns from information furnished by the parties pursuant to Section 10 [40-10-10 NMSA 1978] of the Child Custody Jurisdiction Act or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order the person to be joined as a party and to be duly notified of the pendency of a proceeding and of his joinder as a party. If the person joined as a party is outside New Mexico, he shall be served with process or otherwise notified in accordance with Section 6 [40-10-6 NMSA 1978] of that act.

History: Laws 1981, ch. 119, § 11.

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

§ 40-10-12. Appearance of parties and the child.

A. The district court may order any party to the proceeding who is in New Mexico to appear personally before the district court, and, if that party has physical custody of the child, the court may order that he appear personally with the child.

B. If a party to the proceeding whose presence is desired by the district court is outside New Mexico with or without the child, the court may order that the notice given under Section 6 [40-10-6 NMSA 1978] of the Child Custody Jurisdiction Act include a statement directing that party to appear personally with or without the child and

declaring that failure to appear may result in a decision adverse to that party.

C. If a party to the proceeding who is outside New Mexico is directed to appear pursuant to Subsection B of this section or desires to appear personally before the district court with or without the child, the court may require another party to pay to the clerk of the district court travel and other necessary expenses of the party so appearing and of the child, if this is just and proper under the circumstances.

History: Laws 1981, ch. 119, § 12.

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.

§ 40-10-13. Binding force and res judicata effect of custody decree.

A custody decree rendered by a district court of New Mexico which had jurisdiction under Section 4 [40-10-4 NMSA 1978] of the Child Custody Jurisdiction Act binds all parties who have been served in New Mexico or notified in accordance with Section 6 [40-10-6 NMSA 1978] of that act or who have submitted to the jurisdiction of the court and who have been given an opportunity to be heard. As to these parties, the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978].

History: Laws 1981, ch. 119, § 13.

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.

§ 40-10-14. Recognition of out-of-state custody decrees.

The district court of New Mexico shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978] or which was made under factual circumstances meeting the jurisdictional standards of that act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of the Child Custody Jurisdiction Act.

History: Laws 1981, ch. 119, § 14.

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

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).

§ 40-10-15. Modification of custody decree of another state.

A. If a court of another state has made a custody decree, a district court of New Mexico shall not modify that decree unless:

(1) it appears that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978] or has declined to assume jurisdiction to modify the decree; and

(2) the district court of New Mexico has jurisdiction.

B. If a district court of New Mexico is authorized under Subsection A of this section and Section 9 [40-10-9 NMSA 1978] of the Child Custody Jurisdiction Act to modify a custody decree of another state, it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with Section 23 [40-10-23 NMSA 1978] of that act.

History: Laws 1981, ch. 119, § 15.

Sections 32-1-9A NMSA 1978 and 40-10-15A(1) NMSA 1978 are in pari materia because both deal with jurisdiction of the children's court; and, being in pari materia, they are to be construed together, if possible, to give effect to the provisions of both statutes. The construction that 32-1-9A NMSA 1978 gives the children's court the exclusive jurisdiction to act and that 40-10-15A(1) limits when that authority is to be exercised, gives effect to both statutes. State ex rel. Department of Human Servs. v. Avinger, 104 N.M. 355, 721 P.2d 781 (Ct. App. 1985), aff'd, 104 N.M. 255, 720 P.2d 290 (1986).

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, 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. Department of Human Servs. v. Avinger, 104 N.M. 355, 721 P.2d 781 (Ct. App. 1985), aff'd, 104 N.M. 255, 720 P.2d 290 (1986).

Section 40-10-15A NMSA 1978 limits the court's exercise of jurisdiction in a "neglected child" proceeding brought under 32-1-9(A) 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. Department of Human Servs. v. Avinger, 104 N.M. 255, 720 P.2d 290 (1986).

Federal Parental Kidnapping Prevention Act has supremacy over state law. Serna v. Salazar, 98 N.M. 648, 651 P.2d 1292 (1982).

Compliance with jurisdictional prerequisites of 40-10-4 NMSA 1978. - The New Mexico statute requires compliance with only one of four prerequisites in 40-10-4 NMSA 1978 to satisfy the jurisdictional requirement. Olsen v. Olsen, 98 N.M. 644, 651 P.2d 1288 (1982); Serna v. Salazar, 98 N.M. 648, 651 P.2d 1292 (1982).

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

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).

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.

§ 40-10-16. Filing and enforcement of custody decree of another state.

A. A certified copy of a custody decree of another state may be filed in the office of the clerk of any district court of New Mexico. The clerk shall treat the decree in the same manner as a custody decree of the district court of New Mexico. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of New Mexico.

B. A person violating a custody decree of another state, making it necessary to enforce the decree in New Mexico, may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses.

History: Laws 1981, ch. 119, § 16.

Law reviews. - 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).

§ 40-10-17. Registry of out-of-state custody decrees and proceedings.

The clerk of each district court shall maintain a registry in which he shall enter the following:

A. certified copies of custody decrees of other states received for filing;

B. communications as to the pendency of custody proceedings in other states;

C. communications concerning a finding of inconvenient forum by a court of another state; and

D. other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of New Mexico or the disposition to be made by it in a custody proceeding.

History: Laws 1981, ch. 119, § 17.

§ 40-10-18. Certified copies of custody decree.

The clerk of a district court of New Mexico shall, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, certify and forward a copy of the decree to that court or person.

History: Laws 1981, ch. 119, § 18.

§ 40-10-19. Testimony by deposition in another state.

In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The district court on its own motion may direct 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 shall be taken.

History: Laws 1981, ch. 119, § 19.

§ 40-10-20. Hearing and studies in another state.

A. A court of New Mexico may request the appropriate court of another state to hold a

hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state or to have social studies made with respect to the custody of a child involved in proceedings pending in the district court of New Mexico, and to forward to the district court of New Mexico certified copies of the transcript of the record of the hearing, the evidence otherwise adduced or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties.

B. A district court of New Mexico may request the appropriate court of another state to order a party to custody proceedings pending in the court of New Mexico to appear in the proceedings and, if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.

History: Laws 1981, ch. 119, § 20.

§ 40-10-21. Assistance to courts of other states.

A. Upon request of the court of another state, the district courts of New Mexico which are competent to hear custody matters may order a person in New Mexico to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in New Mexico or may order social studies to be made for use in a custody proceeding in another state. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced and any social studies prepared shall be forwarded by the clerk of the district court to the requesting court.

B. A person within New Mexico may voluntarily give his testimony or statement in New Mexico for use in a custody proceeding outside New Mexico.

C. Upon request of the court of another state, a competent district court of New Mexico may order a person in New Mexico to appear alone or with the child in a custody proceeding in another state. The district court may condition compliance with the request upon assurance by the other state that travel and other necessary expenses will be advanced or reimbursed.

History: Laws 1981, ch. 119, § 21.

"Upon request of the court of another state". - An order by a trial court requiring the human services 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. State ex rel. Human Servs. Dep't v. Martin, 104 N.M. 279, 720 P.2d 314 (Ct. App. 1986).

§ 40-10-22. Preservation of documents for use in other states.

In any custody proceeding in New Mexico, the district court shall preserve the pleadings, orders and decrees; any record that has been made of its hearings; social studies; and other pertinent documents until the child reaches the age of majority. Upon appropriate request of the court of another state, the district court of New Mexico shall forward to the other court certified copies of any or all of such documents.

History: Laws 1981, ch. 119, § 22.

§ 40-10-23. Request for court records of another state.

Whenever a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a district court of New Mexico, the district court of New Mexico, upon taking jurisdiction of the case, shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in Section 22 [40-10-22 NMSA 1978] of the Child Custody Jurisdiction Act.

History: Laws 1981, ch. 119, § 23.

§ 40-10-24. Applicability.

The provisions of the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978] shall apply only between those states which have enacted the same or similar legislation.

History: Laws 1981, ch. 119, § 25.

Severability clauses. - Laws 1981, ch. 119, § 24, provides for the severability of the Child Custody Jurisdiction Act if any part or application thereof is held invalid.

Article 11

Uniform Parentage Act

§ 40-11-1. Short title.

This act [40-11-1 to 40-11-23 NMSA 1978] may be cited as the "Uniform Parentage Act".

History: Laws 1986, ch. 47, § 1.

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

§ 40-11-2. Definition.

As used in the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978], "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother and child relationship and the father and child relationship.

History: Laws 1986, ch. 47, § 2.

§ 40-11-3. Relationship not dependent on marriage.

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

History: Laws 1986, ch. 47, § 3.

§ 40-11-4. How parent and child relationship established.

The parent and child relationship between a child and:

A. the natural mother may be established by proof of her having given birth to the child, or as provided by Section 21 [40-11-21 NMSA 1978] of the Uniform Parentage Act;

B. the natural father may be established as provided in the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978]; and

C. an adoptive parent may be established as provided by the Adoption Act [40-7-29 to 40-7-61 NMSA 1978].

History: Laws 1986, ch. 47, § 4.

§ 40-11-5. Presumption of paternity.

A. A man is presumed to be the natural father of a child if:

(1) he and the child's natural mother are or have been married to each other and the child is born during the marriage or within three hundred days after the marriage is

terminated by death, annulment, declaration of invalidity or dissolution of marriage or after a decree of separation is entered by a court;

(2) before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(a) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage or within three hundred days after its termination by death, annulment, declaration of invalidity or divorce; or

(b) if the attempted marriage is invalid without a court order, the child is born within three hundred days after the termination of cohabitation;

(3) after the child's birth, he and the child's natural mother have married or attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(a) he has acknowledged his paternity of the child in writing filed with the vital statistics bureau of the health services division of the health and environment department;

(b) with his consent, he is named as the child's father on the child's birth certificate; or

(c) he is obligated to support the child under a written voluntary promise or by court order;

(4) while the child is under the age of majority, he openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child; or

(5) he acknowledges his paternity of the child in writing filed with the vital statistics bureau of the health services division of the health and environment department, which shall promptly inform the mother of the filing of the acknowledgement, and, within a reasonable time after being informed of the filing, she does not dispute the acknowledgement.

B. If two or more men are presumed under this section to be the child's father, an acknowledgement by one of them may be effective only with the written consent of the other or pursuant to Subsection C of this section.

C. A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more men are presumed under this section to be the father of the same child, paternity shall be established as provided in the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978]. If the presumption has been rebutted with respect to one man, paternity of the child by another man may be determined in the same action, if he has been made a party.

D. A man is presumed to be the natural father of a child if pursuant to blood or genetic tests, properly performed by a qualified individual and evaluated by an expert, including deoxyribonucleic acid (DNA) probe technique tests under the Uniform Parentage Act, the probability of his being the father is ninety-nine percent or higher.

History: Laws 1986, ch. 47, § 5; 1989, ch. 56, § 1.

The 1989 amendment, effective June 16, 1989, added Subsection D.

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

§ 40-11-6. Artificial insemination.

A. If, under the supervision of a licensed physician and with the consent of her husband, a woman is inseminated artificially with semen donated by a man not her husband, the husband is treated as if he were the natural father of the child thereby conceived so long as the husband's consent is in writing, signed by him and his wife. The physician shall certify their signatures and the date of the insemination and file the husband's consent with the vital statistics bureau of the health services division of the health and environment department, where it shall be kept confidential and in a sealed file; provided, however, that the physician's failure to either certify or file the consent shall not affect the father and child relationship.

B. Any donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife may be treated as if he were the natural father of the child thereby conceived if he so consents in writing signed by him and the woman. The physician shall certify their signatures and the date of the insemination and file the donor's consent with the vital statistics bureau of the health services division of the health and environment department where it shall be kept confidential and in a sealed file; provided, however, that the physician's failure to either certify or file the consent shall not affect the father and child relationship.

C. All papers and records pertaining to the insemination, whether part of a court, medical or any other file, are subject to inspection only upon an order of the court for good cause shown.

History: Laws 1986, ch. 47, § 6.

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

§ 40-11-7. Determination of father and child relationship; who may bring action; when action may be brought.

A. Any interested party may bring an action for the purpose of determining the existence or nonexistence of the parent and child relationship.

B. If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except service of process and the taking of depositions to perpetuate testimony.

History: Laws 1986, ch. 47, § 7.

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, 108 N.M. 674, 777 P.2d 913 (Ct. App. 1989).

§ 40-11-8. Jurisdiction; venue.

A. The district court has jurisdiction over an action brought under the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978]. The action may also be joined with an action for dissolution of marriage, annulment, separate maintenance or support.

B. A person who has sexual intercourse in this state thereby submits to the jurisdiction of the courts of this state as to an action brought under the Uniform Parentage Act with respect to a child who may have been conceived by that act of intercourse. In addition to any other method provided by rule or statute, personal jurisdiction may be acquired over such person by delivery of summons outside this state by personal service or by registered mail with proof of actual receipt.

C. The action may be brought in the county in which any party resides or is found or, if the father is deceased, in which proceedings for probate of his estate have been or could be commenced.

History: Laws 1986, ch. 47, § 8.

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

§ 40-11-9. Parties.

The child shall be made a party to the action. If he is a minor, he shall be represented by his general guardian or a guardian ad litem appointed by the court, or both. The court may align the parties.

History: Laws 1986, ch. 47, § 9.

Cross-references. - As to guardians ad litem for minors, see 38-4-10 to 38-4-12 NMSA 1978.

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.

§ 40-11-10. Pre-trial proceedings.

As soon as practicable after an action to declare the existence or nonexistence of the father and 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 1986, ch. 47, § 10.

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

§ 40-11-11. Pre-trial recommendations.

A. On the basis of the information produced at the pre-trial hearing, the judge or master conducting the hearing shall evaluate the probability of determining the existence or nonexistence of the father and child relationship in a trial. On the basis of the evaluation, an appropriate recommendation for settlement shall be made to the parties.

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 blood tests have not been taken, the court shall require the parties to submit to blood tests, if practicable. Thereafter, the judge 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 or

master conducting the hearing finds it unlikely that all parties would accept a recommendation he might make under Subsection A or C of this section.

History: Laws 1986, ch. 47, § 11.

§ 40-11-12. Blood tests.

A. The court may, and upon request of a party shall, require the child, mother or alleged father to submit to blood or genetic tests, including deoxyribonucleic acid (DNA) probe technique tests.

B. The court, upon reasonable request by a party, shall order that independent tests be performed by other experts qualified as examiners of blood types, or as qualified experts in the administration of genetic tests, including deoxyribonucleic acid (DNA) probe technique tests.

C. In all cases, the court shall determine the number and qualifications of the experts.

History: Laws 1986, ch. 47, § 12; 1989, ch. 56, § 2.

The 1989 amendment, effective June 16, 1989, substituted all of the language of Subsection A following "blood" for "tests", and added all of the language of Subsection B following "blood types".

§ 40-11-13. Evidence relating to paternity.

Evidence relating to paternity may include:

A. evidence of sexual intercourse between the mother and alleged father at any possible time of conception;

B. an expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy;

C. blood test or genetic test results, including deoxyribonucleic acid (DNA) probe technique test results, if available, of the statistical probability of the alleged father's paternity, based on a test performed by a qualified individual and evaluated by an expert; and

D. all other evidence relevant to the issue of paternity of the child.

History: Laws 1986, ch. 47, § 13; 1989, ch. 56, § 3.

The 1989 amendment, effective June 16, 1989, rewrote Subsection C which formerly read: "blood test results, if available, of the statistical probability of the alleged father's paternity, based on a test performed by an expert".

Admissibility of opinion testimony based on blood testing. - The Human Leukocyte Antigen (HLA) 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, 104 N.M. 500, 723 P.2d 971 (Ct. App. 1986).

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, 104 N.M. 500, 723 P.2d 971 (Ct. App. 1986).

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, 104 N.M. 500, 723 P.2d 971 (Ct. App. 1986).

Evidence properly excluded. - Exclusion of a letter written by a doctor summarizing his conclusions of paternity test results, together with the statistical probability calculations based on the serologic tests performed, was proper since a proper foundation had not been established for the documents' admission. State ex rel. Human Servs. Dep't v. Coleman, 104 N.M. 500, 723 P.2d 971 (Ct. App. 1986).

Law reviews. - Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

§ 40-11-14. Civil action.

A. An action under the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978] is a civil action governed by the rules of civil procedure. The mother of the child and the alleged father are competent to testify and may be compelled to testify.

B. Testimony relating to sexual access to the mother by an unidentified man at any time or by an identified man at a time other than the probable time of conception is inadmissible in evidence, unless offered by the mother.

C. In an action against an alleged father, evidence offered by him with respect to a man who is not subject to the jurisdiction of the court concerning his sexual intercourse with the mother at or about the probable time of conception of the child is admissible in

evidence only if the alleged father has undergone and made available to the court blood tests, the results of which do not exclude the possibility of his paternity of the child.

History: Laws 1986, ch. 47, § 14.

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).

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. - Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

§ 40-11-15. Judgment or order.

A. The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes.

B. If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that a new birth certificate be issued.

C. 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.

D. 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, a lump sum payment shall not thereafter deprive a state agency of its right to reimbursement from an appropriate party should the child become a recipient of public assistance.

E. In determining the amount to be paid by a parent for support of the child or children, a court or child support hearing office shall make such determination in accordance with the provisions of the child support guidelines of Section 40-4-11.1 NMSA 1978.

History: Laws 1986, ch. 47, § 15; 1989, ch. 56, § 4.

The 1989 amendment, effective June 16, 1989, rewrote Subsection E to the extent that a detailed comparison would be impracticable.

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, 54 A.L.R.4th 1170.

§ 40-11-16. Costs.

The court may order reasonable fees of counsel, experts, the child's guardian and other costs of the action and pre-trial proceedings, including blood or genetic tests, to be paid by any party in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid from court funds.

History: Laws 1986, ch. 47, § 16; 1989, ch. 56, § 5.

The 1989 amendment, effective June 16, 1989, inserted "or genetic" in the first sentence.

§ 40-11-17. Enforcement of judgment or order.

A. If existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated under the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978] or under prior law, the obligation of the father may be enforced in the same or other proceedings by any interested party.

B. The court may order support payments to be made to the mother; the clerk of the court; or a person, corporation or agency designated to collect or administer such funds for the benefit of the child, upon such terms as the court deems appropriate.

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 1986, ch. 47, § 17.

Cross-references. - As to enforcement of judgments, see 39-1-1 NMSA 1978 et seq. and 39-5-1 NMSA 1978 et seq.

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).

§ 40-11-18. Modification of judgment or order.

The court has continuing jurisdiction to modify or revoke a judgment or order for future support.

History: Laws 1986, ch. 47, § 18.

§ 40-11-19. Right to counsel; free transcript on appeal.

A. At the pre-trial 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 1986, ch. 47, § 19.

§ 40-11-20. Hearings and records; confidentiality.

Notwithstanding any other law concerning public hearings and records, any hearing or trial held under the provisions of the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978] 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, nothing in this section shall infringe upon the right of the parties to an action or proceeding to inspect the court record.

History: Laws 1986, ch. 47, § 20.

§ 40-11-21. Action to declare mother and child relationship.

Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978] applicable to the father and child relationship apply.

History: Laws 1986, ch. 47, § 21.

§ 40-11-22. Birth records.

A. Upon order of a court of this state or upon request of a court of another state, the vital statistics bureau of the health services division of the health and environment

department shall prepare a new certificate of birth consistent with the findings of the court and shall substitute the new certificate for the original certificate of birth.

B. The fact that the father and child relationship was declared after the child's birth shall not be ascertainable from the new certificate, but the actual place and date of birth shall be shown.

C. The evidence upon which the new certificate 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 1986, ch. 47, § 22.

Cross-references. - As to the vital statistics bureau of the health and environment department, see 24-14-3 NMSA 1978.

§ 40-11-23. Limitation.

A. An action to determine a parent and child relationship under the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978] shall be brought no later than three years after the child has reached the age of majority.

B. The action to establish paternity under that act shall be available for any child for whom a paternity action was brought and dismissed on or after August 16, 1984 because of the application of a statute of limitations of less than eighteen years.

History: Laws 1986, ch. 47, § 23; 1989, ch. 56, § 6.

The 1989 amendment, effective June 16, 1989, designated the formerly undesignated provisions as Subsection A, and added Subsection B.

Article 12

Domestic Relations Mediation

§ 40-12-1. [Domestic Relations Mediation Act;] short title.

This act [40-12-1 to 40-12-6 NMSA 1978] may be cited as the "Domestic Relations Mediation Act."

History: Laws 1987, ch. 153, § 1.

§ 40-12-2. Purpose.

The purpose of the Domestic Relations Mediation Act [40-12-1 to 40-12-6 NMSA 1978] 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 [40-12-1 to 40-12-6 NMSA 1978]:

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 that establishes a domestic relations mediation program pursuant to

Section 5 [40-12-5 NMSA 1978] of the Domestic Relations Mediation Act 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. Deposits to the fund shall include payments made through the imposition of a sliding fee scale pursuant to Section 5 [40-12-5 NMSA 1978] of the Domestic Relations Mediation Act and the collection of the surcharge provided for in Section 6 [40-12-6 NMSA 1978] of that act.

History: Laws 1987, ch. 153, § 4.

§ 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.

§ 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.

This act [40-13-1 to 40-13-7 NMSA 1978] may be cited as the "Family Violence Protection Act".

History: Laws 1987, ch. 286, § 1.

§ 40-13-2. Definitions.

As used in the Family Violence Protection Act [40-13-1 to 40-13-7 NMSA 1978]:

A. "co-parents" means persons who have a child in common, regardless of whether they have been married or have lived together at any time;

B. "court" means the district court of the judicial district where an alleged victim of domestic abuse resides or is found;

C. "domestic abuse" means any incident resulting in physical harm, bodily injury or assault or a threat causing imminent fear of such harm by any household member;

D. "household member" means a spouse, former spouse, family member, present or former household member or co-parent of a child; and

E. "order of protection" means a court order granted for the protection of victims of domestic abuse.

History: Laws 1987, ch. 286, § 2.

§ 40-13-3. Petition for order of protection; contents; indigent petitioners; standard forms.

A. A victim of domestic abuse may petition the court under the Family Violence Protection Act [40-13-1 to 40-13-7 NMSA 1978] 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. No petitioner is required to file for annulment, separation or divorce as a prerequisite to obtaining an order of protection. However, the petition shall state whether any other domestic action is pending between the petitioner and the respondent. If an action is pending, the petition shall be filed in the court which has jurisdiction over the pending action.

D. If the petition is accompanied by an affidavit showing that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to

proceed as an indigent without payment of court costs. In determining the financial status of the petitioner for the purpose of this subsection, the income of the alleged perpetrator of the domestic abuse shall not be considered.

E. Standard simplified petition forms with instructions for completion shall be available to petitioners not represented by counsel. Law enforcement agencies shall keep such forms and make them available upon request to victims of domestic violence.

History: Laws 1987, ch. 286, § 3.

§ 40-13-4. Temporary order of protection; hearing.

Upon the filing of a petition for order of protection, the court shall:

A. 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;

B. cause the temporary order of protection together with notice of hearing to be served immediately on the alleged perpetrator of the domestic abuse; and

C. within ten days after the granting of the temporary order of protection, hold a hearing on the question of continuing the order; or

D. 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.

History: Laws 1987, ch. 286, § 4.

§ 40-13-5. Order of protection; contents; remedies; title to property not affected.

A. Upon finding that an act of domestic abuse has occurred, the court shall enter an order of protection ordering the respondent household member to refrain from abusing the petitioner or any other household member. The court shall specifically describe in clear language understandable to the respondent the behavior the court has ordered the respondent 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 petitioner during the period the order of protection is effective or order the respondent to provide temporary suitable alternative housing for petitioner and any children to whom the respondent

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 petitioner on a basis which gives primary consideration to the safety of the victim and the children;

(3) order that the respondent shall not initiate contact with the petitioner;

(4) restrain the parties from transferring, concealing, encumbering or otherwise disposing of petitioner's property or the joint property of the parties except in the usual course of business or for the necessities of life; and to account to the court for all such transferences, encumbrances and expenditures made after the order is served or communicated to the party restrained in court; and

(5) order other injunctive relief as the court deems necessary for the protection of the petitioner including orders to law enforcement agencies as provided by this section.

B. The order shall contain a notice that violation of any provision of the order constitutes contempt of court and may result in a fine or imprisonment or both.

C. If the order supersedes or alters prior orders of the court pertaining to domestic matters between the parties, the order shall say so on its face.

D. No order issued under the Family Violence Protection Act [40-13-1 to 40-13-7 NMSA 1978] shall affect title to any property or allow the petitioner to transfer, conceal, encumber or otherwise dispose of respondent's property or the joint property of the parties.

E. Either party may request a review hearing to amend the order.

History: Laws 1987, ch. 286, § 5.

§ 40-13-6. Service of order; duration; penalty; remedies not exclusive.

A. An order of protection granted under the Family Violence Protection Act [40-13-1 to 40-13-7 NMSA 1978] shall be filed with the clerk of the court and a copy shall be sent by the clerk to the sheriff of the county in which the court is located. The order shall be personally served upon the respondent, unless he or his attorney was present at the time the order was issued. If the petitioner has been found by the court to be unable to pay court costs, the order shall be served without cost to the petitioner.

B. An order of protection granted by the court shall be effective for a fixed period of time not to exceed three months. The order may be extended for good cause upon motion of the petitioner for an additional period of time not to exceed three months.

C. A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order pursuant to this section.

D. The remedies provided in the Family Violence Protection Act are in addition to any other civil or criminal remedy available to the petitioner.

History: Laws 1987, ch. 286, § 6.

§ 40-13-7. Law enforcement officers; emergency assistance; limited liability.

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 [40-13-1 to 40-13-7 NMSA 1978], the right to file a written statement or request for an arrest warrant and the availability of domestic violence shelters, medical care, counseling and other services;

(2) upon the request of the petitioner, providing or arranging for transportation of the victim to a medical facility or place of shelter;

(3) upon the request of the petitioner, accompanying the victim to the victim's residence to remove 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 petitioner, assist in placing the petitioner in possession of the dwelling or premises or otherwise assist in execution or service of the order of protection;

(5) arresting the abusing household member when appropriate; 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. Any law enforcement officer responding to the request for assistance under the Family Violence Protection Act is immune from civil liability to the extent allowed by law.

History: Laws 1987, ch. 286, § 7.