CHAPTER 40
Domestic Affairs

ARTICLE 1
Marriage in General

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

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

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

ANNOTATIONS

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

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

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

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

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).

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.

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

55 C.J.S. Marriage § 18.

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

A. A person may solemnize the contract of matrimony by means of an 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, United States constitution, laws of the state or laws of the United States 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; 2001, ch. 99, § 1.

ANNOTATIONS

Cross references. — For 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.

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

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.

County clerk not included. — 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.

Police judge may perform marriage. — 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.

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

Ceremony performed with proxy. — Marriage ceremony may be performed where one of the parties is represented by a proxy as has been allowed and recognized in the Catholic church since before the Council of Trent. 1943-44 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, 142 A.L.R. 8, 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.

ANNOTATIONS

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.

ANNOTATIONS

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).

New Mexico law applies as to evidence required for validity. — Although foreign law determines the requisites of an asserted foreign common-law marriage, New Mexico law determines the competency, admissibility, quality, degree and quantum of evidence required to establish the vital facts. 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).

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

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

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.

ANNOTATIONS

Cross references. — For 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.

Consent for 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.

ANNOTATIONS

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

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

Knowledge of person's age not element of offense. — The marrying of a female under 15, prohibited by this section (before its amendment), the penalty for which was provided by 40-1-8 NMSA 1978, belonged to that class of statutory misdemeanors where knowledge of the person's age and an intent to marry one under age is not a necessary element of the offense. Territory v. Harwood, 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.

ANNOTATIONS

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

Marriage valid where celebrated. — New Mexico's public policy against incest did not preclude the district court from awarding a mother primary physical custody of her children, after taking into account her plans to marry her uncle, where that choice was in

the best interests of the children, and mother and uncle intended to reside in California. Leszinske v. Poole, 110 N.M. 663, 798 P.2d 1049 (Ct. App. 1990).

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

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

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

Incestuous marriage, attack after death of party, 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.

ANNOTATIONS

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.

ANNOTATIONS

Bracketed material. — The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not part of the law.

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; 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55 C.J.S. Marriage §§ 35, 36.

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

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.

ANNOTATIONS

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

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

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

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.

Consent for 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.

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 [department of health]. 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 [department of health].

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

C. The secretary of health and environment [secretary of health] 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 [secretary of health].

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 [secretary of health].

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.

ANNOTATIONS

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

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

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

For the department of health, see 9-7-1 to 9-7-16 NMSA 1978.

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

For the children's trust fund, see 24-19-1 to 24-19-9 NMSA 1978.

Bracketed material. — The bracketed references to the department of health and the secretary of health were inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978 and enacts a new 9-7-4 NMSA 1978, relating to the department of health. Laws 1991, ch. 25, § 17 amends 9-7-5 NMSA 1978 to provide that the administrative head of the department of health is the secretary of health. The bracketed material was not enacted by the legislature and is not part of the law.

Compiler's notes. — The regulations of the department of health governing premarital examinations, referred to in this section, were withdrawn by the department of health. The notice of the repeal of those regulations was filed with the state records center on January 23, 1995.

Premarital blood tests to be made at any laboratory. — Clearly the statute authorizes the performance of premarital blood tests at any laboratory approved by the department of health and is not confined in its operation to laboratories operated directly by the department. 1957-58 Op. Att'y Gen. No. 58-140.

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

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

40-1-12. 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.

ANNOTATIONS

Cross references. — For county clerks, see N.M. Const., art. VI, § 22.

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.

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.

ANNOTATIONS

Cross references. — For county clerks, see N.M. Const., art. VI, § 22.

For removal and suspension of public officers, see 10-4-1 to 10-4-29 NMSA 1978.

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.

ANNOTATIONS

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).

Magistrate has no authority to pass on 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.

ANNOTATIONS

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

For 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.

ANNOTATIONS

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.

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.

ANNOTATIONS

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

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.

APPLICATION FOR MARRIAGE LICENSE

No. ..... STATEMENTS

RECEIVED AND FILED

IN COUNTY CLERK'S OFFICE

at ..... o'clock ..... M.

.....
....19 .....

DATE OF PREMARITAL PHYSICAL EXAMINATION

Bride
.....

Groom
.....

COUNTY CLERK
.....COUNTY

By
.....Deputy

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

Male Applicant	Female Applicant
Date of Birth	Date of Birth
Place of Birth	Place of Birth
Present Address	Present Address
.....	.....
Signature	Signature

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

(seal)

..... By
.....Deputy

Signature County Clerk

CONSENT OF PARENT OR GUARDIAN
(Where either party is under age)

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

.....

Signature Parent (Guardian)

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

.....

Signature Parent (Guardian)

MARRIAGE LICENSE

State of New Mexico,
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.

ANNOTATIONS

Cross references. — For 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.

ANNOTATIONS

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

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.

ANNOTATIONS

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

ARTICLE 2
Rights of Married Persons Generally

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

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

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

ANNOTATIONS

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

For Uniform Interstate Family Support Act, see Chapter 40, Article 6A NMSA 1978.

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).

Alimony after remarriage not good public policy unless exceptional circumstances. — When the wife contracts a subsequent marriage with another, thus creating a duty of support in him, good public policy does not demand that she continue to receive support from her first husband unless she prove exceptional circumstances. Kuert v. Kuert, 60 N.M. 432, 292 P.2d 115 (1956).

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).

Support 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).

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

Father entitled to recovery for support furnished wife. — In action for divorce the wife is not entitled to recovery for support furnished her by her father as cause of action

for such support, if any, is vested in the father. Harper v. Harper, 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.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For 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).

Agreement may be set aside in discretion of court. — A separation agreement in New Mexico, though binding upon the parties during such time as they are separated as

husband and wife, when submitted in a divorce case for consideration of the court, is subject to such action as the court in its discretion may take, and the court may disregard any previous agreement for support and make such award as in the discretion of the court may seem just and fair. Scanlon v. Scanlon, 60 N.M. 43, 287 P.2d 238 (1955).

Agreement void where contrary to public policy. — Provisions of a separation contract which would cut the plaintiff off without support from her former spouse in the case of spouse's remarriage though plaintiff remained single, or in the case of spouse's change of occupation, are void as contrary to public policy. Scanlon v. Scanlon, 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 § 44 et seq.

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).

Influence so used as to confuse judgment and control will. — The affection, confidence and gratitude which inspires the gift from a husband to a wife, being a natural and lawful influence, does not render the gift voidable, unless the influence has been so used as to confuse the judgment and control the will of the donor. Trigg v. Trigg, 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).

If wife did not know she was signing separation agreement which would be used against her as a permanent division of community property, the fraud practiced on her was a fraud de facto and the agreement was void ab initio. Curtis v. Curtis, 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).

Burden upon husband to show full disclosure. — Where a husband in contemplation of a divorce, through his attorney, made a property settlement with his wife by which he acquired her interest in the community property, worth approximately $100,000, for $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).

Transmutation must be supported by clear, strong and convincing proof. — Transmutation of community funds into joint tenancy must be supported by proof which is clear, strong and convincing, and a mere preponderance of the evidence will not suffice to effect it. Chavez v. Chavez, 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.

ANNOTATIONS

Wife aware of transfer made by husband as her attorney-in-fact. — Where husband, acting for himself and as attorney-in-fact for his wife, made and delivered to plaintiff a written assignment and transfer of their mineral interests, the powers so conferred upon the husband authorized him to convey wife's interests, where he had conveyed other properties owned by them acting under the same powers-of-attorney and evidence indicated wife was aware of business conducted by her husband in her behalf and assented thereto. Soens v. Riggle, 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.

ANNOTATIONS

Cross references. — For acknowledgements, see 14-14-1 to 14-14-11 NMSA 1978.

For signing of real estate conveyances, see 47-1-5 NMSA 1978.

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).

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

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

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.

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.

Divorce or judicial separation as affecting marriage settlement, 95 A.L.R. 1469.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNOTATIONS

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

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

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

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

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

ANNOTATIONS

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

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

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

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

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

ANNOTATIONS

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

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

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

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

ANNOTATIONS

Cross references. — For suit for division of property, see 40-4-3, 40-4-4, 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).

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

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

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

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

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

ANNOTATIONS

Applicable only to separation agreements. — This section has reference solely to the separation agreement provided for between husband and wife by 40-2-8 NMSA 1978, and has no reference to their authority to contract. McDonald v. Lambert, 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.

ANNOTATIONS

Cross references. — For abolition of curtesy and dower, see 45-2-112 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.(decided under prior law) 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.

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

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

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

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

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

ANNOTATIONS

Dissimilarity of estate by entireties and community estate. — There is no similarity between a community estate and an estate by the entireties, except as to the husband and wife feature, and where it has been found necessary to segregate the husband's or wife's interest in community property the courts have found legal principles to justify it. McDonald v. Senn, 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 491 (1972).

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

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

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.

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

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

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

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

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

ANNOTATIONS

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. — 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 instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 A.L.R.2d 294.

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

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

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

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

It is against the public policy of this state to allow one spouse to obligate community property by entering into a contract of indemnity whereby he will indemnify a surety company in case of default of the principal upon a bond or undertaking issued in consideration of the contract of indemnity. No community property shall be liable for any indebtedness incurred as a result of any contract of indemnity made after the effective date of this section, unless both husband and wife sign the contract of indemnity.

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

ANNOTATIONS

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

Applicability of section. — This section did not apply to bar an action on a promissory note brought by the promisee against the wives of the promisors, since the action was a simple suit on a note against the remaining members of the marital community and not a contract of indemnity. Lubbock Steel & Supply, Inc. v. Gomez, 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 §§ 164 to 166.

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

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

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

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

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

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

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

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

ANNOTATIONS

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 § 168.

40-3-6. Short title.

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

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

ANNOTATIONS

Common-law concepts and community property concepts are distinct; a common-law rule would not be authority for dismissing a community property claim. Rodgers v. Ferguson, 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).

Insurance proceeds are community property even if not divided upon divorce. — Where there is an insured third person (the child) and a spouse (the defendant) as beneficiary and the proceeds were not paid during marriage, but the right to the proceeds was obtained during marriage, this right was not changed and was not divided upon the divorce. Hickson v. Herrmann, 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).

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).

If husband owned right to receive proceeds of policy as community property of the parties, this right, not having been disposed of by divorce, became the right of the parties as tenants in common. Hickson v. Herrmann, 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.

ANNOTATIONS

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

40-3-8. Classes of property.

A. "Separate property" means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNOTATIONS

I. GENERAL CONSIDERATION.

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

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

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

Retroactive application of 1984 amendments. — The United States Court of Appeals submitted the following certified question to the state supreme court: Do the 1984 amendments to this section apply retroactively so as to convert property acquired by husband and wife as joint tenants prior to the passage of the amendments, and thus originally held as separate property, into community property which would be included in the bankruptcy estate? Swink v. Sunwest Bank, 955 F.2d 31 (10th Cir. 1992). For answer to certified question, see note below to Swink v. Fingado, 115 N.M. 275, 850 P.2d 978 (1993).

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

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).

Intent to transmute necessary. — Separate property can only be held to have been transmuted into community property during the course of a marriage upon a clear showing of intent by the party originally in possession of the property to effect such transmutation; the mere fact that a joint mortgage was taken on the property and that community funds were used to repay the loan is insufficient to effect transmutation, in the absence of a showing of intent. Macias v. Macias, 1998-NMCA-170, 126 N.M. 309, 968 P.2d 814.

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).

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

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

Subsequent improvements with community funds does not change status. — Property acquired in New Mexico takes its status as community or separate property at the time and by the manner of its acquisition and subsequent improvement of the premises with community funds does not, of itself, change the nature of the premises, but would only create an indebtedness as between the spouses. Thus, the subsequent erection of improvements on the separate property of the husband with community funds was immaterial to the respective rights of the wife and the bonding company seeking indemnification from the husband for certain amounts paid pursuant to its

bonds to the state and at most, would merely give rise to an indebtedness as between the spouses, so that the tract was subject to sale under the attachment of the bonding company. 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.(decided under former law) Massaglia v. Commissioner, 286 F.2d 258 (10th Cir. 1961).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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).

Burden of proof. — If a party alleging that property held in joint tenancy was meant to be separate, to prevail there must be either a clear designation of that intent, or enough

evidence to overcome the presumption of community property. Swink v. Sunwest Bank (In re Fingado), 113 Bankr. 37 (Bankr. D.N.M. 1990).

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).

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

Mere commingling of separate property with community property does not change its character from separate to community property, unless the separate property so commingled cannot be traced and identified. Burlingham v. Burlingham, 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).

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).

Extent of community lien on separate property. — Under New Mexico law, the community is entitled to an equitable lien against separate property only to the extent that the community can show that its funds or labor enhanced the value of the property or increased the equity interest in the property. Martinez v. Block, 115 N.M. 762, 858 P.2d 429 (Ct. App. 1993).

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).

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).

Owner of separate property employs others to manage it for him. — If a husband owning property as his sole and separate estate employs others to manage it and does not himself expend any labor, skill or industry upon it, the proceeds of the property must be held to be his separate property. Campbell v. Campbell, 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).

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).

Stock dividends. — Dividends from separately invested stock are generally considered rents, issues and profits of the separate estate. Zemke v. Zemke, 116 N.M. 114, 860 P.2d 756 (Ct. App.)

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

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 491 (1972) (decided under former law).

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

Income from separate property not necessarily separate. — Merely because a ranch belongs to a husband as his separate property does not mean that the income therefrom is his separate property. Moore v. Moore, 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).

Burden of proving value of improvements made by community effort. — Real property acquired by a husband prior to marriage, and paid for during the marriage with monies from his retirement disability pension, was separate property. Thus, where the wife failed to show the amount by which community labor or funds enhanced the value of the property, the trial court's decision to apportion some of the proceeds of the sale of

the property to the community was not supported by the record. Bayer v. Bayer, 110 N.M. 782, 800 P.2d 216 (Ct. App. 1990).

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

III. COMMUNITY PROPERTY.

Limited purpose for which income considered community property. — New Mexico's community property law only considers a spouse's income as property of the other spouse for the purpose of distributing assets in the case of a divorce or legal separation, not to determine the equality of wages under the federal Equal Pay Act. Consistent with this reasoning is the fact that half of a husband's salary is not attributed to his wife for the purposes of determining his wife's social security, workers' compensation, or unemployment benefits. Dean v. United Food Stores, Inc., 767 F. Supp. 236 (D.N.M. 1991).

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

Rebuttable presumption that income is community. — There is a rebuttable presumption that income received by either party during their marriage is community property. Moore v. Moore, 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).

If the parties remarried after a divorce decree brought an end to the marital community, a new community was created, and military benefits earned during the parties' second marriage came within the purview of Subsection B and were community property. Pacheco v. Quintana, 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).

Proceeds under covenant not to compete are not community property. — The proceeds under a covenant not to compete negotiated as part of the sale of a business are not community property within the community property laws of this state, where the forthcoming payments were not included in the valuation of the stock and were to be received after divorce. Lucas v. Lucas, 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).

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

Military retirement 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).

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

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

A. "Separate debt" means:

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

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

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

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

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

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

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

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

ANNOTATIONS

Purpose. — Subsection A is directed mainly toward relations between couples and their creditors. The legislature did not intend to restrict the courts' ability to practice

fairness as between two spouses. Fernandez v. Fernandez, 111 N.M. 442, 806 P.2d 582 (Ct. App. 1991).

Requirement of written notice to creditor. — The main purpose of Subsection A(4), requiring written notice to the creditor, is to protect creditors who might be unaware that spouses do not intend to create a community debt. As between spouses, however, it is not as necessary to require strict compliance with the statute. Where there is evidence that spouses do not intend the debt to be community and take steps to ensure it is not, a court may find this substantial compliance sufficient to declare the debt separate as between the spouses. Fernandez v. Fernandez, 111 N.M. 442, 806 P.2d 582 (Ct. App. 1991).

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

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).

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

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

As between a spouse and the other spouse's creditor, Subsection A(4) requires that the debtor spouse expressly communicate the seperate nature of a marital debt to a creditor in writing when creating a marital debt intended to be that spouse's separate obligation, and since the defendant debtor was unable to point to any written provision in the note or to any other written agreement between himself and the creditor bank that identified the debt as his own separate obligation, the debt remained a community debt. Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

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

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).

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

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).

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

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

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

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).

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

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

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).

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

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. — Liability of community property for antenuptial debts and obligations, 68 A.L.R.4th 877.

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

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

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

History: Laws 1997, ch. 190, § 67.

ANNOTATIONS

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

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

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

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

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

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

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

ANNOTATIONS

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

Wife's interest in community can be segregated and subjected to lien. — The public policy of the state of New Mexico on the subject of community property does not preclude a holding that the wife's vested interest in community real property can be segregated and subjected to a statutory judgment lien for a personal tort committed by the wife during the coverture. 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).

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

far as was shown; therefore, the vested estate of the wife (intervenor) in and to the community property tracts was exempt from the attachment proceedings instituted by the bonding company, and the community interest of the husband was subject to sale under the attachment, inasmuch as his shortages created a separate liability on his part, resulting in a judgment against him. 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.

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

40-3-10.1. Unreasonable debt.

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

History: Laws 1983, ch. 75, § 2.

ANNOTATIONS

Attorney fees. — Trial court's finding and ultimate conclusion that all of the wife's attorney fees were excessive and unreasonable was error, where the fees that the wife incurred by seeking settlement of child custody and visitation constituted community debts under 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 Subsection B of this section or Section 42-10-9 NMSA 1978. Should such property be insufficient, only the separate property of the spouse who contracted or incurred the debt shall be liable for its satisfaction. If both spouses contracted or incurred the debt, the separate property of both spouses is jointly and severally liable for its satisfaction.

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

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

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

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

ANNOTATIONS

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

Determination whether community or separate tort. — Section 40-3-9 NMSA 1978 leaves to the courts the problem of determining whether a tort committed by a spouse during marriage is a "community" or a "separate" tort. Under the rule followed in most community property states, the test to be applied in such cases is an after-the-fact determination of whether the act in which the spouse was engaged at the time of the tort was one which was of actual or potential benefit to the community. If it was of benefit, the tort is a "community" tort, and thus a community debt, to be collected under the provisions of this section. Dell v. Heard, 532 F.2d 1330 (10th Cir. 1976).

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

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

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.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Property takes status as community or separate at time and by manner of acquisition. — Property acquired in New Mexico takes its status as community or separate property at the time and by the manner of its acquisition; and if a part of the purchase money is later paid by other funds than those of the owner of the property, whether of the community or an individual spouse, the owner is indebted to the source of such funds in that amount, but such payment does not affect the title of the purchaser. Shanafelt v. Holloman, 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).

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

Disability retirement pay is community property for purposes of distribution of property upon dissolution of marriage. Stroshine v. Stroshine, 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).

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

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).

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

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

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

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).

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

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 cotenants in joint tenancy or tenancy in common. The spouses must join in all leases of community real property or separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common if the initial term of the lease, together with any option or extension contained in the lease or provided for contemporaneously, exceeds five years or if the lease is for an indefinite term.

Any transfer, conveyance, mortgage or lease or contract to transfer, convey, mortgage or lease any interest in the community real property or in separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common attempted to be made by either spouse alone in violation of the provisions of this section shall be void and of no effect, except that either spouse may transfer, convey, mortgage or lease directly to the other without the other joining therein.

Except as provided in this section, either spouse may transfer, convey, mortgage or lease separate real property without the other's joinder.

B. Nothing in this section shall affect the right of one of the spouses to transfer, convey, mortgage or lease or contract to transfer, convey, mortgage or lease any community real property or separate real property owned by the spouses as cotenants

in joint tenancy or tenancy in common without the joinder of the other spouse, pursuant to a validly executed and recorded power of attorney as provided in Section 47-1-7 NMSA 1978. Nothing in this section shall affect the right of a spouse not joined in a transfer, conveyance, mortgage, lease or contract to validate an instrument at any time by a ratification in writing.

History: 1953 Comp., § 57-4A-7, enacted by Laws 1973, ch. 320, § 8; 1975, ch. 246, § 5; 1993, ch. 165, § 1.

ANNOTATIONS

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

The 1993 amendment, effective June 18, 1993, made stylistic changes in Subsection A; and in Subsection B, substituted "47-1-7 NMSA 1978" for "70-1-6 NMSA 1953" at the end of the first sentence and added the second sentence.

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).

No limit on who may claim benefit. — This section is directed at the conveyance itself and not at the identity of the person claiming the conveyance is void. It contains no limitations regarding for whose benefit it may be used. C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria, 110 N.M. 291, 795 P.2d 502 (1990).

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).

If both spouses do not join, an attempt by one spouse to transfer, convey or mortgage community real property is void. Swink v. Sunwest Bank (In re Fingado), 113 Bankr. 37 (Bankr. D.N.M. 1990).

Section not applicable to executory contract to sell community. — The failure of seller's wife to sign does not render agreement void or unenforceable, but was sufficient where she was named in the agreement and was ready, willing and able to convey her community interest. This section, requiring the wife to sign deeds and mortgages affecting community property, has no application to an action for damages on the husband's executory contract for the sale of community realty, and it is immaterial whether the action is by the vendor or the vendee. Pickett v. Miller, 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).

Spouse's failure to sign bank note did not preclude subsequent encumbrance. — Subsection A should not be construed to require both spouses to join in creating a community debt merely because a later judgment on the debt might encumber community real property. To the extent that New Mexico common law suggests otherwise, those decisions are overruled. Accordingly, the trial court did not err when it ordered the judicial sale of the spouse's residence to satisfy the creditor bank's judgment on note defaulted on by the husband individually. Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

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); but see Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

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); but see Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

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

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).

Effect on after-acquired property. — An otherwise valid and fully enforceable real estate sales contract, executed by a single spouse, was not rendered wholly void under Subsection A because the asset later was acquired by the community. The contract was void as to after-acquired community property, but was valid as to the after-acquired real estate when it was transmuted and owned by the seller as his separate estate. English v. Sanchez, 110 N.M. 343, 796 P.2d 236 (1990).

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).

For survey of 1990-91 commercial law, see 22 N.M.L. Rev. 661 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Husband and Wife § 49 et seq.

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

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

41 C.J.S. Husband and Wife § 168.

40-3-14. Management and control of other community personal property.

A. Except as provided in Subsections B and C of this section, either spouse alone has full power to manage, control, dispose of and encumber the entire community personal property.

B. Where only one spouse is:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement between that spouse and a third party as having sole authority to manage, control, dispose of or encumber the community personal property which is described in or which is the subject of the agreement, whether the agreement was executed prior to or after July 1, 1973; only the spouse so named may manage, control, dispose of or encumber the community personal property described in such a document evidencing ownership or in such a written agreement.

C. Where both spouses are:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement with a third party as having joint authority to dispose of or encumber the community personal property which is described in or the subject of the agreement, whether the agreement was executed prior to or after July 1, 1973; both spouses must join to dispose of or encumber such community personal property where the names of the spouses are joined by the word "and." Where the names of the spouses are joined by the word "or," or by the words "and/or," either spouse alone may dispose of or encumber such community personal property.

History: 1953 Comp., § 57-4A-8, enacted by Laws 1973, ch. 320, § 10; 1975, ch. 246, § 6.

ANNOTATIONS

Power to manage 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), overruled on other grounds, Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

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), overruled on other grounds, Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

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).

Revocation of gift. — Each spouse has the power to manage and dispose of the community's personal property, subject to a fiduciary duty to the other spouse, and absent intervening equities, a gift of substantial community property to a third person

without the other spouse's consent may be revoked and set aside for the benefit of the aggrieved spouse. Roselli v. Rio Communities Serv. Station, Inc., 109 N.M. 509, 787 P.2d 428 (1990).

Where the husband had consented to neither the wife's removal of community funds from a joint account prior to the parties' separation nor to the wife's gift of the funds to their two daughters, the husband was entitled to recover his share of the gifts from the wife's property. Fernandez v. Fernandez, 111 N.M. 442, 806 P.2d 582 (Ct. App. 1991).

Payment of life insurance policy premiums with community funds results in a community property interest in policy proceeds. Roselli v. Rio Communities Serv. Station, Inc., 109 N.M. 509, 787 P.2d 428 (1990).

Expended earnings not subject to distribution. — Since the expenditures of the spouses' earnings and other community funds during a period of separation were not shown to be contrary to any court order or in violation of a fiduciary duty owed by one party to the other, the trial court erred in making its apportionment of community assets by awarding the husband funds which no longer existed and then allowing the wife an offsetting award out of other existing community property. Irwin v. Irwin, 1996-NMCA-007, 121 N.M. 266, 910 P.2d 342.

Law reviews. — For comment on Thaxton v. Thaxton, 75 N.M. 450, 405 P.2d 932 (1965), see 6 Nat. Resources J. 298 (1966).

For 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 § 12 et seq.

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 § 158.

40-3-15. Joinder of minor spouse in conveyances, mortgages and leases.

A married person under the age of majority may join with his or her spouse in all transactions for which joinder is required by Section 40-3-13 NMSA 1978 and such joinder shall have the same force and effect as if the minor spouse had attained his or her majority at the time of the execution of the instrument.

History: 1953 Comp., § 57-4A-9, enacted by Laws 1973, ch. 320, § 11.

ANNOTATIONS

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 43 C.J.S. Infants § 141.

40-3-16. Disposition and management of real property without joinder and management of community personal property subject to management of one spouse alone where spouse has disappeared.

A. If a spouse disappears and his location is unknown to the other spouse, the other spouse may, not less than thirty days after such disappearance, file a petition setting forth the facts which make it desirable for the petitioning spouse to engage in a transaction for which joinder of both spouses is required by Section 40-3-13 NMSA 1978 or to manage, control, dispose of or encumber community personal property which the disappearing spouse alone has sole authority to manage, control, dispose of or encumber under Section 40-3-14 NMSA 1978.

B. The petition shall be filed in a district court of any county in which real property described in the petition is located or, if only community personal property is involved, in the district court of the county where the disappearing spouse resided.

C. The district court shall appoint a guardian ad litem for the spouse who has disappeared and shall allow a reasonable fee for his services.

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

E. After the hearing, and upon determination of the fact of disappearance by one spouse, the district court may allow the petitioning spouse alone to engage in the transaction for which joinder of both spouses is required by Section 40-3-13 NMSA 1978 or to manage, control, dispose of or encumber community personal property which the disappearing spouse alone has authority to manage, control, dispose of or encumber under Section 40-3-14 NMSA 1978.

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

History: 1953 Comp., § 57-4A-10, enacted by Laws 1973, ch. 320, § 12.

ANNOTATIONS

Cross references. — For provision concerning disposition of real property without joinder where spouse is prisoner of war/person missing-in-action, see 40-3-5 NMSA 1978.

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

40-3-17. Judgments to be recorded.

All orders rendered pursuant to Section 32-2-7 NMSA 1953 authorizing the transfer, conveyance, mortgage or lease of community real property or other real property owned by the spouses as co-tenants in joint tenancy or tenancy in common may be recorded in the office of the county clerk of the county where any real property affected thereby is situated.

History: 1953 Comp., § 57-4A-11, enacted by Laws 1973, ch. 320, § 13.

ANNOTATIONS

Severability 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 45-5-409 and 45-5-424 NMSA 1978.

ARTICLE 3A
Uniform Premarital Agreement

40-3A-1. Short title.

This act [40-3A-1 to 40-3A-10 NMSA 1978] may be cited as the "Uniform Premarital Agreement Act".

History: Laws 1995, ch. 61, § 1.

40-3A-2. Definitions.

As used in the Uniform Premarital Agreement Act [40-3A-1 to 40-3A-10 NMSA 1978]:

A. "premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage; and

B. "property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

History: Laws 1995, ch. 61, § 2.

40-3A-3. Formalities.

A premarital agreement must be in writing, signed by both parties and acknowledged. It is enforceable without consideration.

History: Laws 1995, ch. 61, § 3.

40-3A-4. Content.

A. Parties to a premarital agreement may contract with respect to:

(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;

(5) the ownership rights in and disposition of the death benefit from a life insurance policy;

(6) the choice of law governing the construction of the agreement; and

(7) any other matter not in violation of public policy.

B. A premarital agreement may not adversely affect the right of a child or spouse to support, a party's right to child custody or visitation, a party's choice of abode or a party's freedom to pursue career opportunities.

History: Laws 1995, ch. 61, § 4.

40-3A-5. Effect of marriage.

A premarital agreement becomes effective upon marriage.

History: Laws 1995, ch. 61, § 5.

40-3A-6. Amendment; revocation.

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed and acknowledged by the parties or by a consistent and mutual course of conduct, which evidences an amendment to or revocation of the premarital agreement. The amended agreement or the revocation is enforceable without consideration.

History: Laws 1995, ch. 61, § 6.

40-3A-7. Enforcement.

A. A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) that party did not execute the agreement voluntarily; or

(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(b) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(c) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

B. An issue of unconscionability or voluntariness of a premarital agreement shall be decided by the court as a matter of law.

History: Laws 1995, ch. 61, § 7.

40-3A-8. Enforcement; void marriage.

If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

History: Laws 1995, ch. 61, § 8.

40-3A-9. Limitation of actions.

Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

History: Laws 1995, ch. 61, § 9.

40-3A-10. Application and construction.

The Uniform Premarital Agreement Act [40-3A-1 to 40-3A-10 NMSA 1978] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act among states enacting it.

History: Laws 1995, ch. 61, § 10.

ANNOTATIONS

Severability clauses. — Laws 1995, ch. 61, § 11 provides that if any provision of the Uniform Premarital Agreement Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act which can be given effect without the invalid provision or application, and to this end the provisions of that act are severable.

ARTICLE 4
Dissolution of Marriage

40-4-1. Dissolution of marriage.

On the petition of either party to a marriage, a district court may decree a dissolution of marriage on any of the following grounds:

A. incompatibility;

B. cruel and inhuman treatment;

C. adultery; or

D. abandonment.

History: 1953 Comp., § 22-7-1, enacted by Laws 1973, ch. 319, § 1.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For annulment, see 40-1-9 NMSA 1978.

For provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, see 40-10A-101 to 40-10A-403 NMSA 1978.

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).

Action for intentional infliction of emotional distress. — Public policy considerations should not preclude a spouse from initiating a cause of action for intentional infliction of emotional distress predicated upon conduct arising during the marriage of the parties and from raising a tort claim in a divorce proceeding. Nevertheless, in determining when this tort should be recognized in the marital setting, the threshold of outrageousness should be set high enough - or the circumstances in which the tort is recognized should be described precisely enough, that the social good from recognizing the tort will not be outweighed by unseemly and invasive litigation of meritless claims. Hakkila v. Hakkila, 112 N.M. 172, 812 P.2d 1320 (Ct. App. 1991).

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

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

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

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

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

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

For note, "Tort Law - Intentional Infliction of Emotional Distress in the Marital Context: Hakkila v. Hakkila," see 23 N.M.L. Rev. 387 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation §§ 12, 19, 20 to 128.

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.

Joinder of tort actions between spouses with proceeding for dissolution of marriage, 4 A.L.R.5th 972.

Homosexuality as ground for divorce, 96 A.L.R.5th 83.

27A C.J.S. Divorce §§ 13-70.

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).

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.

ANNOTATIONS

Divorce must be decreed where incompatibility exists. — The legislature, acting properly within its powers, has established "incompatibility" as a ground for divorce and once such a finding is made that it exists, a divorce decree must be entered. Garner v. Garner, 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.

ANNOTATIONS

Cross references. — For separation contracts, see 40-2-4 to 40-2-9 NMSA 1978.

Law of Spain and Mexico as basis for interpretation. — Since the civil law of Spain and Mexico served as the model for the statutory law of this state concerning the property rights of husband and wife, that law will be looked to as the basis for interpretation and definition. McDonald v. Senn, 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 alimony, separate maintenance, or support, 6 A.L.R.2d 1277, 52 A.L.R.3d 156.

Defenses available to husband in civil suit by wife for support, 10 A.L.R.2d 466, 36 A.L.R.4th 502.

Trial court's jurisdiction as to alimony or maintenance pending appeal of matrimonial action, 19 A.L.R.2d 703.

Reconciliation as affecting separation agreement or decree, 35 A.L.R.2d 707, 36 A.L.R.4th 502.

Nonresident wife, right to maintain action for separate maintenance alone against resident husband, 36 A.L.R.2d 1369.

Specific performance of provisions of separation agreement other than those for support or alimony, 44 A.L.R.2d 1091.

Property rights of spouses adjudicated in action for separate maintenance without divorce, 74 A.L.R.2d 316.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses, 94 A.L.R.3d 176.

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

Validity, construction, and application of Uniform Child Custody Jurisdiction Act, 96 A.L.R.3d 968, 78 A.L.R.4th 1028, 16 A.L.R.5th 650, 20 A.L.R.5th 700, 21 A.L.R.5th 396, 40 A.L.R.5th 227.

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

Initial award or denial of child custody to homosexual or lesbian parent, 6 A.L.R.4th 1297.

Excessiveness or adequacy of amount of money awarded as separate maintenance, alimony, or support for spouse without absolute divorce, 26 A.L.R.4th 1190.

Court's authority to award temporary alimony or suit money in action for divorce, separate maintenance, or alimony where the existence of a valid marriage is contested, 34 A.L.R.4th 814.

Reconciliation as affecting decree for limited divorce, separation, alimony, separate maintenance, or spousal support, 36 A.L.R.4th 502.

Spouse's right to discovery of closely held corporation records during divorce proceeding, 38 A.L.R.4th 145.

Spouse's dissipation of marital assets prior to divorce as factor in divorce court's determination of property division, 41 A.L.R.4th 416.

Divorce: equitable distribution doctrine, 41 A.L.R.4th 481.

Primary caretaker role of respective parents as factor in awarding custody of child, 41 A.L.R.4th 1129.

Divorce and separation: treatment of stock options for purposes of dividing marital property, 46 A.L.R.4th 640.

Valuation of stock options for purposes of divorce court's property distribution, 46 A.L.R.4th 689.

Divorced or separated spouse's living with member of opposite sex as affecting other spouse's obligation of alimony or support under separation agreement, 47 A.L.R.4th 38.

Modern status of views as to validity of premarital agreements contemplating divorce or separation, 53 A.L.R.4th 22.

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

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms - modern status, 53 A.L.R.4th 161.

Divorce and separation: method of valuation of life insurance policies in connection with trial court's division of property, 54 A.L.R.4th 1203.

Divorce: excessiveness or adequacy of trial court's property award - modern cases, 56 A.L.R.4th 12.

Divorce: propriety of property distribution leaving both parties with substantial ownership interest in same business, 56 A.L.R.4th 862.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Lis pendens as applicable to suit for separation or dissolution of marriage, 65 A.L.R.4th 522.

Insanity as defense to divorce or separation suit - post-1950 cases, 67 A.L.R.4th 277.

Divorce and separation: effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R.4th 173.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 A.L.R.4th 786.

Valuation of goodwill in medical or dental practice for purposes of divorce court's property distribution, 78 A.L.R.4th 853.

What constitutes order made pursuant to state domestic relations law for purposes of qualified domestic relations order exception to antialienation provision of Employee Retirement Income Security Act of 1974 (29 USCS § 1056(d)), 79 A.L.R.4th 1081.

Divorce and separation: consideration of tax consequences in distribution of marital property, 9 A.L.R.5th 568.

Divorce and separation: award of interest on deferred installment payments of marital asset distribution, 10 A.L.R.5th 191.

Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(a), 40 A.L.R.5th 227.

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

Consideration of obligor's personal-injury recovery or settlement infixing alimony or child support, 59 A.L.R.5th 489.

Initial award or denial of child custody to homosexual or lesbian parent, 62 A.L.R.5th 591.

Custodial parent's homosexual or lesbian relationship with third person as justifying modification of child custody order, 65 A.L.R.5th 591.

Spouse's cause of action for negligent personal injury, or proceeds therefrom, as separate or community property, 80 A.L.R.5th 533.

Determination of whether proceeds from personal injury settlement or recovery constitute marital property, 109 A.L.R.5th 1.

40-4-4. Venue; jurisdiction over property.

Any proceeding for the dissolution of marriage, division of property, disposition of children or alimony, as provided for in this chapter, may be instituted in the county where either of the parties resides. In such proceedings, the court shall have jurisdiction of all property of the parties, wherever located or situated in the state.

History: Laws 1901, ch. 62, § 24; Code 1915, § 2775; C.S. 1929, § 68-503; 1941 Comp., § 25-703; 1953 Comp., § 22-7-3; Laws 1967, ch. 112, § 1; 1973, ch. 319, § 4.

ANNOTATIONS

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).

Authority to void attorneys' charging lien. — In a domestic relations suit, the trial court had authority to void notice of attorneys' charging lien recorded on the parties' residence and to allocate the proceeds, giving priority to the claims of court-appointed experts if the facts and circumstances justified it. Philipbar v. Philipbar, 1999-NMCA-063, 127 N.M. 341, 980 P.2d 1075.

Venue determined from complaint and character of judgment. — Under this section venue is generally determined from the complaint and character of the judgment which may be rendered thereon. Davey v. Davey, 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).

Jurisdiction over separate property. — In proceedings for dissolution of marriage, the trial court has complete jurisdiction over all separate as well as community property located in New Mexico. Trego v. Scott, 1998-NMCA-080, 125 N.M. 323, 961 P.2d 168, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

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).

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 §§ 218, 219, 587.

Change of residence pendente lite, jurisdiction as affected by, 7 A.L.R.2d 1414.

Trial court's jurisdiction as to alimony or maintenance pending appeal of matrimonial action, 19 A.L.R.2d 703.

Jurisdiction on constructive or substituted service, in divorce or alimony action, to reach property within state, 10 A.L.R.3d 212.

Power of divorce court to deal with real property located in another state, 34 A.L.R.3d 962.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses, 94 A.L.R.3d 176.

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

Divorce: order requiring that party not compete with former marital business, 59 A.L.R.4th 1075.

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

Divorce and separation: effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

Divorce: propriety of using contempt proceeding to enforce property settlement award or order, 72 A.L.R.4th 298.

Valuation of goodwill in accounting practice for purposes of divorce court's property distribution, 77 A.L.R.4th 609.

Divorce and separation: goodwill in accounting practice as property subject to distribution on dissolution of marriage, 77 A.L.R.4th 645.

Valuation of goodwill in law practice for purposes of divorce court's property distribution, 77 A.L.R.4th 683.

Accrued vacation, holiday time, and sick leave as marital or separate property, 78 A.L.R.4th 1107.

Divorce and separation: goodwill in law practice as property subject to distribution on dissolution of marriage, 79 A.L.R.4th 171.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of action involving matrimonial dispute, 55 A.L.R.5th 647.

27A C.J.S. Divorce §§ 99, 111; 27B C.J.S. Divorce § 511.

40-4-5. Dissolution of marriage; jurisdiction; domicile.

The district court has jurisdiction to decree a dissolution of marriage when at the time of filing the petition either party has resided in this state for at least six months immediately preceding the date of the filing and has a domicile in New Mexico. As used in this section, "domicile" means that the person to whom it applies:

A. is physically present in this state and has a place of residence in this state;

B. has a present intention in good faith to reside in this state permanently or indefinitely;

C. provided further, persons serving in any military branch of the United States government who have been continuously stationed in any military base or installation in New Mexico for such period of six months shall, for the purposes hereof, be deemed to have a domicile of the state and county where such military base or installation is located; and

D. provided further, any person who had resided continuously in New Mexico for at least six months immediately prior to his or his spouse's entry into any military branch of the United States government, who is stationed or whose spouse is stationed at any military base or installation outside of New Mexico and who has a present intention in good faith to return and to reside in this state permanently or indefinitely, shall for the purposes hereof, be deemed to have a domicile of the state and county of his residence immediately prior to his or his spouse's entry into the military branch.

History: 1953 Comp., § 22-7-4, enacted by Laws 1971, ch. 273, § 1; 1973, ch. 319, § 5; 1977, ch. 101, § 1.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Purpose of requiring domicile within the state for a specified period of time as a jurisdictional prerequisite to obtaining a divorce is to prevent divorce-minded couples from shopping for favorable residence requirements. Hagan v. Hardwick, 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).

Since statute's residence requirement 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).

State has substantial interest in service families stationed in the state. — 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 §§ 201 to 220.

Extra-territorial recognition and effect, as regards marital status, of a decree of divorce or separation rendered in a state or country in which neither of the parties was domiciled, 39 A.L.R. 677, 1 A.L.R.2d 1385, 28 A.L.R.2d 1303.

Separate domicil of wife for purposes of jurisdiction over subject matter of suit by her for divorce or separation, 39 A.L.R. 710.

Jurisdiction of state court over divorce suit by resident of United States reservation, 46 A.L.R. 993.

Residence of person in armed forces for purposes of divorce suit, 156 A.L.R. 1465, 157 A.L.R. 1462, 158 A.L.R. 1474.

Duty to recognize and give effect to decrees of divorce rendered in other states, or in foreign country, as affected by lack of domicil at divorce forum, 157 A.L.R. 1399, 1 A.L.R.2d 1385, 28 A.L.R.2d 1303.

What constitutes residence or domicil within states for purpose of jurisdiction in divorce, 159 A.L.R. 496.

Length or duration of domicil, as distinguished from fact of domicil, as a jurisdictional matter in divorce action, 2 A.L.R.2d 291.

False allegation of plaintiff's domicil or residence in the state as a ground for vacation of default decree of divorce, 6 A.L.R.2d 596.

Residence or domicile, for purpose of divorce action, of one in armed forces, 21 A.L.R.2d 1163.

Nature and location of one's business or calling as element in determining domicil in divorce cases, 36 A.L.R.2d 756.

Validity of statute imposing durational residency requirements for divorce applicants, 57 A.L.R.3d 221.

Validity and construction of statutory provision relating to jurisdiction of court for purpose of divorce of servicemen, 73 A.L.R.3d 431.

Vacating or setting aside divorce decree after remarriage of party, 17 A.L.R.4th 1153.

27A C.J.S. Divorce §§ 99 to 105.

40-4-6. Verification of petition.

The petition in all proceedings for the dissolution of marriage, division of property, disposition of children or alimony, must be verified by the affidavit of the petitioner.

History: Laws 1901, ch. 62, § 26; Code 1915, § 2777; C.S. 1929, § 68-505; 1941 Comp., § 25-705; 1953 Comp., § 22-7-5; Laws 1973, ch. 319, § 6.

40-4-7. Proceedings; spousal support; support of children; division of property.

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

B. On final hearing, the court:

(1) may allow either party such a reasonable portion of the spouse's property or such a reasonable sum of money to be paid by either spouse either in a single sum or in installments, as spousal support as under the circumstances of the case may seem just and proper, including a court award of:

(a) rehabilitative spousal support that provides the receiving spouse with education, training, work experience or other forms of rehabilitation that increases the receiving spouse's ability to earn income and become self-supporting. The court may include a specific rehabilitation plan with its award of rehabilitative spousal support and may condition continuation of the support upon compliance with that plan;

(b) transitional spousal support to supplement the income of the receiving spouse for a limited period of time; provided that the period shall be clearly stated in the court's final order;

(c) spousal support for an indefinite duration;

(d) a single sum to be paid in one or more installments that specifies definite amounts, subject only to the death of the receiving spouse; or

(e) a single sum to be paid in one or more installments that specifies definite amounts, not subject to any contingencies, including the death of the receiving spouse;

(2) may:

(a) modify and change any order in respect to spousal support awarded pursuant to the provisions of Subparagraph (a), (b) or (c) of Paragraph (1) of this subsection whenever the circumstances render such change proper; or

(b) designate spousal support awarded pursuant to the provisions of Subparagraph (a) or (b) of Paragraph (1) of this subsection as nonmodifiable with respect to the amount or duration of the support payments;

(3) may set apart out of the property or income of the respective parties such portion for the maintenance and education of:

(a) their unemancipated minor children as may seem just and proper; or

(b) their children until the children's graduation from high school if the children are emancipated only by age, are under nineteen and are attending high school; and

(4) may make such an order for the guardianship, care, custody, maintenance and education of the minor children, or with reference to the control of the property of the respective parties to the proceeding, or with reference to the control of the property decreed or fund created by the court for the maintenance and education of the minor children, as may seem just and proper.

C. The court may order and enforce the payment of support for the maintenance and education after high school of emancipated children of the marriage pursuant to a written agreement between the parties.

D. An award of spousal support made pursuant to the provisions of Subparagraph (a), (b), (c) or (d) of Paragraph (1) of Subsection B of this section shall terminate upon the death of the receiving spouse, unless the court order of spousal support provides otherwise.

E. When making determinations concerning spousal support to be awarded pursuant to the provisions of Paragraph (1) or (2) of Subsection B of this section, the court shall consider:

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

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

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

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

(a) the standard of living of the respective spouses during the term of the marriage;

(b) the maintenance of medical insurance for the respective spouses; and

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

(5) the duration of the marriage;

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

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

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

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

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

F. The court shall retain jurisdiction over proceedings involving periodic spousal support payments when the parties have been married for twenty years or more prior to the dissolution of the marriage, unless the court order or decree specifically provides that no spousal support shall be awarded.

G. The court may modify and change any order or agreement merged into an order in respect to the guardianship, care, custody, maintenance or education of the children whenever circumstances render such change proper. The district court shall have exclusive jurisdiction of all matters pertaining to the guardianship, care, custody, maintenance and education of the children until the parents' obligation of support for their children terminates. The district court shall also have exclusive, continuing jurisdiction with reference to the property decreed or funds created for the children's maintenance and education.

History: Laws 1901, ch. 62, § 27; Code 1915, § 2778; C.S. 1929, § 68-506; 1941 Comp., § 25-706; Laws 1943, ch. 46, § 1; 1953 Comp., § 22-7-6; Laws 1973, ch. 319, § 7; 1993, ch. 144, § 1; 1997, ch. 56, § 1.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For provisions pertaining to a supervised visitation program, ee 40-12-5.1 NMSA 1978.

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

For mandatory Medical Support Act, see 40-4C-1 to 40-4C-14 NMSA 1978.

The 1993 amendment, effective July 1, 1993, in Subsection A, substituted "spousal support" for "alimony" in the first sentence; in Subsection B, rewrote Paragraphs (1) and (2); added present Subsections C through E, redesignating former Subsection C as Subsection F; in Subsection F, rewrote the second sentence as the present third and fourth sentences and deleted the former third sentence, which concerned the disposition of funds remaining when the children reach the age of majority; and made stylistic changes in the second sentence of subsection A and in Paragraph (3) of Subsection B.

The 1997 amendment added Subparagraphs B(3)(a) and B(3)(b) and made related stylistic changes; added Subsection C and redesignated former Subsections C through F as D through G; and in Subsection G, substituted "until the parents' obligation of support for their children terminates" for "so long as the children remain minors". Laws 1997, ch. 56 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 20, 1997, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

Standard of review. — The district court’s decisions in making an equitable division of community property and debts are reviewed for abuses of discretion, but the threshold question of whether a particular asset is community property is a question of law to be reviewed de novo. Arnold v. Arnold, 2003-NMCA-114, 134 N.M. 381, 77 P.3d 285.

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).

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).

"Either party" as used in Subsection A of this section can logically only refer to the parties to the underlying domestic relations proceeding, that is, husband and wife. Garcia v. Jeantette, 2004-NMCA-004, 134 N.M. 776, 82 P.3d 947.

Exclusive jurisdiction not indefinite jurisdiction. — A court acquires exclusive jurisdiction over the property involved for purposes of a division of the property, or a modification of the decree as to payments for alimony, maintenance and education of the minor children, but this does not mean that such court may retain such jurisdiction indefinitely or that another court of concurrent jurisdiction may not acquire jurisdiction over the property at a time when the proceeding is apparently settled. Ortiz v. Gonzales, 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).

If decree is clear and unambiguous, neither pleadings, findings nor matters dehors the record may be used to change its meaning or even to construe it. Chavez v. Chavez, 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).

Opinion of owner as to value. — In divorce proceedings, an owner is entitled to give opinion as to value of community property. Lahr v. Lahr, 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).

Trial courts, in proceedings for dissolution of a marriage, have the power and authority to execute, modify or vacate any order involving the guardianship, care, custody, maintenance and education of minor children. Rhinehart v. Nowlin, 111 N.M. 319, 805 P.2d 88 (Ct. App. 1990).

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).

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

If any doubt court may hold property as community. — When entertaining an ultimate doubt as to whether property is separate or community, the trial court may resolve the doubt by holding the property to be community, if acquired after marriage and the trial court may, subject to review, set over real estate to the wife in lieu of alimony. Loveridge v. Loveridge, 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 assets and liabilities between parties. — In apportioning a husband and wife's assets and liabilities, the trial court must attempt to perform an allocation that is fair under all the circumstances. Fernandez v. Fernandez, 111 N.M. 442, 806 P.2d 582 (Ct. App. 1991).

The court's power to apportion assets in an equitable manner should also include the ability to give effect to the parties' intentions, whether or not the parties strictly comply with the community property or debt statutes. Fernandez v. Fernandez, 111 N.M. 442, 806 P.2d 582 (Ct. App. 1991).

Separate property value enhanced due to community labor. — The community is entitled to a lien against the separate property of a spouse for the enhanced value of

such property attributable to community labor during marriage. Smith v. Smith, 114 N.M. 276, 837 P.2d 869 (Ct. App. 1992).

Where there has been an increase during marriage in the value of a business held as the separate property of a spouse, due in part to community efforts and labor, any undercompensation of one or both spouses employed by the business is a factor which may properly be considered in determining whether a community lien should be imposed against such property; ascertaining the amount of comparable wages for the value of community labor performed on behalf of such business is an appropriate method of determining whether the value of such labor has been fairly compensated. Smith v. Smith, 114 N.M. 276, 837 P.2d 869 (Ct. App. 1992).

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).

Apportionment does not require mathematical exactness but all circumstances considered. — It is impossible to lay down hard and fast guidelines in apportioning assets between the separate estate of a conjugal partner and the community; the surrounding circumstances must be carefully considered as each case will depend upon its own facts, and the ultimate answer will call into play the nicest and most profound judgment of the trial court. Mathematical exactness is not expected or required, but substantial justice can be accomplished by the exercise of reason and judgment in all such cases. Michelson v. Michelson, 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).

Retirement benefits. — The rule for distribution of a nonemployee spouse's interest in a retirement plan, whatever the rule is, should be applied only in the absence of an agreement between the spouses on the subject. Ruggles v. Ruggles, 116 N.M. 52, 860 P.2d 182 (1993).

The "lump sum" method is the preferable one for satisfying the nonemployee spouse's claim to her community interest in her spouse's retirement plan, and the trial court should have discretion in implementing that method, alone or in combination with other methods, including (in an appropriate case) the "reserved jurisdiction" method, in distributing the nonemployee spouse's interest upon dissolution. Ruggles v. Ruggles, 116 N.M. 52, 860 P.2d 182 (1993).

Absent an express agreement by the parties to the contrary, the only retirement penalties to be imposed against the nonemployee spouse's share of the pension being distributed pursuant to a "pay-as-it-comes in" method are those penalties that were actually applied to calculate the employee spouse's pension benefits, not any hypothetical penalties. Franklin v. Franklin, 116 N.M. 11, 859 P.2d 479 (Ct. App. 1993).

When the community interest in a pension is fully vested and matured, the trial court should value the retirement benefits as a whole, including the value of the survivor's benefit provision of the retirement plan, and consider such value in apportioning each

party's share of the total retirement benefits. Irwin v. Irwin, 1996-NMCA-007, 121 N.M. 266, 910 P.2d 342.

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). Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (1983).

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).

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

For note, "New Mexico Changes the Method of Allocating Future Pension Benefits Between Divorcing Spouses: *Ruggles v. Ruggles,*" see 25 N.M.L. Rev. 249 (1995).

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.

Subsection F of this section is construed to mean what it says; in cases in which the marriage lasted twenty or more years, the court must retain jurisdiction to consider spousal support when the final decree was silent as to such support. Rhoades v. Rhoades, 2004-NMCA-020, ___N.M.___, 85 P.3d 246.

And Subsection F provides express authority for a district court to award spousal support. Rhoades v. Rhoades, 2004-NMCA-020, ___N.M.___, 85 P.3d 246.

Reduction in spouse's share of military retirement benefits. — Subsection F of this section is read to permit the award of spousal support where the cause for the award develops from financial inequity resulting from a reduction in a spouse's share of military retirement benefits due to an increase in disability benefits. Rhoades v. Rhoades, 2004-NMCA-020, ___N.M.___, 85 P.3d 246.

Effect of bankruptcy court's action. — Where the district court had independent statutory authority on which to award spousal support, a bankruptcy court's factual findings, legal conclusions, and judgment had no preclusive effect. Rhoades v. Rhoades, 2004-NMCA-020, ___N.M.___, 85 P.3d 246.

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).

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).

If alimony issue raised, parties entitled to present evidence. — Where plaintiff contended a need on her part for a continuation of her right to support and defendant denied this need, the issue of alimony was raised, and a proper disposition of this factual issue entitled plaintiff to introduce evidence and be fully heard in support of her contention. The trial court, by disposing of the issue on the basis of the colloquy between it and counsel, denied plaintiff her right. Burnside v. Burnside, 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 NMRA. 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) NMRA in judgment by default, since the essential nature of the decree was an equitable division of the community property of the parties for which the wife had petitioned. Worland v. Worland, 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).

Since divorce decree is silent on any award of alimony to wife, that judgment is res judicata on the question of alimony and precludes a later alimony award. Furthermore, a general reservation of jurisdiction in the decree is ineffective to uphold an award of alimony allowed after the entry of a final decree of divorce. Unser v. Unser, 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).

Effect of expiration of obligation. — When the obligation to pay alimony expires, there is no longer any provision for alimony remaining. Under these circumstances, the court has no power to alter or amend alimony. Because however, the wife filed the motion before the alimony expired, the court had jurisdiction to modify the award. Deeds v. Deeds, 115 N.M. 192, 848 P.2d 1119 (Ct. App. 1993).

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).

Since 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).

Alimony ends as of date of remarriage unless conditions extraordinary. — On the application of the divorced husband to abate support payment to the divorced wife on the ground of her remarriage, such application should be granted as of the date of her remarriage unless she proves extraordinary conditions justifying continuance of the former husband's duty to support his former wife after she has become the wife of another man, and the evaluation and effect to be given these conditions rests in the sound discretion of the trial court. Kuert v. Kuert, 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).

Since divorced wife admitted her remarriage and no proof of such exceptional circumstances as would justify a continuance of the husband's duty to support his ex-wife subsequent to her remarriage, it appeared trial court erred in awarding wife alimony accruing subsequent to her remarriage. Kuert v. Kuert, 60 N.M. 432, 292 P.2d 115 (1956).

Some court action is necessary to abate alimony if 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).

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).

Mental health of recipient. — The provision requiring the trial court to consider the health of a spouse seeking spousal support implicitly requires that the court also consider the mental health of a spouse where a prima facie showing has been made concerning the recipient spouse's alleged current mental condition. Martinez v. Martinez, 1997-NMCA-125, 124 N.M. 313, 950 P.2d 286.

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.

Legislative intent behind Subsection C of this section is that post-minority education agreements in marital settlements may now merge into the divorce decree and the court has jurisdiction to enforce the agreement. Weddington v. Weddington, 2004-NMCA-034, ____N.M.____, 86 P.3d 623.

Once the parties have voluntarily agreed to provide for post-secondary education of their children, there exists an agreement that the district court can interpret, if it is ambiguous, and also enforce. Weddington v. Weddington, 2004-NMCA-034, ____N.M.____, 86 P.3d 623.

Enforcement of parties' agreement regarding post-minority education is now governed by this section and the district court has jurisdiction to enforce the agreement

after employing contract construction tools. Weddington v. Weddington, 2004-NMCA-034, ____N.M.____, 86 P.3d 623.

Construed with 40-4-11.1 NMSA 1978. — The legislature intended 40-4-11.1 NMSA 1978 to update and make uniform throughout the state the amount of the child support obligation based on the income of the parents, but did not intend to abolish the requirement that the party seeking modification make the traditional showing of a substantial change in circumstances, harmonizing 40-4-11.1 NMSA 1978 with 40-4-7 NMSA 1978 and giving effect to both. Perkins v. Rowson, 110 N.M. 671, 798 P.2d 1057 (Ct. App. 1990).

Trial court exclusive jurisdiction. — Trial courts are given exclusive jurisdiction of all matters relating to the guardianship, care, custody, maintenance, and education of the children. Rhinehart v. Nowlin, 111 N.M. 319, 805 P.2d 88 (Ct. App. 1990).

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).

Agreement for post-minority child support. — The district court has the power, arising from its original jurisdiction over matters sounding in contract, to enforce valid

agreements for post-minority support. Ottino v. Ottino, 2001-NMCA-012, 130 N.M. 168, 21 P.3d 37, cert. quashed, 131 N.M. 363, 36 P.3d 953 (2001).

A marriage settlement agreement covering post-minority support was not rendered unenforceable by its inclusion in the final divorce decree. Ottino v. Ottino, 2001-NMCA-012, 130 N.M. 168, 21 P.3d 37, cert. quashed, 131 N.M. 363, 36 P.3d 953 (2001).

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).

Duty of support for disabled child. — Parents have a common law continuing duty to support a severely disabled child if the child was disabled before reaching the age of majority, and the court had authority to enforce such duty. Cohn v. Cohn, 1997-NMCA-011, 123 N.M. 85, 934 P.2d 279.

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 if law and procedure followed. — Where trial court temporarily reduced support payments and made custodial changes and in doing so followed both the applicable principles of law and regular procedure in making its findings of fact, and where its findings were supported by substantial evidence, the results were pursuant to judicial discretion; not in its abuse. Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968).

No abuse of discretion if finding supported by substantial evidence. — The rule applicable in cases seeking a change of custody is to the effect that the trial court has discretion in its determination of custody and that appellate court will not interfere or reverse unless there is not substantial evidence to support the court's findings and conclusions, or there has been a manifest abuse of discretion. Stone v. Stone, 79 N.M. 351, 443 P.2d 741 (1968).

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).

Best interests not measured altogether by material and economic factors. — When considering the right to custody, the welfare and best interest of the child is not measured altogether by material and economic factors - parental love and affection

must find some place in the scheme and we all know this covers a multitude of weaknesses. Shorty v. Scott, 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).

Credit for pre-order payments invalid modification. — The trial court erred in crediting the husband with child support "prepayments." Parties may not, by private agreement, modify future child support obligations; rather, modification of future child support is a matter to be determined by the courts. Ingalls v. Ingalls, 119 N.M. 85, 888 P.2d 967 (Ct. App. 1994).

A husband who made unauthorized "prepayments" of child support need not lose credit for his prepayments; the husband could file a petition to modify his future child support obligations and, in such a case, an agreement between the parties to the effect that the husband would "prepay" child support in exchange for a reduction in such payments in the future, coupled with actual payment in this manner, should receive serious consideration by the trial court in weighing prospective modification. Ingalls v. Ingalls, 119 N.M. 85, 888 P.2d 967 (Ct. App. 1994).

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).

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).

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).

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

The child's best interests is the principal consideration of the court in initially determining a child's custody, as well as in effecting a change in custody, and a change of custody is permissible only upon a showing of a change of circumstances, even if decree provided otherwise. Specter v. Specter, 85 N.M. 112, 509 P.2d 879 (1973).

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).

Court authority to grant visitation rights. — The granting of visitation rights to a person or persons who the trial court determines are significant and important to the

welfare of the children is a part of the trial court's grant of power. Rhinehart v. Nowlin, 111 N.M. 319, 805 P.2d 88 (Ct. App. 1990).

Trial court has the power and discretion to grant visitation rights to a stepmother, where visitation is in the best interests and welfare of the children. Rhinehart v. Nowlin, 111 N.M. 319, 805 P.2d 88 (Ct. App. 1990).

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).

Whether custodial parent fostering good relations between noncustodial parent and children considered. — On a motion to modify child support payments, it is proper for the trial court to inquire as to whether the custodial parent is fulfilling the duty to foster good relations between the noncustodial parent and the children, as this may be considered as a factor bearing on the amount of child support that is granted over and above the normal necessities. Spingola v. Spingola, 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).

Adjustment of property division on remand. — Where, although the wife requested alimony, the trial court found she had failed to show need, and that finding was not challenged on appeal, on remand, the court in its discretion was limited to reconsidering the fairness and equity of the balance of the property division, and making whatever adjustments were necessary to achieve a fair and equitable division and disposition of the parties' property and other interests. Bayer v. Bayer, 110 N.M. 782, 800 P.2d 216 (Ct. App. 1990).

V. EXPENSES OF PROCEEDING.

Central purpose of attorney fees award under this section is to remedy any financial disparity between the divorcing parties so that each may make an efficient and effective presentation of his or her claims in the underlying divorce case. Garcia v. Jeantette, 2004-NMCA-004, 134 N.M. 776, 82 P.3d 947.

Award of attorney fees to intervening third party not authorized. – Subsection A of this section does not authorize the district court to order an intervening third party to pay attorney fees incurred by a divorcing party who was required to bring a separate action to collect on a judgment entered in the divorce proceeding. Garcia v. Jeantette, 2004-NMCA-004, 134 N.M. 776, 82 P.3d 947.

Consideration of parties' economic disparity. — It is appropriate for the trial court to consider the parties' access to financial resources when exercising its discretion in awarding attorneys' fees. Monsanto v. Monsanto, 119 N.M. 678, 894 P.2d 1034 (Ct. App. 1995).

In making its award of attorneys' fees, the trial court properly considered the economic disparity between husband and wife and the husband's access to financial resources through his family. Monsanto v. Monsanto, 119 N.M. 678, 894 P.2d 1034 (Ct. App. 1995).

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).

Discretion of the trial court in the award of attorney fees is not unrestrained and it should consider various factors, including the most important one of economic disparity. Gomez v. Gomez, 119 N.M. 755, 895 P.2d 277 (Ct. App. 1995).

Fees allowed even if husband relieved of alimony payments. — Where a divorced husband was relieved from further payment of alimony, the court might still award the wife counsel fees. Lord v. Lord, 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).

Consideration of obstructive behavior. — So long as an award of attorney fees under Subsection A of this section does not duplicate a sanction imposed for discovery abuse, obstructive behavior of a party during litigation is an appropriate factor for consideration in making such an award. Hakkila v. Hakkila, 112 N.M. 172, 812 P.2d 1320 (Ct. App. 1991).

Where nonmoving party refused to sign settlement agreement. — Attorney's fees, which are permitted by this section and were authorized under marital settlement

agreement (MSA), were improperly denied by trial court, where nonmoving party's refusal to sign MSA was the cause of the action and required the fees to be incurred. Herrera v. Herrera, 1999-NMCA-034, 126 N.M. 705, 974 P.2d 675.

Attorney's fees to be paid to spouse, not attorney. — An order directing the payment of attorney's fees by the husband in a divorce case direct to the wife's attorney is void. The wife is the party to the action, not the attorney, and the order must provide it be paid to her or to the clerk of the court for her benefit. Lloyd v. Lloyd, 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).

Award not disturbed because attorney dissatisfied. — Trial court's award of attorney's fees approved by wife would not be disturbed because attorney was dissatisfied. Dunne v. Dunne, 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 attorney's fees was appropriate. — Award of $2,500 in attorney fees to petitioner was warranted on appeal. Rhinehart v. Nowlin, 111 N.M. 319, 805 P.2d 88 (Ct. App. 1990).

The evidence of economic disparity between husband and wife supported the trial court's award of $20,000 in attorney's fees to the wife. Monsanto v. Monsanto, 119 N.M. 678, 894 P.2d 1034 (Ct. App. 1995).

An award of attorney's fees to the mother was appropriate since the trial court considered the economic disparity between the parties, and considered the father's financial circumstances in reaching its findings regarding his gross monthly income and in allowing him to make installment payments on the award. Alverson v. Harris, 1997-NMCA-024, 123 N.M. 153, 935 P.2d 1165.

An award of attorneys' fees was inappropriate since the matter of attorneys' fees had been covered by the original decree, and the present effort to set aside that decree on ill-founded grounds had been unsuccessful. Unser v. Unser, 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).

Since fees may be allowed by court husband not liable in independent suit. — Where counsel and suit fees may be allowed by court, the husband is not liable in an independent suit by the wife's attorney for necessary disbursements in the case. LaFollette v. Romero, 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).

While the award of attorney fees to one spouse is discretionary, the trial court should consider the relative financial status of the parties and the ability of the parties to employ and pay counsel. Foutz v. Foutz, 110 N.M. 642, 798 P.2d 592 (Ct. App. 1990).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation §§ 477, 607, 608, 1001, 1005.

Collusion as bar to divorce, 2 A.L.R. 699, 109 A.L.R. 832.

Condonation of matrimonial offense without cohabitation, 6 A.L.R. 1157, 47 A.L.R. 576.

Liability of husband in independent action for services rendered by attorney to wife in divorce suit, 25 A.L.R. 354, 42 A.L.R. 315.

Financial condition of parties as affecting allowance of suit money in divorce suit, 35 A.L.R. 1099.

Decree of divorce or pleadings or evidence in divorce suit as estoppel to deny marriage between the parties thereto, 45 A.L.R. 925.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance, 18 A.L.R.2d 10.

Trial court's jurisdiction as to alimony or maintenance pending appeal of matrimonial action, 19 A.L.R.2d 703.

Divorce decree as res judicata or estoppel as to previous marital status, against or in favor of third person, 20 A.L.R.2d 1163.

Default decree in divorce action as estoppel or res judicata with respect of marital property rights, 22 A.L.R.2d 724.

Power of court, in absence of express authority, to grant relief from judgment by default in divorce action, 22 A.L.R.2d 1312.

Pension of husband as resource which court may consider in determining amount of alimony, 22 A.L.R.2d 1421.

Condonation of cruel treatment as defense in divorce action, 32 A.L.R.2d 107.

Reconciliation as affecting separation agreement or decree, 35 A.L.R.2d 707, 36 A.L.R.4th 502.

Husband's right to alimony, maintenance, suit money, or attorney's fees, 66 A.L.R.2d 880.

Propriety of reference in connection with fixing amount of alimony, 85 A.L.R.2d 801.

Credit for payments on temporary alimony pending appeal, against liability for permanent alimony, 86 A.L.R.2d 696.

Right of attorney to continue divorce or separation suit against client's wishes, 92 A.L.R.2d 1009.

Propriety and effect of undivided award for support of more than one person, 2 A.L.R.3d 596.

Consideration of tax liability or consequences in determining alimony or property settlement provisions of divorce or separation, 51 A.L.R.3d 461, 9 A.L.R.5th 568.

Effect of remarriage of spouses to each other on permanent alimony provisions in final divorce decree, 52 A.L.R.3d 1334.

Provision in divorce decree that one party obtain or maintain life insurance for benefit of other party or child, 59 A.L.R.3d 9.

Right, in custody proceedings, to cross-examine investigating officer whose report is used by the court in its decision, 59 A.L.R.3d 1337.

Wife's possession of independent means as affecting her right to temporary alimony or allowance for support of children, 60 A.L.R.3d 728.

Divorce: power of court to modify decree for support, alimony, or the like, based on agreement of the parties, 61 A.L.R.3d 520.

Effect in subsequent proceedings of paternity findings or implications in divorce decree or in support or custody order made incidental thereto, 78 A.L.R.3d 846.

Adulterous wife's right to permanent alimony, 86 A.L.R.3d 97.

Grandparents' visitation rights after dissolution of marriage, 90 A.L.R.3d 217.

Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support, 91 A.L.R.3d 530.

Propriety in divorce proceedings of awarding rehabilitative alimony, 97 A.L.R.3d 740.

Parent's obligation to support unmarried minor child who refuses to live with parent, 98 A.L.R.3d 334.

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

Propriety of decree in proceeding between divorced parents to determine mother's duty to pay support for children in custody of father, 98 A.L.R.3d 1146.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child, 99 A.L.R.3d 268.

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education, 99 A.L.R.3d 322.

Action based upon reconveyance, upon promise of reconciliation, of property realized from divorce award or settlement, 99 A.L.R.3d 1248.

Custodial parent's sexual relations with third person as justifying modification of child custody order, 100 A.L.R.3d 625.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 A.L.R.3d 1129.

Visitation rights of persons other than natural parents or grandparents, 1 A.L.R.4th 1270.

Removal by custodial parents of child from jurisdiction in violation of court order as justifying termination, suspension, or reduction of child support payments, 8 A.L.R.4th 1231.

Right of incarcerated mother to retain custody of infant in penal institution, 14 A.L.R.4th 748.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation, 15 A.L.R.4th 224.

Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 A.L.R.4th 864.

Propriety of awarding joint custody of children, 17 A.L.R.4th 1013.

Divorce and separation: effect of trial court giving consideration to needs of children in making property division - modern status, 19 A.L.R.4th 239.

Validity and enforceability of escalation clause in divorce decree relating to alimony and child support, 19 A.L.R.4th 830.

Spouse's liability, after divorce, for community debt contracted by other spouse during marriage, 20 A.L.R.4th 211.

Authority of divorce court to award prospective or anticipated attorneys' fees to enable parties to maintain or defend divorce suit, 22 A.L.R.4th 407.

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

Effect of remarriage of spouses to each other on child custody and support provisions of prior divorce decree, 26 A.L.R.4th 325.

Excessiveness or adequacy of amount of money awarded as separate maintenance, alimony, or support for spouse without absolute divorce, 26 A.L.R.4th 1190.

Excessiveness or adequacy of money awarded as temporary alimony, 26 A.L.R.4th 1218.

Excessiveness or adequacy of amount of money awarded for alimony and child support combined, 27 A.L.R.4th 1038.

Excessiveness or adequacy of amount of money awarded as permanent alimony following divorce, 28 A.L.R.4th 786.

Court-authorized permanent or temporary removal of child by parent to foreign country, 30 A.L.R.4th 548.

Property settlement agreement as affecting divorced spouse's right to recover as named beneficiary under former spouse's life insurance policy, 31 A.L.R.4th 59.

Proper date for valuation of property being distributed pursuant to divorce, 34 A.L.R.4th 63.

Court's authority to award temporary alimony or suit money in action for divorce, separate maintenance, or alimony where the existence of a valid marriage is contested, 34 A.L.R.4th 814.

Order awarding temporary support or living expenses upon separation of unmarried partners pending contract action based on services relating to personal relationship, 35 A.L.R.4th 409.

Visitation rights of homosexual or lesbian parent, 36 A.L.R.4th 997.

Validity and application of statute allowing endangered child to be temporarily removed from parental custody, 38 A.L.R.4th 756.

Propriety of provision of custody or visitation order designed to insulate child from parent's extramarital sexual relationships, 40 A.L.R.4th 812.

Spouse's dissipation of marital assets prior to divorce as factor in divorce court's determination of property division, 41 A.L.R.4th 416.

Divorce: equitable distribution doctrine, 41 A.L.R.4th 481.

Primary caretaker role of respective parents as factor in awarding custody of child, 41 A.L.R.4th 1129.

Stepparent's postdivorce duty to support stepchild, 44 A.L.R.4th 520.

Divorce and separation: treatment of stock options for purposes of dividing marital property, 46 A.L.R.4th 640.

Valuation of stock options for purposes of divorce court's property distribution, 46 A.L.R.4th 689.

Divorced or separated spouse's living with member of opposite sex as affecting other spouse's obligation of alimony or support under separation agreement, 47 A.L.R.4th 38.

Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

Child support: court's authority to reinstitute parent's support obligation after terms of prior decree have been fulfilled, 48 A.L.R.4th 952.

Necessity that divorce court value property before distributing it, 51 A.L.R.4th 11.

Modern status of views as to validity of premarital agreements contemplating divorce or separation, 53 A.L.R.4th 22.

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

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms - modern status, 53 A.L.R.4th 161.

Divorce: excessiveness or adequacy of combined property division and spousal support awards - modern cases, 55 A.L.R.4th 14.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order, 57 A.L.R.4th 710.

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

Divorce property distribution: treatment and method of valuation of future interest in real estate or trust property not realized during marriage, 62 A.L.R.4th 107.

Prejudgment interest awards in divorce cases, 62 A.L.R.4th 156.

Power to modify spousal support award for a limited term, issued in conjunction with divorce, so as to extend the term or make the award permanent, 62 A.L.R.4th 180.

Divorce: voluntary contributions to child's education expenses as factor justifying modification of spousal support award, 63 A.L.R.4th 436.

Child custody: separating children by custody awards to different parents - post-1975 cases, 67 A.L.R.4th 354.

Divorce and separation: effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R.4th 173.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 A.L.R.4th 786.

Valuation of goodwill in medical or dental practice for purposes of divorce court's property distribution, 78 A.L.R.4th 853.

Accrued vacation, holiday time, and sick leave as marital or separate property, 78 A.L.R.4th 1107.

Death of obligor spouse as affecting alimony, 79 A.L.R.4th 10.

Divorce and separation: goodwill in law practice as property subject to distribution on dissolution of marriage, 79 A.L.R.4th 171.

What constitutes order made pursuant to state domestic relations law for purposes of qualified domestic relations order exception to antialienation provision of Employee Retirement Income Security Act of 1974 (29 USCS § 1056(d)), 79 A.L.R.4th 1081.

Child custody and visitation rights of person infected with AIDS, 86 A.L.R.4th 211.

Divorce: court's authority to institute or increase spousal support award after discharge of prior property award in bankruptcy, 87 A.L.R.4th 353.

Denial or restriction of visitation rights to parent charged with sexually abusing child, 1 A.L.R.5th 776.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 A.L.R.5th 337.

Divorce: spouse's right to order that other spouse pay expert witness fees, 4 A.L.R.5th 403.

Divorce and separation: consideration of tax consequences in distribution of marital property, 9 A.L.R.5th 568.

Divorce and separation: award of interest on deferred installment payments of marital asset distribution, 10 A.L.R.5th 191.

Spouse's right to set off debt owed by other spouse against accrued spousal or child support payments, 11 A.L.R.5th 259.

Consideration of obligated spouse's earnings from overtime or "second job" held in addition to regular full-time employment in fixing alimony or child support awards, 17 A.L.R.5th 143.

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

Parent's use of drugs as factor in award of custody of children, visitation rights, or termination of parental rights, 20 A.L.R.5th 534.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child, 34 A.L.R.5th 447.

Smoking as factor in child custody and visitation cases, 36 A.L.R.5th 377.

Alimony as affected by recipient spouse's remarriage in absence of controlling specific statue, 47 A.L.R.5th 129.

Excessiveness or inadequacy of lump-sum alimony award, 49 A.L.R.5th 441.

Alimony or child-support awards as subject to attorneys' liens, 49 A.L.R. 5th 595.

Consideration of obligor's personal-injury recovery or settlement infixing alimony or child support, 59 A.L.R.5th 489.

Custodial parent's homosexual or lesbian relationship with third person as justifying modification of child custody order, 65 A.L.R.5th 591.

Effect of same-sex relationship on right to spousal support, 73 A.L.R.5th 599.

Copyright, patent, or other intellectual property as marital property for purposes of alimony, support, or divorce settlement, 80 A.L.R.5th 487.

Spouse's cause of action for negligent personal injury, or proceeds therefrom, as separate or community property, 80 A.L.R.5th 533.

Divorce decree or settlement agreement as affecting divorced spouse's right to recover as named beneficiary on former spouse's individual retirement account, 99 A.L.R.5th 637.

Propriety of equalizing income of spouses through alimony awards, 102 A.L.R.5th 395.

Debts for alimony, maintenance, and support as exceptions to bankruptcy discharge, under § 523(a)(5) of Bankruptcy Code of 1978 (11 USCS § 523(a)(5)), 69 A.L.R. Fed. 403.

Pre-emptive effect of Employee Retirement Income Security Act (ERISA) provisions (29 USCS §§ 1056(d)(3), 1144(a), 1144(b)(7)) with respect to orders entered in domestic relations proceedings, 116 A.L.R. Fed. 503.

27B C.J.S. Divorce §§ 306 et seq., 508 et seq.; 27C C.J.S. Divorce, § 611 et seq.

40-4-7.1. Use of life insurance policy as security.

In any proceeding brought pursuant to the provisions of Section 40-4-7 NMSA 1978 or in any other proceeding for the division of property or spousal or child support brought pursuant to the provisions of Chapter 40 NMSA 1978, the court may require either party or both parties to the proceeding to maintain the minor children of the parties or a spouse or former spouse as beneficiaries on a life insurance policy as security for the payment of:

(1) support for the benefit of the minor children;

(2) spousal support; or

(3) the cost to equalize a property division in the event of the death of the insured on the life insurance policy.

The court may also allocate the cost of the premiums of the life insurance policy between the parties.

History: 1978 Comp., § 40-4-7.1, enacted by Laws 1993, ch. 110, § 1.

40-4-7.2. Binding arbitration option; procedure.

A. Parties to an action for divorce, separation, custody or time-sharing, child support, spousal support, marital property and debt division or attorney fees related to such matters, including any post-judgment proceeding, may stipulate to binding arbitration by a signed agreement that provides for an award with respect to one or more of the following issues:

(1) valuation and division of real and personal property;

(2) child support, custody, time-sharing or visitation;

(3) spousal support;

(4) costs, expenses and attorney fees;

(5) enforceability of prenuptial and post-nuptial agreements;

(6) determination and allocation of responsibility for debt as between the parties;

(7) any civil tort claims related to any of the foregoing; or

(8) other contested domestic relations matters.

B. A court may not order a party to participate in arbitration except to the extent a party has agreed to participate pursuant to a written arbitration agreement. When the party involved is a minor, then his parent must consent to arbitration. When the party involved is a minor with a guardian ad litem, the guardian ad litem must provide written consent. When the party involved is a minor without a guardian ad litem, then in order for arbitration to proceed the court must find that arbitration is in the best interest of the minor.

C. Arbitration pursuant to this section shall be heard by one or more arbitrator. The court shall appoint an arbitrator agreed to by the parties if the arbitrator consents to the appointment.

D. If the parties have not agreed to an arbitrator, the court shall appoint an arbitrator who:

(1) is an attorney in good standing with the state bar of New Mexico;

(2) has practiced as an attorney for not less than five years immediately preceding the appointment and actively practiced in the area of domestic relations during three of those five years. Any period of time during which a person serves as a judge, special master or child support hearing officer is considered as actively practicing in the area of domestic relations; or

(3) is another professional licensed and experienced in the subject matter that is the area of the dispute.

E. An arbitrator appointed pursuant to this section is immune from liability in regard to the arbitration proceeding to the same extent as the judge who has jurisdiction of the action that is submitted to arbitration.

F. Objections to the qualifications of an arbitrator must be raised in connection with the appointment by the court or they are waived. The court will permit parties to raise objections based on qualifications within ten days of appointment of an arbitrator. Parties who agree on an arbitrator waive objections to his qualifications.

G. An arbitrator appointed pursuant to this section:

(1) shall hear and make an award on each issue submitted for arbitration pursuant to the arbitration agreement subject to the provisions of the agreement; and

(2) has all of the following powers and duties:

(a) to administer an oath or issue a subpoena as provided by court rule;

(b) to issue orders regarding discovery proceedings relative to the issues being arbitrated, including appointment of experts; and

(c) to allocate arbitration fees and expenses between the parties, including imposing a fee or expense on a party or attorney as a sanction for failure to provide information, subject to provisions of the arbitration agreement.

H. An arbitrator, attorney or party in an arbitration proceeding pursuant to this section shall disclose in writing any circumstances that may affect an arbitrator's impartiality, including, bias, financial interests, personal interests or family relationships. Upon disclosure of such a circumstance, a party may request disqualification of the arbitrator. If the arbitrator does not withdraw within seven days after a request for disqualification, the party may file a motion for disqualification with the court.

I. If the court finds that the arbitrator is disqualified, the court may appoint another arbitrator, subject to the provisions of the arbitration agreement.

J. As soon as practicable after the appointment of the arbitrator, the parties and attorneys shall confer with the arbitrator to consider all of the following:

(1) scope of the issues submitted;

(2) date, time and place of the hearing;

(3) witnesses, including experts, who may testify;

(4) appointment of experts and a schedule for exchange of expert reports or summary of expert testimony; and

(5) subject to the provisions of Subsection K of this section, exhibits, documents or other information each party considers material to the case and a schedule for production or exchange of the information. An objection not made before the hearing to production or lack of production of information is waived.

K. The arbitrator shall order reasonable access to information for each party that is material to the arbitration issues prior to the hearing, including the following:

(1) a current complete sworn financial disclosure statement, when financial matters are at issue;

(2) if a court has issued an order concerning an issue subject to arbitration, a copy of the order;

(3) any relevant documents related to the arbitration issues defined by the arbitrator;

(4) proposed award by each party for each issue subject to arbitration; and

(5) expert opinions of experts to be used by either party or appointed by the arbitrator.

L. Except as provided by this section, court rule or the arbitration agreement, a record shall not ordinarily be made of an arbitration hearing pursuant to this section unless either party requests it. If a record is not required, an arbitrator may make a record to be used only by the arbitrator to aid in reaching the decision.

M. Unless waived by the parties, a record shall be made of that portion of the hearing that concerns child custody, visitation or time-sharing.

N. The arbitration agreement may set forth any standards on which an award should be based, including the law to be applied. An arbitration agreement shall provide that in deciding child support issues, the arbitrator shall apply Section 40-4-11.1 NMSA 1978 when setting or modifying a child support order.

O. Unless otherwise agreed to by the parties and arbitrator in writing or on the record, the arbitrator shall issue the written award on each issue within sixty days after

the end of the hearing and after receipt of proposed findings of fact and conclusions of law if requested by the arbitrator.

P. If the parties reach an agreement regarding child custody, time-sharing or visitation, the agreement shall be placed on the record by the parties under oath and shall be included in the arbitrator's written award.

Q. The arbitrator retains jurisdiction to correct errors or omissions in an award upon motion by a party to the arbitrator within twenty days after the award is issued or upon the arbitrator's own motion. Another party to the arbitration may respond to the motion within seven days after the motion is made. The arbitrator shall make a decision on the motion within seven days after the expiration of the response time period.

R. The court shall enforce an arbitrator's award or other order issued pursuant to this section in the same manner as an order issued by the court. A party may make a motion to the court to enforce an arbitrator's award or order.

S. Any party in an action that was submitted to arbitration pursuant to this section shall file with the court a stipulated order, or a motion to enforce the award within twenty-one days after the arbitrator's award is issued unless otherwise agreed to by the parties in writing or unless the arbitrator or court grants an extension.

T. If a party applies to the court for vacation of an arbitrator's award in binding arbitration issued pursuant to this section that concerns child custody, time-sharing or visitation, the court shall review the award based only upon the record of the arbitration hearing and factual matters that have arisen since the arbitration hearing that are relevant to the claim. The court may vacate an award of custody, time-sharing or visitation made in binding arbitration if the court finds that circumstances have changed since issuance of the award that are adverse to the best interests of the child, upon a finding that the award will cause harm or be detrimental to a child, or pursuant to Subsections U and V of this section. An arbitration agreement may provide a broader scope of review of custody, time-sharing or visitation issues by the court, and such review will apply if broader than this section.

U. If a party applies to the court for vacation or modification of an arbitrator's award issued pursuant to this section, the court shall review the award only as provided in Subsections T and V of this section.

V. If a party applies under this section, the court may vacate, modify or correct an award under any of the following circumstances:

(1) the award was procured by corruption, fraud or other undue means;

(2) there was evident partiality by an arbitrator, or misconduct prejudicing a party's rights;

(3) the arbitrator exceeded his powers; or

(4) the arbitrator refused to postpone the hearing on a showing of sufficient cause or refused to hear evidence substantial and material to the controversy.

W. An application to vacate an award on grounds stated in Subsections U and V of this section shall be decided by the court. If an award is vacated on grounds stated in Paragraph (3) or (4) of Subsection V of this section, the court may order a rehearing before the arbitrator who made the award when both parties consent to the rehearing before the arbitrator who made the award.

X. An appeal from an arbitration award pursuant to this section that the court confirms, vacates, modifies or corrects shall be taken in this same manner as from an order or judgment in other domestic relations actions.

Y. No arbitrator may decide issues of a criminal nature or make decisions on petitions pursuant to the Family Violence Protection Act [Chapter 40, Article 13, NMSA 1978].

History: Laws 1999, ch. 123, § 1.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 123 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 18, 1999, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

40-4-7.3. Accrual of interest; delinquent child and spousal support.

A. Interest shall accrue on delinquent child support at the rate of four percent and spousal support at the rate set forth in Section 56-8-4 NMSA 1978 in effect when the support payment becomes due and shall accrue from the date the support is delinquent until the date the support is paid.

B. Interest shall accrue on a consolidated judgment for delinquent child support at the rate of four percent when the consolidated judgment is entered until the judgment is satisfied.

C. Unless the order, judgment, decree or wage withholding order specifies a due date other than the first day of the month, support shall be due on the first day of each month and, if not paid by that date, shall be delinquent.

D. In calculation of support arrears, payments of support shall be first applied to the current support obligation, next to any delinquent support, next to any consolidated

judgment of delinquent support, next to any accrued interest on delinquent support and next to any interest accrued on a consolidated judgment of delinquent support.

E. The human services department shall have the authority to forgive accrued interest on delinquent child support assigned to the state not otherwise specified in an order, judgment, decree or income withholding order if, in the judgment of the secretary of human services, forgiveness will likely result in the collection of more child support, spousal support or other support and will likely result in the satisfaction of the judgment, decree or wage withholding order. This authority shall include the ability to authorize the return of suspended licenses.

History: Laws 1999, ch. 299, § 1; 2004, ch. 41, § 2.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 299 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 18, 1999, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

The 2004 amendment, effective May 19, 2004, amended Subsection A to delete "or consolidated in a judgment" at the end of the subsection, amended Subsection B to delete a reference to 59-8-4 NMSA 1978 and insert a four percent rate of interest and added a new Subsection E.

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

A. In any proceeding for the disposition of children when custody of minor children is contested by any party, the court may appoint an attorney at law as guardian ad litem on the court's motion or upon application of any party to appear for and represent the minor children. Expenses, costs and attorneys' fees for the guardian ad litem may be allocated among the parties as determined by the court.

B. When custody is contested, the court:

(1) shall refer that issue to mediation if feasible unless a party asserts or it appears to the court that domestic violence or child abuse has occurred, in which event the court shall halt or suspend mediation unless the court specifically finds that:

(a) the following three conditions are satisfied: 1) the mediator has substantial training concerning the effects of domestic violence or child abuse on victims; 2) a party who is or alleges to be the victim of domestic violence is capable of negotiating with the other party in mediation, either alone or with assistance, without suffering from an imbalance of power as a result of the alleged domestic violence; and 3) the mediation process contains appropriate provisions and conditions to protect against an imbalance

of power between the parties resulting from the alleged domestic violence or child abuse; or

(b) in the case of domestic violence involving parents, the parent who is or alleges to be the victim requests mediation and the mediator is informed of the alleged domestic violence;

(2) may order, in addition to or in lieu of the provisions of Paragraph (1) of this subsection, that each of the parties undergo individual counseling in a manner that the court deems appropriate, if the court finds that the parties can afford the counseling; and

(3) may use, in addition to or in lieu of the provisions of Paragraph (1) of this subsection, auxiliary services such as professional evaluation by application of Rule 11-706 of the New Mexico Rules of Evidence or Rule 1-053 of the Rules of Civil Procedure for the District Courts.

C. As used in this section:

(1) "child abuse" means:

(a) that a child has been physically, emotionally or psychologically abused by a parent;

(b) that a child has been: 1) sexually abused by a parent through criminal sexual penetration, incest or criminal sexual contact of a minor as those acts are defined by state law; or 2) sexually exploited by a parent through allowing, permitting or encouraging the child to engage in prostitution and allowing, permitting, encouraging or engaging the child in obscene or pornographic photographing or filming or depicting a child for commercial purposes as those acts are defined by state law;

(c) that a child has been knowingly, intentionally or negligently placed in a situation that may endanger the child's life or health; or

(d) that a child has been knowingly or intentionally tortured, cruelly confined or cruelly punished; provided that nothing in this paragraph shall be construed to imply that a child who is or has been provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner of the church or denomination, is for that reason alone a victim of child abuse within the meaning of this paragraph; and

(2) "domestic violence" means one parent causing or threatening physical harm or assault or inciting imminent fear of physical, emotional or psychological harm to the other parent.

History: 1953 Comp., § 22-7-7, enacted by Laws 1977, ch. 286, § 1; 1993, ch. 241, § 1.

ANNOTATIONS

Cross references. — For guardian ad litem for infant defendant, see 38-4-10 NMSA 1978.

For failure to apply for appointment of guardian ad litem, see 38-4-11 NMSA 1978.

For liability of guardian ad litem for costs, see 38-4-12 NMSA 1978.

For appointment of guardian ad litem to defend suit, see 38-4-15 NMSA 1978.

For compromise by guardian ad litem, see 38-4-16 NMSA 1978.

For costs paid by guardian ad litem, see 38-4-17 NMSA 1978.

For guardians of minors, see 45-5-201 to 45-5-212 NMSA 1978.

For guardians of incapacitated persons, see 45-5-301 to 45-5-315 NMSA 1978.

For protection of property of persons under disability and minors, see 45-5-401 to 45-5-432 NMSA 1978.

The 1993 amendment, effective July 1, 1993, designated the provisions of this section as Subsection A and added Subsections B and C.

Compiler's notes. — The section heading of this section in Laws 1977, ch. 286, § 1, designated this section as "2277." The section number has been corrected in the history as set out above.

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).

Mediation not required. — The language of Subsection B(1) of this section and 40-4-9.1G NMSA 1978 permits the court to bypass mediation if it does not appear to be feasible, even in non-domestic violence or abuse situations. Thomas v. Thomas, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7, cert. denied, 128 N.M. 150, 990 P.2d 824 (1999).

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.

ANNOTATIONS

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

For provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, see 40-10A-101 to 40-10A-403 NMSA 1978.

Discretion of court to hold in-camera hearing. — The holding of an in-camera hearing under Subsection C is a matter entrusted to the sound discretion of the trial court. Normand v. Ray, 109 N.M. 403, 785 P.2d 743 (1990).

Trial court's denial of an in-camera hearing to determine a child's preferences as to where she wanted to live was not error, where the court was otherwise adequately apprised of the child's wishes and there was evidence in the record otherwise supporting the ruling of the court. Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).

Older child's preference not controlling. — Although the provisions of this section direct that the trial court shall consider the desires of a minor over 14 years of age concerning custody, under the statute, the trial court is not conclusively bound to award custody according to such preference. Instead, the controlling inquiry of the court in any child custody dispute involves a balancing of all relevant factors and determining the best interests of the child. Normand v. Ray, 109 N.M. 403, 785 P.2d 743 (1990).

Best interest of child controlling. — Trial court's decision to change primary physical custody of the parties' son from mother to father, was reasonable, where the child had reached the age at which the court was statutorily required to consider his desires, and the court clinic's advisory consultation report approved the change as being in the best interests of the child. Clayton v. Trotter, 110 N.M. 369, 796 P.2d 262 (Ct. App. 1990).

Effect of custodial parent's subsequent incestuous marriage. — New Mexico's public policy against incest did not preclude the district court from awarding a mother primary physical custody of her children, after taking into account her plans to marry her uncle, where that choice was in the best interests of the children, and mother and uncle intended to reside in California. Leszinske v. Poole, 110 N.M. 663, 798 P.2d 1049 (Ct. App. 1990).

Sexual orientation not sufficient to deny visitation. — Sexual orientation, standing alone, is not a permissible basis for the denial of shared custody or visitation. Evidence of sexual and associational conduct may be relevant to determining the best interests of the child, but is not, by itself, sufficient to make that determination. A.C. v. C.B., 113 N.M. 581, 829 P.2d 660 (Ct. App. 1992).

Modification of award. — Because a final order was not entered until the custody-review hearing, a change in circumstances was not necessary to modify the court's joint custody award. Rather, the court was required to consider the standards for custody under this section and to comply with the requirements of Rule 1-052(b) NMRA. Fitzsimmons v. Fitzsimmons, 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).

Father awarded physical custody. — Where a mother, in the Marine Corps, had lived in six different locales in five years, and the father, because of his work schedule, allowed the parties' minor child to live with his sister, the court did not err in awarding father physical custody, but requiring him to maintain the child's present residence with her aunt, while maintaining joint legal custody. Brito v. Brito, 110 N.M. 276, 794 P.2d 1205 (Ct. App. 1990).

Order reversed for lack of evidence. — Trial court's order changing custody, apparently based on an allegation that the mother did not send the children to the father for a Christmas visit, was reversed, in the absence of the existence of any evidence in the record and the adoption of findings concerning the best interests and welfare of the children. Campbell v. Alpers, 110 N.M. 21, 791 P.2d 472 (Ct. App. 1990).

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

For note, "Family Law - Custody Dispute between Biological Mother and Nonbiological, Nonadoptive Party: A.C. v. C.B.," see 23 N.M.L. Rev. 331 (1993).

For comment, "Custody Standards in New Mexico: Between Third Parties and Biological Parents, What Is the Trend?" see 27 N.M.L. Rev. 547 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Infants §§ 28 to 57; 59 Am. Jur. 2d Parent and Child §§ 23 to 36.

Jurisdiction to award custody of child having legal domicil in another state, 4 A.L.R.2d 7.

Jurisdiction to award custody of child domiciled in state but physically outside of it, 9 A.L.R.2d 434.

Nonresidence as affecting one's right to custody of child, 15 A.L.R.2d 432.

Power of court, on its own motion, to modify provisions of divorce decree as to custody of children, upon application for other relief, 16 A.L.R.2d 664.

Alienation of child's affections as affecting custody award, 32 A.L.R.2d 1005.

Consideration of investigation by welfare agency or the like in modifying award as between parents of custody of children, 35 A.L.R.2d 629.

Education: purview of charge for "college education," 36 A.L.R.2d 1323.

Right to custody of child as affected by death of custodian appointed by divorce decree, 39 A.L.R.2d 258.

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

Opening or modification of divorce decree as to custody or support of child not provided for in the decree, 71 A.L.R.2d 1370.

Court's power to modify child custody order as affected by agreement which was incorporated in divorce decree, 73 A.L.R.2d 1444.

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

Violation of custody provision of agreement or decree as affecting child support payment provision, and vice versa, 95 A.L.R.2d 118.

Propriety of court conducting private interview with child in determining custody, 99 A.L.R.2d 954.

Child's wishes as factor in awarding custody, 4 A.L.R.3d 1396.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support, 17 A.L.R.3d 764.

Award of custody of child where contest is between child's mother and grandparent, 29 A.L.R.3d 366.

Award of custody of child where contest is between child's parents and grandparents, 31 A.L.R.3d 1187.

Divorce: necessity of notice of application for temporary custody of child, 31 A.L.R.3d 1378.

Noncustodial parent's rights as respects education of child, 36 A.L.R.3d 1093.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 A.L.R.3d 605.

Sexual abuse of child by parent as ground for termination of parent's right to child, 58 A.L.R.3d 1074.

Right, in custody proceedings, to cross-examine investigating officer whose report is used by the court in its decision, 59 A.L.R.3d 1337.

Modern status of maternal preference rule or presumption in child custody cases, 70 A.L.R.3d 262.

Effect in subsequent proceedings of paternity findings or implications in divorce decree or in support or custody order made incidental, 78 A.L.R.3d 846.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding, 79 A.L.R.3d 417.

Validity, construction, and application of Uniform Child Custody Jurisdiction Act, 96 A.L.R.3d 968, 78 A.L.R.4th 1028, 16 A.L.R.5th 650, 20 A.L.R.5th 700, 21 A.L.R.5th 396, 40 A.L.R.5th 227.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child, 99 A.L.R.3d 268.

Custodial parent's sexual relations with third person as justifying modification of child custody order, 100 A.L.R.3d 625.

Parent's physical disability or handicap as factor in custody award or proceedings, 3 A.L.R.4th 1044.

Initial award or denial of child custody to homosexual or lesbian parent, 6 A.L.R.4th 1297.

Award of custody of child where contest is between natural parent and stepparent, 10 A.L.R.4th 767.

Race as factor in custody award or proceedings, 10 A.L.R.4th 796.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights, 10 A.L.R.4th 827.

Propriety of awarding custody of child to parent residing or intending to reside in foreign country, 20 A.L.R.4th 677.

Religion as factor in child custody and visitation cases, 22 A.L.R.4th 971.

Effect of remarriage of spouses to each other on child custody and support provisions of prior divorce decree, 26 A.L.R.4th 325.

Interference by custodian of child with noncustodial parent's visitation rights as ground for change of custody, 28 A.L.R.4th 9.

Parent's or relative's rights of visitation of adult against latter's wishes, 40 A.L.R.4th 846.

Primary caretaker role of respective parents as factor in awarding custody of child, 41 A.L.R.4th 1129.

Attorneys' fees awards in parent-nonparent child custody case, 45 A.L.R.4th 212.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 A.L.R.4th 1170.

Mother's status as "working mother" as factor in awarding child custody, 62 A.L.R.4th 259.

Withholding visitation rights for failure to make alimony or support payments, 65 A.L.R.4th 1155.

Child custody: separating children by custody awards to different parents - post-1975 cases, 67 A.L.R.4th 354.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 A.L.R.4th 742.

Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically requested in pleadings of prevailing party, 5 A.L.R.5th 863.

Continuity of residence as factor in contest between parent and nonparent for custody of child who has been residing with nonparent - modern status, 15 A.L.R.5th 692.

Parties' misconduct as ground for declining jurisdiction under § 8 of the Uniform Child Custody Jurisdiction Act (UCCJA), 16 A.L.R.5th 650.

Age of parent as factor in awarding custody, 34 A.L.R.5th 57.

Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(a), 40 A.L.R.5th 227.

Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic violence in awarding custody of children, 51 A.L.R.5th 241.

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

Initial award or denial of child custody to homosexual or lesbian parent, 62 A.L.R.5th 591.

Custodial parent's homosexual or lesbian relationship with third person as justifying modification of child custody order, 65 A.L.R.5th 591.

Custodial parent's relocation as grounds for change of custody, 70 A.L.R.5th 377.

Child custody and visitation rights arising from same-sex relationship, 80 A.L.R.5th 1.

Religion as factor in visitation cases, 95 A.L.R.5th 533.

Restrictions on parent's child visitation rights based on parent's sexual conduct, 99 A.L.R.5th 475.

27C C.J.S. Divorce §§ 620 to 631, 639.

40-4-9.1. Joint custody; standards for determination; parenting plan.

A. There shall be a presumption that joint custody is in the best interests of a child in an initial custody determination. An award of joint custody does not imply an equal division of financial responsibility for the child. Joint custody shall not be awarded as a substitute for an existing custody arrangement unless there has been a substantial and material change in circumstances since the entry of the prior custody order or decree, which change affects the welfare of the child such that joint custody is presently in the best interests of the child. With respect to any proceeding in which it is proposed that joint custody be terminated, the court shall not terminate joint custody unless there has been a substantial and material change in circumstances affecting the welfare of the child, since entry of the joint custody order, such that joint custody is no longer in the best interests of the child.

B. In determining whether a joint custody order is in the best interests of the child, in addition to the factors provided in Section 40-4-9 NMSA 1978, the court shall consider the following factors:

(1) whether the child has established a close relationship with each parent;

(2) whether each parent is capable of providing adequate care for the child throughout each period of responsibility, including arranging for the child's care by others as needed;

(3) whether each parent is willing to accept all responsibilities of parenting, including a willingness to accept care of the child at specified times and to relinquish care to the other parent at specified times;

(4) whether the child can best maintain and strengthen a relationship with both parents through predictable, frequent contact and whether the child's development will profit from such involvement and influence from both parents;

(5) whether each parent is able to allow the other to provide care without intrusion, that is, to respect the other's parental rights and responsibilities and right to privacy;

(6) the suitability of a parenting plan for the implementation of joint custody, preferably, although not necessarily, one arrived at through parental agreement;

(7) geographic distance between the parents' residences;

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

(9) whether a judicial adjudication has been made in a prior or the present proceeding that either parent or other person seeking custody has engaged in one or more acts of domestic abuse against the child, a parent of the child or other household member. If a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child, the abused parent or other household member.

C. In any proceeding in which the custody of a child is at issue, the court shall not prefer one parent as a custodian solely because of gender.

D. In any case in which the parents agree to a form of custody, the court should award custody consistent with the agreement unless the court determines that such agreement is not in the best interests of the child.

E. In making an order of joint custody, the court may specify the circumstances, if any, under which the consent of both legal custodians is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent.

F. When joint custody is awarded, the court shall approve a parenting plan for the implementation of the prospective custody arrangement prior to the award of joint custody. The parenting plan shall include a division of a child's time and care into periods of responsibility for each parent. It may also include:

(1) statements regarding the child's religion, education, child care, recreational activities and medical and dental care;

(2) designation of specific decision-making responsibilities;

(3) methods of communicating information about the child, transporting the child, exchanging care for the child and maintaining telephone and mail contact between parent and child;

(4) procedures for future decision making, including procedures for dispute resolution; and

(5) other statements regarding the welfare of the child or designed to clarify and facilitate parenting under joint custody arrangements.

In a case where joint custody is not agreed to or necessary aspects of the parenting plan are contested, the parties shall each submit parenting plans. The court may accept the plan proposed by either party or it may combine or revise these plans as it deems necessary in the child's best interests. The time of filing of parenting plans shall be set by local rule. A plan adopted by the court shall be entered as an order of the court.

G. Where custody is contested, the court shall refer that issue to mediation if feasible. The court may also use auxiliary services such as professional evaluation by application of Rule 706 [Rule 11-706 NMRA] of the New Mexico Rules of Evidence or Rule 53 [Rule 1-053 NMRA] of the Rules of Civil Procedure for the District Courts.

H. Notwithstanding any other provisions of law, access to records and information pertaining to a minor child, including medical, dental and school records, shall not be denied to a parent because that parent is not the child's physical custodial parent or because that parent is not a joint custodial parent.

I. Whenever a request for joint custody is granted or denied, the court shall state in its decision its basis for granting or denying the request for joint custody. A statement that joint custody is or is not in the best interests of the child is not sufficient to meet the requirements of this subsection.

J. An award of joint custody means that:

(1) each parent shall have significant, well-defined periods of responsibility for the child;

(2) each parent shall have, and be allowed and expected to carry out, responsibility for the child's financial, physical, emotional and developmental needs during that parent's periods of responsibility;

(3) the parents shall consult with each other on major decisions involving the child before implementing those decisions; that is, neither parent shall make a decision or take an action which results in a major change in a child's life until the matter has been discussed with the other parent and the parents agree. If the parents, after discussion, cannot agree and if one parent wishes to effect a major change while the

other does not wish the major change to occur, then no change shall occur until the issue has been resolved as provided in this subsection;

(4) the following guidelines apply to major changes in a child's life:

(a) if either parent plans to change his home city or state of residence, he shall provide to the other parent thirty days' notice in writing stating the date and destination of move;

(b) the religious denomination and religious activities, or lack thereof, which were being practiced during the marriage should not be changed unless the parties agree or it has been otherwise resolved as provided in this subsection;

(c) both parents shall have access to school records, teachers and activities. The type of education, public or private, which was in place during the marriage should continue, whenever possible, and school districts should not be changed unless the parties agree or it has been otherwise resolved as provided in this subsection;

(d) both parents shall have access to medical and dental treatment providers and records. Each parent has authority to make emergency medical decisions. Neither parent may contract for major elective medical or dental treatment unless both parents agree or it has been otherwise resolved as provided in this subsection; and

(e) both parents may attend the child's public activities and both parents should know the necessary schedules. Whatever recreational activities the child participated in during the marriage should continue with the child's agreement, regardless of which of the parents has physical custody. Also, neither parent may enroll the child in a new recreational activity unless the parties agree or it has been otherwise resolved as provided in this subsection; and

(5) decisions regarding major changes in a child's life may be decided by:

(a) agreement between the joint custodial parents;

(b) requiring that the parents seek family counseling, conciliation or mediation service to assist in resolving their differences;

(c) agreement by the parents to submit the dispute to binding arbitration;

(d) allocating ultimate responsibility for a particular major decision area to one legal custodian;

(e) terminating joint custody and awarding sole custody to one person;

(f) reference to a master pursuant to Rule 53 [Rule 1-053 NMRA] of the Rules of Civil Procedure for the District Courts; or

(g) the district court.

K. When any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent.

L. As used in this section:

(1) "child" means a person under the age of eighteen;

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

(3) "domestic abuse" means any incident by a household member against another household member resulting in:

(a) physical harm;

(b) severe emotional distress;

(c) a threat causing imminent fear of physical harm by any household member;

(d) criminal trespass;

(e) criminal damage to property;

(f) stalking or aggravated stalking, as provided in Sections 30-3A-3 and 30-3A-3.1 NMSA 1978; or

(g) harassment, as provided in Section 30-3A-2 NMSA 1978;

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

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

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

(7) "period of responsibility" means a specified period of time during which a parent is responsible for providing for a child's physical, developmental and emotional needs, including the decision making required in daily living. Specified periods of responsibility shall not be changed in an instance or more permanently except by the methods of decision making described under Subsection L [sic] of this section;

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

(9) "visitation" means a period of time available to a noncustodial parent, under a sole custody arrangement, during which a child resides with or is under the care and control of the noncustodial parent.

History: 1978 Comp., § 40-4-9.1, enacted by Laws 1981, ch. 112, § 1; reenacted by Laws 1986, ch. 41, § 1; 1999, ch. 242, § 1.

ANNOTATIONS

Bracketed material. — The reference in Subsection L(7) to Subsection L appears to be erroneous. The apparent intended reference is to Subsection J. The bracketed word "sic" was inserted by the compiler. It was not enacted by the legislature and is not part of the law.

The 1999 amendment, effective June 18, 1999, added Subsection B(9); in Subsection L, added Paragraph (3), redesignated the subsequent paragraphs accordingly, and substituted "decision making described under Subsection L of this section" for "decision making described under the definition of joint custody" in Paragraph (7); and made stylistic changes throughout the section.

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).

Whether modification of the initial agreement is appropriate is a matter entrusted to the sound discretion of the trial court, based upon the evidence submitted by the parties. Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).

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).

The plain language of this section requires the court to set forth in its decision the basis for its determination either granting or denying joint custody. Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).

Trial court adequately articulated the basis for its denial of a motion for modification of visitation, where the motion did not specifically seek the granting or denial of joint custody, and the court's order denying modification recited in applicable part: "the motion is denied because the father failed to allege or prove the existence of a material change of circumstances relating to the child." Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).

Joint custody award. — As specified by Subsection J(1), an award of joint custody means that "each parent shall have significant, well-defined periods of responsibility for the child"; however, joint custody awards need not equally divide the time period relating to the child's physical custody. Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).

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).

Where a mother, in the Marine Corps, had lived in six different locales in five years, and the father, because of his work schedule, allowed the parties' minor child to live with his sister, the court did not err in awarding father physical custody, but requiring him to maintain the child's present residence with her aunt, while maintaining joint legal custody. Brito v. Brito, 110 N.M. 276, 794 P.2d 1205 (Ct. App. 1990).

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).

Burden on party seeking to modify joint custody decree. — A party seeking to modify a decree of joint custody must overcome the presumption of the reasonableness of the original decree. Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).

Burden of proof in modification of joint custody arrangements. — In a joint custody arrangement, when one party initiates a proceeding to alter an existing custody arrangement, the party seeking such change has the burden to show that the existing arrangement is no longer workable. Each party will then have the burden to persuade the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court, but that party's failure to carry this burden will only mean that the court remains free to adopt the arrangement or plan that it determines best promotes the child's interests. Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991).

Notice and hearing required. — Joint custody cannot be terminated except after a hearing following specific notice that continuation of joint custody will be at issue. Taylor v. Tittman, 120 N.M. 22, 896 P.2d 1171 (Ct. App. 1995).

Modification of joint custody warranted. — Whether or not there was proof of "emotional damage" per se, the observation that the parties' continuing inability to cooperate was affecting the children was a sufficient change in circumstance to support the modification of joint custody. Thomas v. Thomas, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7, cert. denied, 128 N.M. 150, 990 P.2d 824 (1999).

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).

Relocation of custodial parent. — In situations in which one parent has sole custody of the child, the custodian seeking to relocate with a child is entitled to a presumption that the move is in the best interests of the child, and the burden is on the noncustodial parent to show that the move is against those interests or motivated by bad faith on the part of the custodial parent. However, the designation of one parent as "primary physical custodian" under a court-approved parenting plan in a joint custody situation simply means that the child resides with that parent more than half the time. Consequently, one parent's status as primary physical custodian has no particular significance and should not entitle that parent to the benefit of any presumption. Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991).

Burden on relocating party impermissible. — In joint custody cases, placing the burden on the party seeking to relocate to show that the relocation is in the best interests of the child unconstitutionally impairs the relocating parent's right to travel. Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991).

Mediation not required. — The language of Subsection G of this section and 40-4-8B(1) NMSA 1978 permits the court to bypass mediation if it does not appear to be feasible, even in non-domestic violence or abuse situations. Thomas v. Thomas, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7, cert. denied, 128 N.M. 150, 990 P.2d 824 (1999).

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

Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

For article, "Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum," see 29 N.M.L. Rev. 245 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 A.L.R.4th 864.

Propriety of awarding joint custody of children, 17 A.L.R.4th 1013.

Religion as factor in child custody and visitation cases, 22 A.L.R.4th 971.

Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 A.L.R.4th 1170.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 A.L.R.4th 786.

Child custody and visitation rights of person infected with AIDS, 86 A.L.R.4th 211.

Application of child-support guidelines to cases of joint-, split-, or similar shared-custody arrangements, 57 A.L.R.5th 389.

40-4-10. Appointment of guardian ad litem.

After service of summons and copy of petition on any insane spouse and on the guardian of his or her estate, the court shall appoint an attorney at law as guardian ad litem to appear for and represent the insane spouse.

History: Laws 1933, ch. 27, § 2; 1941 Comp., § 25-711; 1953 Comp., § 22-7-8; Laws 1973, ch. 319, § 8.

ANNOTATIONS

Cross references. — For appointment of guardian ad litem to defend suit for incapacitated person, see 38-4-15 NMSA 1978.

For guardians of incapacitated person, see 45-5-301 to 45-5-315 NMSA 1978.

For protection of property of persons under disability and minors, see 45-5-401 to 45-5-432 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Infants §§ 155 to 194.

40-4-11. Determination of award of child support; notice to withhold income. (See Compiler's notes.).

In any proceeding before a court in which the court has the duty or authority to determine liability of a parent for the support of minor children or the amount of that support, the court:

A. shall make a specific determination and finding of the amount of support to be paid by a parent in accordance with the provisions of Section 40-4-11.1 NMSA 1978;

B. shall not consider present or future welfare financial assistance payments to or on behalf of the children in making its determination under Subsection A of this section; and

C. for good cause may order the parent liable for support of a minor child to assign to the person or public office entitled to receive the child support that portion of the parent's periodic income or other periodic entitlements to money. The assignment of that portion of the parent's periodic income or other periodic entitlements to money may be ordered by the court by the issuance of a notice to withhold income against the income of the parent. The procedures for the issuance of the notice to withhold income, the content of the notice to withhold income, the duties of the parent liable for child support and the duties of the employer responsible for withholding income shall be the same as provided for in the Support Enforcement Act [40-4A-1 NMSA 1978], except that delinquency in payment under an order for support need not be a pre-existing condition to effectuate the procedures of the Support Enforcement Act for purpose of withholding income under this section.

History: 1953 Comp., § 22-7-11.1, enacted by Laws 1971, ch. 185, § 1; 1987, ch. 340, § 1; 1988, ch. 87, § 1.

ANNOTATIONS

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.

In Leeder v. Leeder, 118 N.M. 603, 884 P.2d 494 (Ct. App. 1994), the court discussed the interpretation of these two sections and concluded that reading the second version of this section, Subsection A of 40-4-11.1, and 40-4-11.2 NMSA 1978 together, the guidelines are presumed to provide the proper amount of child support and that the second version of this section is ordinarily satisfied if the court sets forth the computations made under the guidelines. The second version of this section requires additional findings only when the children's needs for care, maintenance, and education, in light of the parents' financial resources, justify a departure from the guidelines. Although under this interpretation there is substantial overlap in what is required by Subsection A of the second version of this section, Subsection A of 40-4-11.1, and 40-4-11.2, there is no way to avoid the overlap without distorting the meaning of the statutory language for no discernible purpose. Statutes which relate to the same subject matter should, if possible, be construed to give effect to every provision of each.

40-4-11. Determination of award of child support; disregard of welfare payments; notice to withhold income. (See Compiler's notes.).

In any proceeding before a court in which the court has the duty or authority to determine liability of a parent for the support of minor children or the amount of that support, the court:

A. shall make a specific determination and finding of the amount of support to be paid by a parent to provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent;

B. shall not consider present or future welfare financial assistance payments to or on behalf of the children in making its determination under Subsection A of this section; and

C. for good cause may order the parent liable for support of a minor child to assign to the person or public office entitled to receive the child support that portion of the parent's periodic income or other periodic entitlements to money. The assignment of that portion of the parent's periodic income or other periodic entitlements to money may be ordered by the court by the issuance of a notice to withhold income against the income of the parent. The procedures for the issuance of the notice to withhold income, the content of the notice to withhold income, the duties of the parent liable for child support and the duties of the employer responsible for withholding income shall be the same as provided for in the Support Enforcement Act [40-4A-1 NMSA 1978], except that delinquency in payment under an order for support need not be a pre-existing condition to effectuate the procedures of the Support Enforcement Act for purpose of withholding income under this section.

History: 1978 Comp., § 40-4-11, enacted by Laws 1988, ch. 87, § 3.

ANNOTATIONS

Cross references. — For the Parental Responsibility Act, see Chapter 40, Article 5A NMSA 1978.

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.

In Leeder v. Leeder, 118 N.M. 603, 884 P.2d 494 (Ct. App. 1994), the court discussed the interpretation of these two sections and concluded that reading the second version of this section, Subsection A of 40-4-11.1, and 40-4-11.2 NMSA 1978 together, the guidelines are presumed to provide the proper amount of child support and that the second version of this section is ordinarily satisfied if the court sets forth the computations made under the guidelines. The second version of this section requires additional findings only when the children's needs for care, maintenance, and education, in light of the parents' financial resources, justify a departure from the guidelines. Although under this interpretation there is substantial overlap in what is required by Subsection A of the second version of this section, Subsection A of 40-4-11.1, and 40-4-11.2, there is no way to avoid the overlap without distorting the meaning of the statutory language for no discernible purpose. Statutes which relate to the same subject matter should, if possible, be construed to give effect to every provision of each.

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).

Specific findings by the court. — The child support guidelines are presumed to provide the proper amount of child support and Subsection A is ordinarily satisfied if the court sets forth the computations made under the guidelines. Additional findings are required only when the children's needs for care, maintenance, and education, in light of the parents' financial resources, justify a departure from the guidelines. Leeder v. Leeder, 118 N.M. 603, 884 P.2d 494 (Ct. App. 1994).

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, 48 A.L.R.4th 919.

Support provisions of judicial decree or order as limit of father's liability for expenses of child, 7 A.L.R.2d 491.

Father's duty under divorce or separation decree to support child as affected by the latter's induction into military service, 20 A.L.R.2d 1414.

Contract to support, maintain, or educate a child as within provision of statute of frauds relating to contracts not to be performed within a year, 49 A.L.R.2d 1293.

Education as element in allowance for benefit of child in decree of divorce or separation, 56 A.L.R.2d 1207.

Marriage of minor child as terminating support provisions in divorce or similar decree, 58 A.L.R.2d 355.

Father's liability for support of child furnished after entry of decree of divorce not providing for support, 69 A.L.R.2d 203, 91 A.L.R.3d 530.

Opening or modification of divorce decree as to custody or support of child not provided for in the decree, 71 A.L.R.2d 1370.

Right of wife to allowance for expense money in action by or against husband, without divorce, for child custody, 82 A.L.R.2d 1088.

What law governs validity and enforceability of contract made for support of illegitimate child, 87 A.L.R.2d 1306.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments, 89 A.L.R.2d 7.

Violation of custody or visitation provision of agreement or decree as affecting child support payment provision, and vice versa, 95 A.L.R.2d 118.

Court's establishment of trust to secure alimony or child support in divorce proceedings, 3 A.L.R.3d 1170.

Statutory family allowance to minor children as affected by previous agreement or judgment for their support, 6 A.L.R.3d 1387.

Power of court which denied divorce, legal separation or annulment, to award custody or make provisions for support of child, 7 A.L.R.3d 1096.

What voluntary acts of child, other than marriage or entry into military service, terminate parent's obligation to support, 32 A.L.R.3d 1055.

Income of child from other source as excusing parent's compliance with support provisions of divorce decree, 39 A.L.R.3d 1292.

Right to credit on accrued support payments for time child is in father's custody or for other voluntary expenditures, 47 A.L.R.3d 1031.

Retrospective increase in allowance for alimony, separate maintenance, or support, 52 A.L.R.3d 156.

Provision in divorce decree that one party obtain or maintain life insurance for benefit of child, 59 A.L.R.3d 9.

Liability of parent for support of child institutionalized by juvenile court, 59 A.L.R.3d 636.

Effect in subsequent proceedings of paternity findings or implications in divorce decree or in support or custody order made incidental, 78 A.L.R.3d 846.

Propriety of decree in proceeding between divorced parents to determine mother's duty to pay support for children in custody of father, 98 A.L.R.3d 1146.

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education, 99 A.L.R.3d 322.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 A.L.R.3d 1129.

Visitation rights of persons other than natural parents or grandparents, 1 A.L.R.4th 1270.

Validity and enforceability of escalation clause in divorce decree relating to alimony and child support, 19 A.L.R.4th 830.

Effect of remarriage of spouses to each other on child custody and support provisions of prior divorce decree, 26 A.L.R.4th 325.

Excessiveness or adequacy of money awarded as child support, 27 A.L.R.4th 864.

Excessiveness or adequacy of amount of money awarded for alimony and child support combined, 27 A.L.R.4th 1038.

What constitutes "extraordinary" or similar medical or dental expenses for purposes of divorce decree requiring one parent to pay such expenses for child in custody of other parent, 39 A.L.R.4th 502.

Stepparent's postdivorce duty to support stepchild, 44 A.L.R.4th 520.

Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

Divorce: excessiveness or adequacy of combined property division and spousal support awards - modern cases, 55 A.L.R.4th 14.

Withholding visitation rights for failure to make alimony or support payments, 65 A.L.R.4th 1155.

Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R.4th 173.

Death of obligor parent as affecting decree for support of child, 14 A.L.R.5th 557.

Loss of income due to incarceration as affecting child support obligation, 27 A.L.R.5th 540.

What voluntary acts of child, other than marriage or entry into military service, terminate parent's obligation to support, 55 A.L.R.5th 557.

Application of child-support guidelines to cases of joint-, split-, or similar shared-custody arrangements, 57 A.L.R.5th 389.

Right of putative father to visitation with child born out of wedlock, 58 A.L.R.5th 669.

Consideration of obligor's personal-injury recovery or settlement infixing alimony or child support, 59 A.L.R.5th 489.

Right to credit on child support arrearages for time parties resided together after separation or divorce, 104 A.L.R.5th 605.

Validity, construction, and application of Child Support Recovery Act of 1992 (18 USCA § 228), 147 A.L.R. Fed. 1

40-4-11.1. Child support; guidelines.

A. In any action to establish or modify child support, the child support guidelines as set forth in this section 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 underemployed. Income need not be imputed to the primary custodial parent actively caring for a child of the parties who is under the age of six or disabled. If income is imputed, a reasonable child care expense may be imputed. The gross income of a parent means only the income and earnings of that parent and not the income of subsequent spouses, notwithstanding the community nature of both incomes after remarriage; and

(2) "gross income" includes income from any source and includes but is not limited to income from salaries, wages, tips, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, significant in-kind benefits that reduce personal living expenses, prizes and alimony or maintenance received, provided:

(a) "gross income" shall not include benefits received from 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 do not include expenses determined by the court to be inappropriate for purposes of calculating child support;

(c) "gross income" shall not include the amount of alimony payments actually paid in compliance with a court order;

(d) "gross income" shall not include the amount of child support actually paid by a parent in compliance with a court order for the support of prior children; and

(e) "gross income" shall not include a reasonable amount for a parent's obligation to support prior children who are in that parent's custody. A duty to support subsequent children is not ordinarily a basis for reducing support owed to children of the parties but may be a defense to a child support increase for the children of the parties. In raising such a defense, a party may use Table A as set forth in Subsection K of this section 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 the 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-five percent of the time. Such arrangements can exist where the parties share responsibilities pursuant to Section 40-4-9.1 NMSA 1978; and

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

E. The basic child support obligation shall be calculated based on the combined income of both parents and shall be paid by them proportionately pursuant to Subsections K and L of this section.

F. Physical custody adjustments shall be made as follows:

(1) for basic visitation situations, the basic child support obligation shall be calculated using the basic child support schedule, Worksheet A and instructions contained in Subsection K of this section. The court may provide for a partial abatement of child support for visitations of one month or longer; and

(2) for shared responsibility arrangements, the basic child support obligation shall be calculated using the basic child support schedule, Worksheet B and instructions contained in Subsection L of this section.

G. In shared responsibility situations, each parent retains the percentage of the basic support obligation equal to the number of twenty-four-hour days of responsibility spent by each child with each respective parent divided by three hundred sixty-five.

H. 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.

I. 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.

J. Whenever application of the child support guidelines set forth in this section requires a person to pay to another person more than forty percent of his gross income for a single child support obligation for current support, there shall be a presumption of a substantial hardship, justifying a deviation from the guidelines.

K. BASIC CHILD SUPPORT SCHEDULE. -

BASIC CHILD SUPPORT SCHEDULE

Both Parents' Combined Gross Monthly Income	Number of children					
	1	2	3	4	5	6
$ 0 - 800	$100	$150	$150	$150	$150	$150
850	119	150	150	150	150	150
900	153	155	157	158	160	162
950	187	189	191	193	196	198
1,000	206	223	226	228	231	233
1,050	215	257	260	263	266	269
1,100	224	291	294	298	301	304
1,150	232	325	329	332	336	339
1,200	241	351	363	367	371	375
1,250	250	363	397	401	406	410
1,300	258	375	431	436	441	445
1,350	267	387	457	470	475	481
1,400	275	399	471	505		

510	516				
1,450		283	411	485	536
545	551				
1,500		292	423	499	551
579	585				
1,550		300	435	513	567
613	620				
1,600		308	447	527	582
631	654				
1,650		316	458	540	597
647	689				
1,700		324	470	554	612
664	710				
1,750		333	482	568	628
680	728				
1,800		341	494	582	643
697	746				
1,850		349	506	596	658
714	764				
1,900		357	517	609	673
730	781				
1,950		365	529	623	689
747	799				
2,000		373	541	637	704
763	816				
2,050		382	553	651	719
780	834				
2,100		390	564	665	734
796	852				
2,150		398	576	678	750
813	869				
2,200		406	588	692	765
829	887				
2,250		414	600	706	780
846	905				
2,300		422	611	720	795
862	922				
2,350		430	623	733	810
879	940				
2,400		438	635	747	825
895	957				
2,450		443	641	754	834
904	967				
2,500		447	647	761	841
912	976				
2,550		451	652	768	849
920	984				

2,600		455	658	775	856
928	993				
2,650		459	664	782	864
936	1,002				
2,700		463	670	788	871
944	1,010				
2,750		467	675	795	878
952	1,019				
2,800		471	681	802	886
960	1,027				
2,850		474	687	808	893
968	1,036				
2,900		478	692	815	900
976	1,044				
2,950		482	698	822	908
984	1,053				
3,000		486	704	828	915
992	1,062				
3,050		490	710	835	923
1,000	1,070				
3,100		494	715	842	930
1,008	1,079				
3,150		497	720	847	936
1,014	1,085				
3,200		500	723	851	940
1,019	1,090				
3,250		503	727	855	945
1,024	1,095				
3,300		505	731	859	949
1,029	1,101				
3,350		508	734	863	954
1,033	1,106				
3,400		511	738	867	958
1,038	1,111				
3,450		513	742	871	963
1,043	1,116				
3,500		516	745	875	967
1,048	1,121				
3,550		519	749	879	971
1,053	1,127				
3,600		522	752	883	976
1,058	1,132				
3,650		524	756	887	980
1,063	1,137				
3,700		527	760	891	985
1,067	1,142				
3,750		530	763	895	989

1,072	1,147				
3,800		532	767	899	994
1,077	1,153				
3,850		535	771	903	998
1,082	1,158				
3,900		540	777	911	1,007
1,091	1,168				
3,950		545	785	919	1,016
1,101	1,178				
4,000		550	792	927	1,025
1,111	1,189				
4,050		554	799	936	1,034
1,121	1,199				
4,100		559	806	944	1,043
1,130	1,209				
4,150		564	812	952	1,052
1,140	1,220				
4,200		569	819	960	1,060
1,150	1,230				
4,250		574	826	968	1,069
1,159	1,241				
4,300		579	833	976	1,078
1,169	1,251				
4,350		584	840	984	1,087
1,179	1,261				
4,400		589	847	992	1,096
1,188	1,272				
4,450		594	854	1,000	1,105
1,198	1,282				
4,500		599	861	1,008	1,114
1,208	1,292				
4,550		604	868	1,016	1,123
1,217	1,303				
4,600		608	875	1,024	1,132
1,227	1,313				
4,650		612	880	1,030	1,139
1,234	1,321				
4,700		615	885	1,036	1,145
1,241	1,328				
4,750		619	890	1,042	1,152
1,248	1,336				
4,800		622	895	1,048	1,158
1,256	1,344				
4,850		625	900	1,054	1,165
1,263	1,351				
4,900		629	905	1,060	1,172
1,270	1,359				

4,950	632	910	1,066	1,178	1,277
1,367					
5,000	635	915	1,072	1,185	1,284
1,374					
5,050	639	920	1,078	1,192	1,292
1,382					
5,100	642	926	1,085	1,199	1,300
1,391					
5,150	646	931	1,092	1,206	1,308
1,399					
5,200	650	937	1,098	1,214	1,316
1,408					
5,250	654	942	1,105	1,221	1,324
1,416					
5,300	657	948	1,112	1,228	1,332
1,425					
5,350	661	954	1,119	1,236	1,340
1,433					
5,400	666	960	1,126	1,244	1,349
1,443					
5,450	671	967	1,134	1,253	1,358
1,453					
5,500	675	973	1,141	1,261	1,367
1,463					
5,550	680	980	1,149	1,269	1,376
1,472					
5,600	685	987	1,156	1,278	1,385
1,482					
5,650	690	993	1,164	1,286	1,394
1,492					
5,700	695	1,000	1,171	1,294	1,403
1,501					
5,750	700	1,007	1,179	1,303	1,412
1,511					
5,800	704	1,013	1,186	1,311	1,421
1,521					
5,850	709	1,020	1,194	1,319	1,430
1,530					
5,900	714	1,027	1,201	1,328	1,439
1,540					
5,950	719	1,033	1,209	1,336	1,448
1,549					
6,000	724	1,040	1,216	1,344	1,457
1,559					
6,050	728	1,047	1,224	1,353	

1,466	1,569				
6,100		733	1,053	1,232	1,361
1,475	1,579				
6,150		738	1,060	1,240	1,370
1,485	1,589				
6,200		742	1,067	1,247	1,378
1,494	1,599				
6,250		747	1,073	1,255	1,387
1,504	1,609				
6,300		751	1,080	1,263	1,396
1,513	1,619				
6,350		756	1,087	1,271	1,405
1,523	1,629				
6,400		760	1,093	1,279	1,413
1,532	1,639				
6,450		765	1,100	1,287	1,422
1,541	1,649				
6,500		770	1,107	1,295	1,431
1,551	1,660				
6,550		774	1,113	1,303	1,439
1,560	1,670				
6,600		779	1,120	1,311	1,448
1,570	1,680				
6,650		783	1,127	1,318	1,457
1,579	1,690				
6,700		788	1,133	1,326	1,466
1,589	1,700				
6,750		792	1,140	1,334	1,474
1,598	1,710				
6,800		797	1,147	1,342	1,483
1,607	1,720				
6,850		802	1,153	1,350	1,492
1,617	1,730				
6,900		806	1,160	1,358	1,500
1,626	1,740				
6,950		811	1,167	1,366	1,509
1,636	1,751				
7,000		815	1,173	1,374	1,518
1,645	1,761				
7,050		820	1,180	1,382	1,527
1,655	1,771				
7,100		824	1,187	1,389	1,535
1,664	1,781				
7,150		828	1,193	1,396	1,543
1,673	1,789				
7,200		832	1,198	1,403	1,550
1,680	1,798				

7,250	836	1,203	1,409	1,557	1,688	1,806
7,300	840	1,209	1,416	1,564	1,696	1,814
7,350	843	1,214	1,422	1,572	1,704	1,823
7,400	847	1,220	1,429	1,579	1,711	1,831
7,450	851	1,225	1,435	1,586	1,719	1,839
7,500	855	1,231	1,442	1,593	1,727	1,847
7,550	858	1,236	1,448	1,600	1,735	1,856
7,600	862	1,241	1,455	1,607	1,742	1,864
7,650	866	1,247	1,461	1,614	1,750	1,872
7,700	869	1,252	1,467	1,622	1,758	1,881
7,750	873	1,258	1,474	1,629	1,766	1,889
7,800	877	1,263	1,480	1,636	1,773	1,897
7,850	881	1,269	1,487	1,643	1,781	1,905
7,900	884	1,274	1,493	1,650	1,789	1,914
7,950	888	1,279	1,500	1,657	1,797	1,922
8,000	892	1,285	1,506	1,665	1,804	1,930

For gross monthly income greater than $8,000,

multiply gross by the following percentages:

11%	16.1%	18.8%	20.8%	22.6%	24%.	

_____

WORKSHEET A - BASIC VISITATION

_____ JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO
NO. _____
_____,
Petitioner,
vs.
_____,
Respondent.

MONTHLY CHILD SUPPORT OBLIGATION

	Custodial Parent		Other Parent		Combined
1. Gross Monthly Income	$_____	+	$_____	=	$_____
2. Percentage of Combined Income (Each parent's income divided by combined income)	_____%	+	_____%	=	_____

100%

3. Number of Children _____
4. Basic Support from Schedule (Use combined income from Line 1) = _____
5. Children's Health and Dental

Insurance Premium _____ + _____ = _____

6. Work-Related Child Care _____ + _____ = _____

7. Additional Expenses _____ + _____ = _____

8. Total Support (Add Lines 4 [sic], 5, 6 and 7 for each parent and for combined column) _____ + _____ = _____

9. Each Parent's Obligation (Combined Column Line 8 x each parent's Line 2) _____ _____

10. Enter amount for each parent from Line 8 -_____ -_____

11. Each parent's net obligation (Subtract Line 10 from Line 9 for each parent). _____ _____ Other Parent pays Custodial Parent this Amount

_____ PAYS _____ EACH MONTH $_____

_____ _____

Petitioner's Signature Respondent's Signature

Date:_____

_____

BASIC VISITATION

INSTRUCTIONS FOR WORKSHEET A

Line 1. Gross monthly income:

Includes all income, except 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 that parent's 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) [fifty dollars ($50)]. Look at the basic child support schedule. In the far left-hand column of the basic child support schedule, find the rounded combined income figure. Read across to the column with the correct number of children. Enter that amount on Line 4.

Line 5. Children's Health and Dental Insurance Premium:

Enter the cost paid by a parent for covering these children with medical and dental insurance under that parent's column on Line 5. Add costs paid by each parent and enter under the combined column on Line 5.

Line 6. Work-Related Child Care:

Enter the cost paid by each parent for work-related child care. If the cost varies (for example, between school year and summer), take the total yearly cost and divide by twelve. Enter each parent's figure in that parent's column on Line 6. Add the cost for both parents and enter in the combined column on Line 6.

Line 7. Additional Expenses:

Enter the amounts paid by each parent for additional expenses provided by Subsection I of this section on Line 7. Add the cost for both parents and enter in the combined column on Line 7.

Line 8. Total Support:

Total [add] the basic support amount from Line 4 in the combined column with the combined column on Lines 4, 5, 6 and 7 [5, 6 and 7] and enter the totals in combined column on Line

8.

Line 9. Each Parent's Obligation:

Multiply the total child support amount on Line 8 by each parent's percentage share on Line 2, and enter each parent's dollar share under that parent's column on Line 9.

Line 10. Total Support:

Enter the total amount shown for each parent on Line 8 beside the "minus" marks on Line 10.

Line 11. Net Obligation:

For each parent, subtract the amount on Line 10 from the amount on Line 9. Enter the difference for each parent in that parent's column on Line 11. The amount in the box "other parent" is what that parent pays to the custodial parent each month. Do not subtract the amount on the custodial parent's Line 11 from the amount in the other parent's box. The custodial parent is presumed to use the amount in that parent's column on Line 11 for the children.

_____

SHARED RESPONSIBILITY

INSTRUCTIONS FOR WORKSHEET B [sic]

_____ JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO
NO. _____
_____,
Petitioner,
vs.
_____,
Respondent.

MONTHLY CHILD SUPPORT OBLIGATION

	Mother		Father		Combined
Part 1 - Basic Support:					
1. Gross Monthly Income	$_____		$_____		$_____
2. Percentage of Combined Income (Each parent's income divided by combined income)	_____	+	_____	=	_____ 100%
3. Number of Children _____					
4. Basic Support from Schedule (Use combined income from Line 1)					= _____
5. Shared Responsibility Basic Obligation (Line 4 x 1.5)					_____
6. Each Parent's Share (Line 5 x each parent's Line 2)	_____		_____		
7. Number of 24 hour days with each parent (must total 365)	_____	+			_____ _____
8. Percentage with each parent (Line 7 divided by 365)	_____	+			_____ _____ 100%
9. Amount retained (Line 6 x Line 8 for each parent)	_____		_____		
10. Each Parent's Obligation (subtract Line 9 from Line 6)	_____		_____		
11. Amount Transferred (subtract smaller amount on Line 10 from larger amount on Line 10.) Parent with larger amount on Line 10 pays other parent the difference.					_____
Part 2 - Additional Payments:					
12. Children's Health and Dental Insurance Premium	_____	+	_____	=	_____
13. Work-Related Child Care	_____	+	_____	=	_____
14. Additional Expenses	_____	+	_____	=	_____
15. Total Additional Payments (Add Lines 12, 13 and 14 for each					

parent and for combined column) _____ + _____ = _____

16. Each Parent's Obligation (Combined Column Line 15 x each parent's Line 2) _____ _____

17. Amount transferred (Subtract each parent's Line 16 from his Line 15). Parent with "minus" figure pays that amount to other parent. _____ _____

Part 3 - Net Amount Transferred:

18. Combine Lines 11 and 17 by addition if same parent pays on both lines, otherwise by subtraction.

_____

_____ PAYS _____ EACH MONTH

$_____

_____ _____

Petitioner's Signature Respondent's Signature

Date:_____

_____

SHARED RESPONSIBILITY

INSTRUCTIONS FOR WORKSHEET B

Part 1 - Basic Support:

Line 1. Gross Monthly Income:

Includes all income, except 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 that parent's percentage of combined income.

Lines 3 and 4. Basic Support:

Fill in the number of children on the worksheet (Line 3). Round combined income to nearest one hundred dollars ($100). Look at the basic child support schedule. In the far left-hand column of that schedule, find the rounded combined income figure. Read across to the column with the correct number of children. Enter that amount on Line 4.

Line 5. Shared Responsibility Basic Obligation:

Multiply the basic obligation on Line 4 by 1.5.

Line 6. Each Parent's Share:

Multiply the support amount on Line 5 by each parent's percentage share on Line 2, and enter each parent's dollar share under that parent's column on Line 6.

Line 7. Each Parent's Time of Care for Children:

Enter the number of twenty-four-hour days of responsibility that each parent has each child in a year according to the parenting plan.

Line 8. Percentage of Twenty-Four-Hour Days With Each Parent:

Divide each parent's number of twenty-four-hour days (Line 7) by three hundred sixty-five to obtain a percentage.

Line 9. Amount Retained:

Under shared responsibility arrangements, each parent retains the percentage of the basic support obligation equal to the number of twenty-four-hour days of responsibility spent by each child with each respective parent divided by three hundred sixty-five. Multiply each parent's share of basic support (Line 6) by the percentage in that parent's Line 8 and enter the result on that parent's Line 9. This is the amount that each parent retains to pay the children's expenses during that parent's periods of responsibility.

Line 10. Each Parent's Basic Obligation:

Subtract the amount retained by each parent for direct expenses (Line 9) from that parent's basic obligation (Line 6) and enter the difference on that parent's Line 10.

Line 11. Amount Transferred for Basic Support:

In shared responsibility situations, both parents are entitled not only to retain money for direct expenses but also to receive contributions from the other parent toward those

expenses. Therefore, subtract the smaller amount on Line 10 from the larger amount on Line 10 to arrive at a net amount transferred for basic support.

Part 2 - Additional Payments:

Line 12. Children's Health and Dental Insurance Premium:

Enter the cost paid by a parent for covering these children with medical and dental insurance under that parent's column on Line 12. Add costs paid by each parent and enter under the combined column on Line 12.

Line 13. Work-Related Child Care:

Enter the cost paid by each parent for work-related child care. If the cost varies (for example, between school year and summer), take the total yearly cost and divide by twelve. Enter each parent's figure in that parent's column on Line 13. Add the cost for both parents and enter in combined column on Line 13.

Line 14. Cost Paid For Additional Expenses:

Enter the cost paid by each parent for additional expenses provided by Subsection I of this section on Line 14.

Line 15. Enter Total of Lines 12, 13 and 14:

For each parent, total the amount paid by him for insurance, child care and additional expenses (Lines 12, 13 and 14). Enter the total in that parent's column on Line 15 and the total of both parents' expenses under the combined column on Line 15.

Line 16. Each Parent's Obligation:

Multiply the total additional payments (combined column on Line 15) by each parent's percentage share of income on Line 2, and enter each parent's dollar share of the additional payments on his Line 16.

Line 17. Amount Transferred:

Subtract each parent's obligation for additional expenses (that parent's Line 16) from the total additional payments made by that parent (that parent's Line 15). The parent with a "minus" figure pays the other parent the amount on Line 17.

Part 3 - Net Amount Transferred:

Line 18. Combine Lines 11 and 17:

Combine the amount owed by one parent to the other for basic support (Line 11) and the amount owed by one parent to the other for additional payments (Line 17). If the same parent owes for both obligations, add Lines 11 and 17, and enter the total on Line 18. If one parent owes for basic support and the other owes for additional payments, subtract the smaller amount from the larger and enter on Line 18. Fill in the blanks by stating which parent pays and which parent receives the net amount transferred.

History: 1978 Comp., § 40-4-11.1, enacted by Laws 1988, ch. 87, § 2; 1991, ch. 206, § 1; 1995, ch. 142, § 1.

ANNOTATIONS

Cross references. — For designation of human services department as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV D of the federal Social Security Act, see 27-2-27 NMSA 1978.

For local district court rules and forms, see LR1-705, LR1-Form G, LR2-503, LR2-Form J, LR2-Form Q, LR3-Form 3.55, LR3-Form 3.56, LR5-504, LR8-108C, LR9-606, and LR11-114.

Bracketed material. — The instructions for Worksheet A for line 8 "Total Support" appear to be inconsistent with Worksheet A line 8 "Total Support". Since the "custodial parent" and "other parent" columns do not contain an amount in line 4, it appears that it was intended that lines 5 through 7 in the "custodial parent" and "other parent" columns should be added and the totals inserted on line 8 of those columns. For the "combined column", lines 5 through 7 should be added to the amount entered in line 4. The "+"

For the "custodial parent" and "other parent" columns, add Lines 5, 6 and 7 and enter the totals on Line 8. For the "combined column" add lines 4 through 7 and insert the total on line 8.

The instructions for line 4 of Worksheet A and line 3 of Worksheet B provide that the combined income is to be rounded to the nearest $100. It would appear that both of these instructions should have been amended to be consistent with the 1995 revision of the "Basic Child Support Schedule" as set forth as Subsection K. Chapter 142, Laws 1995 amended the "Basic Child Support Schedule" to provide $50 increments in the schedule rather than $100 increments.

Notwithstanding the heading of Worksheet B as "Instructions", what follows is Worksheet B.

The bracketed insertions in this section were inserted by the compiler to reflect what appears to have been intended. The bracketed insertions were not enacted by the legislature and are not part of the law.

The 1991 amendment, effective June 14, 1991, deleted "permanent" preceding "child support" in the first sentence in Subsection A; in Subsection C, inserted "significant in-kind benefits that reduce personal living expenses" in the introductory paragraph of Paragraph (2) and substituted "Table A as set forth in Subsection J of this section" for "these guidelines" in Subparagraph (e) of Paragraph (2); added present Subsection I; designated former Subsections I and J as Subsections J and K; substituted "Payments" for "Expenses" in the heading of "Part 2" of the "Instructions for Worksheet B" in

Subsection K; and made related changes and minor stylistic changes throughout the section.

The 1995 amendment, effective June 16, 1995, rewrote this section to the extent that a detailed comparison is impracticable.

Compiler's notes. — Laws 1991, ch. 206, § 4, effective June 14, 1991, repeals Laws 1988, ch. 87, § 4 which was to repeal 40-4-11.1 NMSA 1978 effective June 30, 1991.

Requirement for use of Worksheet B. — Since the non-physical custodial parent had visitation with the child more than 30% of the time, the court was required to use Worksheet B in calculating child support. Gomez v. Gomez, 119 N.M. 755, 895 P.2d 277 (Ct. App. 1995).

Medical coverage alone not "child support." — Child support obligation was not met merely by father's provision of medical insurance for child, where such coverage was required by the Mandatory Medical Support Act, Section 40-4C-2 NMSA 1978, and was in addition to, not in lieu of, father's support obligations under the child support guidelines. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Right to child support arrearages. — Mother's silence and conduct in accepting the unilaterally reduced child support payments, without more, was insufficient to support a finding of waiver of her right to child support arrearages as provided in the divorce decree; nor was such evidence sufficient to support a finding of acquiescence. McCurry v. McCurry, 117 N.M. 564, 874 P.2d 25 (Ct. App. 1994).

Custody neither "basic visitation" nor "shared responsibility." — Where one of two children of divorced parents lived 59% of the time with his father and 41% of his time with his mother and the other lived 71% of her time with her mother and 29% with her father, child support should have been computed, first, for the daughter, by treating her as the sole child in a basic visitation arrangement, then, for the son, by treating him as a child for whom father and mother had shared responsibility, adjusting the calculation to take into account that he is the sole child housed by father and the second child housed by mother. Erickson v. Erickson, 1999-NMCA-056, 127 N.M. 140, 978 P.2d 347.

Income considerations. — Income under Subsection C includes "income from any source" and can include interest or trust income and as such the trial court was entitled to consider potential as well as actual, present income and could examine any such assets that could produce such income. Talley v. Talley, 115 N.M. 89, 847 P.2d 323 (Ct. App. 1993).

By limiting its determination of the father's gross monthly income to his tax returns, the trial court was too strict in defining what it believed was income, and it erred in not considering other sources of revenue, including cash savings, yearly interest, IRA's and land purchases. Padilla v. Montano, 116 N.M. 398, 862 P.2d 1257 (Ct. App. 1993).

Trial court properly included income from an individual retirement account in its calculations of a parent's child support obligation; the fact that the parent would have to pay a penalty for withdrawing the money from the individual retirement account prior to reaching the age of retirement did not render the money unavailable for child support, under this section. Quintana v. Eddins, 2002-NMCA-008, 131 N.M. 435, 38 P.3d 203.

Use of the father's dividend earnings in the year prior to the year in question was error where it was shown that his dividend investments changed from year-to-year. Boutz v. Donaldson, 1999-NMCA-131, 128 N.M. 232, 991 P.2d 517.

Even though the father, a writer, was not engaged in writing and had no income from current literary efforts during the year in question, the trial court erred in refusing to allow him to deduct a sum for fixed overhead expenses from his earnings from previous writings during that year. Boutz v. Donaldson, 1999-NMCA-131, 128 N.M. 232, 991 P.2d 517.

Under Subsection C(1), the court should have imputed income from full-time employment to the mother even though she did not work full-time during the marriage. Styka v. Styka, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

As long as a parent was working full time in his or her area of expertise, earning an income within the range presented by the evidence and in a location reasonably accessible to his or her child, a trial court could not make finding of underemployment without also finding bad faith; to do otherwise would put a parent in the untenable position of choosing between playing an active role in the child's upbringing and leaving to earn enough money to meet the support obligation. Quintana v. Eddins, 2002-NMCA-008, 131 N.M. 435, 38 P.3d 203.

The trial court was within its discretion not to consider the mother underemployed by virtue of her reasonable, yet unsuccessful, efforts to establish a profitable business, and reasonable efforts to provide a home for her children. Boutz v. Donaldson, 1999-NMCA-131, 128 N.M. 232, 991 P.2d 517.

The language of Subsection C(2) requires consideration of the actual amount of income from the sources listed therein in the determination of each parent's gross income. Styka v. Styka, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Interest earned on cash assets received in a property distribution is income for purposes of child support and the determination of income includes the income potential of idle assets. Styka v. Styka, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Where a father failed to obtain full-time employment or attempt to regain his law license, a district court properly imputed income against him for child support purposes based

on his underemployment; however, the amount imputed was not supported by sufficient evidence because there was no showing that the father could have secured employment at the salary he made at his last job. State ex rel. Human Servs. Dep't v. Kelley, 2003-NMCA-050, 133 N.M. 510, 64 P.3d 537.

Past lifestyle of children. — Past status may provide probative evidence about the likelihood of future status. There was no error in the trial court's consideration of the children's past lifestyle to assess the fairness of the support award. Roberts v. Wright, 117 N.M. 294, 871 P.2d 390 (Ct. App. 1994).

Business expenses of closely-held corporation. — While the trial court may consider the tax treatment of business expenses claimed by a parent as "ordinary and necessary," the trial court is not limited to the tax treatment of a particular expense. The parent claiming a business expense must show not only that it is ordinary and necessary to the business, but also that it is irrelevant to calculating support obligations. For example, business expenses that are valid for accounting or tax purposes may not affect a parent's actual cash flow, so they would normally not be considered ordinary and necessary for purposes of calculating support. Roberts v. Wright, 117 N.M. 294, 871 P.2d 390 (Ct. App. 1994); Jurado v. Jurado, 119 N.M. 522, 892 P.2d 969 (Ct. App. 1995).

Not considered income. — The term "in-kind benefits" in Subsection C(2) refers to employment benefits and does not apply to a residence in which the mother was living without cost. Styka v. Styka, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Monthly payments of capital not income. — Monthly payments on a real estate contract that constitutes return of capital is not income. Leeder v. Leeder, 118 N.M. 603, 884 P.2d 494 (Ct. App. 1994).

Gifts. — Under Subsection C(2), gross income generally does not include gifts; however, deviation from the child support guidelines as authorized under Subsection A could include the calculation of periodic dependable gifts. Styka v. Styka, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Attorney fees properly awarded. — The trial court's determination of attorney fees was proper where the length of the marriage, husband's substantial separate assets, and wife's lack of out-of-home working experience all supported its decision. Talley v. Talley, 115 N.M. 89, 847 P.2d 323 (Ct. App. 1993).

Changed circumstances required for modification of support. — The legislature intended 40-4-11.1 NMSA 1978 to update and make uniform throughout the state the amount of the child support obligation based on the income of the parents, but did not intend to abolish the requirement that the party seeking modification make the traditional showing of a substantial change in circumstances, harmonizing 40-4-11.1

with 40-4-7 NMSA 1978 and giving effect to both. Perkins v. Rowson, 110 N.M. 671, 798 P.2d 1057 (Ct. App. 1990).

Court order required for modification of undivided award. — Where a modification award provided one amount for "child support for the two minor children," and did not contain language expressly or even impliedly allowing an automatic reduction when the older child turned 18, relief could only have been obtained. Bustos v. Bustos, 2000-NMCA-040, 128 N.M. 842, 999 P.2d 1074.

Costs to be considered. — Under Subsection H, the trial court is required to include child-care costs in its computations. Styka v. Styka, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Trial court did not err in including the costs of private school in child support calculations. Styka v. Styka, 1999-NMCA-002, 126 N.M. 515, 972 P.2d 16, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

Child-care costs incurred while attending college. — Child-care costs paid by the mother while she attended college in pursuit of a college degree were incurred "due to employment or job search" for the purpose of calculating child support obligations under Subsection G. Alverson v. Harris, 1997-NMCA-024, 123 N.M. 153, 935 P.2d 1165.

Deviations from support guidelines. — Trial court erred in departing from the statutory child support guidelines without first determining the amount due under the guidelines, in failing to clearly indicate how it arrived at its award, and in failing to explain its deviations from the guidelines. Tedford v. Gregory, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Law reviews. — For article, "Positive Parenting and Negative Contributions: Why Payment of Child Support Should Not Be Regarded as Dissipation of Marital Assets," see 30 N.M.L. Rev. 1 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Basis for imputing income for purpose of determining child support where obligor spouse is voluntarily unemployed or underemployed, 76 A.L.R.5th 191.

Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R.4th 173.

Consideration of obligated spouse's earnings from overtime or "second job" held in addition to regular full-time employment in fixing alimony or child support awards, 17 A.L.R.5th 143.

Treatment of depreciation expenses claimed for tax or accounting purposes in determining ability to pay child or spousal support, 28 A.L.R.5th 46.

Validity, construction, and application of Child Support Recovery Act of 1992 (18 USCA § 228), 147 A.L.R. Fed. 1

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.

ANNOTATIONS

Child's income. — In allowing a credit against basic child support for off-schedule sources of income, such as social security benefits paid directly to the child, this section requires the trial court to exercise its discretion on a case-by-case basis, with the child's standard of living a crucial factor. Pederson v. Pederson, 2000-NMCA-042, 129 N.M. 56, 1 P.3d 974.

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.

40-4-11.4. Modification of child support orders; exchange of financial information.

A. A court may modify a child support obligation upon a showing of material and substantial changes in circumstances subsequent to the adjudication of the pre-existing order. There shall be a presumption of material and substantial changes in circumstances if application of the child support guidelines in Section 40-4-11.1 NMSA 1978 would result in a deviation upward or downward of more than twenty percent of the existing child support obligation and the petition for modification is filed more than one year after the filing of the pre-existing order.

B. All child support orders shall contain a provision for the annual exchange of financial information by the obligor and obligee upon a written request by either party. The financial information to be furnished shall include:

(1) federal and state tax returns, including all schedules, for the year preceding the request;

(2) W-2 statements for the year preceding the request;

(3) Internal Revenue Service Form 1099s for the year preceding the request;

(4) work-related daycare statements for the year preceding the request;

(5) dependent medical insurance premiums for the year preceding the request; and

(6) wage and payroll statements for four months preceding the request.

For the purposes of this subsection, the wages of a subsequent spouse may be omitted from the financial information provided by either the obligor or the obligee.

History: Laws 1990, ch. 58, § 1; 1991, ch. 206, § 2.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, rewrote this section to the extent that a detailed comparison would be impracticable.

Reduction of child support payments upon child reaching majority age. — When a prior decree directs that a noncustodial parent make lump-sum, periodic child support payments for two or more children, and one of the children subsequently reaches the age of majority, the best procedure for a noncustodial parent who seeks a reduction in child support is to obtain a stipulated order authorizing such modification, or alternatively to request a hearing on the request for reduction. McCurry v. McCurry, 117 N.M. 564, 874 P.2d 25 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Death of obligor parent as affecting decree for support of child, 14 A.L.R.5th 557.

Decrease in income of obligor spouse following voluntary termination of employment as basis for modification of child support award, 39 A.L.R.5th 1.

40-4-11.5. Modification of child support orders in cases enforced by the state Title IV-D agency.

A. For child support cases being enforced by the human services department acting as the state's Title IV-D child support enforcement agency as provided in Section 27-2-27 NMSA 1978, the department shall implement a process for the periodic review of child support orders that shall include:

(1) a review of support orders every three years upon the request of either the obligor or obligee or, if there is an assignment of support rights pursuant to the Public Assistance Act [27-2-1 NMSA 1978], upon the request of the department or of either the obligor or obligee;

(2) notification by the department of its review to the obligor and obligee; and

(3) authorization to require financial information from the obligor and the obligee to determine whether the support obligation should be presented to the court for modification.

B. In carrying out its duties under this section, the secretary of human services, or the secretary's authorized representative, has the power to issue subpoenas:

(1) to compel the attendance of the obligor or the obligee at a hearing on the child support order;

(2) to compel production by the obligor or the obligee of financial or wage information, including federal or state tax returns;

(3) to compel the obligor or the obligee to disclose the location of employment of the payor party; and

(4) to compel the employer of the obligor or the obligee to disclose information relating to the employee's wages.

C. A subpoena issued by the human services department under this section shall state with reasonable certainty the nature of the information required, the time and place where the information shall be produced, whether the subpoena requires the attendance of the person subpoenaed or only the production of information and records and the consequences of failure to obey the subpoena.

D. A subpoena issued by the human services department under this section shall be served upon the person to be subpoenaed or, at the option of the secretary or the secretary's authorized representative, by certified mail addressed to the person at his last known address. The service of the subpoena shall be at least ten days prior to the required production of the information or the required appearance. If the subpoena is served by certified mail, proof of service is the affidavit of mailing. After service of a subpoena upon a person, if the person neglects or refuses to comply with the subpoena, the department may apply to the district court of the county where the subpoena was served or the county where the subpoena was responded to for an order compelling compliance. Failure of the person to comply with the district court's order shall be punishable as contempt.

E. If a review by the human services department results in a finding that a child support order should be modified in accordance with the guidelines, it should be

presented to the court for modification and the obligor and the obligee shall be notified of their respective rights and shall have thirty days to respond to the department's finding. The right to seek modification shall rest with the department in the case of obligations being enforced as a result of a public assistance recipient's assignment of support rights to the state as provided in the Social Security Act, 42 U.S.C. 602(a)(26).

F. At the request of the obligor or the obligee or upon the filing of a motion to modify child support, the human services department shall furnish any information it has obtained in its review process regarding wages or other information pertaining to the obligor or the obligee.

G. Nothing in this section shall be construed to restrict the right of either party to petition the court to modify a child support obligation. The human services department shall not be required to conduct a review of any party's obligation more than once every three years.

History: Laws 1990, ch. 58, § 2; 1997, ch. 237, § 21.

ANNOTATIONS

Cross references. — For designation of human services department as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV D of the federal Social Security Act, see 27-2-27 NMSA 1978.

The 1997 amendment, effective April 11, 1997, rewrote Paragraph A(1), inserted "human services" near the beginning of Subsection C, and inserted "should be modified in accordance with the guidelines, it" near the beginning of Subsection E.

40-4-11.6. Attachment of guideline worksheet to order.

A completed child support obligation guideline worksheet shall be attached to all orders that establish or modify child support. The completed worksheet shall be signed by the obligor and obligee or their attorneys. The completed worksheet shall be incorporated as part of the child support order. The worksheet shall also be attached to the child support order unless the court decrees that the worksheet be sealed or unless the obligor and obligee agree that it should be sealed.

History: 1978 Comp., § 40-4-11.6, enacted by Laws 1991, ch. 206, § 3.

ANNOTATIONS

Review of worksheet on appeal. — Absent a request to the trial court that it include a worksheet, father failed to preserve this error for review. Roberts v. Wright, 117 N.M. 294, 871 P.2d 390 (Ct. App. 1994).

40-4-12. Allowance from spouse's separate property as alimony.

In proceedings for the dissolution of marriage, separation or support between husband and wife, the court may make an allowance to either spouse of the other spouse's separate property as alimony and the decree making the allowance shall have the force and effect of vesting the title of the property so allowed in the recipient.

History: 1941 Comp., § 25-716, enacted by Laws 1947, ch. 16, § 1; 1953 Comp., § 22-7-13; Laws 1973, ch. 319, § 9.

ANNOTATIONS

Cross references. — For notes regarding alimony, see "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).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Divorce and Separation § 755.

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.

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.

Consideration of tax liability or consequences in determining alimony or property settlement provisions of divorce or separation, 51 A.L.R.3d 461, 9 A.L.R.5th 568.

Fault as consideration in alimony, spousal support, or property division awards pursuant to no-fault divorce, 86 A.L.R.3d 1116.

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

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

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation, 15 A.L.R.4th 224.

Court's authority to award temporary alimony where existence of valid marriage is contested, 34 A.L.R.4th 814.

Necessity that divorce court value property before distributing it, 51 A.L.R.4th 11.

Divorce and separation: method of valuation of life insurance policies in connection with trial court's division of property, 54 A.L.R.4th 1203.

Divorce: excessiveness or adequacy of combined property division and spousal support awards - modern cases, 55 A.L.R.4th 14.

Withholding visitation rights for failure to make alimony or support payments, 65 A.L.R.4th 1155.

Death of obligor spouse as affecting alimony, 79 A.L.R.4th 10.

Effect of same-sex relationship on right to spousal support, 73 A.L.R.5th 599.

Propriety of equalizing income of spouses through alimony awards, 102 A.L.R.5th 395.

27B C.J.S. Divorce § 398.

40-4-13. Spousal support to constitute lien on real estate.

A. The decree making the allowance for spousal support to either spouse shall be a lien on the real estate of the obligor spouse from the date of filing of a notice of order or decree in the office of the county clerk of each county where any of the property is situated.

B. The notice of order or decree shall contain:

(1) the caption of the case from which the duty of spousal support arose, including the state, county and court in which the case was heard, the case number and the names of the parties when the case was heard;

(2) the date of entry of the judgment, order or decree from which the duty of spousal support arose;

(3) the current names, social security numbers and dates of birth of the parties; and

(4) each party's last known address, unless ordered otherwise in the judgment, order or decree from which the duty of spousal support arose.

C. The notice shall be executed and acknowledged in the same manner as a grant of land is executed and acknowledged.

D. A copy of the recorded notice shall be sent to the obligor spouse at his last known address.

History: 1941 Comp., § 25-717, enacted by Laws 1947, ch. 16, § 2; 1953 Comp., § 22-7-14; Laws 1973, ch. 319, § 10; 1993, ch. 111, § 1.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, substituted "Spousal support" for "Money allowance" in the catchline, designated the existing provisions as Subsection A, substituted "spousal support" for "alimony", "obligor" for "other", and "of a notice of order or" for "for record a certified copy of the" in Subsection A, and added Subsections B through D.

Enforcement of child support by attachment for contempt. — Section 2190 of Code 1915 (39-4-1 NMSA 1978), though giving execution for money decrees in equity, does not abrogate equity power to enforce by attachment as for contempt its decree for monthly payments for support of children. Ex parte Sedillo, 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 §§ 884 to 893.

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.

Death of obligor spouse as affecting alimony, 79 A.L.R.4th 10.

27B C.J.S. Divorce § 471.

40-4-14. Allowance in property; appointment and removal of guardian.

In proceedings for the dissolution of marriage, separation or support between husband and wife, the court may make an allowance of certain property or properties of either party or of both parties for the maintenance, education and support of the minor children of the parties, and may vest title to the part of the property so allowed in a conservator appointed by the court. The conservator must qualify and serve in such capacity as provided in Sections 5-101 through 5-502 [45-5-101 to 45-5-502 NMSA 1978] of the Probate Code.

History: 1941 Comp., § 25-718, enacted by Laws 1947, ch. 16, § 3; 1953 Comp., § 22-7-15; Laws 1973, ch. 319, § 11; 1975, ch. 257, § 8-114.

ANNOTATIONS

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support, 91 A.L.R.3d 530.

40-4-15. Child support to constitute lien on real and personal property.

A. In case a sum of money is allowed to the children by the decree for the support, education or maintenance of the children, the decree shall become a lien on the real and personal property of the obligor party from the date of filing of a notice of order or decree in the office of the county clerk of each county where any of the property may be situated.

B. The notice of order or decree shall contain:

(1) the caption of the case from which the duty of child support arose, including the state, county and court in which the case was heard, the case number and the names of the parties when the case was heard;

(2) the date of entry of the judgment, order or decree from which the duty of child support arose;

(3) the current names, social security numbers and dates of birth of the parties; and

(4) each party's last known address, unless ordered otherwise in the judgment, order or decree from which the duty of child support arose.

C. The notice shall be executed and acknowledged in the same manner as a grant of land is executed and acknowledged.

D. A copy of the recorded notice shall be sent to the obligor spouse at his last known address.

History: 1941 Comp., § 25-719, enacted by Laws 1947, ch. 16, § 4; 1953 Comp., § 22-7-16; Laws 1985, ch. 105, § 15; 1993, ch. 111, § 2.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, substituted "Child support" for "Money allowance to children" in the catchline, designated the existing provisions as Subsection A, substituted "obligor party" for "party who must furnish the child support" and "of a notice of order or" for "for record a certified copy of the" in Subsection A, and added Subsections B through D.

When lien perfected. — Once the decree is duly filed, a perfected and protected statutory lien arises. Lekvold v. Henderson, 18 Bankr. 663 (Bankr. D.N.M. 1982).

Claim for child support may be prosecuted against deceased father's estate. — Where a father has been ordered by a court of competent jurisdiction to make child support payments until his child reaches majority in accord with a stipulation made by parents and present in decree, and thereafter the father dies while the child is yet a minor, a claim may be successfully prosecuted in the probate court against the estate of the father to enforce the payment. Hill v. Matthews, 76 N.M. 474, 416 P.2d 144 (1966).

Exemptions unavailable. — Statutory exemptions for debtors in foreclosure actions set forth in article 10 of chapter 42 are unavailable to a parent as against a lien for child support obligations under this section. D'Avignon v. Graham, 113 N.M. 129, 823 P.2d 929 (Ct. App. 1991).

Law reviews. — For comment on Hill v. Matthews, 76 N.M. 474, 416 P.2d 144 (1966), see 7 Nat. Resources J. 129 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Decree for periodical payments for support of children as lien or subject of declaration of lien, 59 A.L.R.2d 656.

Child support: court's authority to reinstitute parent's support obligation after terms of prior decree have been fulfilled, 48 A.L.R.4th 952.

40-4-16. [Satisfaction of liens.]

The liens created by this act [40-4-12 to 40-4-19 NMSA 1978] may be satisfied by execution or may be foreclosed under the same procedure as is now allowed for the foreclosure of judgment liens.

History: 1941 Comp., § 25-720, enacted by Laws 1947, ch. 16, § 5; 1953 Comp., § 22-7-17.

ANNOTATIONS

Cross references. — For execution and foreclosure, see 39-4-1 to 39-4-16 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Decree for periodic payments for support or alimony as a lien, or the subject of a declaration of a lien, 59 A.L.R.2d 656.

40-4-17. [Motion to remove lien; bond for alimony or support payments.]

The district court upon motion made in the cause wherein the decree was rendered may remove the liens created by this act [40-4-12 to 40-4-19 NMSA 1978] upon notice and upon good cause shown from any or all of the real estate, subject to such lien; and the judge, in his discretion, upon the removal of such lien, may require bond for the faithful performance of the payment of alimony or support money in accordance with the decree.

History: 1941 Comp., § 25-722, enacted by Laws 1947, ch. 16, § 7; 1953 Comp., § 22-7-19.

ANNOTATIONS

Law reviews. — For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 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.

ANNOTATIONS

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.

ANNOTATIONS

Cross references. — For execution and foreclosure, see 39-4-1 to 39-4-16 NMSA 1978.

For attachment and garnishment, see 42-9-1 to 42-9-39 NMSA 1978.

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).

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 §§ 860 to 928.

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.

ANNOTATIONS

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 Chapter 40, Article 4A NMSA 1978.

40-4-20. Failure to divide or distribute property on the entry of a decree of dissolution of marriage or separation; distribution of spousal or child support and determination of paternity when death occurs during proceedings for dissolution of marriage, separation, annulment of marriage or paternity.

A. The failure to divide or distribute property on the entry of a decree of dissolution of marriage or of separation shall not affect the property rights of either the husband or wife, and either may subsequently institute and prosecute a suit for division and distribution or with reference to any other matter pertaining thereto that could have been litigated in the original proceeding for dissolution of marriage or separation.

B. Upon the filing and service of a petition for dissolution of marriage, separation, annulment, division of property or debts, spousal support, child support or determination of paternity pursuant to the provisions of Chapter 40, Article 4 or 11 NMSA 1978, if a party to the action dies during the pendency of the action, but prior to the entry of a decree granting dissolution of marriage, separation, annulment or determination of paternity, the proceedings for the determination, division and distribution of marital property rights and debts, distribution of spousal or child support or determination of paternity shall not abate. The court shall conclude the proceedings as if both parties had

survived. The court may allow the spouse or any children of the marriage support as if the decedent had survived, pursuant to the provisions of Chapter 40, Article 4 or 11 NMSA 1978. In determining the support, the court shall, in addition to the factors listed in Chapter 40, Article 4 NMSA 1978, consider the amount and nature of the property passing from the decendent [decedent] to the person for whom the support would be paid, whether by will or otherwise.

History: Laws 1901, ch. 62, § 31; Code 1915, § 2781; C.S. 1929, § 68-509; 1941 Comp., § 25-709; 1953 Comp., § 22-7-22; Laws 1973, ch. 319, § 13; 1993, ch. 90, § 1.

ANNOTATIONS

Cross references. — For proceeding for division of property, see 40-4-3 NMSA 1978.

Bracketed material. — The bracketed material in Subsection B was inserted by the compiler. It was not enacted by the legislature and is not part of the law.

The 1993 amendment, effective July 1, 1993, rewrote the catchline which read "Failure to divide property on dissolution of marriage"; designated the formerly undesignated provisions as Subsection A; in Subsection A, substituted "divide or distribute property on the entry of a decree of dissolution of marriage or of separation" for "divide the property on the dissolution of marriage" and added "or separation" at the end; added Subsection B; and made minor stylistic changes.

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).

If property rights are not considered or disposed of in divorce action, a suit seeking division and distribution of the property may be subsequently prosecuted. Zarges v. Zarges, 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); Martinez v. Martinez, 2004-NMCA-007, __ N.M. __, 83 P.3d 298.

Statute of limitations does not apply to action for accounting and partition of real property. – There is nothing about the bare holding of title that should equate to the accrual of a cause of action that triggers a time limitation on the right to seek partition; thus, the trial court must analyze a post-divorce action to partition real property in the same fashion as any partition action by a tenant in common. Martinez v. Martinez, 2004-NMCA-007, __ N.M. __, 83 P.3d 298.

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

Existing present interest of wife continues even after divorce. — This section recognizes an existing present interest of the wife in the community property during the existence of the matrimonial status, which continues even after divorce, where the property is not divided in the decree in the divorce case. In re Miller's Estate, 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).

Since husband owned right to receive proceeds of policy as community property of the parties, this right, not having been disposed of by divorce, became the right of the parties as tenants in common. Hickson v. Herrmann, 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).

Applicability of USFSPA to pre-1981 divorce decrees. — The provisions of Paragraph 1408(c)(1) of the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 10(c)(1), do not entitle a non-military spouse to a share of the military spouse's pension, where the divorce decree was decided prior to June 25, 1981, and where such decree did not treat the pension as marital property or reserve jurisdiction to make such determination at a later date. Hennessy v. Duryea, 1998-NMSA-036, 124 N.M. 754, 955 P.2d 683, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Federal preemption. — The purpose of Paragraph 1408(c)(1) of the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 10(c)(1), is to preempt state laws that allow reopening of divorce decrees that were silent as to military retirement pay; to the extent that Subsection A of this section is inconsistent with such purpose, Subsection A of this section is preempted. Hennessy v. Duryea, 1998-NMSA-036, 124 N.M. 754, 955 P.2d 683, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Federal preemption regarding military disability retirement benefits. — United States Supreme Court decision in *Mansell v. Mansell,* 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989), holding that states were preempted by federal statute from treating military disability retirement benefits as community property, would not be applied retroactively. Toupal v. Toupal, 109 N.M. 774, 790 P.2d 1055 (Ct. App.), cert. denied, 498 U.S. 982, 111 S. Ct. 513, 112 L. Ed. 2d 525 (1990).

New action to modify property division. — Even though the court which entered the original divorce decree no longer had jurisdiction under Rule 1-060, 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.

Valuation of goodwill in medical or dental practice for purposes of divorce court's property distribution, 78 A.L.R.4th 853.

Accrued vacation, holiday time, and sick leave as marital or separate property, 78 A.L.R.4th 1107.

Divorce and separation: goodwill in law practice as property subject to distribution on dissolution of marriage, 79 A.L.R.4th 171.

What constitutes order made pursuant to state domestic relations law for purposes of qualified domestic relations order exception to antialienation provision of Employee Retirement Income Security Act of 1974 (29 USCS § 1056(d)), 79 A.L.R.4th 1081.

27B C.J.S. Divorce § 508.

ARTICLE 4A
Support Enforcement

40-4A-1. Short title.

This act may be cited as the "Support Enforcement Act".

History: Laws 1985, ch. 105, § 1.

ANNOTATIONS

Cross references. — For the Parental Responsibilty Act, see Chapter 40, Article 5A NMSA 1978.

For forms relating to garnishment of wages for child support, see Rules 4-811 and 4-812 NMRA.

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 [40-4A-1 NMSA 978]:

A. "authorized quasi-judicial officer" means a person appointed by the court pursuant to rule 53(a) [Rule 1-053A NMRA] of the Rules of Civil Procedure for the District Courts;

B. "consumer reporting agency" means any person who, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties and who uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports;

C. "delinquency" means any payment under an order for support which has become due and is unpaid;

D. "department" means the human services department;

E. "income" means any form of periodic payment to an obligor, regardless of source, including but not limited to wages, salary, commission, compensation as an independent contractor, workers' compensation benefits, disability benefits, annuity and retirement benefits or other benefits, bonuses, interest or any other payments made by any person, but does not include:

(1) any amounts required by law to be withheld, other than creditor claims, including but not limited to federal, state and local taxes, social security and other retirement and disability contributions;

(2) union dues;

(3) any amounts exempted by federal law; or

(4) public assistance payments;

F. "notice of delinquency" means the notice of delinquency as provided for in Section 40-4A-4 NMSA 1978;

G. "notice to withhold income" means a notice that requires the payor to withhold from the obligor money necessary to meet the obligor's duty under an order for support and, in the event of a delinquency, requires the payor to withhold an additional amount to be applied towards the reduction of the delinquency;

H. "obligor" means the person who owes a duty to make payments under an order for support;

I. "obligee" means any person who is entitled to receive support under an order for support or that person's legal representative;

J. "order for support" means any order which has been issued by any judicial, quasi-judicial or administrative entity of competent jurisdiction of any state and which order provides for:

(1) periodic payment of funds for the support of a child or a spouse;

(2) modification or resumption of payment of support;

(3) payment of delinquency; or

(4) reimbursement of support;

K. "payor" means any person or entity who provides income to an obligor;

L. "person" means an individual, corporation, partnership, governmental agency, public office or other entity; and

M. "public office" means the state disbursement unit of the department as defined in Section 454B of the Social Security Act.

History: Laws 1985, ch. 105, § 2; 1993, ch. 254, § 1; 1997, ch. 237, § 6.

ANNOTATIONS

Cross references. — For district attorneys, see N.M. Const., art. VI, § 24 and 36-1-1 to 36-1-27 NMSA 1978.

For the human services department, see 9-8-1 to 9-8-14 NMSA 1978.

For provisions relating to establishing a state case registry of obligors and related information and additional support enforcement procedures, see 27-1-8 to 27-1-14 NMSA 1978.

For single state agency designation for Title IV-D, see 27-2-27 NMSA 1978.

For district court clerks, see 34-6-19 NMSA 1978.

For the State Directory of New Hires Act, see Chapter 50, Article 13 NMSA 1978.

The 1993 amendment, effective June 18, 1993, substituted "or" for "and" at the end of Paragraph (3) of Subsection E; substituted "40-4A-4 NMSA 1978" for "4 of the Support Enforcement Act" in Subsection F; deleted a proviso concerning foreign orders from the

end of the introductory language of Subsection J; and made stylistic changes in Subsections G and J.

The 1997 amendment, effective April 11, 1997, inserted "bonuses, interest" following "benefits" near the end of Subsection E, and rewrote Subsection M.

Social Security Act. — Section 454B of the federal Social Security Act, referred to in Subsection M, is codified as 42 U.S.C. § 654b.

40-4A-3. Purpose of income withholding.

Income withholding is intended to ensure compliance with the order for support and provide for the liquidation of any delinquency which may have accrued.

History: Laws 1985, ch. 105, § 3.

40-4A-4. Notice of delinquency.

A. When an obligor accrues a delinquency, the obligee or public office may prepare and serve upon the obligor a copy of a verified notice of delinquency. The income of a person with a support obligation imposed by a support order issued or modified in the state before January 1, 1994, if not otherwise subject to immediate withholding under Section 40-4A-4.1 NMSA 1978, shall become subject to immediate withholding as provided in Section 40-4A-4.1 NMSA 1978 if arrearages occur, without the need for a judicial or administrative hearing.

B. If the date upon which payment is due under an order for support is not stated in the order for support, the due date shall be deemed to be the last day of the month.

C. The notice of delinquency shall:

(1) recite those terms of the order for support which enumerate the support obligation;

(2) contain a current computation of the period and total amount of the delinquency;

(3) inform the obligor of the amount to be withheld;

(4) inform the obligor of the procedures available to contest the income withholding on the grounds that the withholding or the amount withheld is improper due to a mistake of fact;

(5) state that, unless the obligor complies with the procedures to contest the income withholding, a notice to withhold income shall be served upon the payor;

(6) state that the notice to withhold income shall be applicable to any current or subsequent payor; and

(7) state the name and address of the public office to which withheld income shall be sent.

D. The original notice of delinquency shall be filed with the clerk of the district court.

E. Service of the notice of delinquency upon the obligor shall be effected by sending the notice by prepaid certified mail addressed to the obligor at his last known address or by any method provided by law for service of a summons. Proof of service shall be filed with the clerk of the district court.

History: Laws 1985, ch. 105, § 4; 1997, ch. 237, § 7.

ANNOTATIONS

Cross references. — For provisions relating to establishing a state case registry of obligors and related information and additional support enforcement procedures, see 27-1-8 to 27-1-14 NMSA 1978.

For the State Directory of New Hires Act, see Chapter 50, Article 13 NMSA 1978.

The 1997 amendment, effective April 11, 1997, rewrote Subsection A, in Paragraph B(4), added "on the grounds that the withholding of the amount withheld is improper due to a mistake of fact" at the end, substituted "contest the" for "avoid" in that paragraph and in Paragraph B(5), and made minor stylistic changes.

40-4A-4.1. Immediate child support income withholding.

A. In any judicial proceeding in which child support is ordered, modified or enforced and which proceeding is brought or enforced pursuant to Title IV-D of the Social Security Act as provided in Section 27-2-27 NMSA 1978, the income of the support obligor shall be subject to immediate income withholding regardless of the existence of any child support arrearage or delinquency. Effective January 1, 1994, in proceedings in which child support services are not being provided pursuant to Title IV-D and the initial child support order is issued in the state on or after January 1, 1994, the income of the support obligor shall be subject to immediate income withholding regardless of the existence of any child support arrearage or delinquency.

B. As part of the court or administrative order establishing, modifying or enforcing the child support obligation, the court shall issue the order to withhold.

C. The order to withhold shall state:

(1) the style, docket number and court having jurisdiction of the cause;

(2) the name, address and, if available, the social security number of the obligor;

(3) the amount and duration of the child support payments. If any of the ordered amount is toward satisfaction of an arrearage or delinquency up to the date of the order, the amount payable to current and past-due support shall be specified, together with the total amount of the delinquency or arrearage, including judgment interest, if any;

(4) the name and date of birth of the child for whom support is ordered and the name of the obligee;

(5) the name and address of the person or agency to whom the payment is to be made, together with the agency's internal case number; and

(6) any other information deemed necessary to effectuate the order.

D. All Title IV-D payments shall be made through the public office. All non-Title IV-D payments shall be made through the public office to be effective on October 1, 1998.

E. The maximum amount withheld pursuant to this section and any other garnishment shall not exceed fifty percent of the obligor's income.

F. The order of a withholding shall be mailed by the Title IV-D agency or the support obligee, obligee's attorney or court by certified mail to the payor. The payor shall pay over income as provided by and in compliance with the procedures of Section 40-4A-8 NMSA 1978.

G. The court may provide an exception to the immediate income withholding required by this section if it finds good cause for not ordering immediate withholding. The burden shall be on the party claiming good cause to raise the issue and demonstrate the existence of good cause to the court. In the event of a finding of good cause, the court shall make a written finding in the order specifying the reasons or circumstances justifying the good-cause exception and why income withholding would not be in the best interest of the child. If the order is one modifying a support obligation and immediate income withholding is not ordered, the order shall include a finding that the obligor has timely paid support in the past. The order shall provide that the obligor shall be subject to withholding if a one-month support delinquency accrues.

H. The court shall make an exception to the immediate income withholding required by this section if the parties to the proceeding enter into a written agreement providing for alternative means of satisfying the child support obligation. Such an agreement shall be incorporated into the order of the court. For the purposes of this subsection, the support obligee shall be considered to be the department in the case of child support obligations that the state is enforcing pursuant to an assignment of support rights to it as

a condition of the assignor's receipt of public assistance. The agreement shall contain the signatures of a representative of the department and the custodial parent.

I. Notwithstanding the provisions of Subsection G of this section, immediate income withholding shall take place if the child support obligor so requests. The notice to withhold shall be filed with the clerk of the district court and the requirements of Subsection C of this section, Subsections D, E and F of Section 40-4A-5 and Sections 40-4A-6, 40-4A-8, 40-4A-10 and 40-4A-11 NMSA 1978 shall apply.

J. A court shall order a wage withholding effective on the date on which a custodial parent requests such withholding to begin if the court determines, in accordance with such procedures and standards as it may establish, that the request should be approved, notwithstanding:

(1) the absence of a support delinquency of at least one month;

(2) a finding of good cause under Subsection G of this section; or

(3) an agreement under Subsection H of this section.

K. The standards and procedures established for purposes of Subsection J of this section shall provide for the protection of the due process rights of the support obligor, appropriate notices and the right to a hearing under the Support Enforcement Act [40-4A-1 NMSA 1978].

L. Wages not subject to withholding under Subsection J of this section shall still be subject to withholding on an earlier date as provided by law.

M. Notwithstanding any other provision of this section, wages not subject to withholding because of a finding of good cause under Subsection G of this section shall not be subject to withholding at the request of a custodial parent unless the court changes its determination of good cause not to initiate immediate wage withholding.

N. In the event a child support obligor accrues a delinquency in an amount equal to at least one month's support obligation and notwithstanding any previous agreement or court finding to the contrary, income withholding shall issue against the support obligor and the procedures set out in Section 40-4A-4 NMSA 1978 shall be followed. Such withholding shall terminate only upon the termination of all obligations imposed by the order of support and payment in full of all enforceable child support delinquencies.

History: 1978 Comp., § 40-4A-4.1, enacted by Laws 1990, ch. 30, § 1; 1992, ch. 26, § 1; 1993, ch. 254, § 2; 1997, ch. 237, § 8.

ANNOTATIONS

Cross references. — For provisions regarding collection of unpaid support obligations through seizure of lottery winnings, see 6-24-22 NMSA 1978.

For forms relating to garnishment of wages for child support, see Rules 4-811 and 4-812 NMRA.

The 1992 amendment, effective May 20, 1992, in Subsection H, substituted "shall be" for "must be" in the second sentence; in Subsections H and I, deleted "human services" preceding "department" at the first appearance of that word in both subsections; added present Subsection J and redesignated former Subsection J as Subsection N; and added subsections L and M.

The 1993 amendment, effective June 18, 1993, substituted "Immediate" for "Title IV-D" in the catchline; in Subsection A, deleted "or administrative" after "judicial" in the first sentence and added the second sentence; deleted "or administrative body" after "court" in Subsection B, Paragraph (1) of Subsection C, the first, second and third sentences of Subsection G, the first and second sentences of Subsection H, and Subsection M; deleted "All" from the beginning and added the language beginning "with the exception" to the end, in Subsection D; inserted "or the support obligee, obligee's attorney or court" in the first sentence of Subsection F; divided the former third sentence of Subsection G into the present third and last sentences, substituting the language beginning "why income withholding" to the end of the present third sentence and "The order shall provide" at the beginning of the present last sentence for "shall further include as part of its written order"; added the fourth sentence to Subsecion G; added the last sentence of Subsection H; in Subsection I, deleted "the department" from the end of the first sentence and deleted the former second sentence, which read: "Such request shall be in writing in a form provided by the department"; substituted "court" for "Title IV-D agency" in the introductory language of Subsection J; deleted "by the department" after "established" in Subsection K; and deleted "in a case being enforced pursuant to the state's Title IV-D program" after "obligation" in the first sentence of Subsection N.

The 1997 amendment, effective April 11, 1997, rewrote Subsection D, and made minor stylistic changes throughout the section.

Compiler's notes. — The reference to Subsections D, E and F of 40-4A-5 NMSA 1978 in Subsection I should be a reference to Subsections C, D and E in light of the 1997 amendment to Section 40-4A-5 NMSA 1978.

Social Security Act. — Title IV-D of the federal Social Security Act is codified as 42 U.S.C. § 651 et seq.

40-4A-5. Notice to withhold income.

A. The obligee or public office shall file an affidavit with the clerk of the district court showing that notice of delinquency has been duly served upon the obligor.

B. Upon filing of the affidavit required by Subsection A of this section, the notice to withhold income shall be filed with the clerk of the district court and served upon the payor by certified mail or personal delivery, and proof of service shall be filed with the clerk of the district court.

C. A conformed copy of the notice to withhold income shall be mailed to the obligor at his last known address.

D. The notice to withhold income shall be verified by the obligee or public office and shall:

(1) state the amount of income to be withheld from the obligor; provided, however, the amount to be applied to satisfy the monthly obligation under the order for support, the amount of the delinquency which is set forth in the notice of delinquency and the amount to be applied to reduce the delinquency set forth in the notice of delinquency shall be stated separately;

(2) state that payments due from multiple obligors may be combined into one remittance so long as each withholding is separately identified;

(3) state that the maximum amount of an obligor's income subject to withholding pursuant to the Support Enforcement Act [40-4A-1 NMSA 1978] and pursuant to any garnishment shall not exceed fifty percent;

(4) state the duties of the payor as set forth in Section 40-4A-8 NMSA 1978; and

(5) require that all payments be made through the public office to ensure accurate recordkeeping.

E. The termination of the obligations imposed by the order of support and payment in full of any delinquency shall revoke the notice to withhold income.

History: Laws 1985, ch. 105, § 5; 1987, ch. 26, § 1; 1997, ch. 237, § 9.

ANNOTATIONS

The 1997 amendments, effective April 11, 1997, deleted former Subsection A which provided "at least twenty days following service of the notice of delinquency, the obligee or public office shall determine if the procedure to avoid income withholding pursuant to Section 40-4A-7 NMSA 1978 has been instituted", deleted the first sentence of former Subsection B providing "if the procedure to avoid income withholding has not been instituted", designated the second sentence of that subsection as Subsection A, deleting the second sentence relating to procedure to avoid income withholding having occurred, and redesignated the following subsections accordingly; and made minor stylistic changes throughout the section.

40-4A-6. Amount of income subject to withholding.

A. The income of an obligor shall be subject to withholding in an amount:

(1) equal to the monthly support obligation set forth in the order for support; and

(2) in the event of a delinquency, the additional amount of twenty percent of the monthly support obligation set forth in the order for support, or such amount as the court may order after notice and hearing, until payment in full of any delinquency set forth in the notice of delinquency.

B. The maximum amount of an obligor's income which may be subject to withholding pursuant to the Support Enforcement Act [40-4A-1 NMSA 1978] and pursuant to any garnishment shall not exceed fifty percent.

History: Laws 1985, ch. 105, § 6.

40-4A-7. Procedure to avoid income withholding.

Except as provided in Section 40-4A-4.1 NMSA 1978, the obligor may contest the notice to withhold income by filing a petition with the clerk of the district court within twenty days after service of the notice of delinquency. Grounds for the contest shall be limited to a dispute concerning the existence or amount of the delinquency or noncompliance with the Support Enforcement Act [40-4A-1 NMSA 1978]. The clerk of the district court shall notify the obligor and the obligee or public office, as appropriate, of the time and place of the hearing on the petition. The court shall hold the hearing pursuant to the provisions of Section 40-4A-9 NMSA 1978.

History: Laws 1985, ch. 105, § 7; 1987, ch. 26, § 2; 1990, ch. 30, § 2; 1997, ch. 237, § 10.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, added "Except as provided in Section 40-4A-4.1 NMSA 1978" at the beginning of the section and made a minor stylistic change in the final sentence.

The 1997 amendment, effective April 11, 1997, in the first sentence, substituted "contest the" for "prevent a" near the beginning, deleted "from being served" following "income", and deleted "to stay service" following "petition" in that sentence and at the end of the second sentence; and substituted "contest" for "petition to stay service" at the beginning of the second sentence.

40-4A-8. Duties of payor.

A. Any payor who has been served with a notice to withhold income shall deduct and pay over income as provided in this section. The payor shall deduct the amount designated in the notice to withhold income no later than the next payment of income that is payable to the obligor following service of the notice to withhold income and shall forward the amount withheld to the public office or in the case of non-Title IV-D support payments, pursuant to the court order until October 1, 1998, within seven business days of the employee's normal pay date. For each withholding of income, the payor shall be entitled to and may deduct a one dollar ($1.00) fee to be taken from the income to be paid to the obligor.

B. Whenever the obligor is no longer receiving income from the payor, the payor shall notify the public office, and the payor shall inform the obligee and public office of the last known address of the obligor and any subsequent payor, if known.

C. Withholding of income under the Support Enforcement Act [40-4A-1 NMSA 1978] shall have priority over any other legal process under the laws of this state against the same income. Where there is more than one order for withholding against a single obligor pursuant to the Support Enforcement Act [40-4A-1 NMSA 1978], the payor shall allocate support among obligees, but in no case shall the allocation result in a withholding for one of the support obligations not being implemented.

D. No payor shall discharge, discipline, refuse to hire or otherwise penalize any obligor because of the duty to withhold income.

E. The payor shall terminate or modify withholding within fourteen days of receipt of a conformed copy of a notice to terminate or modify a withholding.

F. Any order or notice for income withholding made pursuant to Section 40-4A-4.1 or 40-4A-5 NMSA 1978 shall be binding against future payors by operation of law upon actual knowledge of the contents of the order or notice or upon receipt by personal delivery or certified mail of a filed copy of the order or notice to the payor.

History: Laws 1985, ch. 105, § 8; 1990, ch. 30, § 3; 1997, ch. 237, § 11.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, substituted "and the payor shall inform the obligee and public office" for "Upon request the payor shall inform the obligee" in Subsection B; redesignated former Subsection C as part of present Subsection B; redesignated former Subsections D to F as present Subsections C to E; in present Subsection C, corrected a misspelling and substituted "Section 40-4A-9 NMSA 1978" for "Section 9 of the Support Enforcement Act"; and added Subsection F.

The 1997 amendment, effective April 11, 1997, rewrote the second sentence in Subsection A, deleted "designated" following "notify the" in Subsection B, and in Subsection C, substituted "the payor shall allocate support among obligees, but in no

case shall the allocation result in a withholding for one of the support obligations not being implemented" for "the orders shall receive priority in payment according to the date of service on the payor, subject to any contrary directive established pursuant to Subsection B of Section 40-4A-9 NMSA 1978" at the end of the last sentence.

40-4A-9. Petitions to modify, suspend or terminate notice of withholding.

A. When an obligor files a petition pursuant to Section 40-4A-7 NMSA 1978, the court, after due notice to all parties, shall hear and resolve the matter no later than forty-five days following the service of the notice of delinquency. Where the court cannot promptly resolve the issues alleged in the petition, the court may order immediate execution of an amended notice to withhold income as to any undisputed amounts and may continue the hearing on the disputed issues for such reasonable length of time as required under the circumstances. Failure to meet the time requirements shall not constitute a defense to the notice to withhold income.

B. At any time, an obligor or obligee or the public office may petition the court to:

(1) modify, suspend or terminate the notice to withhold income because of a corresponding modification, suspension or termination of the underlying order for support;

(2) modify the amount of income to be withheld to increase the rate of payment of the delinquency; or

(3) suspend the notice to withhold income because of the inability of the public office to deliver income withheld to the obligee due to the obligee's failure to provide a mailing address or other means of delivery.

C. Except for orders to withhold issued pursuant to Section 40-4A-4.1 NMSA 1978, an obligor may petition the court at any time to terminate the withholding of income because payments pursuant to the notice to withhold income have been made for at least three years and all delinquencies have been paid. The court shall suspend the notice to withhold income, absent good cause for denying the petition. If the obligor subsequently becomes delinquent in payment of the order for support, the obligee or public office may serve another notice to withhold income by complying with all requirements for notice and service pursuant to the Support Enforcement Act [40-4A-1 NMSA 1978].

History: 1978 Comp., § 40-4A-9, enacted by Laws 1985, ch. 105, § 9; 1987, ch. 26, § 3; 1990, ch. 30, § 4; 1997, ch. 237, § 12.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, in the first sentence of Subsection C, substituted "Except for orders to withhold issued pursuant to Section 40-4A-4.1 NMSA 1978" for "At any time" at the beginning and made a minor stylistic change.

The 1997 amendment, effective April 11, 1997, deleted "to stay service or" from the section heading, deleted "to stay service" following "petition" near the beginning of Subsection A, and deleted Subsection D relating to an obligee seeking an order to reapportion the distribution of the obligor's withheld income upon notice to all interested parties.

40-4A-10. Additional duties.

A. An obligee who is receiving income withholding payments under the Support Enforcement Act [40-4A-1 NMSA 1978] shall notify the public office forwarding such payments of any change of address within seven days of such change.

B. Within seven days of change of payor or residence, an obligor whose income is being withheld or who has been served with a notice of delinquency pursuant to the Support Enforcement Act [40-4A-1 NMSA 1978] shall notify the obligee and the public office of the new payor or new residence address.

C. Any public office that collects, disburses or receives payments pursuant to a notice to withhold income shall maintain complete, accurate and clear records of all payments and their disbursements.

D. The department shall take all actions necessary to institute income withholding upon the request of an obligor.

E. All new orders for support or modifications of orders for support shall provide notice that if an obligor accrues a delinquency in an amount equal to at least one month's support obligation, his income shall be subject to withholding in an amount sufficient to satisfy the order for support and that an additional amount shall be withheld to reduce and retire any delinquency.

F. In addition to any other materials provided to an obligee at the time the obligee applies to the department for assistance, the department shall make available to the obligee a list of the types of services available, and a copy of federal time frames concerning child support enforcement.

History: Laws 1985, ch. 105, § 10; 1987, ch. 26, § 4; 1990, ch. 30, § 5; 1993, ch. 148, § 1.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, inserted "or residence" near the beginning and added "or new residence address" at the end of Subsection B, made a

minor stylistic change in Subsection C and deleted the former Subsection F which read "The department shall promulgate, by regulation, forms and nonbinding, statewide child support guidelines for proceedings under the Support Enforcement Act and shall make available to the public and the courts the forms and guidelines and any other informational materials which describe the procedures and remedies set forth in that act".

The 1993 amendment, effective July 1, 1993, added Subsection F.

40-4A-11. Penalties.

If any person willfully fails to withhold or pay over income pursuant to the Support Enforcement Act [40-4A-1 NMSA 1978], willfully discharges, disciplines, refuses to hire or otherwise penalizes an obligor as prohibited by Subsection D of Section 40-4A-8 NMSA 1978, or otherwise fails to comply with any duty imposed by that act, the court, upon due notice and hearing:

A. shall impose a fine against the payor for the total amount that the payor willfully failed to withhold or pay over;

B. shall order reinstatement of or award damages to the obligor, or both, where the obligor has been discharged, disciplined or otherwise penalized by the payor; or

C. may take such other action, including action for contempt of court, as may be appropriate.

History: Laws 1985, ch. 105, § 11; 1997, ch. 237, § 13.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, substituted "Subsection D of Section 40-4A-8 NMSA 1978" for "Subsection E of Section 8 of that act" in the introductory language, and in Subsection A, substituted "impose a fine" for "enter judgment".

40-4A-12. Interstate withholding by registration of foreign support order.

A. Upon filing of a certified copy of a foreign order for support containing an income withholding provision, the clerk of the district court shall docket the case and inform the obligee of this action. The foreign order for support filed in accordance with this section shall constitute a legal basis for income withholding in this state. Upon filing the order, together with a notice to withhold income, the order may be served upon the payor and obligor by prepaid certified mail or by any method provided by law for service of summons. The payor shall promptly notify the obligor of receipt of service. Proof of service shall be filed with the clerk of the district court. The obligor may contest the validity or enforcement of the income withholding by filing a petition to stay income

withholding within twenty days after service of the order and notice. If the obligor files a petition to stay, the court shall hear and resolve the matter no later than forty-five days following service of the order and notice to withhold. The procedure and grounds for contesting the validity and enforcement of the income withholding are the same as those available for contesting an income withholding notice and order in this state. The obligor shall give notice of the petition to stay to the support enforcement agency providing services to the obligee, the person or agency designated to receive payments in the income withholding notice, or if there is no designated person or agency, the obligee.

B. Filing of the order for support shall not confer jurisdiction on the courts of this state for any purpose other than income withholding.

C. If the obligor presents evidence that constitutes a full or partial defense, the court shall, on the request of the obligee, continue the case to permit further evidence relative to the defense to be adduced by either party; provided, however, the court shall order immediate execution as to any undisputed amounts as set forth in Subsection A of Section 40-4A-9 NMSA 1978.

D. In addition to other procedural devices available to a party, any party to the proceeding may adduce testimony of witnesses in another state, including the parties and any of the children, by deposition, written discovery, photographic discovery such as videotaped depositions, telephone or photographic means. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner and terms upon which the testimony shall be taken.

E. A court of this state may request the appropriate court or agency of another state to hold a hearing to adduce evidence, to permit a deposition to be taken before the court or agency or to order a party to produce or give evidence under other procedures of that state and may request that certified copies of the evidence adduced in compliance with the request be forwarded to the court of this state.

F. Upon request of a court or agency of another state, a court of this state may order a person in this state to appear at a hearing or deposition before the court to adduce evidence or to produce or give evidence under other procedures available in this state. A certified copy of the evidence adduced, such as a transcript or videotape, shall be forwarded by the clerk of the district court to the requesting court or agency.

G. A person within this state may voluntarily testify by statement or affidavit in this state for use in a proceeding to obtain income withholding outside this state.

History: Laws 1985, ch. 105, § 12; 1990, ch. 30, § 6; 1993, ch. 254, § 3.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, added "by registration of foreign support order" in the catchline; in Subsection C, substituted "Section 40-4A-9 NMSA 1978" for "Section 9 of the Support Enforcement Act" and made a minor stylistic change; and substituted "Subsection A of this section" for "Subsection A of section 12 of the Support Enforcement Act" in the first sentence in Subsection H.

The 1993 amendment, effective June 18, 1993, rewrote Subsection A; in Subsection B, substituted "Filing" for "Registration" at the beginning and deleted "unless otherwise permitted by law" at the end; and deleted former Subsection H, concerning the modification or nullification of orders of support.

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, as defined in Section 603(f) of the Fair Credit Reporting Act, 15 U.S.C. 1681(a)(f), and upon thirty days' advance notice to the obligor, the department, in accordance with its regulations, may release information regarding the delinquency of an obligor. The department may charge a reasonable fee to the consumer reporting agency.

History: Laws 1985, ch. 105, § 17; 1997, ch. 237, § 23.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, inserted the federal act reference, and deleted "if the delinquency of the obligor exceeds one thousand dollars ($1,000)" at the end of the first sentence.

40-4A-16. Remedies in addition to other laws.

The rights, remedies, duties and penalties created by the Support Enforcement Act [40-4A-1 NMSA 1978] are in addition to any other rights, remedies, duties and penalties created by any other law.

History: Laws 1985, ch. 105, § 19.

ANNOTATIONS

Severability clauses. — Laws 1985, ch. 105, § 20 provides for the severability of the act if any part or application thereof is held invalid.

40-4A-17. Publication of names of obligors; amount owed.

The department shall publish, once every three months in a newspaper with statewide circulation, the names and last known addresses of at least twenty-five delinquent obligors. In addition to publication of the obligors' names and last known addresses, the department shall publish the respective amounts of delinquency accrued by the individual obligors as of the date of publication.

History: Laws 1993, ch. 148, § 2.

40-4A-18. Information regarding delinquency payments.

Upon a request from an obligee, the department shall make available a written statement of:

A. payments made to the obligee by the obligor pursuant to an order for support; and

B. the amount of any delinquency still owed to the obligee by the obligor.

History: Laws 1993, ch. 148, § 3.

40-4A-19. Liens.

The state Title IV-D agency must have and use procedures under which:

A. liens arise by operation of law against real and personal property for amounts of overdue support owed by a noncustodial parent who resides or owns property in the state; and

B. the state courts and tribunals accord full faith and credit to liens arising in another state, when the state Title IV-D agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to recording or serving liens that arise within the state, except that such rules may not require judicial notice or hearing prior to the enforcement of such a lien.

History: Laws 1997, ch. 237, § 24.

40-4A-20. Unpaid child support interest arrears management program.

The department shall designate an arrears management program starting on or after December 15, 2004 to provide amnesty for child support arrears, pursuant to procedures adopted by the department. The arrears management program shall not exceed more than twelve months and shall only be authorized thereafter every two years. The department shall, before renewing the next arrears management program, provide to the interim welfare reform oversight committee a report on the previous arrears management program.

History: Laws 2004, ch. 41, § 3.

ANNOTATIONS

Effective dates. — Laws 2004, ch. 41 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective May 19, 2004, 90 days after adjournment of the legislature.

ARTICLE 4B
Child Support Hearing Officers

40-4B-1. Short title.

Sections 1 through 10 [40-4B-1 to 40-4B-10 NMSA 1978] of this act may be cited as the "Child Support Hearing Officer Act".

History: Laws 1988, ch. 127, § 1.

40-4B-2. Purpose.

The purpose of the Child Support Hearing Officer Act [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.

ANNOTATIONS

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 et seq.

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.

40-4B-4. Child support hearing officers; appointment; terms; qualifications; compensation.

A. Child support hearing officers shall be appointed by and serve at the pleasure of the judges of the judicial districts determined pursuant to Subsection D of this section. Each hearing officer shall be selected by a majority of the district court judges in the judicial district to which he is assigned. The child support hearing officers shall be paid

pursuant to a cooperative agreement between the human services department 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 [Rules 21-100 through 21-500 and Rule 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 [10-9-1 NMSA 1978]. Their compensation shall be set by the judges who appoint them, but such compensation shall not exceed eighty percent of the current salary for district court judges.

D. Child support hearing officers shall serve in such judicial districts as the secretary deems appropriate considering the case loads and case needs of the state's Title IV D program.

History: Laws 1988, ch. 127, § 4; 1993, ch. 124, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection A, deleted "Five" at the beginning of the subsection and made a minor stylistic change.

"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 et seq., 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 [40-4A-1 NMSA 1978], actions brought to modify existing support obligations, actions to establish parentage and actions under the Revised Uniform Reciprocal Enforcement of Support Act [Uniform Interstate Family Support Act, Chapter 40, Article 6A NMSA 1978]; provided the Child Support Hearing Officer Act

does not apply to proceedings for the establishment of custody. The presiding judge or his designee shall refer only matters concerning the establishment and enforcement of support obligations to a child support hearing officer in all of those proceedings in which:

A. the department as the state's Title IV D agency is acting as the enforcing party pursuant to an assignment of support rights under Section 27-2-27 NMSA 1978;

B. the department, pursuant to Section 27-2-27 NMSA 1978, is acting as the representative of a custodial parent who is not receiving aid to families with dependent children; and

C. the department is the enforcing Title IV D party pursuant to a written request for enforcement of a support obligation received from an agency in another state responsible for administering that state's federal Title IV D program.

History: Laws 1988, ch. 127, § 5; 1993, ch. 124, § 2.

ANNOTATIONS

Bracketed material. — The bracketed reference to the Uniform Interstate Family Support Act in the introductory paragraph was inserted by the compiler in light of the repeal of the Revised Uniform Reciprocal Enforcement of Support Act, 40-6-1 to 40-6-41 NMSA 1978. The bracketed material was not enacted by the legislature and is not part of the law.

The 1993 amendment, effective June 18, 1993, in the introductory paragraph, inserted "actions to establish parentage and actions under the Revised Uniform Reciprocal Enforcement of Support Act" and made minor stylistic changes.

"Title IV D program". — The phrase "Title IV D program" refers to a state program adopted pursuant to 42 U.S.C. § 651 et seq.

The Revised Uniform Reciprocal Enforcement of Support Act, referred to in the introductory paragraph, was compiled as 40-6-1 to 40-6-41, NMSA 1978, and was repealed by Laws 1994, ch. 107, § 904.

40-4B-6. Hearings; powers of child support hearing officers.

A. Child support hearing officers have the adjudicatory powers possessed by district courts under the Support Enforcement Act [40-4A-1 NMSA 1978], the Revised Uniform Reciprocal Enforcement of Support Act [Uniform Interstate Family Support Act, Chapter 40, Article 6A NMSA 1978] and any other law allowing the enforcement and establishment of support obligations by the state Title IV D agency.

B. Hearings shall be held in the judicial district in which the claim arose or in the judicial district where one of the parties resides.

C. The child support hearing officer shall have the power to preserve and enforce order during hearings; administer oaths; issue subpoenas to compel the attendance and testimony of witnesses, the production of books, papers, documents and other evidence or the taking of depositions before a designated individual competent to administer oaths; examine witnesses; and do all things conformable to law which may be necessary to enable him to discharge the duties of his office effectively.

D. Any person committing any of the following acts in a proceeding before a child support hearing officer may be held accountable for his conduct in accordance with the provisions of Subsection E of this section:

(1) disobedience of or resistance to any lawful order or process;

(2) misbehavior during a hearing or so near the place of the hearing as to obstruct it;

(3) failure to produce any pertinent book, paper or document after having been ordered to do so;

(4) refusal to appear after having been subpoenaed;

(5) refusal to take the oath or affirmation as a witness; or

(6) refusal to be examined according to law.

E. The child support hearing officer may certify to the district court the fact that an act specified in Paragraphs (1) through (6) of Subsection C [D] of this section was committed in that court. The court shall hold a hearing and if the evidence so warrants may punish the offending person in the same manner and to the same extent as for contempt committed before the court, or the court may commit the person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

History: Laws 1988, ch. 127, § 6.

ANNOTATIONS

Bracketed material. — The bracketed "D" following "Subsection C" in the first sentence of Subsection E, was added by the compiler as the apparent intended reference.

The bracketed reference to the Uniform Interstate Family Support Act in Subsection A was inserted by the compiler in light of the repeal of the Revised Uniform Reciprocal Enforcement of Support Act, 40-6-1 to 40-6-41 NMSA 1978. The bracketed material was not enacted by the legislature and is not part of the law.

"Title IV D agency". — The phrase "Title IV D agency" means an agency established pursuant to Title IV D, 42 U.S.C. § 651 et seq., of the federal Social Security Act to administer a state plan and program to enforce child support obligations. See 40-4B-5A NMSA 1978.

The Revised Uniform Reciprocal Enforcement of Support Act, referred to in Subsection A, was compiled as 40-6-1 to 40-6-41, NMSA 1978, and was repealed by Laws 1994, ch. 107, § 904.

40-4B-7. Proceedings.

A. When a reference is made, the clerk of the court shall furnish the hearing officer with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the hearing officer shall proceed in lieu of the district court in accordance with the Rules of Civil Procedure.

B. The parties may procure the attendance of witnesses before the hearing officer by the issuance and service of subpoenas as provided in Section 6 [40-4B-6 NMSA 1978] of the Child Support Hearing Officer Act. If without adequate excuse a witness fails to appear or give evidence, he may be punished by the district judge as for a contempt and be subjected to the consequences, penalties and remedies provided in Section 6 of the Child Support Hearing Officer Act and the Rules of Civil Procedure.

History: Laws 1988, ch. 127, § 7.

ANNOTATIONS

Cross references. — For the New Mexico Rules of Civil Procedure, see Rule 1-001 NMRA et seq.

40-4B-8. Report.

A. The child support hearing officer shall prepare a report with a decision upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, shall set them forth in the report. He shall file the report with the clerk of the court and unless waived by the parties shall file with it a transcript or other authorized recording of the proceedings and of the evidence and original exhibits. The clerk shall mail immediately notice of the filing to all parties.

B. Within ten days after being served with notice of the filing of the report, any party may file written objections with the district court and serve such objections on the other parties.

C. If the district court judge wishes to review the hearing officer's decision de novo or on the record, he shall take action on the objections presented by the parties within fifteen days after the objections are filed. Failure to act by the district judge within the

time allowed is deemed acceptance by the district court of the child support hearing officer's decision and will grant the decision the full force and effect of a district court decision.

D. If the district court's review is on the record, he shall set aside the decision only if the decision is found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record as a whole; or

(3) otherwise not in accordance with law.

E. The effect of a child support hearing officer's report is the same whether or not the parties have consented to the reference; however, when the parties stipulate that a child support hearing officer's findings of fact shall be final, only questions of law arising upon the report may thereafter be considered.

History: Laws 1988, ch. 127, § 8; 1993, ch. 124, § 3.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "evidence" for "record" in Paragraph (2) of Subsection D and made a minor stylistic change in Subsection C.

40-4B-9. Review and appeal.

Within thirty days after the hearing officer's decision becomes final pursuant to Section 8 [40-4B-8 NMSA 1978] of the Child Support Hearing Officer Act, an applicant or recipient may file a notice of appeal in the same manner as that of an appeal from a district court decision pursuant to the Rules of Appellate Procedure.

History: Laws 1988, ch. 127, § 9.

ANNOTATIONS

Cross references. — For the Rules of Appellate Procedure, see Rule 12-101 NMRA et seq.

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.

ARTICLE 4C
Mandatory Medical Support

40-4C-1. Short title.

Chapter 40, Article 4C NMSA 1978 may be cited as the "Mandatory Medical Support Act".

History: Laws 1990, ch. 78, § 1; 2003, ch. 287, § 1.

ANNOTATIONS

Cross references. — For proceedings for the support of children, see 40-4-7 NMSA 1978.

For creation of human services department, see 9-8-4 NMSA 1978.

For designation of the human services department as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV D of the federal act, see 27-2-27 NMSA 1978.

For the Minimum Healthcare Protection Act, see 59A-23B-1 to 59A-23B-11 NMSA 1978.

The 2003 amendment, effective April 8, 2003, substituted "Chapter 40, Article 4C NMSA 1978" for "This act" at the beginning.

40-4C-2. Purpose.

To assure that children have access to quality medical care, it is the purpose of the Mandatory Medical Support Act [Chapter 40, Article 4C NMSA 1978] to require parents responsible for the support of minor children to provide or purchase health insurance and dental insurance coverage for those children when such coverage is available.

History: Laws 1990, ch. 78, § 2; 2003, ch. 287, § 2.

ANNOTATIONS

The 2003 amendment, effective April 8, 2003, deleted "of divorced and separated parents" near the beginning, inserted "provide or" preceding "purchase health insurance", and deleted "through employers or unions" at the end.

Medical coverage alone not "child support." — Child support obligation was not met merely by father's provision of medical insurance for child, where such coverage was required by this section, and was in addition to, not in lieu of, father's support obligations under the child support guidelines. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

40-4C-3. Definitions.

As used in the Mandatory Medical Support Act [Chapter 40, Article 4C NMSA 1978]:

A. "court" means any district court ordering child support of an obligor;

B. "dental insurance coverage" means those coverages generally associated with a dental plan of benefits, not including medicaid coverage authorized by Title 19 of the Social Security Act and administered by the department;

C. "department" means the human services department;

D. "employer" means an individual, organization, agency, business or corporation hiring an obligor for pay;

E. "health insurance coverage" means those coverages generally associated with a medical plan of benefits, not including medicaid coverage authorized by Title 19 of the Social Security Act and administered by the department;

F. "insurer" means an employment-related or other group health care insurance plan, a health maintenance organization, a nonprofit health care plan or other type of health care insurance plan under which medical or dental services are provided, regardless of service delivery mechanism;

G. "minor child" means a child younger than eighteen years of age who has not been emancipated;

H. "national medical support notice" means a court-ordered notice to an employer that an employee's child must be covered by the employment-related group health care insurance plan;

I. "obligee" means a person to whom a duty of support is owed or a person, including the department, who has commenced a proceeding for enforcement of an alleged duty of support or for registration of a support order, regardless of whether the person to whom a duty of support is owed is a recipient of public assistance; and

J. "obligor" means a person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or for registration of a support order is commenced.

History: Laws 1990, ch. 78, § 3; 1994, ch. 76, § 4; 2003, ch. 287, § 3.

ANNOTATIONS

The 1994 amendment, effective March 4, 1994, deleted "the child support enforcement division of" following "means" in Subsection C, deleted "human services" preceding "department" in Subsections E and H, added Subsection F, and redesignated former Subsections F to H as Subsections G to I.

The 2003 amendment, effective April 8, 2003, deleted "human services" near the end of Subsection B; substituted "19" for "XIX" following "authorized by Title" in Subsections B and E; rewrote Subsection F; added present Subsection H; redesignated former Subsections H and I as Subsections I and J; and inserted "for" following "duty of support or" in Subsection J.

Federal Social Security Act. — Title 19 of the federal Social Security Act, referred to in Subsections B and E, appears as 42 U.S.C. § 1396 et seq.

40-4C-4. Medical support; order.

A. The court shall order an obligor to name the minor child on behalf of whom support is owed as an eligible dependent of health insurance coverage or dental insurance coverage if:

(1) health insurance coverage or dental insurance coverage that meets or exceeds the minimum standards required under the Mandatory Medical Support Act [40-4C-1 NMSA 1978] is not available at a more reasonable cost to the obligee than to the obligor for coverage of the minor child; and

(2) such health insurance coverage or dental insurance coverage is available to the obligor through an employment-related or other group health care insurance plan.

B. The court may consider the impact of the cost of health insurance coverage or dental insurance coverage on the payment of the base child support amounts in determining whether such insurance coverage shall be ordered.

C. The court may order the obligor to obtain health insurance coverage or dental insurance coverage for any minor child to whom support is owed, if:

(1) the court finds that health insurance coverage or dental insurance coverage for the minor child is not available to the obligor through an employment-related or other group health care insurance plan; and

(2) the obligee does not have such health insurance coverage or dental insurance coverage available at a more reasonable cost than the obligor for coverage of the minor child.

D. The court shall require the obligor to be liable for all or a portion of the medical or dental expenses of the minor child that are not covered by the required health insurance coverage or dental insurance coverage, if:

(1) the court finds that the health insurance coverage or dental insurance coverage required to be obtained by the obligor or available to the obligee does not pay all the reasonable and necessary medical or dental expenses of the minor child; and

(2) the court finds that the obligor has the financial resources to contribute to the payment of these medical or dental expenses.

E. The court shall require the obligor to provide health insurance coverage or dental insurance coverage for the benefit of the obligee if it is available at no additional cost to the obligor.

F. The court in any proceeding for the establishment, enforcement or modification of a child support obligation may modify an existing order of support or establish child support, as applicable, for the minor child to incorporate the provisions for medical support ordered pursuant to the Mandatory Medical Support Act [40-4C-1 NMSA 1978].

History: Laws 1990, ch. 78, § 4; 2003, ch. 287, § 4.

ANNOTATIONS

The 2003 amendment, effective April 8, 2003, substituted "employment-related or other group health care insurance plan" for "employer or union" at the end of Paragraphs A(2) and C(1); and inserted "coverage" following " health insurance" in Subsection B and Paragraph C(1).

40-4C-5. Order; proof of compliance; notice.

A. The obligor shall provide to the obligee within thirty days of receipt of effective notice of a court order for health insurance coverage or dental insurance coverage pursuant to the Mandatory Medical Support Act [Chapter 40, Article 4C NMSA 1978] written proof of the obligor's compliance with that order. Compliance means either that the health insurance coverage or dental insurance coverage has been obtained or that a correct and complete application for such coverage has been made.

B. The obligee shall forward a copy of the court order for health insurance coverage or dental insurance coverage issued pursuant to the Mandatory Medical Support Act [Chapter 40, Article 4C NMSA 1978] to the obligor's employer or union only when ordered to do so by the court or when:

(1) the obligor fails to provide written proof of compliance with the court order to the obligee within thirty days of the obligor's receipt of effective written notice of the court order;

(2) the obligee serves by mail at the obligor's last known post office address written notice on the obligor of the obligee's intent to enforce the order; and

(3) the obligor fails to provide within fifteen days after the date the obligee mailed the notice in Paragraph (2) of this subsection written proof to the obligee that the obligor has obtained the health insurance coverage or dental insurance coverage ordered by the court or has applied for such coverage.

C. Upon receipt of a court order for health insurance coverage or dental insurance coverage pursuant to the Mandatory Medical Support Act [Chapter 40, Article 4C NMSA 1978], the employer or union shall forward a copy of the order to the health insurer or dental insurer, as applicable.

History: Laws 1990, ch. 78, § 5.

40-4C-6. Obligations; employers, unions and insurers; plan.

A. Upon receipt of a national medical support notice or the court order for health insurance coverage or dental insurance coverage pursuant to Section 40-4C-5 NMSA 1978 or upon application of the obligor pursuant to the court order, the employer or union shall enroll the minor child as an eligible dependent in the health insurance plan or dental insurance plan and withhold any required premium from the obligor's income or wages. If more than one health insurance plan or dental insurance plan is offered by the employer, union or insurer, the minor child shall be enrolled in the plan in which the obligor is enrolled. If the obligor is not enrolled in a plan, the child shall be enrolled in a plan that meets the minimum coverage criteria required pursuant to the Mandatory Medical Support Act [40-4C-1 NMSA 1978]. If the obligor is not enrolled in a plan, the premiums charged for the child or children of the obligor shall be those charged for the enrollment of the obligor only.

B. In any instance in which the obligor is required by a court order to provide health insurance coverage or dental insurance coverage for the minor child and the obligor is eligible for health insurance coverage or dental insurance coverage through an employment-related or other group health care insurance plan, the employer, union or insurer shall do the following:

(1) permit the obligor to enroll for health insurance coverage or dental insurance coverage the minor child who is otherwise eligible for coverage without regard to any enrollment season restrictions;

(2) enroll the minor child for health insurance coverage or dental insurance coverage if the obligor fails to enroll the minor child upon application by the obligee or the department;

(3) not disenroll or eliminate coverage of any minor child so enrolled unless:

(a) the employer is provided with satisfactory written evidence that the court order is no longer in effect;

(b) the minor child is or will be enrolled in comparable health coverage that meets the coverage criteria required pursuant to the Mandatory Medical Support Act [40-4C-1 NMSA 1978] and that will take effect not later than the effective date of the disenrollment;

(c) the obligor has terminated employment; or

(d) the employer has eliminated health insurance coverage or dental insurance coverage for all of its employees; and

(4) withhold from the obligor's compensation the obligor's share, if any, of premiums for health insurance coverage or dental insurance coverage and to pay the share of premiums to the insurer, unless otherwise provided in law or regulation.

C. In those instances where the obligor fails or refuses to execute any document necessary to enroll the minor child in the health insurance plan or dental insurance plan ordered by the court, the required information and authorization may be provided by the department or the custodial parent or guardian of the minor child.

D. Information and authorization provided by the department or the custodial parent or guardian of the minor child shall be valid for the purpose of meeting enrollment requirements of the health insurance plan or dental insurance plan and shall not affect the obligation of the employer or union and the insurer to enroll the minor child in the health insurance plan or dental insurance plan for which other eligibility, enrollment, underwriting terms and other requirements are met. In instances in which the minor child is insured through the obligor, the insurer shall provide all information to the obligee that may be helpful or necessary for the minor child to obtain benefits.

E. A minor child that an obligor is required to cover as an eligible dependent pursuant to the Mandatory Medical Support Act [40-4C-1 NMSA 1978] shall be considered for insurance coverage purposes as a dependent of the obligor until the child is emancipated or until further order of the court.

F. In instances in which the minor child is insured through the obligor, the insurer is prohibited from denying health insurance coverage or dental insurance coverage of the minor child on the grounds that the minor child was born out of wedlock, that the minor child is not claimed as a dependent on the obligor's federal income tax return or that the minor child does not reside with the obligor or reside in the insurer's service area.

G. In instances in which the minor child is insured through the obligor, the insurer is prohibited from imposing requirements on the department that are different from requirements applicable to an agent or assignee of any other individual covered by the insurer.

H. In instances in which the minor child is insured through the obligor, the insurer shall permit the obligee or health care provider, with the approval of the obligee, to submit claims for covered services without the approval of the obligor. The insurer shall make payments on submitted claims directly to the obligee or the health care provider.

I. When the obligor is terminated, the employer shall notify the department of the termination.

History: Laws 1990, ch. 78, § 6; 1994, ch. 76, § 5; 2003, ch. 287, § 5.

ANNOTATIONS

The 1994 amendment, effective March 4, 1994, substituted "Section 40-4C-5 NMSA 1978" for "Section 5 of the Mandatory Medical Support Act" in Subsection A, added Subsection B, redesignated former Subsections B to D as Subsections C to E, inserted the sentence beginning "In instances" in Subsection D, and added Subsections F to H.

The 2003 amendment, effective April 8, 2003, in Subsection A, inserted "a national medical support notice or" near the beginning, substituted "the court" for "that" following "obligor pursuant to", substituted "union or insurer" for "or union" following "by the employer", substituted "If the obligor is not enrolled in a plan, the child shall be enrolled in a plan" for "or the least costly plan available to the obligor" following "obligor is enrolled", added the last sentence; substituted "employment-related or other group health care insurance plan" for "employer or union" following "coverage through an" in the first paragraph of Subsection B; deleted "that" at the beginning of Subparagraph B(3)(b); inserted "plan" following "the health insurance" in Subsection D; and inserted "health care" twice in Subsection H; and added Subsection I.

40-4C-7. Health insurance coverage required.

Any health insurance coverage plan ordered for a minor child pursuant to the Mandatory Medical Support Act [Chapter 40, Article 4C NMSA 1978] shall at a minimum, meet minimum standards of acceptable coverage, deductibles, coinsurance, lifetime benefits, out-of-pocket expenses, co-payments and plan requirements as set forth in regulations promulgated by the secretary of human services pursuant to the Mandatory Medical Support Act. To be an acceptable choice under the act, a health maintenance organization plan, in addition to meeting minimum standards, shall have a coverage area specified under the plan that includes the residential area of the minor child who is covered under the plan as an eligible dependent.

History: Laws 1990, ch. 78, § 7.

40-4C-8. Limitation on application.

No insurer, health maintenance organization or non-profit health care plan shall be required to change coverages offered as a result of the minimum standards

promulgated pursuant to the Mandatory Medical Support Act [Chapter 40, Article 4C NMSA 1978]. Nothing in the Mandatory Medical Support Act shall be construed as creating any regulatory authority over the business of insurance.

History: Laws 1990, ch. 78, § 8.

40-4C-9. Authorization for claims.

The signature of the custodial parent of the minor child insured pursuant to a court order or a directive issued by the department is a valid authorization to the health insurer or dental insurer for purposes of processing an insurance reimbursement payment.

History: Laws 1990, ch. 78, § 9; 2003, ch. 287, § 6.

ANNOTATIONS

The 2003 amendment, effective April 8, 2003, inserted "or a directive issued by the department" following "a court order".

40-4C-10. Employer, union or insurer notice.

When an order for health insurance coverage or dental insurance coverage pursuant to the Mandatory Medical Support Act [40-4C-1 NMSA 1978] is in effect, upon termination of the obligor's employment or upon termination of the insurance coverage, the employer, union or insurer shall make a good faith effort to notify the obligee within ten days of the termination date with notice of conversion privileges.

History: Laws 1990, ch. 78, § 10; 2003, ch. 287, § 7.

ANNOTATIONS

The 2003 amendment, effective April 8, 2003, substituted "union or insurer" for "or union" in the section heading and following "coverage, the employer".

40-4C-11. Release of information.

When an order for health insurance coverage or dental insurance coverage pursuant to the Mandatory Medical Support Act [40-4C-1 NMSA 1978] is in effect, the obligor's employer, union or insurer shall release to the obligee, upon request, information on such coverage, including the name of the insurer.

History: Laws 1990, ch. 78, § 11; 2003, ch. 287, § 8.

ANNOTATIONS

The 2003 amendment, effective April 8, 2003, substituted "union or insurer" for "or union" following "the obligor's employer".

40-4C-12. Obligor liability.

A. An obligor who fails to maintain the health insurance coverage or dental insurance coverage for the benefit of a minor child as ordered pursuant to the Mandatory Medical Support Act [40-4C-1 NMSA 1978] shall be liable to the obligee for any medical and dental expenses incurred from the date of the court order.

B. An obligor who receives payment from a third party for the costs of medical or dental services provided to a minor child and who fails to use the payment to reimburse the department is liable to the department to the extent of the department's payment for the services. The department is authorized to intercept the obligor's tax refund or use other means of enforcement available to the department to recoup amounts paid. Claims for current or past due child support take priority over any claims made pursuant to this subsection. Proof of failure to maintain health insurance coverage or dental insurance coverage as ordered constitutes a showing of increased need by the obligee and provides a basis for modification of the obligor's child support order.

C. An obligor is required to provide the department with the following information concerning health insurance coverage or dental insurance coverage:

(1) obligor's name and tax identification number;

(2) type of coverage (single or family);

(3) name, address and identifying number of health insurance coverage or dental insurance coverage;

(4) name and tax identification number of other individuals who are provided health insurance coverage or dental insurance coverage by the obligor;

(5) effective period of coverage; and

(6) name, address and the tax identification number of the employer.

History: Laws 1990, ch. 78, § 12; 1994, ch. 76, § 6; 2003, ch. 287, § 9.

ANNOTATIONS

The 1994 amendment, effective March 4, 1994, inserted the language beginning "An obligor" preceding "Proof of failure" in Subsection B, and added Subsection C.

The 2003 amendment, effective April 8, 2003, substituted "An" for "The" at the beginning of Subsection A; in Subsection B, inserted "or use other means of

enforcement available to the department" following "obligor's tax refund", inserted "coverage" following "or dental insurance"; and substituted "An" for "If the department is the obligee, the" at the beginning of Subsection C.

40-4C-13. Department; duties.

The department shall implement and enforce an order for health insurance coverage or dental insurance coverage when the minor child receives public assistance or medicaid or upon application of the obligee to the department and payment by the obligee of any fees required by the department.

History: Laws 1990, ch. 78, § 13; 1994, ch. 76, § 7; 2003, ch. 287, § 10.

ANNOTATIONS

The 1994 amendment, effective March 4, 1994, deleted "human services" following "required by the" at the end of the section.

The 2003 amendment, effective April 8, 2003, inserted "or medicaid" following "receives public assistance".

40-4C-14. Enforcement.

All remedies available for the collection and enforcement of child support apply to medical support ordered pursuant to the Mandatory Medical Support Act [Chapter 40, Article 4C NMSA 1978]. For the purpose of enforcement, the costs of individual or group health or hospitalization coverage or liabilities established pursuant to Section 11 [40-4C-11 NMSA 1978] of the Mandatory Medical Support Act are considered to be additional child support.

History: Laws 1990, ch. 78, § 14.

ARTICLE 5
Illegitimacy and Support

(Repealed by Laws 1985, ch. 105, § 21; Laws 1986, ch. 47, § 25.)

40-5-1 to 40-5-26. Repealed.

ANNOTATIONS

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 5A
Parental Responsibility

40-5A-1. Short title.

This act [40-5A-1 to 40-5A-13 NMSA 1978] may be cited as the "Parental Responsibility Act".

History: Laws 1995, ch. 25, § 1.

ANNOTATIONS

Cross references. — For the State Directory of New Hires Act, see Chapter 50, Article 13 NMSA 1978.

40-5A-2. Purpose.

The purpose of the Parental Responsibility Act [40-5A-1 to 40-5A-13 NMSA 1978] is to require:

A. parents to eliminate child support arrearages in order to be issued, maintain or renew a license; and

B. compliance with, after receiving appropriate notice, subpoenas or warrants relating to paternity or child support, which will subsequently reduce both the number of children in New Mexico who live at or below the poverty level and the financial obligation that falls to the state when parents do not provide for their minor children.

History: Laws 1995, ch. 25, § 2; 1997, ch. 237, § 25; 1998, ch. 53, § 1.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, designated the existing language as Subsections A and B, inserted "or recreational license, including but not limited to a hunting, fishing or trapping license, and a driver's" at the end of Subsection A, and added the language beginning "to require" and ending "child support," to the beginning of Subsection B, and made minor stylistic changes in the section.

The 1998 amendment, effective March 9, 1998, deleted "to require" in Subsections A and B, and substituted "be issued, maintain or renew a license" for "maintain a professional, occupational or recreational license, including but not limited to a hunting, fishing or trapping license, and a driver's license" in Subsection A.

40-5A-3. Definitions.

As used in the Parental Responsibility Act [40-5A-1 to 40-5A-13 NMSA 1978]:

A. "applicant" means an obligor who is applying for issuance of a license;

B. "board" means:

(1) the construction industries commission, the construction industries division and the electrical bureau, mechanical bureau and general construction bureau of the construction industries division of the regulation and licensing department;

(2) the manufactured housing committee and manufactured housing division of the regulation and licensing department;

(3) a board, commission or agency that administers a profession or occupation licensed pursuant to Chapter 61 NMSA 1978;

(4) any other state agency to which the Uniform Licensing Act [61-1-1 NMSA 1978] is applied by law;

(5) a licensing board or other authority that issues a license, certificate, registration or permit to engage in a profession or occupation regulated in New Mexico;

(6) the department of game and fish;

(7) the motor vehicle division of the taxation and revenue department; or

(8) the alcohol and gaming division of the regulation and licensing department;

C. "certified list" means a verified list that includes the names, social security numbers and last known addresses of obligors not in compliance;

D. "compliance" means that:

(1) an obligor is no more than thirty days in arrears in payment of amounts required to be paid pursuant to an outstanding judgment and order for support; and

(2) an obligor has, after receiving appropriate notice, complied with subpoenas or warrants relating to paternity or child support proceedings;

E. "department" means the human services department;

F. "judgment and order for support" means the judgment entered against an obligor by the district court or a tribal court in a case brought by the department pursuant to Title IV-D of the Social Security Act;

G. "license" means a liquor license or other license, certificate, registration or permit issued by a board that a person is required to have to engage in a profession or occupation in New Mexico; "license" includes a commercial driver's license, driver's license and recreational licenses, including hunting, fishing or trapping licenses;

H. "licensee" means an obligor to whom a license has been issued; and

I. "obligor" means the person who has been ordered to pay child or spousal support pursuant to a judgment and order for support.

History: Laws 1995, ch. 25, § 3; 1997, ch. 237, § 26; 1998, ch. 53, § 2.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added Paragraphs B(6) and B(7), designated Paragraph D(1) and inserted "no" near the beginning, added Paragraph D(2), added "driver's license and recreational licenses, including but not limited to hunting, fishing or trapping licenses" in Subsection G, and made minor stylistic changes.

The 1998 amendment, effective March 9, 1998, in Subsection B, deleted "or" in Paragraph B(6), added "or" in Paragraph B(7), and added Paragraph B(8); deleted "with a judgment and order for support" at the end of Subsection C; and in Subsection G inserted "liquor license or other" near the beginning, substituted "license" for "and", and deleted "but not limited to" after "including".

Social Security Act. — Title IV-D of the Federal Social Security Act, referred to in Subsection F, appears as 42 U.S.C. § 651 et seq.

40-5A-4. Application for license.

A person who submits an application for a license issued by a board is not eligible for issuance of the license if he is not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings. A board that denies or proposes to deny the application on the grounds that he is not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings shall advise the applicant in writing of the grounds for denial of his application and his right, if any, to a hearing. The applicant shall have a right to a hearing if, pursuant to applicable law governing hearings, the denial of the application on other grounds would have entitled the applicant to a hearing. The application shall be reinstated if, within thirty days of the date of the notice, the applicant provides the board with a certified statement from the department that he is in

compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings.

History: Laws 1995, ch. 25, § 4; 1997, ch. 237, § 27.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" at the end of the first and last sentences and in the middle of the second sentence, inserted "applicable" following "pursuant to" in the third sentence, and made minor stylistic changes.

40-5A-5. Renewal of license.

A licensee who seeks renewal of his license from a board is not eligible to have the license renewed if he is not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings. A board that denies or proposes to deny the renewal of a license on the grounds that the licensee is not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings shall advise the licensee in writing of the grounds for the denial or proposed denial and his right to a hearing. The licensee shall have a right to a hearing on the denial of the renewal of his license pursuant to the applicable law governing hearings. The application for renewal shall be reinstated if, within thirty days of the date of the notice, the licensee provides the board with a certified statement from the department that he is in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings.

History: Laws 1995, ch. 25, § 5; 1997, ch. 237, § 28.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" at the end of the first and last sentences and in the middle of the second sentence, in the third sentence inserted "the applicable" following "pursuant to", and deleted "for his profession or occupation" at the end of that sentence.

40-5A-6. Suspension or revocation of license.

The failure of a licensee to be in compliance with a judgment and order for support or subpoena or warrants relating to paternity or child support proceedings is grounds for suspension or revocation of a license. The proceeding shall be conducted by a board pursuant to the law governing suspension and revocation proceedings for the license.

History: Laws 1995, ch. 25, § 6; 1997, ch. 237, § 29.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" at the end of the first sentence, and substituted "the license" for "his profession or occupation" at the end of the last sentence, and made a minor stylistic change.

40-5A-7. Certified lists.

The department shall provide each board with a certified list of obligors not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings within ten calendar days after the first day of each month. By the end of the month in which the certified list is received, each board shall report to the department the names of applicants and licensees who are on the list and the action the board has taken in connection with such applicants and licensees.

History: Laws 1995, ch. 25, § 7; 1997, ch. 237, § 30.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" in the first sentence, deleted "of the board" following "licensees" in the last sentence, and made a minor stylistic change.

40-5A-8. Court orders.

As part of a judgment and order for support, a district court may require the obligor to surrender any license held by him or may refer the matter to the appropriate board for further action.

History: Laws 1995, ch. 25, § 8.

40-5A-9. Rules and regulations.

On or before November 1, 1995, boards shall promulgate and file, in accordance with the States Rules Act [Chapter 14, Article 4 NMSA 1978], rules and regulations to implement the provisions of the Parental Responsibility Act [40-5A-1 to 40-5A-13 NMSA 1978].

History: Laws 1995, ch. 25, § 9.

40-5A-10. Action by supreme court.

The supreme court shall adopt by order rules for the denial of applications or licensing and renewal of licenses and for the suspension or revocation of licenses of

lawyers and other persons licensed by the supreme court for the failure of an applicant or licensee to be in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings and may delegate the enforcement of the rules to a board under its supervision.

History: Laws 1995, ch. 25, § 10; 1997, ch. 237, § 31.

ANNOTATIONS

Cross references. — For rules governing admission to the New Mexico Bar, see 15-101 NMRA et seq.

For rules of professional conduct, see 16-101 NMRA et seq.

For rules governing the New Mexico Bar, see 24-101 NMRA et seq.

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" near the end of the section.

40-5A-11. Joint powers agreements.

A board may enter into a joint powers agreement with the regulation and licensing department to administer the provisions of the Parental Responsibility Act [40-5A-1 to 40-5A-13 NMSA 1978] for the board.

History: Laws 1995, ch. 25, § 11.

40-5A-12. Federal funds; board surcharges.

A. The department may enter into joint powers agreements with boards to assist in the implementation of the Parental Responsibility Act [40-5A-1 to 40-5A-13 NMSA 1978]. The agreements shall provide for payment to the boards of federal funds to cover the portion of costs allowable under federal law and regulation that are incurred by the boards in implementing those sections. The agreement shall also provide for payment by the boards to the department for the nonfederal share of costs incurred by the department in assisting the boards. The boards shall reimburse the department for the nonfederal share of costs incurred pursuant to the Parental Responsibility Act from money collected from licensees or applicants for licenses.

B. Notwithstanding any other provision of law, each board may levy a surcharge on any fee assessed for licensure or regulation of the profession or occupation to cover the costs of implementing and administering the provisions of the Parental Responsibility Act. The surcharge may be adopted after notice to the licensees and applicants, but shall not require the adoption or amendment of a regulation.

History: Laws 1995, ch. 25, § 12.

40-5A-13. Annual report.

The department shall report to the governor and the legislature by December 1 of each year on the progress of child support enforcement measures, including:

A. the number of delinquent obligors certified by the department;

B. the number of obligors who also were licensees or applicants subject to the provisions of the Parental Responsibility Act [40-5A-1 to 40-5A-13 NMSA 1978];

C. the number of licenses that were suspended or revoked by each board, the number of new licenses and renewals that were delayed or denied by each board and the number of licenses and renewals that were granted following an applicant's compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings; and

D. the costs incurred in the implementation and enforcement of the Parental Responsibility Act.

History: Laws 1995, ch. 25, § 13; 1997, ch. 237, § 32.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added "or subpoenas or warrants relating to paternity or child support proceedings" to the end of Subsection C.

ARTICLE 6
Reciprocal Enforcement of Support

(Repealed by Laws 1994, ch. 107, § 904.)

40-6-1 to 40-6-41. Repealed.

ANNOTATIONS

Repeals. — Laws 1994, ch. 107, § 904 repeals 40-6-1 to 40-6-41 NMSA 1978, as enacted by Laws 1969, ch. 242, §§ 1-41, and as amended by Laws 1977, ch. 252, § 25, relating to uniform reciprocal enforcement of support, effective July 1, 1995. For provisions of former sections, see 1994 Replacement Pamphlet. For present comparable provisions, see Chapter 40, Article 6A NMSA 1978.

ARTICLE 6A
Uniform Interstate Family Support

ARTICLE 1
GENERAL PROVISIONS

40-6A-101. Definitions.

As used in the Uniform Interstate Family Support Act [this article]:

(1) "child" means an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent;

(2) "child-support order" means a support order for a child, including a child who has attained the age of majority under the law of the issuing state;

(3) "duty of support" means an obligation imposed or imposable by law to provide support for a child, spouse or former spouse, including an unsatisfied obligation to provide support;

(4) "home state" means the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period;

(5) "income" includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under the law of this state;

(6) "income-withholding order" means an order or other legal process directed to an obligor's employer or other debtor to withhold support from the income of the obligor;

(7) "initiating state" means a state from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding state under the Uniform Interstate Family Support Act or a law or procedure substantially similar to that act, the Uniform Reciprocal Enforcement of Support Act or the Revised Uniform Reciprocal Enforcement of Support Act;

(8) "initiating tribunal" means the authorized tribunal in an initiating state;

(9) "issuing state" means the state in which a tribunal issues a support order or renders a judgment determining parentage;

(10) "issuing tribunal" means the tribunal that issues a support order or renders a judgment determining parentage;

(11) "law" includes decisional and statutory law and rules and regulations having the force of law;

(12) "obligee" means:

(i) an individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered;

(ii) a state or political subdivision to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee; or

(iii) an individual seeking a judgment determining parentage of the individual's child;

(13) "obligor" means an individual or the estate of a decedent:

(i) who owes or is alleged to owe a duty of support;

(ii) who is alleged but has not been adjudicated to be a parent of a child; or

(iii) who is liable under a support order;

(14) "register" means to record a support order or judgment determining parentage in the appropriate tribunal of this state;

(15) "registering tribunal" means a tribunal in which a support order is registered;

(16) "responding state" means a state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state under the Uniform Interstate Family Support Act or law or procedure substantially similar to that act, the Uniform Reciprocal Enforcement of Support Act or the Revised Uniform Reciprocal Enforcement of Support Act;

(17) "responding tribunal" means the authorized tribunal in a responding state;

(18) "spousal support order" means a support order for a spouse or former spouse of the obligor;

(19) "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. "State" includes an Indian tribe and a foreign jurisdiction that has enacted a law or established procedures for issuance and

enforcement of support orders which are substantially similar to the procedures under the Uniform Interstate Family Support Act, the Uniform Reciprocal Enforcement of Support Act or the Revised Uniform Reciprocal Enforcement of Support Act;

(20) "support enforcement agency" means a public official or agency authorized to seek:

(i) enforcement of support orders or laws relating to the duty of support;

(ii) establishment or modification of child support;

(iii) determination of parentage; or

(iv) to locate obligors or their assets;

(21) "support order" means a judgment, decree or order, whether temporary, final or subject to modification, for the benefit of a child, a spouse or a former spouse, which provides for monetary support, health care, arrearages or reimbursement, and may include related costs and fees, interest, income withholding, attorney's fees and other relief; and

(22) "tribunal" means a court, administrative agency or quasi-judicial entity authorized to establish, enforce or modify support orders or to determine parentage.

History: Laws 1994, ch. 107, § 101; 1997, ch. 9, § 1.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, in Paragraph (7), inserted "is forwarded or in which a proceeding is filed for forwarding to a responding state" and "or procedure" near the middle, and deleted "is filed for forwarding to a responding state" at the end; in Paragraph (16), inserted "is filed or to which a proceeding", "for filing from an initiating state" and "or procedure" ; and in Paragraph (19), deleted "the Commonwealth of" following "District of Columbia", inserted "the United States Virgin Islands", and "enacted a law or" and added "the Uniform Reciprocal Enforcement of Support Act or the Revised Uniform Reciprocal Enforcement of Support Act" at the end; and made minor stylistic changes.

Compiler's notes. — The Revised Uniform Reciprocal Enforcement of Support Act, referred to in Paragraphs (7), (16), and (19), was compiled as 40-6-1 to 40-6-41 NMSA 1978, and was repealed by Laws 1994, ch. 107, § 904.

"Duty of support". — The duty to support a spouse by way of alimony is a duty of support for purposes of the Reciprocal Enforcement Act. State ex rel. Benzing v. Benzing, 104 N.M. 129, 717 P.2d 105 (Ct. App. 1986) (decided under prior law).

Law reviews. — For article, "Child Support Enforcement: The New Mexico Experience," see 9 N.M.L. Rev. 25 (1978-79).

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

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.

Construction and application of Uniform Interstate Family Support Act, 90 A.L.R.5th 1.

41 C.J.S. Husband and Wife § 244; 67A C.J.S. Parent and Child §§ 165 to 177.

40-6A-102. Tribunal of state.

The district courts are the tribunals of this state.

History: Laws 1994, ch. 107, § 102; 1997, ch. 9, § 2.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "Tribunal of state" for "Tribunals of this state" in the section heading.

40-6A-103. Remedies cumulative.

Remedies provided by the Uniform Interstate Family Support Act [this article] are cumulative and do not affect the availability of remedies under other law.

History: Laws 1994, ch. 107, § 103.

ARTICLE 2
JURISDICTION

PART A
EXTENDED PERSONAL JURISDICTION

40-6A-201. Bases for jurisdiction over nonresident.

In a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(1) the individual is personally served with notice within this state;

(2) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(3) the individual resided with the child in this state;

(4) the individual resided in this state and provided prenatal expenses or support for the child;

(5) the child resides in this state as a result of the acts or directives of the individual;

(6) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;

(7) the individual asserted parentage in the putative father registry maintained in this state by the department of health; or

(8) there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

History: Laws 1994, ch. 107, § 201.

ANNOTATIONS

No denial of due process or equal protection under former 40-6-1 NMSA 1978 et seq. — Defendant's claim of deprivation of due process in that he did not have an opportunity to examine plaintiff, where no explanation was made as to why plaintiff's deposition was not taken, there was no attempt to obtain further information from her by way of discovery under the provisions of this law, and no continuance was requested, was denied as the Reciprocal Act does not violate the fourteenth amendment as claimed by the defendant, and there was no denial of due process or equal protection of the law. State ex rel. Terry v. Terry, 80 N.M. 185, 453 P.2d 206 (1969) (decided under prior law).

Requirements of due process complied with. — That there is no deprivation of due process is clear. When the court of this state receives the papers from the initiating state the defendant is given notice, an opportunity to be heard, by deposition to examine and cross-examine the plaintiff and any witness that may have testified in the initiating state, to examine and cross-examine any witnesses that may testify in this

state, to meet opposing evidence, and to oppose with evidence. Thus the requirements of due process are complied with. State ex rel. Terry v. Terry, 80 N.M. 185, 453 P.2d 206 (1969).

Extradition provisions apply to reciprocal support provisions. — The real effect of former 40-6-5 NMSA was to make 31-4-6 NMSA 1978 specifically applicable to extradition for the crime of nonsupport. Under this section, in considering a requested extradition, the governor of this state need not look to see whether the demanding state has a specific statute making it a crime to fail to support a wife or child when the "failure" by the accused occurs when he is beyond the borders of the demanding state. 1953-54 Op. Att'y Gen. No. 5713 (rendered under former law).

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) (decided under former law).

All that was needed for proper jurisdiction in proceeding under former act was the presence of the husband or father in the responding state, the presence of the child or the wife in another state, and the existence of a duty of support on the part of the father under the laws of the responding state. Natewa v. Natewa, 84 N.M. 69, 499 P.2d 691 (1972) (decided under prior law).

Enforcement of provisions does not interfere with Indian government or federal grant. — The enforcement of the New Mexico Revised Uniform Reciprocal Enforcement of Support Act does not interfere with the internal self-government of the Zuni tribe or contravene an express federal grant or reservation by placing jurisdiction of actions to enforce support obligations in the district courts of New Mexico rather than tribal courts, as the support obligation here arises from the marital relationship between appellant and appellee. Natewa v. Natewa, 84 N.M. 69, 499 P.2d 691 (1972) (decided under prior law).

40-6A-202. Procedure when exercising jurisdiction over nonresident.

A tribunal of this state exercising personal jurisdiction over a nonresident under Section 201 [40-6A-201 NMSA 1978] of the Uniform Interstate Family Support Act may apply Section 316 [40-6A-316 NMSA 1978] of that act to receive evidence from another state, and Section 318 [40-6A-318 NMSA 1978] of that act to obtain discovery through a tribunal of another state. In all other respects, Articles 3 through 7 [40-6A-301 to 40-6A-701 NMSA 1978] of the Uniform Interstate Family Support Act do not apply and the tribunal shall apply the procedural and substantive law of this state, including the rules on choice of law other than those established by the Uniform Interstate Family Support Act [this article].

History: Laws 1994, ch. 107, § 202.

ANNOTATIONS

Compiler's notes. — Articles 3 through 7 of the Uniform Interstate Family Support Act are found as Parts 3 through 7 of Chapter 40, Article 6A NMSA 1978.

PART B
PROCEEDINGS INVOLVING TWO OR MORE STATES

40-6A-203. Initiating and responding tribunal of state.

Under the Uniform Interstate Family Support Act [this article], a tribunal of this state may serve as an initiating tribunal to forward proceedings to another state and as a responding tribunal for proceedings initiated in another state.

History: Laws 1994, ch. 107, § 203; 1997, ch. 9, § 3.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, deleted "this" following "of" from the section heading.

40-6A-204. Simultaneous proceedings in another state.

(a) A tribunal of this state may exercise jurisdiction to establish a support order if the petition or comparable pleading is filed after a petition or comparable pleading is filed in another state only if:

(1) the petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;

(2) the contesting party timely challenges the exercise of jurisdiction in the other state; and

(3) if relevant, this state is the home state of the child.

(b) A tribunal of this state may not exercise jurisdiction to establish a support order if the petition or comparable pleading is filed before a petition or comparable pleading is filed in another state if:

(1) the petition or comparable pleading in the other state is filed before the expiration of the time allowed in this state for filing a responsive pleading challenging the exercise of jurisdiction by this state;

(2) the contesting party timely challenges the exercise of jurisdiction in this state; and

(3) if relevant, the other state is the home state of the child.

History: Laws 1994, ch. 107, § 204.

40-6A-205. Continuing, exclusive jurisdiction.

(a) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a child-support order:

(1) as long as this state remains the residence of the obligor, the individual obligee or the child for whose benefit the support order is issued; or

(2) until all of the parties who are individuals have filed written consents with the tribunal of this state for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

(b) A tribunal of this state issuing a child-support order consistent with the law of this state may not exercise its continuing jurisdiction to modify the order if the order has been modified by a tribunal of another state pursuant to a law substantially similar to the Uniform Interstate Family Support Act [this article].

(c) If a child-support order of this state is modified by a tribunal of another state pursuant to a law substantially similar to the Uniform Interstate Family Support Act, a tribunal of this state loses its continuing, exclusive jurisdiction with regard to prospective enforcement of the order issued in this state and may only:

(1) enforce the order that was modified as to amounts accruing before the modification;

(2) enforce nonmodifiable aspects of that order; and

(3) provide other appropriate relief for violations of that order which occurred before the effective date of the modification.

(d) A tribunal of this state shall recognize the continuing, exclusive jurisdiction of a tribunal of another state which has issued a child-support order pursuant to a law substantially similar to the Uniform Interstate Family Support Act.

(e) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

(f) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A tribunal of this state may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state.

History: Laws 1994, ch. 107, § 205; 1997, ch. 9, § 4.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "all of the parties who are individuals have" for "each individual party has" and "consents" for "consent" near the beginning of Subsection (a)(2).

Law of state where respondent present applicable. — Under former 40-6-4 NMSA 1978 and 40-6-7 NMSA 1978, the duty of support imposed by the laws of this state or the laws of the state where respondent was present for any period during which support is sought are binding upon the respondent regardless of the presence or residence or the petitioner-obligee. State ex rel. Alleman v. Shoats, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984) (decided under former law).

No absolute right of obligee to choose applicable law. — The choice of law provision in the former reciprocal enforcement act was intended to prevent the obligee from having the absolute right to choose the applicable law as her interest might dictate. Altman v. Altman, 101 N.M. 380, 683 P.2d 62 (Ct. App. 1984) (decided under former law).

40-6A-206. Enforcement and modification of support order by tribunal having continuing jurisdiction.

(a) A tribunal of this state may serve as an initiating tribunal to request a tribunal of another state to enforce or modify a support order issued in that state.

(b) A tribunal of this state having continuing, exclusive jurisdiction over a support order may act as a responding tribunal to enforce or modify the order. If a party subject to the continuing, exclusive jurisdiction of the tribunal no longer resides in the issuing state, in subsequent proceedings the tribunal may apply Section 316 [40-6A-316 NMSA 1978] of the Uniform Interstate Family Support Act to receive evidence from another state and Section 318 [40-6A-318 NMSA 1978] of that act to obtain discovery through a tribunal of another state.

(c) A tribunal of this state which lacks continuing, exclusive jurisdiction over a spousal support order may not serve as a responding tribunal to modify a spousal support order of another state.

History: Laws 1994, ch. 107, § 206.

PART C
RECONCILIATION WITH ORDERS OF OTHER STATES

40-6A-207. Recognition of controlling child-support order.

(a) If a proceeding is brought under the Uniform Interstate Family Support Act [this article] and only one tribunal has issued a child-support order, the order of that tribunal controls and must be so recognized.

(b) If a proceeding is brought under the Uniform Interstate Family Support Act and two or more child-support orders have been issued by tribunals of this state or another state with regard to the same obligor and child, a tribunal of this state shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction:

(1) if only one of the tribunals would have continuing, exclusive jurisdiction under the Uniform Interstate Family Support Act, the order of that tribunal controls and shall be so recognized;

(2) if more than one of the tribunals would have continuing, exclusive jurisdiction under the Uniform Interstate Family Support Act, an order issued by a tribunal in the current home state of the child controls and must be so recognized, but if an order has not been issued in the current home state of the child, the order most recently issued controls and must be so recognized; and

(3) if none of the tribunals would have continuing, exclusive jurisdiction under the Uniform Interstate Family Support Act, the tribunal of this state having jurisdiction over the parties shall issue a child-support order, which controls and must be so recognized.

(c) If two or more child-support orders have been issued for the same obligor and child and if the obligor or the individual obligee resides in this state, a party may request a tribunal of this state to determine which order controls and must be so recognized under Subsection (b) of this section. The request must be accompanied by a certified copy of every support order in effect. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.

(d) The tribunal that issued the controlling order under Subsection (a), (b) or (c) of this section is the tribunal that has continuing, exclusive jurisdiction under Section 40-6A-205 NMSA 1978.

(e) A tribunal of this state that determines by order the identity of the controlling order under Paragraph (1) or (2) of Subsection (b) of this section or which issues a new controlling order under Paragraph (3) of Subsection (b) of this section shall state in that order the basis upon which the tribunal made its determination.

(f) Within thirty days after issuance of an order determining the identity of the controlling order, the party obtaining the order shall file a certified copy of it with each tribunal that issued or registered an earlier order of child support. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order.

History: Laws 1994, ch. 107, § 207; 1997, ch. 9, § 5.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "controlling child-support order" for "child support orders" in the section heading and rewrote this section to the extent that a detailed comparison is impracticable.

Laws of New Mexico have long required father to support children and such a duty is emphasized under the provisions of the Reciprocal Enforcement Act. State ex rel. Terry v. Terry, 80 N.M. 185, 453 P.2d 206 (1969) (decided under prior law).

Law of state where respondent present applicable. — Under former 40-6-4 and 40-6-7 NMSA 1978, the duty of support imposed by the laws of this state or the laws of the state where respondent was present for any period during which support is sought were binding upon the respondent regardless of the presence or residence of the petitioner-obligee. State ex rel. Alleman v. Shoats, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984) (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and effect of provision of Uniform Reciprocal Enforcement of Support Act that no support order shall supersede or nullify any other order, 31 A.L.R.4th 347.

Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

40-6A-208. Multiple child support orders for two or more obligees.

In responding to multiple registrations or petitions for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which was issued by a tribunal of another state, a tribunal of this state shall enforce those orders in the same manner as if the multiple orders had been issued by a tribunal of this state.

History: Laws 1994, ch. 107, § 208.

40-6A-209. Credit for payments.

Amounts collected and credited for a particular period pursuant to a support order issued by a tribunal of another state must be credited against the amounts accruing or accrued for the same period under a support order issued by the tribunal of this state.

History: Laws 1994, ch. 107, § 209.

ARTICLE 3
CIVIL PROVISIONS OF GENERAL APPLICATION

40-6A-301. Proceedings under the Uniform Interstate Family Support Act.

(a) Except as otherwise provided in the Uniform Interstate Family Support Act [this article], this article [40-6A-301 to 40-6A-319 NMSA 1978] applies to all proceedings under that act.

(b) The Uniform Interstate Family Support Act provides for the following proceedings:

(1) establishment of an order for spousal support or child support pursuant to Article 4 [40-6A-401 NMSA 1978] of that act;

(2) enforcement of a support order and income-withholding order of another state without registration pursuant to Article 5 [40-6A-501 to 40-6A-502 NMSA 1978] of that act;

(3) registration of an order for spousal support or child support of another state for enforcement pursuant to Article 6 [40-6A-601 to 40-6A-612 NMSA 1978] of that act;

(4) modification of an order for child support or spousal support issued by a tribunal of this state pursuant to Article 2, Part B [40-6A-203 to 40-6A-206 NMSA 1978] of that act;

(5) registration of an order for child support of another state for modification pursuant to Article 6 of that act;

(6) determination of parentage pursuant to Article 7 [40-6A-701 NMSA 1978] of that act; and

(7) assertion of jurisdiction over nonresidents pursuant to Article 2, Part A [40-6A-201 to 40-6A-202 NMSA 1978] of that act.

(c) An individual petitioner or a support enforcement agency may commence a proceeding authorized under the Uniform Interstate Family Support Act by filing a

petition in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state which has or can obtain personal jurisdiction over the respondent.

History: Laws 1994, ch. 107, § 301.

40-6A-302. Action by minor parent.

A minor parent, or a guardian or other legal representative of a minor parent, may maintain a proceeding on behalf of or for the benefit of the minor's child.

History: Laws 1994, ch. 107, § 302.

ANNOTATIONS

Cross references. — For age of majority, see 28-3-1 NMSA 1978.

40-6A-303. Application of law of state.

Except as otherwise provided by the Uniform Interstate Family Support Act [this article], a responding tribunal of this state:

(1) shall apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings; and

(2) shall determine the duty of support and the amount payable in accordance with the law and support guidelines of this state.

History: Laws 1994, ch. 107, § 303; 1997, ch. 9, § 6.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, deleted "this" preceding "state" in the section heading.

40-6A-304. Duties of initiating tribunal.

(a) Upon the filing of a petition authorized by the Uniform Interstate Family Support Act [this article], an initiating tribunal of this state shall forward three copies of the petition and its accompanying documents:

(1) to the responding tribunal or appropriate support enforcement agency in the responding state; or

(2) if the identity of the responding tribunal is unknown, to the state information agency of the responding state with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) If a responding state has not enacted the Uniform Interstate Family Support Act or a law or procedure substantially similar to that act, a tribunal of this state may issue a certificate or other document and make findings required by the law of the responding state. If the responding state is a foreign jurisdiction, the tribunal may specify the amount of support sought and provide other documents necessary to satisfy the requirements of the responding state.

History: Laws 1994, ch. 107, § 304; 1997, ch. 9, § 7.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, designated the existing language as Subsection (a) and added Subsection (b).

40-6A-305. Duties and powers of responding tribunal.

(a) When a responding tribunal of this state receives a petition or comparable pleading from an initiating tribunal or directly pursuant to Subsection (c) of Section 40-6A-301 NMSA 1978, it shall cause the petition or pleading to be filed and notify the petitioner where and when it was filed.

(b) A responding tribunal of this state, to the extent otherwise authorized by law, may do one or more of the following:

(1) issue or enforce a support order, modify a child-support order or render a judgment to determine parentage;

(2) order an obligor to comply with a support order, specifying the amount and the manner of compliance;

(3) order income withholding;

(4) determine the amount of any arrearage and specify a method of payment;

(5) enforce orders by civil or criminal contempt, or both;

(6) set aside property for satisfaction of the support order;

(7) place liens and order execution on the obligor's property;

(8) order an obligor to keep the tribunal informed of the obligor's current residential address, telephone number, employer, address of employment and telephone number at the place of employment;

(9) issue a bench warrant for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the bench warrant in any local and state computer systems for criminal warrants;

(10) order the obligor to seek appropriate employment by specified methods;

(11) award reasonable attorney's fees and other fees and costs; and

(12) grant any other available remedy.

(c) A responding tribunal of this state shall include in a support order issued under the Uniform Interstate Family Support Act [this article], or in the documents accompanying the order, the calculations on which the support order is based.

(d) A responding tribunal of this state may not condition the payment of a support order issued under the Uniform Interstate Family Support Act upon compliance by a party with provisions for visitation.

(e) If a responding tribunal of this state issues an order under the Uniform Interstate Family Support Act, the tribunal shall send a copy of the order to the petitioner and the respondent and to the initiating tribunal, if any.

History: Laws 1994, ch. 107, § 305; 1997, ch. 9, § 8.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, in Subsection (a), substituted "Subsection (c) of Section 40-6A-301 NMSA 1978" for "Section 301(c) of the Uniform Interstate Family Support Act" and deleted "by first class mail" following "the petitioner"; and in Subsection (e) deleted "by first class mail" preceding "the petitioner".

Duty of support need not have been adjudicated. — Reciprocal Enforcement of Support Act authorized both finding and enforcement of a duty of child support by responding state, even if a duty of support had 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) (decided under prior law).

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) (decided under prior law).

Provisions for receipt of evidence of out-of-state obligor's defenses. — Where the obligor of an out-of-state child support obligation has provided evidence that constitutes a strong and convincing defense to the payment of support, the district court may order that the case be continued to allow the obligee the opportunity to provide further evidence, either by appearing in person or by providing deposition testimony. Furthermore, the district court may order that if the obligee chooses to provide evidence by a deposition, then the petitioner must pay the costs of the obligor's attorney to travel to an out-of-state deposition. It would be unjust and inequitable to limit interrogation to written questions under these circumstances. State ex rel. California v. Ramirez, 99 N.M. 92, 654 P.2d 545 (1982) (decided under prior law).

Jurisdictional requisites in responding state. — In a support proceeding initiated in another state and filed in district court in New Mexico as the responding state, all that is needed for proper jurisdiction is the presence of the person owing support in New Mexico, the presence of the child or person owed support in another state, and the existence of a duty of support under the laws of the responding state. State ex rel. Alleman v. Shoats, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984) (decided under prior law).

Responding state may make independent finding as to necessary support. — The responding state has the authority to make an independent finding on the amount of support necessary for the maintenance of a minor child, regardless of the amount which may have been set by another court, and has discretionary equitable power to make an order of child support retroactive to the date a complaint is received and filed with the responding state. State ex rel. Alleman v. Shoats, 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984) (decided under prior law).

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) (decided under prior law).

40-6A-306. Inappropriate tribunal.

If a petition or comparable pleading is received by an inappropriate tribunal of this state, it shall forward the pleading and accompanying documents to an appropriate tribunal in this state or another state and notify the petitioner where and when the pleading was sent.

History: Laws 1994, ch. 107, § 306; 1997, ch. 9, § 9.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, deleted "by first class mail" following "the petitioner".

40-6A-307. Duties of support enforcement agency.

(a) A support enforcement agency of this state, upon request, shall provide services to a petitioner in a proceeding under the Uniform Interstate Family Support Act [this article].

(b) A support enforcement agency that is providing services to the petitioner as appropriate shall:

(1) take all steps necessary to enable an appropriate tribunal in this state or another state to obtain jurisdiction over the respondent;

(2) request an appropriate tribunal to set a date, time and place for a hearing;

(3) make a reasonable effort to obtain all relevant information, including information as to income and property of the parties;

(4) within two days, exclusive of Saturdays, Sundays and legal holidays, after receipt of a written notice from an initiating, responding or registering tribunal, send a copy of the notice to the petitioner;

(5) within two days, exclusive of Saturdays, Sundays and legal holidays, after receipt of a written communication from the respondent or the respondent's attorney, send a copy of the communication to the petitioner; and

(6) notify the petitioner if jurisdiction over the respondent cannot be obtained.

(c) The Uniform Interstate Family Support Act does not create or negate a relationship of attorney and client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency.

History: Laws 1994, ch. 107, § 307; 1997, ch. 9, § 10.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, deleted "by first class mail" following "copy of the notice" in Paragraph (b)(4), and deleted "by first class mail" following "a copy of the communication" in Paragraph (b)(5).

Cross references. — For the human services department, see 9-8-1 to 9-8-14 NMSA 1978.

40-6A-308. Duty of attorney general.

If the attorney general determines that the support enforcement agency is neglecting or refusing to provide services to an individual, the attorney general may order the agency to perform its duties under the Uniform Interstate Family Support Act [this article] or may provide those services directly to the individual.

History: Laws 1994, ch. 107, § 308.

40-6A-309. Private counsel.

An individual may employ private counsel to represent the individual in proceedings authorized by the Uniform Interstate Family Support Act [this article].

History: Laws 1994, ch. 107, § 309.

40-6A-310. Duties of state information agency.

(a) The human services department is the state information agency under the Uniform Interstate Family Support Act [this article].

(b) The state information agency shall:

(1) compile and maintain a current list, including addresses, of the tribunals in this state which have jurisdiction under the Uniform Interstate Family Support Act and any support enforcement agencies in this state and transmit a copy to the state information agency of every other state;

(2) maintain a register of tribunals and support enforcement agencies received from other states;

(3) forward to the appropriate tribunal in the place in this state in which the individual obligee or the obligor resides, or in which the obligor's property is believed to be located, all documents concerning a proceeding under the Uniform Interstate Family Support Act received from an initiating tribunal or the state information agency of the initiating state; and

(4) obtain information concerning the location of the obligor and the obligor's property within this state not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers, and examination of governmental records, including, to the extent not prohibited by other law, those relating to real

property, vital statistics, law enforcement, taxation, motor vehicles, driver's licenses, and social security.

History: Laws 1994, ch. 107, § 310.

40-6A-311. Pleadings and accompanying documents.

(a) A petitioner seeking to establish or modify a support order or to determine parentage in a proceeding under the Uniform Interstate Family Support Act [this article] must verify the petition. Unless otherwise ordered under Section 312 [40-6A-312 NMSA 1978] of the Uniform Interstate Family Support Act, the petition or accompanying documents must provide, so far as known, the name, residential address, and social security numbers of the obligor and the obligee, and the name, sex, residential address, social security number, and date of birth of each child for whom support is sought. The petition must be accompanied by a certified copy of any support order in effect. The petition may include any other information that may assist in locating or identifying the respondent.

(b) The petition must specify the relief sought. The petition and accompanying documents must conform substantially with the requirements imposed by the forms mandated by federal law for use in cases filed by a support enforcement agency.

History: Laws 1994, ch. 107, § 311.

40-6A-312. Nondisclosure of information in exceptional circumstances.

Upon a finding, which may be made ex parte, that the health, safety, or liberty of a party or child would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal shall order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a proceeding under the Uniform Interstate Family Support Act [this article].

History: Laws 1994, ch. 107, § 312.

40-6A-313. Costs and fees.

(a) The petitioner may not be required to pay a filing fee or other costs.

(b) If an obligee prevails, a responding tribunal may assess against an obligor filing fees, reasonable attorney's fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state, except as provided by other law.

Attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs and expenses.

(c) The tribunal shall order the payment of costs and reasonable attorney's fees if it determines that a hearing was requested primarily for delay. In a proceeding under Article 6 [40-6A-601 to 40-6A-612 NMSA 1978] of the Uniform Interstate Family Support Act, a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change.

History: Laws 1994, ch. 107, § 313.

40-6A-314. Limited immunity of petitioner.

(a) Participation by a petitioner in a proceeding before a responding tribunal, whether in person, by private attorney, or through services provided by the support enforcement agency, does not confer personal jurisdiction over the petitioner in another proceeding.

(b) A petitioner is not amenable to service of civil process while physically present in this state to participate in a proceeding under the Uniform Interstate Family Support Act [this article].

(c) The immunity granted by this section does not extend to civil litigation based on acts unrelated to a proceeding under the Uniform Interstate Family Support Act committed by a party while present in this state to participate in the proceeding.

History: Laws 1994, ch. 107, § 314.

40-6A-315. Nonparentage as defense.

A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under the Uniform Interstate Family Support Act [this article].

History: Laws 1994, ch. 107, § 315.

40-6A-316. Special rules of evidence and procedure.

(a) The physical presence of the petitioner in a responding tribunal of this state is not required for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage.

(b) A verified petition, affidavit, document substantially complying with federally mandated forms, and a document incorporated by reference in any of them,

not excluded under the hearsay rule if given in person, is admissible in evidence if given under oath by a party or witness residing in another state.

(c) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it, and is admissible to show whether payments were made.

(d) Copies of bills for testing for parentage, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least ten days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary.

(e) Documentary evidence transmitted from another state to a tribunal of this state by telephone, telecopier, or other means that do not provide an original writing may not be excluded from evidence on an objection based on the means of transmission.

(f) In a proceeding under the Uniform Interstate Family Support Act [this article], a tribunal of this state may permit a party or witness residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. A tribunal of this state shall cooperate with tribunals of other states in designating an appropriate location for the deposition or testimony.

(g) If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

(h) A privilege against disclosure of communications between spouses does not apply in a proceeding under the Uniform Interstate Family Support Act.

(i) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under the Uniform Interstate Family Support Act.

History: Laws 1994, ch. 107, § 316.

40-6A-317. Communications between tribunals.

A tribunal of this state may communicate with a tribunal of another state in writing, or by telephone or other means, to obtain information concerning the laws of that state, the legal effect of a judgment, decree, or order of that tribunal, and the status of a proceeding in the other state. A tribunal of this state may furnish similar information by similar means to a tribunal of another state.

History: Laws 1994, ch. 107, § 317.

40-6A-318. Assistance with discovery.

A tribunal of this state may:

(1) request a tribunal of another state to assist in obtaining discovery; and

(2) upon request, compel a person over whom it has jurisdiction to respond to a discovery order issued by a tribunal of another state.

History: Laws 1994, ch. 107, § 318.

40-6A-319. Receipt and disbursement of payments.

A support enforcement agency or tribunal of this state shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The agency or tribunal shall furnish to a requesting party or tribunal of another state a certified statement by the custodian of the record of the amounts and dates of all payments received.

History: Laws 1994, ch. 107, § 319.

ARTICLE 4
ESTABLISHMENT OF SUPPORT ORDER

40-6A-401. Petition to establish support order.

(a) If a support order entitled to recognition under the Uniform Interstate Family Support Act [this article] has not been issued, a responding tribunal of this state may issue a support order if:

(1) the individual seeking the order resides in another state; or

(2) the support enforcement agency seeking the order is located in another state.

(b) The tribunal may issue a temporary child support order if:

(1) the respondent has signed a verified statement acknowledging parentage;

(2) the respondent has been determined by or pursuant to law to be the parent; or

(3) there is other clear and convincing evidence that the respondent is the child's parent.

(c) Upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to Section 305 [40-6A-305 NMSA 1978] of the Uniform Interstate Family Support Act.

History: Laws 1994, ch. 107, § 401.

ARTICLE 5
DIRECT ENFORCEMENT OF ORDER OF ANOTHER STATE WITHOUT REGISTRATION

40-6A-501. Employer's receipt of income-withholding order of another state.

An income-withholding order issued in another state may be sent to the obligor's employer without first filing a petition or comparable pleading or registering the order with a tribunal of this state.

History: Laws 1994, ch. 107, § 501; 1997, ch. 9, § 11.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "Employer's receipt of" for "Recognition of" at the beginning of the section heading and rewrote this section to the extent that a detailed comparison is impracticable.

40-6A-502. Employer's compliance with income-witholding [income-withholding] order of another state.

(a) Upon receipt of an income-witholding [income-withholding] order, the obligor's employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-witholding [income-withholding] order issued in another state that appears regular on its face as if it had been issued by a tribunal of this state.

(c) Except as otherwise provided in Subsection (d) of this section and Section 40-6A-503 NMSA 1978 the employer shall withhold and distribute the funds as directed in the withholding order by complying with terms of the order that specify:

(1) the duration and amount of periodic payments of current child support, stated as a sum certain;

(2) the person or agency designated to receive payments and the address to which the payments are to be forwarded;

(3) medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;

(4) the amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal and the obligee's attorney, stated as sums certain; and

(5) the amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

(d) An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:

(1) the employer's fee for processing an income-withholding order;

(2) the maximum amount permitted to be withheld from the obligor's income; and

(3) the times within which the employer must implement the withholding order and forward the child-support payment.

History: 1978 Comp., § 40-6A-502, enacted by Laws 1997, ch. 9, § 12.

ANNOTATIONS

Repeals and reenactments. — Laws 1997, ch. 9, § 12, repeals 40-6A-502 NMSA 1978, as enacted by Laws 1994, ch. 107, § 502, and enacts the above section, effective July 1, 1997. For provisions of former section, see 1994 Replacement Pamphlet.

Bracketed material. — The bracketed material was not enacted by the legislature and it is not part of the law.

40-6A-503. Compliance with multiple income-withholding orders.

If an obligor's employer receives multiple income-withholding orders with respect to the earnings of the same obligor, the employer satisfies the terms of the multiple orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating income withheld for multiple child-support obligees.

History: 1978 Comp., § 40-6A-503, enacted by Laws 1997, ch. 9, § 13.

40-6A-504. Immunity from civil liability.

An employer who complies with an income-withholding order issued in another state in accordance with this article is not subject to civil liability to an individual or agency with regard to the employer's withholding of child support from the obligor's income.

History: 1978 Comp., § 40-6A-504, enacted by Laws 1997, ch. 9, § 14.

40-6A-505. Penalties for noncompliance.

An employer who willfully fails to comply with an income-withholding order issued by another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this state.

History: 1978 Comp., § 40-6A-505, enacted by Laws 1997, ch. 9, § 15.

40-6A-506. Contest by obligor.

(a) An obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in this state in the same manner as if the order had been issued by a tribunal of this state. Section 40-6A-604 NMSA 1978 applies to the contest.

(b) The obligor shall give notice of the contest to:

(1) a support enforcement agency providing services to the obligee;

(2) each employer that has directly received an income-withholding order; and

(3) the person or agency designated to receive payments in the income-withholding order or, if no person or agency is designated, to the obligee.

History: 1978 Comp., § 40-6A-506, enacted by Laws 1997, ch. 9, § 16.

40-6A-507. Administrative enforcement of orders.

(a) A party seeking to enforce a support order or an income-withholding order, or both, issued by a tribunal of another state may send the documents required for registering the order to a support enforcement agency of this state.

(b) Upon receipt of the documents, the support enforcement agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of this state to enforce a support order

or an income-withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency shall register the order pursuant to the Uniform Interstate Family Support Act [this article].

History: 1978 Comp., § 40-6A-507, enacted by Laws 1997, ch. 9, § 17.

ARTICLE 6
ENFORCEMENT AND MODIFICATION OF SUPPORT ORDER AFTER REGISTRATION

PART A
REGISTRATION AND ENFORCEMENT OF SUPPORT ORDER

40-6A-601. Registration of order for enforcement.

A support order or an income-withholding order issued by a tribunal of another state may be registered in this state for enforcement.

History: Laws 1994, ch. 107, § 601.

40-6A-602. Procedure to register order for enforcement.

(a) A support order or income-withholding order of another state may be registered in this state by sending the following documents and information to the appropriate tribunal in this state:

(1) a letter of transmittal to the tribunal requesting registration and enforcement;

(2) two copies, including one certified copy, of all orders to be registered, including any modification of an order;

(3) a sworn statement by the party seeking registration or a certified statement by the custodian of the records showing the amount of any arrearage;

(4) the name of the obligor and, if known:

(i) the obligor's address and social security number;

(ii) the name and address of the obligor's employer and any other source of income of the obligor; and

(iii) a description and the location of property of the obligor in this state not exempt from execution; and

(5) the name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted.

(b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as a foreign judgment, together with one copy of the documents and information, regardless of their form.

(c) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this state may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought.

History: Laws 1994, ch. 107, § 602.

40-6A-603. Effect of registration for enforcement.

(a) A support order or income-withholding order issued in another state is registered when the order is filed in the registering tribunal of this state.

(b) A registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state.

(c) Except as otherwise provided in this article [40-6A-601 to 40-6A-612 NMSA 1978], a tribunal of this state shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

History: Laws 1994, ch. 107, § 603.

40-6A-604. Choice of law.

(a) The law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrearage under the order.

(b) In a proceeding for arrearage, the statute of limitation under the laws of this state or of the issuing state, whichever is longer, applies.

History: Laws 1994, ch. 107, § 604.

PART B
CONTEST OF VALIDITY OR ENFORCEMENT

40-6A-605. Notice of registration of order.

(a) When a support order or income-withholding order issued in another state is registered, the registering tribunal shall notify the nonregistering party. The notice shall be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) The notice shall inform the nonregistering party:

(1) that a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this state;

(2) that a hearing to contest the validity or enforcement of the registered order must be requested within twenty days after notice;

(3) that failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearage and precludes further contest of that order with respect to any matter that could have been asserted; and

(4) of the amount of any alleged arrearage.

(c) Upon registration of an income-withholding order for enforcement, the registering tribunal shall notify the obligor's employer.

History: Laws 1994, ch. 107, § 605; 1997, ch. 9, § 18.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, deleted the former second sentence in Subsection (a), and substituted "shall" for "must" in the present second sentence; substituted "shall" for "must" following "notice" in Subsection (b); and deleted "the date of mailing or personal service of the notice" following "twenty days after" in Paragraph (b)(2).

40-6A-606. Procedure to contest validity or enforcement of registered order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in this state shall request a hearing within twenty days after notice of the registration. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order or to contest the remedies being sought or the amount of any alleged arrearage pursuant to Section 40-6A-607 NMSA 1978.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law.

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time and place of the hearing.

History: Laws 1994, ch. 107, § 606; 1997, ch. 9, § 19.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "40-6A-607 NMSA 1978" for "607 of the Uniform Interstate Family Support Act" at the end of Subsection (a) and deleted "by first class mail" following "notice to the parties" near the end of Subsection (c).

40-6A-607. Contest of registration or enforcement.

(a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(1) the issuing tribunal lacked personal jurisdiction over the contesting party;

(2) the order was obtained by fraud;

(3) the order has been vacated, suspended, or modified by a later order;

(4) the issuing tribunal has stayed the order pending appeal;

(5) there is a defense under the law of this state to the remedy sought;

(6) full or partial payment has been made; or

(7) the statute of limitation under Section 604 [40-6A-604 NMSA 1978] of the Uniform Interstate Family Support Act precludes enforcement of some or all of the arrearage.

(b) If a party presents evidence establishing a full or partial defense under Subsection (a) of this section, a tribunal may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this state.

(c) If the contesting party does not establish a defense under Subsection (a) of this section to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

History: Laws 1994, ch. 107, § 607.

40-6A-608. Confirmed order.

Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

History: Laws 1994, ch. 107, § 608.

PART C
REGISTRATION AND MODIFICATION OF CHILD SUPPORT ORDER

40-6A-609. Procedure to register child support order of another state for modification.

A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another state shall register that order in this state in the same manner provided in Part A [40-6A-601 to 40-6A-604 NMSA 1978] of this article if the order has not been registered. A petition for modification may be filed at the same time as a request for registration, or later. The pleading must specify the grounds for modification.

History: Laws 1994, ch. 107, § 609.

40-6A-610. Effect of registration for modification.

A tribunal of this state may enforce a child support order of another state registered for purposes of modification, in the same manner as if the order had been issued by a tribunal of this state, but the registered order may be modified only if the requirements of Section 611 [40-6A-611 NMSA 1978] of the Uniform Interstate Family Support Act have been met.

History: Laws 1994, ch. 107, § 610.

40-6A-611. Modification of child-support order of another state.

(a) After a child-support order issued in another state has been registered in this state, the responding tribunal of this state may modify that order only if Section 40-6A-613 NMSA 1978 does not apply and after notice and hearing it finds that:

(1) the following requirements are met:

(i) the child, the individual obligee and the obligor do not reside in the issuing state;

(ii) a petitioner who is a nonresident of this state seeks modification; and

(iii) the respondent is subject to the personal jurisdiction of the tribunal of this state; or

(2) the child or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed written consents in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures under the Uniform Interstate Family Support Act [this article], the consent otherwise required of an individual residing in this state is not required for the tribunal to assume jurisdiction to modify the child-support order.

(b) Modification of a registered child-support order is subject to the same requirements, procedures and defenses that apply to the modification of an order issued by a tribunal of this state, and the order may be enforced and satisfied in the same manner.

(c) A tribunal of this state may not modify any aspect of a child-support order that may not be modified under the law of the issuing state. If two or more tribunals have issued child-support orders for the same obligor and child, the order that controls and shall be so recognized under Section 40-6A-207 NMSA 1978 establishes the aspects of the support order which are nonmodifiable.

(d) On issuance of an order modifying a child-support order issued in another state, a tribunal of this state becomes the tribunal having continuing, exclusive jurisdiction.

History: Laws 1994, ch. 107, § 611; 1997, ch. 9, § 20.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, inserted "Section 40-6A-613 NMSA 1978 does not apply and" near the end of the introductory paragraph of Subsection (a), rewrote Paragraph (a)(2), substituted "having" for "of" in the first sentence of Subsection

(d) and added the second sentence; and deleted Subsection (e) which related to the issuance of a modified child support order and the filing of a certified copy of the order with the issuing tribunal.

40-6A-612. Recognition of order modified in another state.

A tribunal of this state shall recognize a modification of its earlier child support order by a tribunal of another state which assumed jurisdiction pursuant to a law substantially similar to the Uniform Interstate Family Support Act [this article] and, upon request, except as otherwise provided in that act, shall:

(1) enforce the order that was modified only as to amounts accruing before the modification;

(2) enforce only nonmodifiable aspects of that order;

(3) provide other appropriate relief only for violations of that order which occurred before the effective date of the modification; and

(4) recognize the modifying order of the other state, upon registration, for the purpose of enforcement.

History: Laws 1994, ch. 107, § 612.

40-6A-613. Jurisdiction to modify child-support order of another state when individual parties reside in this state.

(a) If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child-support order in a proceeding to register that order.

(b) A tribunal of this state exercising jurisdiction under this section shall apply the provisions of Articles 1 and 2 and this article of the Uniform Interstate Family Support Act [this article] and the procedural and substantive law of this state to the proceeding for enforcement or modification. Articles 3, 4, 5, 7 and 8 of the Uniform Interstate Family Support Act do not apply.

History: 1978 Comp., § 40-6A-613, enacted by Laws 1997, ch. 9, § 21.

40-6A-614. Notice to issuing tribunal of modification.

Within thirty days after issuance of a modified child-support order, the party obtaining the modification shall file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order, and in each tribunal in

which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction.

History: 1978 Comp., § 40-6A-614, enacted by Laws 1997, ch. 9, § 22.

ARTICLE 7
DETERMINATION OF PARENTAGE

40-6A-701. Proceeding to determine parentage.

(a) A tribunal of this state may serve as an initiating or responding tribunal in a proceeding brought under the Uniform Interstate Family Support Act [this article] or a law substantially similar to that act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act to determine that the petitioner is a parent of a particular child or to determine that a respondent is a parent of that child.

(b) In a proceeding to determine parentage, a responding tribunal of this state shall apply the procedural and substantive law of this state and the rules of this state on choice of law.

History: Laws 1994, ch. 107, § 701.

ANNOTATIONS

Compiler's notes. — The Revised Uniform Reciprocal Enforcement of Support Act, referred to in Subsection A, was compiled as 40-6-1 to 40-6-41, NMSA 1978, and was repealed by Laws 1994, ch. 107, § 904.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

ARTICLE 8
INTERSTATE RENDITION

40-6A-801. Grounds for rendition.

(a) For purposes of this article [40-6A-801 to 40-6A-802 NMSA 1978], "governor" includes an individual performing the functions of governor or the executive authority of a state covered by the Uniform Interstate Family Support Act [this article].

(b) The governor of this state may:

(1) demand that the governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to provide for the support of an obligee; or

(2) on the demand by the governor of another state, surrender an individual found in this state who is charged criminally in the other state with having failed to provide for the support of an obligee.

(c) A provision for extradition of individuals not inconsistent with the Uniform Interstate Family Support Act applies to the demand even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled therefrom.

History: Laws 1994, ch. 107, § 801.

ANNOTATIONS

Cross references. — For extradition generally, see 31-4-1 to 31-4-31 NMSA 1978.

40-6A-802. Conditions of rendition.

(a) Before making demand that the governor of another state surrender an individual charged criminally in this state with having failed to provide for the support of an obligee, the governor of this state may require a prosecutor of this state to demonstrate that at least sixty days previously the obligee had initiated proceedings for support pursuant to the Uniform Interstate Family Support Act [this article] or that the proceeding would be of no avail.

(b) If, under the Uniform Interstate Family Support Act or a law substantially similar to that act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act, the governor of another state makes a demand that the governor of this state surrender an individual charged criminally in that state with having failed to provide for the support of a child or other individual to whom a duty of support is owed, the governor may require a prosecutor to investigate the demand and report whether a proceeding for support has been initiated or would be effective. If it appears that a proceeding would be effective but has not been initiated, the governor may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the governor may decline to honor the demand. If the petitioner prevails and the individual whose rendition is demanded is subject to a support order, the governor may decline to honor the demand if the individual is complying with the support order.

History: Laws 1994, ch. 107, § 802.

ANNOTATIONS

Compiler's notes. — The Revised Uniform Reciprocal Enforcement of Support Act, referred to in Subsection B, was compiled as 40-6-1 to 40-6-41, NMSA 1978, and was repealed by Laws 1994, ch. 107, § 904.

ARTICLE 9
MISCELLANEOUS PROVISIONS

40-6A-901. Uniformity of application and construction.

The Uniform Interstate Family Support Act [this article] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act among states enacting it.

History: Laws 1994, ch. 107, § 901.

40-6A-902. Short title.

Chapter 40, Article 6A NMSA 1978 may be cited as the "Uniform Interstate Family Support Act".

History: Laws 1994, ch. 107, § 902; 1997, ch. 9, § 23.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "Chapter 40, Article 6A NMSA 1978" for "This act".

40-6A-903. Severability clause.

If any provision of the Uniform Interstate Family Support Act [this article] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act which can be given effect without the invalid provision or application, and to this end the provisions of that act are severable.

History: Laws 1994, ch. 107, § 903.

ARTICLE 7
Adoption

(Repealed by Laws 1981, ch. 171, § 12; Laws 1985, ch. 194, § 39; and Laws 1993, ch. 77, § 234; and recompiled by Laws 1985, ch. 194, § 38.)

40-7-1 to 40-7-24. Repealed.

ANNOTATIONS

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, effective June 19, 1981. For provisions of former sections, see 1978 Original Pamphlet.

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.

40-7-25 to 40-7-28. Recompiled.

ANNOTATIONS

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; the sections were recompiled again as 40-7-62 to 40-7-65 NMSA 1978 to conform to the code assignation of the Adoption Act, 40-7-29 to 40-7-61 NMSA 1978.

40-7-29 to 40-7-65. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 77, § 234E repeals 40-7-29 to 40-7-65 NMSA 1978, as enacted by Laws 1985, ch. 194, §§ 1 to 33 and amended by Laws 1987, ch. 106, §§ 5 and 6, and by Laws 1989, ch. 341, §§ 2 to 15, and as recompiled by Laws 1985, ch. 194, § 38, relating to adoptions, effective July 1, 1993. For provisions of former sections, see 1989 Replacement Pamphlet. For present comparable provisions, see 32A-5-1 to 32A-5-45 NMSA 1978.

ARTICLE 7A
Child Placement Agency Licensing

40-7A-1. Short title.

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.

ANNOTATIONS

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.

ANNOTATIONS

Cross references. — For the human services department, see 9-8-1 to 9-8-14 NMSA 1978.

For the social services division, see 9-8-4 NMSA 1978.

For the secretary of human services, see 9-8-5 NMSA 1978.

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 periods of time not to exceed three years, as determined by the division, if the division is satisfied that the child placement agency is in compliance with the division's 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 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; 1991, ch. 100, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, substituted "periods of time not to exceed three years, as determined by the division" for "one-year periods" near the end

of Subsection A and substituted "served" for "services" at the end of Paragraph (4) of Subsection D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of public or private agency or its employees to prospective adoptive parents in contract or tort for failure to complete arrangement for adoption, 8 A.L.R.5th 860.

40-7A-5. Variances.

Upon written application from a child placement agency 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; appeal.

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 rules. The holder of the license sought to be denied, revoked, suspended or placed on probation or that is not renewed shall be given notice in writing of the proposed action and the reason therefor and shall, at a date and place to be specified in the notice, be given a hearing before a hearing officer appointed by the secretary with an opportunity to produce testimony in the holder's behalf and to be assisted by counsel. The hearing shall be held no earlier than twenty days after service of notice thereof unless the time limitations are waived. A person whose license has been denied, revoked, suspended, placed on probation or not renewed may, on application to the division, have the license issued, reinstated or reissued upon proof that the noncompliance with the rules has ceased.

B. A 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 by appealing to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

C. When any license is denied, suspended, revoked or not renewed, the care and custody of any child placed pursuant to 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; 1998, ch. 55, § 44; 1999, ch. 265, § 46.

ANNOTATIONS

The 1998 amendment, effective September 1, 1998, in the section heading inserted "; appeal"; in Subsection A, substituted "rules" for "regulations" in two places; rewrote Subsection B; in Subsection C, substituted "pursuant to" for "under" and made minor stylistic changes.

The 1999 amendment, effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection B.

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.

ANNOTATIONS

Cross references. — For 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.

ANNOTATIONS

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.

ANNOTATIONS

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. — 57 Am. Jur. 2d Names §§ 10 to 16.

Change of child's name in adoption proceedings, 53 A.L.R.2d 927.

Right of married woman to use maiden surname, 67 A.L.R.3d 1266.

Circumstances justifying grant or denial of petition to change adult's name. 79 A.L.R.3d 562.

Rights and remedies of parents inter se with respect to the names of their children, 40 A.L.R.5th 697.

2 C.J.S. Adoption § 37; 3 C.J.S. Aliens § 142; 27C C.J.S. Divorce § 763; 65 C.J.S. Names § 1.

40-8-2. Notice of petition; exception.

A. Before making application to the court for changing or establishing a name as provided in Section 40-8-1 NMSA 1978, the applicant shall cause a notice thereof, stating the nature of the application, the time and place, when and where the application will be made, to be published in the county where the application is to be made and where the applicant resides; the notice to be published at least once each week for two consecutive weeks in some newspaper printed in the county. If there is no newspaper published in the county where the applicant resides, then the notice shall be published in a newspaper printed in the county nearest to the residence of the person and having a circulation in the county where the person resides.

B. If the court finds that publication of an applicant's name change will jeopardize the applicant's personal safety, the court shall not require publication. The court shall order all records regarding the application to be sealed. The records shall only be opened by court order based upon a showing of good cause or at the applicant's request.

History: Laws 1889, ch. 3, § 2; C.L. 1897, § 2911; Code 1915, § 3808; C.S. 1929, § 92-102; 1941 Comp., § 25-502; 1953 Comp., § 22-5-2; 2001, ch. 125, § 1.

ANNOTATIONS

Cross references. — For legal newspapers and publication of notice, see 14-11-2 NMSA 1978.

The 2001 amendment, effective July 1, 2001, added the section heading; added the Subsection A designation and in that subsection, substituted "a name as provided in Section 40-8-1 NMSA 1978" for "a name as above provided"; and added Subsection B.

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.

ANNOTATIONS

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
Grandparent'S Visitation Privileges

40-9-1. Short title.

Chapter 40, Article 9 NMSA 1978 may be cited as the "Grandparent's Visitation Privileges Act".

History: 1978 Comp., § 40-9-1, enacted by Laws 1993, ch. 93, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 93, § 1 repeals former 40-9-1 NMSA 1978, as enacted by Laws 1979, ch. 13, § 1, relating to visitation privileges upon judgments of dissolution of marriage, legal separation or parentage, and enacts the above section effective July 1, 1993. For provisions of former section, see 1989 Replacement Pamphlet.

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

For note, "Family Law - A Limitation on Grandparental Rights in New Mexico: Christian Placement Service v. Gordon," see 17 N.M.L. Rev. 207 (1987).

Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Grandparents' visitation rights, 90 A.L.R.3d 222.

Religion as factor in child custody and visitation cases, 22 A.L.R.4th 971.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified, 69 A.L.R.5th 1.

Grandparent's visitation rights where child's parents are living, 71 A.L.R.5th 99.

40-9-1.1. Definitions.

As used in the Grandparent's Visitation Privileges Act [this article], "grandparent" means:

A. the biological grandparent or great-grandparent of a minor child; or

B. a person who becomes a grandparent or great-grandparent due to the adoption of a minor child by a member of that person's family.

History: 1978 Comp., § 40-9-1.1, enacted by Laws 1993, ch. 93, § 2.

40-9-2. Children; visitation by grandparent; petition; mediation.

A. In rendering a judgment of dissolution of marriage, legal separation or the existence of the parent and child relationship pursuant to the provisions of the Uniform Parentage Act [40-11-1 to 40-11-23 NMSA 1978], or at any time after the entry of the judgment, the district court may grant reasonable visitation privileges to a grandparent

of a minor child, not in conflict with the child's education or prior established visitation or time-sharing privileges.

B. If one or both parents of a minor child are deceased, any grandparent of the minor child may petition the district court for visitation privileges with respect to the minor. The district court may order temporary visitation privileges until a final order regarding visitation privileges is issued by the court.

C. If a minor child resided with a grandparent for a period of at least three months and the child was less than six years of age at the beginning of the three-month period and the child was subsequently removed from the grandparent's home by the child's parent or any other person, the grandparent may petition the district court for visitation privileges with respect to the child, if the child's home state is New Mexico, as provided in the Child Custody Jurisdiction Act.

D. If a minor child resided with a grandparent for a period of at least six months and the child was six years of age or older at the beginning of the six-month period and the child was subsequently removed from the grandparent's home by the child's parent or any other person, the grandparent may petition the district court for visitation privileges with respect to the child, if the child's home state is New Mexico, as provided in the Child Custody Jurisdiction Act.

E. A biological grandparent may petition the district court for visitation privileges with respect to a grandchild when the grandchild has been adopted or adoption is sought, pursuant to the provisions of the Adoption Act [Chapter 32A, Article 5 NMSA 1978], by:

(1) a stepparent;

(2) a relative of the grandchild;

(3) a person designated to care for the grandchild in the provisions of a deceased parent's will; or

(4) a person who sponsored the grandchild at a baptism or confirmation conducted by a recognized religious organization.

F. When a minor child is adopted by a stepparent and the parental rights of the natural parent terminate or are relinquished, the biological grandparents are not precluded from attempting to establish visitation privileges. When a petition filed pursuant to the provisions of the Grandparent's Visitation Privileges Act [Chapter 40, Artilce 9 NMSA 1978] is filed during the pendency of an adoption proceeding, the petition shall be filed as part of the adoption proceedings. The provisions of the Grandparent's Visitation Privileges Act shall have no application in the event of a relinquishment or termination of parental rights in cases of other statutory adoption proceedings.

G. When considering a grandparent's petition for visitation privileges with a child, the district court shall assess:

(1) any factors relevant to the best interests of the child;

(2) the prior interaction between the grandparent and the child;

(3) the prior interaction between the grandparent and each parent of the child;

(4) the present relationship between the grandparent and each parent of the child;

(5) time-sharing or visitation arrangements that were in place prior to filing of the petition;

(6) the effect the visitation with the grandparent will have on the child;

(7) if the grandparent has any prior convictions for physical, emotional or sexual abuse or neglect; and

(8) if the grandparent has previously been a full-time caretaker for the child for a significant period.

H. The district court may order mediation and evaluation in any matter when a grandparent's visitation privileges with respect to a minor child are at issue. When a judicial district has established a domestic relations mediation program pursuant to the provisions of the Domestic Relations Mediation Act [40-12-1 to 40-12-6 NMSA 1978], the mediation shall conform with the provisions of that act. Upon motion and hearing, the district court shall act promptly on the recommendations set forth in a mediation report and consider assessment of mediation and evaluation to the parties. The district court may order temporary visitation privileges until a final order regarding visitation privileges is issued by the court.

I. When the district court decides that visitation is not in the best interest of the child, the court may issue an order requiring other reasonable contact between the grandparent and the child, including regular communication by telephone, mail or any other reasonable means.

J. The provisions of the Child Custody Jurisdiction Act and Section 30-4-4 NMSA 1978, regarding custodial interference, are applicable to the provisions of the Grandparent's Visitation Privileges Act [Chapter 40, Article 9 NMSA 1978].

History: 1978 Comp., § 40-9-2, enacted by Laws 1993, ch. 93, § 3; 1999, ch. 73, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 93, § 3 repeals former 40-9-2 NMSA 1978, as enacted by Laws 1979, ch. 13, § 2, and enacts the above section, effective July 1, 1993. For provisions of former section, see 1989 Replacement Pamphlet.

The 1999 amendment, effective July 1, 1999, in Subsection G added "any factors relevant to" in Paragraph (1), added Paragraphs (6) through (8), and made minor stylistic changes.

The Child Custody Jurisdiction Act. — The Child Custody Jurisdiction Act was repealed by Laws 2001, ch. 114, § 404, effective July 1, 2001. For comparable provisions, see the Uniform Child-Custody Jurisdiction and Enforcement Act, 40-10A-101 to 40-10A-403 NMSA 1978.

Constitutionality. — This act, authorizing the trial court to permit grandparent child visitation, withstands state and federal constitutional challenges if the allowance of visitation is shown to be in the best interest of the child. Ridenour v. Ridenour, 120 N.M. 352, 901 P.2d 770 (Ct. App. 1995).

Even though the state's enforcement of the Grandparent's Visitation Privileges Act impacts a parent's right to raise a child, the intrusion is not a substantial interference and is thus an appropriate mechanism by which the state may balance the parties' competing interests. Ridenour v. Ridenour, 120 N.M. 352, 901 P.2d 770 (Ct. App. 1995).

Wishes of parents. — Troxell v. Granville, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), requires courts to give special consideration to the wishes of the parents in a grandparents' visitation case, but it does not give the parents an ultimate veto; the court may balance the interests of the parents, grandparents, and children. Williams v. Williams, 2002-NMCA-074, 132 N.M. 445, 50 P.3d 194.

Findings required. — Troxell v. Granville, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), does not require a formal finding of parental unfitness before a court can order grandparent visitation; the court must only find the presence of "special factors" before it can order grandparent visitation over the objections of a fit parent. Williams v. Williams, 2002-NMCA-074, 132 N.M. 445, 50 P.3d 194.

"Special factors" that a court may consider before awarding grandparent visitation over the objectives of a fit parent include the court's concerns, founded in the record, regarding the ability of the parents to carry out their responsibilities in an appropriate manner. Williams v. Williams, 2002-NMCA-074, 132 N.M. 445, 50 P.3d 194.

Visitation allowed even where parental rights relinquished. — The legislature intended that the trial court, upon a showing that grandparent visitation was in the best interests of the child, could authorize grandparent visitation even though the grandparent's son had relinquished his parental rights. Lucero v. Hart, 120 N.M. 794, 907 P.2d 198 (Ct. App. 1995).

Grandparent's burden. — In seeking application of the Grandparent's Visitation Privileges Act, the grandparents have the burden to show that visitation is appropriate. Ridenour v. Ridenour, 120 N.M. 352, 901 P.2d 770 (Ct. App. 1995).

When visitation challenged, guardian may be appointed. — When a petition for grandparent visitation is challenged by the child's parents, the trial court should consider whether it would be beneficial to appoint a guardian ad litem to represent the child in the face of conflicting family interests. Lucero v. Hart, 120 N.M. 794, 907 P.2d 198 (Ct. App. 1995).

Non-statutory factors relevant to request. — In addition to the statutory factors enumerated in Subsection G, other relevant factors relating to a request for grandparent visitation which the trial court may consider include: (1) the love, affection and other emotional ties which may exist between the grandparent and child; (2) the nature and quality of the grandparent-child relationship and the length of time that it has existed; (3) whether visitation will promote or disrupt the child's development; (4) the physical, emotional, mental and social needs of the child; (5) the wishes and opinions of the parents; and (6) the willingness and ability of the grandparent to facilitate and encourage a close relationship among the parent and child. Lucero v. Hart, 120 N.M. 794, 907 P.2d 198 (Ct. App. 1995).

Grandparent does not have right to court-ordered visitation with his or her grandchild. Guiterrez v. Connick, 2004-NMCA-017, ___N.M..___, 87 P.3d 552.

No grandparent visitation right existed at common law. Gutierrez v. Connick, 2004-NMCA-017, ___N.M.___, 87 P.3d 552.

Grandparent visitation privileges are circumscribed by constitutional limitations, in that parents have a fundamental liberty right to make decisions concerning the care, custody, and control of their children, a right that is protected under the Fourteenth Amendment's due process clause. Gutierrez v. Connick, 2004-NMCA-017, ___N.M.___, 87 P.3d 552.

Putative grandparent has standing as interested party under Section 40-11-7 A. NMSA 1978 to bring an action to establish a parent-child relationship for the purpose of establishing the grandparent as either the maternal or paternal grandparent of a child in order to obtain visitation privileges under this section. Gutierrez v. Connick, 2004-NMCA-017, ___N.M.___, 87 P.3d 552.

Grandparent's burden.

Visitation will be denied where grandparents failed to meet their burden under Subsection G of this section to show factors that could support grandparent visitation under Subsection A of this section. Gutierrez v. Connick, 2004-NMCA-017, ___N.M.___, 87 P.3d 552.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Grandparents' visitation rights, 90 A.L.R.3d 222.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified, 69 A.L.R.5th 1.

Grandparent's visitation rights where child's parents are living, 71 A.L.R.5th 99.

40-9-3. Visitation; modification; restrictions.

A. When the district court grants reasonable visitation privileges to a grandparent pursuant to the provisions of the Grandparent's Visitation Privileges Act [this article], the court shall issue any necessary order to enforce the visitation privileges and may modify the privileges or order upon a showing of good cause by any interested person.

B. Absent a showing of good cause, no grandparent or parent shall file a petition pursuant to the provisions of the Grandparent's Visitation Privileges Act more often than once a year.

C. When an action for enforcement of a court order allowing visitation privileges is brought pursuant to the Grandparent's Visitation Privileges Act by a grandparent, the court may award court costs and reasonable attorneys' fees to the prevailing party when a court order is violated.

History: 1978 Comp., § 40-9-3, enacted by Laws 1993, ch. 93, § 4; 1995, ch. 58, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 93, § 4 repeals former 40-9-3 NMSA 1978, as enacted by Laws 1979, ch. 13, § 3, and enacts the above section, effective July 1, 1993. For provisions of former section, see 1989 Replacement Pamphlet.

The 1995 amendment, effective June 16, 1995, inserted "or parent" in Subsection B and added Subsection C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Grandparents' visitation rights, 90 A.L.R.3d 222.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified, 69 A.L.R.5th 1.

Grandparent's visitation rights where child's parents are living, 71 A.L.R.5th 99.

40-9-4. Change of child's domicile; notice to grandparent.

A. When a grandparent is granted visitation privileges with respect to a minor child pursuant to the provisions of the Grandparent's Visitation Privileges Act [this article] and the child's custodian intends to depart the state or to relocate within the state with the intention of changing that child's domicile, the custodian shall:

(1) notify the grandparents of the minor child of the custodian's intent to change the child's domicile at least five days prior to the child's change of domicile;

(2) provide the grandparent with an address and telephone number for the minor child; and

(3) afford the grandparent of the minor child the opportunity to communicate with the child.

B. This state will recognize an order or act regarding grandparent visitation privileges issued by any state, district, Indian tribe or territory of the United States of America.

History: 1978 Comp., § 40-9-4, enacted by Laws 1993, ch. 93, § 5; 1995, ch. 58, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 93, § 5 repeals former 40-9-4 NMSA 1978, as enacted by Laws 1979, ch. 13, § 4, relating to applicability of article, and enacts the above section, effective July 1, 1993. For provisions of former section, see 1989 Replacement Pamphlet.

The 1995 amendment, effective June 16, 1995, redesignated the subsections, inserted "or to relocate within the state" in Subsection A, substituted "change of domicile" for "departure from the state" in Paragraph (1) of Subsection A, and added Subsection B.

ARTICLE 10
Child Custody Jurisdiction

(Repealed by Laws 2001, ch. 114, § 404.)

40-10-1 to 40-10-24. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 114, § 405 repeals 40-10-1 to 40-10-24 NMSA 1978, as enacted by Laws 1981, ch. 119, §§ 1 to 23 and 25, regarding child custody jurisdiction, effective July 1, 2001. For provisions of former sections, see 1999 Replacement Pamphlet. For present comparable provisions, see Chapter 40, Article 10A NMSA 1978.

ARTICLE 10A
Child Custody

ARTICLE 1
GENERAL PROVISIONS

40-10A-101. Short title.

This act [40-10A-101 NMSA 1978] may be cited as the "Uniform Child-Custody Jurisdiction and Enforcement Act".

History: Laws 2001, ch. 114, § 101.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

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 (now see Child Custody Jurisdiction and Enforcement Act, 40-10A-206 NMSA 1978) and the federal Parental

Kidnapping Prevention Act, 28 U.S.C. § 1738A, there is a limitation upon the children's court's authority to modify another state's decree. State ex rel. 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).

For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Attorneys' fees awards in parent-nonparent child custody case, 45 A.L.R.4th 212.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 A.L.R.4th 1170.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 A.L.R.4th 786.

What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 78 A.L.R.4th 1028.

Applicability of Uniform Child Custody Jurisdiction Act (UCCJA) to temporary custody orders, 81 A.L.R.4th 1101.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 A.L.R.4th 742.

Child custody and visitation rights of person infected with AIDS, 86 A.L.R.4th 211.

Denial or restriction of visitation rights to parent charged with sexually abusing child, 1 A.L.R.5th 776.

Home state jurisdiction of court under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 A.L.R.5th 1.

Default jurisdiction of court under § 3(a)(4) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(D), 6 A.L.R.5th 69.

Parties' misconduct as ground for declining jurisdiction under § 8 of the Uniform Child Custody Jurisdiction Act (UCCJA), 16 A.L.R.5th 650.

Significant connection jurisdiction of court to modify foreign child custody decree under §§ 3(a)(2) and 14(b) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PICPA), 28 U.S.C.A. §§ 1738A(c)(2)(b) and 1738A(f)(1), 67 A.L.R.5th 1.

Home state jurisdiction of court to modify foreign child custody decree under §§ 3(a)(1) and 14(a)(2) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §§ 1738A(c)(2)(A) and 1738A(f)(1), 72 A.L.R.5th 249.

Declining jurisdiction to modify prior child custody decree under § 14(a)(1) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A(f)(2), 73 A.L.R.5th 185.

Abandonment jurisdiction of court under §§ 3(a)(3)(i) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.A. §§ 1738A(c)(2)(C)(i) and 1738A(f), notwithstanding existence of prior valid custody decree rendered by second state, 78 A.L.R.5th 465.

Construction and operation of Uniform Child Custody Jurisdiction and Enforcement Act, 100 A.L.R.5th 1.

Construction and application of International Child Abduction Remedies Act (42 USC § 11601 et seq.), 125 A.L.R. Fed. 217.

40-10A-102. Definitions.

As used in the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978]:

(1) "abandoned" means left without provision for reasonable and necessary care or supervision;

(2) "child" means an individual who has not attained eighteen years of age;

(3) "child-custody determination" means a judgment, decree or other order of a court providing for legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial or modification order. The term does not include an order relating to child support or other monetary obligation of an individual;

(4) "child-custody proceeding" means a proceeding in which legal custody, physical custody or visitation with respect to a child is an issue. The term includes a proceeding for dissolution of marriage, custody of a child when dissolution of a marriage is not an issue, neglect, abuse, dependency, guardianship, paternity, termination of parental rights whether filed alone or with an adoption proceeding and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation or enforcement under Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act;

(5) "commencement" means the filing of the first pleading in a proceeding;

(6) "court" means an entity authorized under the law of a state to establish, enforce or modify a child-custody determination;

(7) "home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of

the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period;

(8) "initial determination" means the first child-custody determination concerning a particular child;

(9) "issuing court" means the court that makes a child-custody determination for which enforcement is sought under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978];

(10) "issuing state" means the state in which a child-custody determination is made;

(11) "modification" means a child-custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination;

(12) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity;

(13) "person acting as a parent" means a person, other than a parent, who:

(A) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and

(B) has been awarded legal custody by a court or claims a right to legal custody under the law of this state;

(14) "physical custody" means the physical care and supervision of a child;

(15) "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States;

(16) "tribe" means an Indian tribe or band, or Alaskan Native village, which is recognized by federal law or formally acknowledged by a state; and

(17) "warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

History: Laws 2001, ch. 114, § 102.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

"Home state," as defined in this section and used in 40-10-4A NMSA 1978 (now see 40-10A-201 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).

"Modification decree". — The father's Petition to Establish Child Custody and Visitation, alleging that a California decree was void and not entitled to full faith and credit, constituted a "modification decree" as defined in this section, even though the father did not specifically use the term "modification." Nelson v. Nelson, 1996-NMCA-015, 121 N.M. 243, 910 P.2d 319.

Construed with 32-1-54 NMSA 1978. — That the nonparent custodians of a child were "acting as parents" pursuant to 40-10-3H NMSA 1978 (now see Subsection (13) of this section) because they had physical custody of the child and claimed a right to custody did not have applicability in a neglect or abuse case so as to entitle the custodians to the protections afforded in a termination of parent rights case. In re Agnes P., 110 N.M. 768, 800 P.2d 202 (Ct. App. 1990).

Law reviews. — Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

40-10A-103. Proceedings governed by other law.

The Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

History: Laws 2001, ch. 114, § 103.

ANNOTATIONS

Cross references. — For provisions pertaining to adoption, see Chapter 32A, Article 5 NMSA 1978.

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-104. Application to Indian tribes.

(a) A child-custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] to the extent that it is governed by the Indian Child Welfare Act.

(b) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying Articles 1 and 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 to 40-10A-210 NMSA 1978].

(c) A child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of the Uniform Child-Custody Jurisdiction and Enforcement Act must be recognized and enforced under Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of that act.

History: Laws 2001, ch. 114, § 104.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-105. International application of the Uniform Child-Custody Jurisdiction and Enforcement Act.

(a) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying Articles 1 and 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978].

(b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of the Uniform Child-Custody Jurisdiction and Enforcement Act must be recognized and enforced under Article 3 [40-10A-301 NMSA 1978] of that act.

(c) A court of this state need not apply the Uniform Child-Custody Jurisdiction and Enforcement Act if the child custody law of a foreign country violates fundamental principles of human rights.

History: Laws 2001, ch. 114, § 105.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-106. Effect of child-custody determination.

A child-custody determination made by a court of this state that had jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] binds all persons who have been served in accordance with the laws of this state or notified in accordance with Section 108 [40-10A-108 NMSA 1978] or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

History: Laws 2001, ch. 114, § 106.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 A.L.R.4th 742.

40-10A-107. Priority.

If a question of existence or exercise of jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] is raised in a child-custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

History: Laws 2001, ch. 114, § 107.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-108. Notice to persons outside state.

(a) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of

process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(b) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

History: Laws 2001, ch. 114, § 108.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Notice to interested parties. — Where jurisdiction is sought to be established under the Child Custody Jurisdiction Act (now see the Uniform Child-Custody Jurisdiction and Enforcement Act), a petitioner must obtain service upon the other parties entitled to such notice by affirmatively undertaking to give notice and obtain service upon other interested parties as contemplated by this section. In re Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (Ct. App. 1992).

Waiver of notice. — Mother's handwritten document authorizing grandparents to sign any necessary papers for medical reasons for the child was insufficient to constitute consent to relinquish complete custody of her child to grandparents; nor was such document sufficient to constitute a valid waiver of notice or consent by her to submit to jurisdiction under Subsection D of 40-10-6 NMSA 1978 (now see this section). In re Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (Ct. App. 1992).

40-10A-109. Appearance and limited immunity.

(a) A party to a child-custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child-custody determination, is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(b) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(c) The immunity granted by subsection (a) does not extend to civil litigation based on acts unrelated to the participation in a proceeding under the Uniform Child-

Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] committed by an individual while present in this state.

History: Laws 2001, ch. 114, § 109.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-110. Communication between courts.

(a) A court of this state may communicate with a court in another state concerning a proceeding arising under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978].

(b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Communication between courts on schedules, calendars, court records and similar matters may occur without informing the parties. A record need not be made of the communication.

(d) Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

History: Laws 2001, ch. 114, § 110.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-111. Taking testimony in another state.

(a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order

that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

History: Laws 2001, ch. 114, § 111.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-112. Cooperation between courts; preservation of records.

(a) A court of this state may request the appropriate court of another state to:

(1) hold an evidentiary hearing;

(2) order a person to produce or give evidence pursuant to procedures of that state;

(3) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(4) forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented and any evaluation prepared in compliance with the request; and

(5) order a party to a child-custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (a).

(c) Travel and other necessary and reasonable expenses incurred under subsections (a) and (b) may be assessed against the parties according to the law of this state.

(d) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations and other pertinent records with respect to a child-custody proceeding until the child attains eighteen years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records.

History: Laws 2001, ch. 114, § 112.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

"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 (now see Subsection (b) of this section). State ex rel. Human Servs. Dep't v. Martin, 104 N.M. 279, 720 P.2d 314 (Ct. App. 1986).

ARTICLE 2
JURISDICTION

40-10A-201. Initial child-custody jurisdiction.

(a) Except as otherwise provided in Section 204 [40-10A-204 NMSA 1978], a court of this state has jurisdiction to make an initial child-custody determination only if:

(1) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(2) a court of another state does not have jurisdiction under paragraph (1) or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 207 or 208 [40-10A-207 or 40-10A-208 NMSA 1978] and:

(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) substantial evidence is available in this state concerning the child's care, protection, training and personal relationships;

(3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 207 or 208 [40-10A-207 or 40-10A-208 NMSA 1978]; or

(4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2) or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

History: Laws 2001, ch. 114, § 201.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Termination of parental rights. — A straight termination proceeding, not involving custody, adoption, or other similar issues, does not fall within the Child Custody Jurisdiction Act (now see the Uniform Child-Custody Jurisdiction and Enforcement Act). In re Vernon R.V., 1999-NMCA-125, 128 N.M. 242, 991 P.2d 986.

"Home state," as defined in 40-10-3E NMSA 1978 (now see 40-10A-102(7) NMSA 1978) and used in 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 (now see this section) 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).

Assertion of custody rights through guardianship proceedings. — In New Mexico, while a district court is invested with subject matter jurisdiction to grant a petition for guardianship of a minor or to adjudicate custody disputes between parents and non-parents involving children, except as provided in former 32-1-58 NMSA 1978, in the Children's Code, over objection of a parent, guardianship proceedings are not the

proper means to involuntarily terminate a parent's right to custody of his or her children. In re Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (Ct. App. 1992).

Jurisdiction found. — Mother's voluntary placement of her child with grandparents in this state and allowing the child to remain in New Mexico for almost ten months prior to seeking her return, provided a proper basis for the court's determination that the child had a significant connection with this state so as to enable the court to exercise jurisdiction over the child. In re Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (Ct. App. 1992).

A New Mexico court had jurisdiction to modify a California order on custody since New Mexico was the home state of the parents and children at the time of commencement of the proceeding and since the California divorce decree court had retained jurisdiction only over property and related issues, not custody issues. Nelson v. Nelson, 1996-NMCA-015, 121 N.M. 243, 910 P.2d 319.

The New Mexico district court had jurisdiction over an action by a biological mother's lesbian domestic partner for time sharing and custody of children because there were significant connections between the mother, the children, and New Mexico, and there was substantial evidence regarding the children's care, protection, training and relationships. Barnae v. Barnae, 1997-NMCA-077, 123 N.M. 583, 943 P.2d 1036.

Jurisdiction not asserted. — Where the children resided in New Mexico for less than one year at the time of the divorce, and there is no indication of any connections between the children and the state other than the children's relationship to their father, jurisdiction could not be asserted in "best interests" of children. Trask v. Trask, 104 N.M. 780, 727 P.2d 88 (Ct. App. 1986).

Venue. — A court which renders the initial decree in child custody and visitation proceedings is the proper venue for subsequent modifications of the cutodial order. Dugie v. Cameron, 1999-NMSC-002, 126 N.M. 433, 971 P.2d 390.

Law reviews. — Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For annual survey of domestic relations law in New Mexico, see 18 N.M.L. Rev. 371 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child

Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 A.L.R.4th 742.

Significant connection jurisdiction of court under § 3(a)(2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(B), 5 A.L.R.5th 550.

Abandonment and emergency jurisdiction of court under § 3(a)(3) of the Uniform Child Custody Juridiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(C), 5 A.L.R.5th 788.

Home state jurisdiction of court under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 A.L.R.5th 1.

Default jurisdiction of court under § 3(a)(4) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(D), 6 A.L.R.5th 69.

Significant connection jurisdiction of court to modify foreign child custody decree under §§ 3(a)(2) and 14(b) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PICPA), 28 U.S.C.A. §§ 1738A(c)(2)(b) and 1738A(f)(1), 67 A.L.R.5th 1.

Home state jurisdiction of court to modify foreign child custody decree under §§ 3(a)(1) and 14(a)(2) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §§ 1738A(c)(2)(A) and 1738A(f)(1), 72 A.L.R.5th 249.

Declining jurisdiction to modify prior child custody decree under § 14(a)(1) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A(f)(2), 73 A.L.R.5th 185.

Abandonment jurisdiction of court under §§ 3(a)(3)(i) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.A. §§ 1738A(c)(2)(C)(i) and 1738A(f), notwithstanding existence of prior valid custody decree rendered by second state, 78 A.L.R.5th 465.

Emergency jurisdiction of court under §§ 3(a)(3)(ii) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.A. §§ 1738A(c)(2)(C)(ii) and 1738A(f), to protect interests of child notwithstanding existence of prior, valid custody decree rendered by another state, 80 A.L.R.5th 117.

40-10A-202. Exclusive, continuing jurisdiction.

(a) Except as otherwise provided in Section 204 [40-10A-204 NMSA 1978], a court of this state which has made a child-custody determination consistent with Section 201 or 203 [40-10A-201 or 40-10A-203 NMSA 1978] has exclusive, continuing jurisdiction over the determination until:

(1) a court of this state determines that the child, or the child and one parent, or the child and a person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships; or

(2) a court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state.

(b) A court of this state which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 201 [40-10A-201 NMSA 1978].

History: Laws 2001, ch. 114, § 202.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-203. Jurisdiction to modify determination.

Except as otherwise provided in Section 204 [40-10A-204 NMSA 1978], a court of this state may not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 201(a)(1) or (2) [40-10A-201 NMSA 1978] and:

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under Section 202 [40-10A-202 NMSA 1978] or that a court of this state would be a more convenient forum under Section 207 [40-10A-207 NMSA 1978]; or

(2) a court of this state or a court of the other state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state.

History: Laws 2001, ch. 114, § 203.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Limitation on court authority. — Under both 28 U.S.C. § 1738A(f) of the federal Parental Kidnapping Prevention Act and 40-10-15A NMSA 1978 (now see this section), the children's court lacks the authority to modify another state's custody decree unless the other court no longer has jurisdiction or has declined to exercise jurisdiction to modify its custody decree. State ex rel. 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 (now see 32A-1-108 NMSA 1978) limits the court's exercise of jurisdiction in a "neglected child" proceeding brought under 32-1-9(A) NMSA 1978 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. — The New Mexico statute requires compliance with only one of four prerequisites in 40-10-4 NMSA 1978 (now see 40-10A-203 NMSA 1978) to satisfy the jurisdictional requirement. Olsen v. Olsen, 98 N.M. 644, 651 P.2d 1288 (1982); Serna v. Salazar, 98 N.M. 648, 651 P.2d 1292 (1982).

Law reviews. — For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order, 57 A.L.R.4th 710.

40-10A-204. Temporary emergency jurisdiction.

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child-custody determination that is entitled to be enforced under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 to 40-10A-403 NMSA 1978] and a child-custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 201 through 203 [40-10A-201 to 40-10A-203 NMSA 1978], a child-custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 201 through 203. If a child-custody proceeding has not been

or is not commenced in a court of a state having jurisdiction under Sections 201 through 203, a child-custody determination made under this section becomes a final determination, if it so provides, and this state becomes the home state of the child.

(c) If there is a previous child-custody determination that is entitled to be enforced under the Uniform Child-Custody Jurisdiction and Enforcement Act, or a child-custody proceeding has been commenced in a court of a state having jurisdiction under Sections 201 through 203, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Sections 201 through 203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) A court of this state which has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a state having jurisdiction under Sections 201 through 203, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to Sections 201 through 203, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child and determine a period for the duration of the temporary order.

History: Laws 2001, ch. 114, § 204.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Appealability of interlocutory or pendente lite order for temporary child custody, 82 A.L.R.5th 389.

40-10A-205. Notice; opportunity to be heard; joinder.

(a) Before a child-custody determination is made under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 to 40-10A-403 NMSA 1978], notice and an opportunity to be heard in accordance with the standards of Section 108 [40-10A-108 NMSA 1978] must be given to all persons entitled to notice under the law of this state as in child-custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated and any person having physical custody of the child.

(b) The Uniform Child-Custody Jurisdiction and Enforcement Act does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.

(c) The obligation to join a party and the right to intervene as a party in a child-custody proceeding under the Uniform Child-Custody Jurisdiction and Enforcement Act are governed by the law of this state as in child-custody proceedings between residents of this state.

History: Laws 2001, ch. 114, § 205.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Notice to interested parties. — Where jurisdiction is sought to be established under the Child Custody Jurisdiction Act, a petitioner must obtain service upon the other parties entitled to such notice by affirmatively undertaking to give notice and obtain service upon other interested parties as contemplated by 40-10-6 NMSA 1978 (now see 40-10A-108 NMSA 1978). In re Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (Ct. App. 1992).

Waiver of notice. — Mother's handwritten document authorizing grandparents to sign any necessary papers for medical reasons for the child was insufficient to constitute consent to relinquish complete custody of her child to grandparents; nor was such document sufficient to constitute a valid waiver of notice or consent by her to submit to jurisdiction under Subsection D of 40-10-6 NMSA 1978 (now see 40-10A-108 NMSA 1978). In re Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (Ct. App. 1992).

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).

Execution of facially valid ex parte custody order. — It was objectively reasonable for a social worker, sued under 42 U.S.C. § 1983, to have believed that participating with California police officers in executing in California a facially valid New Mexico ex parte custody order, based on allegations of sexual abuse, that complied with the post-deprivation prompt notice and hearing requirements in Rules 10-303 and 10-304 NMRA, would not violate the federal rights of the child's mother. Social workers reasonably would not know that ex parte orders cannot be served in another state without domesticating them. Yount v. Millington, 117 N.M. 95, 869 P.2d 283 (Ct. App. 1993).

Law reviews. — For annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

40-10A-206. Simultaneous proceedings.

(a) Except as otherwise provided in Section 204 [40-10A-204 NMSA 1978], a court of this state may not exercise its jurisdiction under Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with the Uniform Child-Custody Jurisdiction and Enforcement Act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 207 [40-10A-207 NMSA 1978].

(b) Except as otherwise provided in Section 204 [40-10A-204 NMSA 1978], a court of this state, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 209 [40-10A-209 NMSA 1978]. If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with the Uniform Child-Custody Jurisdiction and Enforcement Act, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with the Uniform Child-Custody Jurisdiction and Enforcement Act does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(c) In a proceeding to modify a child-custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child-custody determination has been commenced in another state, the court may:

(1) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying or dismissing the proceeding for enforcement;

(2) enjoin the parties from continuing with the proceeding for enforcement; or

(3) proceed with the modification under conditions it considers appropriate.

History: Laws 2001, ch. 114, § 206.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Assumption of jurisdiction by New Mexico court. — A New Mexico court had jurisdiction to modify a California order on custody since New Mexico was the home state of the parents and children at the time of commencement of the proceeding and since the California divorce decree court had retained jurisdiction only over property and related issues, not custody issues. Nelson v. Nelson, 1996-NMCA-015, 121 N.M. 243, 910 P.2d 319.

Proceeding in other state. — Award of temporary custody to the mother was improper pursuant to the former New Mexico Child Custody Jurisdiction Act because child custody proceedings were previously filed and pending in the child's home state, which was Missouri. Escobar v. Reisinger, 2003-NMCA-047, 133 N.M. 487, 64 P.3d 514.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 78 A.L.R.4th 1028.

Pending proceeding in another state as ground for declining jurisdiction under § 6(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(g), 20 A.L.R.5th 700.

40-10A-207. Inconvenient forum.

(a) A court of this state which has jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) the length of time the child's home state is or recently was another state;

(3) the distance between the court in this state and the court in the state that would assume jurisdiction;

(4) the relative financial circumstances of the parties with respect to travel arrangements;

(5) any agreement of the parties as to which state should assume jurisdiction;

(6) the nature and location of the evidence required to resolve the pending custody litigation, including testimony of the child;

(7) the ability of the court of each state to decide the custody issue expeditiously and the procedures necessary to present the evidence; and

(8) whether another state has a closer connection with the child or with the child and one or more of the parties, including whether the court of the other state is more familiar with the facts and issues in the pending litigation.

(c) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this state may decline to exercise its jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978]if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

History: Laws 2001, ch. 114, § 207.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

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).

New Mexico held to be most convenient forum. — New Mexico was properly ruled to be a convenient forum for an action by a biological mother's lesbian domestic partner for time sharing and custody of children because of the lack of an adequate forum in California. Barnae v. Barnae, 1997-NMCA-077, 123 N.M. 583, 943 P.2d 1036.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Inconvenience of forum as ground for declining jurisdiction under § 7 of the Uniform Child Custody Jurisdiction Act (UCCJA), 21 A.L.R.5th 396.

40-10A-208. Jurisdiction declined by reason of conduct.

(a) Except as otherwise provided in Section 204 [40-10A-204 NMSA 1978] or by other law of this state, if a court of this state has jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978]because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) a court of the state otherwise having jurisdiction under Sections 201 through 203 [40-10A-201 to 40-10A-203 NMSA 1978] determines that this state is a more appropriate forum under Section 207 [40-10A-207 NMSA 1978]; or

(3) no court of any other state would have jurisdiction under the criteria specified in Sections 201 through 203 [40-10A-201 to 40-10A-203 NMSA 1978].

(b) If a court of this state declines to exercise its jurisdiction pursuant to subsection (a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under Sections 201 through 203 [40-10A-201 to 40-10A-203 NMSA 1978].

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (a), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses and child care expenses during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs or expenses against this state unless authorized by law other than the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978].

History: Laws 2001, ch. 114, § 208.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Attorneys' fees awardable if forum found inconvenient, even if not clearly inappropriate. — Where trial court declines jurisdiction under this section can be the basis for awarding attorney fees on appeal even though trial court did not find New Mexico a clearly inappropriate forum. Hester v. Hester, 100 N.M. 773, 676 P.2d 1338 (Ct. App. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis, 20 A.L.R.4th 823.

40-10A-209. Information to be submitted to court.

(a) Subject to local law providing for the confidentiality of procedures, addresses and other identifying information in a child-custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(1) has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number and the date of the child-custody determination, if any;

(2) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions and, if so, identify the court, the case number and the nature of the proceeding; and

(3) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(b) If the information required by subsection (a) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(c) If the declaration as to any of the items described in subsection (a)(1) through (3) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(d) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(e) If a party alleges in an affidavit or a pleading under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which

the court takes into consideration the health, safety or liberty of the party or child and determines that the disclosure is in the interest of justice.

History: Laws 2001, ch. 114, § 209.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-210. Appearance of parties and child.

(a) In a child-custody proceeding in this state, the court may order a party to the proceeding who is in this state to appear before the court in person with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear in person with the child.

(b) If a party to a child-custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to Section 108 [40-10A-108 NMSA 1978] include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(c) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(d) If a party to a child-custody proceeding who is outside this state is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

History: Laws 2001, ch. 114, § 210.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 A.L.R.4th 864.

ARTICLE 3
ENFORCEMENT

40-10A-301. Definitions.

As used in Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act:

(1) "petitioner" means a person who seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child-custody determination; and

(2) "respondent" means a person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child-custody determination.

History: Laws 2001, ch. 114, § 301.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-302. Enforcement under Hague Convention.

Under Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act, a court of this state may enforce an order for the return of a child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child-custody determination.

History: Laws 2001, ch. 114, § 302.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Compiler's notes. — The text of the Hague Convention on the Civil Aspects of International Child Abduction may be found in the International Agreements Volume of the United States Code Service, and statutory provisions relating to the Hague Convention may be found at 42 U.S.C. § 11601 et seq.

40-10A-303. Duty to enforce.

(a) A court of this state shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] or if the determination was made under factual circumstances

meeting the jurisdictional standards of that act and the determination has not been modified in accordance with that act.

(b) A court of this state may utilize any remedy available under other law of this state to enforce a child-custody determination made by a court of another state. The remedies provided in Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act are cumulative and do not affect the availability of other remedies to enforce a child-custody determination.

(c) A court of this state may enforce a custody determination made pursuant to Sections 201 and 203 [40-10A-201 and 40-10A-203 NMSA 1978] until it is modified by a court having jurisdiction pursuant to Sections 201 and 203.

History: Laws 2001, ch. 114, § 303.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-304. Temporary visitation.

(a) A court of this state which does not have jurisdiction to modify a child-custody determination may issue a temporary order enforcing:

(1) a visitation schedule made by a court of another state; or

(2) the visitation provisions of a child-custody determination of another state that does not provide for a specific visitation schedule.

(b) If a court of this state makes an order under subsection (a)(2), it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act. The order remains in effect until an order is obtained from the other court or the period expires.

History: Laws 2001, ch. 114, § 304.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-305. Registration of child-custody determination.

(a) A child-custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the appropriate court in this state:

(1) a letter or other document requesting registration;

(2) two copies, including one certified copy, of the determination sought to be registered and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

(3) except as otherwise provided in Section 209 [40-10A-209 NMSA 1978], the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination sought to be registered.

(b) On receipt of the documents required by subsection (a), the registering court shall:

(1) cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

(2) serve notice upon the persons named pursuant to subsection (a)(3) and provide them with an opportunity to contest the registration in accordance with this section.

(c) The notice required by subsection (b)(2) must state that:

(1) a registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

(2) a hearing to contest the validity of the registered determination must be requested within twenty days after service of notice; and

(3) failure to contest the registration will result in confirmation of the child-custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(d) A person seeking to contest the validity of a registered order must request a hearing within twenty days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(1) the issuing court did not have jurisdiction under Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act;

(2) the child-custody determination sought to be registered has been vacated, stayed or modified by a court having jurisdiction to do so under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act; or

(3) the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of Section 108 [40-10A-108 NMSA 1978], in the proceedings before the court that issued the order for which registration is sought.

(e) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served must be notified of the confirmation.

(f) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

History: Laws 2001, ch. 114, § 305.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Law reviews. — For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act (now see the Uniform Child-Custody Jurisdiction and Enforcement Act); State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

40-10A-306. Enforcement of registered determination.

(a) A court of this state may grant any relief normally available under the law of this state to enforce a registered child-custody determination made by a court of another state.

(b) A court of this state shall recognize and enforce, but may not modify, except in accordance with Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act, a registered child-custody determination of a court of another state.

History: Laws 2001, ch. 114, § 306.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Law reviews. — For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act (now see the Uniform Child-Custody Jurisdiction and Enforcement Act); State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

40-10A-307. Simultaneous proceedings.

If a proceeding for enforcement under Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act is commenced in a court of this state and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

History: Laws 2001, ch. 114, § 307.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-308. Expedited enforcement of child-custody determination.

(a) A petition under Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(b) A petition for enforcement of a child-custody determination must state:

(1) whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(2) whether the determination for which enforcement is sought has been vacated, stayed or modified by a court whose decision must be enforced under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 to 40-10A-403 NMSA 1978] and, if so, identify the court, the case number and the nature of the proceeding;

(3) whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective

orders, termination of parental rights and adoptions and, if so, identify the court, the case number and the nature of the proceeding;

(4) the present physical address of the child and the respondent, if known;

(5) whether relief in addition to the immediate physical custody of the child and attorney's fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and

(6) if the child-custody determination has been registered and confirmed under Section 305 [40-10A-305 NMSA 1978], the date and place of registration.

(c) Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(d) An order issued under subsection (c) must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs and expenses under Section 312 [40-10A-312 NMSA 1978] and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(1) the child-custody determination has not been registered and confirmed under Section 305 [40-10A-305 NMSA 1978] and that:

(A) the issuing court did not have jurisdiction under Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act;

(B) the child-custody determination for which enforcement is sought has been vacated, stayed or modified by a court having jurisdiction to do so under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act; and

(C) the respondent was entitled to notice, but notice was not given in accordance with the standards of Section 108 [40-10A-108 NMSA 1978] in the proceedings before the court that issued the order for which enforcement is sought; or

(2) the child-custody determination for which enforcement is sought was registered and confirmed under Section 305 [40-10A-305 NMSA 1978], but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act.

History: Laws 2001, ch. 114, § 308.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-309. Service of petition and order.

Except as otherwise provided in Section 311 [40-10A-311 NMSA 1978], the petition and order must be served, by any method authorized by the law of this state, upon the respondent and any person who has physical custody of the child.

History: Laws 2001, ch. 114, § 309.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-310. Hearing and order.

(a) Unless the court issues a temporary emergency order pursuant to Section 204 [40-10A-204 NMSA 1978], upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(1) the child-custody determination has not been registered and confirmed under Section 305 [40-10A-305 NMSA 1978] and that:

(A) the issuing court did not have jurisdiction under Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act;

(B) the child-custody determination for which enforcement is sought has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act; or

(C) the respondent was entitled to notice, but notice was not given in accordance with the standards of Section 108 [40-10A-108 NMSA 1978] in the proceedings before the court that issued the order for which enforcement is sought; or

(2) the child-custody determination for which enforcement is sought was registered and confirmed under Section 305 but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Article 2 of the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) The court shall award the fees, costs and expenses authorized under Section 312 [40-10A-312 NMSA 1978] and may grant additional relief, including a

request for the assistance of law enforcement officials, and set a further hearing to determine whether additional relief is appropriate.

(c) If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(d) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act.

History: Laws 2001, ch. 114, § 310.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-311. Warrant to take physical custody of child.

(a) Upon the filing of a petition seeking enforcement of a child-custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this state.

(b) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by Section 308(b) [40-10A-308 NMSA 1978].

(c) A warrant to take physical custody of a child must:

(1) recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(2) direct law enforcement officers to take physical custody of the child immediately; and

(3) provide for the placement of the child pending final relief.

(d) The respondent must be served with the petition, warrant and order immediately after the child is taken into physical custody.

(e) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(f) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

History: Laws 2001, ch. 114, § 311.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-312. Costs, fees and expenses.

(a) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses and child care expenses during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(b) The court may not assess fees, costs or expenses against a state unless authorized by law other than the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978].

History: Laws 2001, ch. 114, § 312.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-313. Recognition and enforcement.

A court of this state shall accord full faith and credit to an order issued by another state and consistent with the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] which enforces a child-custody determination by a court of another state, unless the order has been vacated, stayed or modified by a court having jurisdiction to do so under Article 2 [40-10A-201 to 40-10A-210 NMSA 1978] of that act.

History: Laws 2001, ch. 114, § 313.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Law reviews. — For Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

For note, "Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; State ex rel. Dept. of Human Servs. v. Avinger," see 17 N.M.L. Rev. 409 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(a), 40 A.L.R.5th 227.

Abandonment jurisdiction of court under §§ 3(a)(3)(i) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.A. §§ 1738A(c)(2)(C)(i) and 1738A(f), notwithstanding existence of prior valid custody decree rendered by second state, 78 A.L.R.5th 465.

40-10A-314. Appeals.

An appeal may be taken from a final order in a proceeding under Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of the Uniform Child-Custody Jurisdiction and Enforcement Act in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under Section 204 [40-10A-204 NMSA 1978], the enforcing court may not stay an order enforcing a child-custody determination pending appeal.

History: Laws 2001, ch. 114, § 314.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-315. Role of prosecutor or public official.

(a) In a case arising under the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] or involving the Hague Convention on the Civil Aspects of International Child Abduction, the prosecutor or other appropriate public official may take any lawful action, including resort to a proceeding under Article 3 [40-10A-301 to 40-10A-317 NMSA 1978] of the Uniform Child-Custody Jurisdiction and

Enforcement Act or any other available civil proceeding, to locate a child, obtain the return of a child or enforce a child-custody determination if there is:

(1) an existing child-custody determination;

(2) a request to do so from a court in a pending child-custody proceeding;

(3) a reasonable belief that a criminal statute has been violated; or

(4) a reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(b) A prosecutor or appropriate public official acting under this section acts on behalf of the court and may not represent any party.

History: Laws 2001, ch. 114, § 315.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

Compiler's notes. — For the Hague Convention, see 40-10A-302 NMSA and notes thereto.

40-10A-316. Role of law enforcement.

At the request of a prosecutor or other appropriate public official acting under Section 315 [40-10A-315 NMSA 1978], a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official with responsibilities under Section 315.

History: Laws 2001, ch. 114, § 316.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-317. Costs and expenses.

If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or other appropriate public official and law enforcement officers under Section 315 or 316 [40-10A-315 or 40-10A-316 NMSA 1978].

History: Laws 2001, ch. 114, § 317.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

ARTICLE 4
MISCELLANEOUS PROVISIONS

40-10A-401. Application and construction.

In applying and construing the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2001, ch. 114, § 401.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-402. Severability clause.

If any provision of the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act which can be given effect without the invalid provision or application and to this end the provisions of the act are severable.

History: Laws 2001, ch. 114, § 402.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

40-10A-403. Transitional provision.

A motion or other request for relief made in a child-custody proceeding or to enforce a child-custody determination which was commenced before the effective date of the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 NMSA 1978] is governed by the law in effect at the time the motion or other request was made.

History: Laws 2001, ch. 114, § 403.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 114, § 405 makes the Uniform Child-Custody Jurisdiction and Enforcement Act effective July 1, 2001.

ARTICLE 10B
Kinship Guardianship

40-10B-1. Short title.

This act [40-10B-1 to 40-10B-15 NMSA 1978] may be cited as the "Kinship Guardianship Act".

History: Laws 2001, ch. 167, § 1.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

Cross references. — For forms approved for use in Kinship Guardianship proceedings see civil forms 4-981 to 4-991 NMRA.

Compiler's notes. — The Kinship Guardianship Act, codified as 40-10B-1 to 40-10B-15 NMSA 1978, was originally drafted an enacted to be Chapter 45, Article 5 NMSA 1978, but it was recompiled to Chapter 48 NMSA 1978, as the latter seems a more appropriate placement.

40-10B-2. Policy; purpose.

A. It is the policy of the state that the interests of children are best served when they are raised by their parents. When neither parent is able or willing to provide appropriate care, guidance and supervision to a child, it is the policy of the state that, whenever possible, a child should be raised by family members or kinship caregivers.

B. The Kinship Guardianship Act is intended to address those cases where a parent has left a child or children in the care of another for ninety consecutive days and that arrangement leaves the child or children without appropriate care, guidance or supervision.

C. The purposes of the Kinship Guardianship Act [40-10B-1 NMSA 1978] are to:

(1) establish procedures to effect a legal relationship between a child and a kinship caregiver when the child is not residing with either parent; and

(2) provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's parents are not willing or able to do so.

History: Laws 2001, ch. 167, § 2.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-3. Definitions.

As used in the Kinship Guardianship Act [40-10B-1 NMSA 1978]:

A. "caregiver" means an adult, who is not a parent of a child, with whom a child resides and who provides that child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child;

B. "child" means an individual who is a minor;

C. "kinship" means the relationship that exists between a child and a relative of the child, a godparent, a member of the child's tribe or clan or an adult with whom the child has a significant bond;

D. "parent" means a biological or adoptive parent of a child whose parental rights have not been terminated; and

E. "relative" means an individual related to a child as a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin or any person denoted by the prefix "grand" or "great", or the spouse or former spouse of the persons specified.

History: Laws 2001, ch. 167, § 3.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-4. Jurisdiction and venue.

A. The district court has jurisdiction of proceedings pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978].

B. Proceedings pursuant to the Kinship Guardianship Act shall be in the district court of the county of the child's legal residence or the county where the child resides, if different from the county of legal residence.

History: Laws 2001, ch. 167, § 4.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-5. Petition; who may file; contents.

A. A petition seeking the appointment of a guardian pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978] may be filed only by:

(1) a kinship caregiver;

(2) a caregiver, who has reached his twenty-first birthday, with whom no kinship with the child exists, who has been nominated to be guardian of the child by the child, and the child has reached his fourteenth birthday; or

(3) a caregiver designated formally or informally by a parent in writing if the designation indicates on its face that the parent signing understands:

(a) the purpose and effect of the guardianship;

(b) that he has the right to be served with the petition and notices of hearings in the action; and

(c) that he may appear in court to contest the guardianship.

B. A petition seeking the appointment of a guardian shall be verified by the petitioner and allege the following with respect to the child:

(1) facts that if proved will meet the requirements of Subsection B of Section 8 of the Kinship Guardianship Act [40-10B-8 NMSA 1978];

(2) the date and place of birth of the child, if known, and if not known, the reason for the lack of knowledge;

(3) the legal residence of the child and the place where he resides, if different from the legal residence;

(4) the marital status of the child;

(5) the name and address of the petitioner;

(6) the kinship, if any, between the petitioner and the child;

(7) the names and addresses of the parents of the child;

(8) the names and addresses of persons having legal custody of the child;

(9) the existence of any matters pending involving the custody of the child;

(10) a statement that the petitioner agrees to accept the duties and responsibilities of guardianship;

(11) the existence of any matters pending pursuant to the provisions of Chapter 32A, Article 4 NMSA 1978 and, if so, a statement that the children, youth and families department consents to the relief requested in the petition;

(12) whether the child is subject to provisions of the federal Indian Child Welfare Act of 1978 and, if so:

(a) the tribal affiliations of the child's parents; and

(b) the specific actions taken by the petitioner to notify the parents' tribes and the results of the contacts, including the names, addresses, titles and telephone numbers of the persons contacted, and copies of correspondence with the tribe; and

(13) other facts in support of the guardianship sought.

History: Laws 2001, ch. 167, § 5.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

Indian Child Welfare Act. — The federal Indian Child Welfare Act of 1978, referred to in subsection B(12), is codified as 25 U.S.C. § 1901 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. § 1901 et seq.) upon child custody determinations, 89 A.L.R.5th 195.

40-10B-6. Service of petition; notice; parties.

A. At the time of filing the petition, the petitioner shall obtain an order of the court setting a date for hearing on the petition, which date shall be no less than thirty and no more than ninety days from the date of filing the petition.

B. The petition and a notice of the hearing shall be served upon:

(1) the children, youth and families department if there is any pending matter relating to the child pursuant to the provisions of Chapter 32A, Article 4 NMSA 1978;

(2) the child if he has reached his fourteenth birthday;

(3) the parents of the child;

(4) a person having custody of the child or visitation rights pursuant to a court order; and

(5) if the child is an Indian child as defined in the federal Indian Child Welfare Act of 1978, the appropriate Indian tribe and any "Indian custodian", together with a notice of pendency of the guardianship proceedings, pursuant to the provisions of the federal Indian Child Welfare Act of 1978.

C. Service of process required by Subsection A of this section shall be made in accordance with the requirements for giving notice of a hearing pursuant to Subsection A of Section 45-1-401 NMSA 1978.

D. The persons required to be served pursuant to Subsection B of this section have a right to file a response as parties to this action. Other persons may intervene pursuant to Rule 1-024 NMRA.

History: Laws 2001, ch. 167, § 6.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

Indian Child Welfare Act. — The federal Indian Child Welfare Act of 1978, referred to in subsection B(5), is codified as 25 U.S.C. § 1901 et seq.

Cross references. — For service of process forms, see Civil Forms 4-206, 4-209 and 4-209B NMRA.

40-10B-7. Temporary guardianship pending hearing.

A. After the filing of the petition, upon motion of the petitioner or a person required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act [40-10B-6 NMSA 1978], or upon its own motion, the court may appoint a temporary guardian to serve for not more than one hundred eighty days or until the case is decided on the merits, whichever occurs first.

B. A motion for temporary guardianship shall be heard within twenty days of the date the motion is filed. The motion and notice of hearing shall be served on all persons required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act.

C. An order pursuant to Subsection A of this section may be entered ex parte upon good cause shown. If the order is entered ex parte, a copy of the order shall be served on the persons required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act. If a person files an objection to the order, the court immediately shall schedule a hearing to be held within ten days of the date the objection is filed. Notice of the hearing shall be given to the petitioner and all persons required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act.

History: Laws 2001, ch. 167, § 7.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-8. Hearing; elements of proof; burden of proof; judgment; child support.

A. Upon hearing, if the court finds that a qualified person seeks appointment, the venue is proper, the required notices have been given, the requirements of Subsection B of this section have been proved and the best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings or make any other disposition of the matter that will serve the best interests of the minor.

B. A guardian may be appointed pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978] only if:

(1) a parent of the child is living and has consented in writing to the appointment of a guardian and the consent has not been withdrawn;

(2) a parent of the child is living but all parental rights in regard to the child have been terminated or suspended by prior court order; or

(3) the child has resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed and a parent having legal custody of the child is currently unwilling or unable to provide adequate care, maintenance and supervision for the child or there are extraordinary circumstances; and

(4) no guardian of the child is currently appointed pursuant to a provision of the Uniform Probate Code [Chapter 45, Article 1 NMSA 1978].

C. The burden of proof shall be by clear and convincing evidence, except that in those cases involving an Indian child as defined in the federal Indian Child Welfare Act of 1978, the burden of proof shall be proof beyond a reasonable doubt.

D. As part of a judgment entered pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978], the court may order a parent to pay the reasonable costs of support and maintenance of the child that the parent is financially able to pay. The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment.

E. The court may order visitation between a parent and child to maintain or rebuild a parent-child relationship if the visitation is in the best interests of the child.

History: Laws 2001, ch. 167, § 8.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

Indian Child Welfare Act. — The federal Indian Child Welfare Act of 1978, referred to in subsection C, is codified as 25 U.S.C. § 1901 et seq.

40-10B-9. Guardian ad litem; appointment.

A. In a proceeding to appoint a guardian pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978], the court may appoint a guardian ad litem for the child upon the motion of a party or solely in the court's discretion. The court shall appoint a guardian ad litem if a parent of the child is participating in the proceeding and objects to the appointment requested.

B. In a proceeding in which a parent of the child has petitioned for the revocation of a guardianship established pursuant to the Kinship Guardianship Act and the guardian objects to the revocation, the court shall appoint a guardian ad litem.

C. The court may order all or some of the parties to a proceeding to pay a reasonable fee of a guardian ad litem. If all of the parties are indigent, the court may award a reasonable fee to the guardian ad litem to be paid out of funds of the court.

History: Laws 2001, ch. 167, § 9.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-10. Guardian ad litem; powers and duties.

A guardian ad litem appointed by the court in a proceeding pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978] shall:

A. in connection with a petition for guardianship, make a diligent investigation of the circumstances surrounding the petition, including visiting the child in the home, interviewing the person proposed as guardian and interviewing the parents of the child if available;

B. in connection with a petition or motion for revocation of a guardianship, recommend an appropriate transition plan in the event the guardianship is revoked; and

C. at a hearing held in connection with proceedings described in Subsection A or B of this section, report to the court concerning the best interests of the child and the child's position on the requested relief.

History: Laws 2001, ch. 167, § 10.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-11. Nomination objection by child.

In a proceeding for appointment of a guardian pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978]:

A. the court shall appoint a person nominated by a child who has reached his fourteenth birthday unless the court finds the nomination contrary to the best interests of the child; and

B. the court shall not appoint a person as guardian if a child who has reached his fourteenth birthday files a written objection in the proceeding before the person accepts appointment as guardian.

History: Laws 2001, ch. 167, § 11.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-12. Revocation of guardianship.

A. Any person, including a child who has reached his fourteenth birthday, may move for revocation of a guardianship created pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978]. The person requesting revocation shall attach to the motion a transition plan proposed to facilitate the reintegration of the child into the home of a parent or a new guardian. A transition plan shall take into consideration the child's age, development and any bond with the guardian.

B. If the court finds that a preponderance of the evidence proves a change in circumstances and the revocation is in the best interests of the child, it shall grant the motion and:

(1) adopt a transition plan proposed by a party or the guardian ad litem;

(2) propose and adopt its own transition plan; or

(3) order the parties to develop a transition plan by consensus if they will agree to do so.

History: Laws 2001, ch. 167, § 12.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-13. Rights and duties of guardian.

A. A guardian appointed for a child pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978] has the legal rights and duties of a parent except the right to consent to adoption of the child and except for parental rights and duties that the court orders retained by a parent.

B. Unless otherwise ordered by the court, a guardian appointed pursuant to the Kinship Guardianship Act has authority to make all decisions regarding visitation between a parent and the child.

C. A certified copy of the court order appointing a guardian pursuant to the Kinship Guardianship Act shall be satisfactory proof of the authority of the guardian, and letters of guardianship need not be issued.

History: Laws 2001, ch. 167, § 13.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-14. Continuing jurisdiction of the court.

The court appointing a guardian pursuant to the Kinship Guardianship Act [40-10B-1 to 40-10B-15 NMSA 1978] retains continuing jurisdiction of the matter.

History: Laws 2001, ch. 167, § 14.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-10B-15. Caregiver's authorization affidavit.

A. A caregiver who executes a caregiver's authorization affidavit substantially in the form contained in Subsection J of this section by completing Items 1 through 4 of the form and who subscribes and swears to it before a notary public, is authorized to enroll the named child in school and consent to school-related medical care for the child.

B. A caregiver who is a relative of the child, who executes a caregiver's authorization affidavit substantially in the form set forth in Subsection J of this section by completing Items 1 through 8 and who subscribes and swears to the affidavit before a notary public, has the same authority to authorize medical care, dental care and mental

health care for the child as a guardian appointed pursuant to the Kinship Guardianship Act [40-10B-1 NMSA 1978].

C. A caregiver's authorization affidavit executed pursuant to this section is not valid for more than one year after the date of its execution.

D. The decision of a caregiver to consent to or refuse medical, dental or mental health care pursuant to a caregiver's authorization affidavit is superseded by a contravening decision of a parent or other person having legal custody of the child if the contravening decision does not jeopardize the life, health or safety of the child.

E. No person who acts in good faith reliance on a caregiver's authorization affidavit to provide medical, dental or mental health care to a child without actual knowledge of facts contrary to those stated in the affidavit is subject to criminal culpability, civil liability or professional disciplinary action if the affidavit complies with the requirements of this section. The foregoing exclusions apply even though a parent having parental rights or person having legal custody of the child has contrary wishes as long as the provider of the care has no actual knowledge of the contrary wishes.

F. A person who relies upon a caregiver's authorization affidavit is under no duty to make further inquiry or investigation.

G. If a child stops living with the caregiver, the caregiver shall give notice of that fact to a school, health care provider, mental health care provider, health insurer or other person who has been given a copy of the caregiver's authorization affidavit.

H. A caregiver's authorization affidavit is invalid unless it contains the warning statement set out in the form contained in Subsection J of this section in not less that ten-point boldface type, or a reasonable equivalent thereof, enclosed in a box with three-point rule lines.

I. As used in this section, "school-related medical care" means medical care that is required by the state or a local government authority as a condition for school enrollment.

J. The caregiver's authorization affidavit shall be in substantially the following form:

"Caregiver's Authorization Affidavit

Use of this affidavit is authorized by the Kinship Guardianship Act.

Instructions:

A. Completion of Items 1-4 and the signing of the affidavit is sufficient to authorize enrollment of a minor in school and authorize school-related medical care.

B. Completion of Items 5-8 is additionally required to authorize any other medical care.

Print clearly:

The minor named below lives in my home and I am 18 years of age or older.

1. Name of minor:

_____

2. Minor's birth date:

_____

3. My name (adult giving authorization):

_____

4. My home address:

_____

5. ( ) I am a grandparent, aunt, uncle or other qualified relative of the minor (see back of this form for a definition of "qualified relative").

6. Check one or both (for example, if one parent was advised and the other cannot be located):

( ) I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.

( ) I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.

7. My date of birth:

_____

8. My NM driver's license or other identification card number:

_____

WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment or both.

I declare under penalty of perjury under the laws of the state of New Mexico that the foregoing is true and correct.

Signed:

_____

The foregoing affidavit was subscribed, sworn to and acknowledged before me this _____ day of _____ 20_____, by _____.

My commission expires: _____ _____
Notary Public

Notices:

1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody and control of the minor, and does not mean that the caregiver has legal custody of the minor.

2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.

3. This affidavit is not valid for more than one year after the date on which it is executed.

Additional Information:

TO CAREGIVERS:

1. "Qualified relative", for purposes of Item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, godparent, member of the child's tribe or clan, an adult with whom the child has a significant bond or any person denoted by the prefix "grand" or "great", or the spouse or former spouse of any of the persons specified in this definition.

2. If the minor stops living with you, you are required to notify any school, health care provider, mental health care provider, health insurer or other person to whom you have given this affidavit.

3. If you do not have the information requested in Item 8, provide another form of identification such as your social security number or medicaid number.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. No person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical, dental or mental health care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for such reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes."

History: Laws 2001, ch. 167, § 15.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 167 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

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.

ANNOTATIONS

Cross references. — For forms that may be used in paternity proceedings, see Domestic Relations Forms 4A-331 and 4A-332 NMRA.

Court may grant grandparent's visitation privileges. — Under the Grandparent's Visitation Privileges Act (40-9-1 to 40-9-4 NMSA 1978), a court may grant visitation privileges in the rendering of a judgment as to the existence of a parent-child relationship pursuant to this article. Lucero v. Hart, 120 N.M. 794, 907 P.2d 198 (Ct. App. 1995).

Law reviews. — For Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

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

For comment, "Stopping the Baby-Trade: Affirming the Value of Human Life Through the Invalidation of Surrogacy Contracts: A Blueprint for New Mexico," see 29 N.M.L. Rev. 407 (1999).

For note, "Collateral Estoppel as a Bar to Post-Divorce Litigation of Paternity - *Tedford v. Gregory*," see 30 N.M.L. Rev. 95 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of father for retroactive child support on judicial determination of paternity, 87 A.L.R.5th 361.

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 [Chapter 32A, Article 5 NMSA 1978].

History: Laws 1986, ch. 47, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born, 84 A.L.R.4th 655.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights, 87 A.L.R.4th 572.

40-11-5. 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 public health division of the department of health;

(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 pursuant to Section 24-14-13 NMSA 1978 or in writing filed with the vital statistics bureau of the public health division of the department of health, which shall promptly inform the mother of the filing of the acknowledgment, and, within a reasonable time after being informed of the filing, she does not dispute the acknowledgment. In order to enforce the rights of custody or visitation, a man presumed to be the father as a result of filing a written acknowledgment shall seek an appropriate judicial order in an action filed for that purpose. A signed voluntary acknowledgment of paternity is considered a legal finding of paternity, subject to the right of any signatory to rescind the acknowledgment within the earlier of:

(a) sixty days from the date of signing; or

(b) the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order, to which the signatory is a party. After sixty days from the date of signing, the acknowledgment may be challenged in court only on the grounds of fraud, duress or material mistake of fact, with the burden of proof upon the challenger, although legal responsibilities arising from signing the acknowledgment may not be suspended during the challenge, except upon a showing of good cause. Judicial or administrative proceedings are not required to ratify an unchallenged acknowledgment.

B. If two or more men are presumed under this section to be the child's father, an acknowledgment 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 person 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.

E. The voluntary acknowledgment of paternity must be recognized as a basis for seeking a support order without requiring any further proceedings to establish paternity.

F. Full faith and credit must be given to determination of paternity made by other states, including acknowledgments of paternity.

History: Laws 1986, ch. 47, § 5; 1989, ch. 56, § 1; 1993, ch. 287, § 3; 1997, ch. 237, § 17.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, added Subsection D.

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted "public health division of the department of health" for "health services division of the health and environment department" in Subparagraph (a) of Paragraph (3) and in the first sentence of Paragraph (5), and inserted "pursuant to Section 24-14-13 NMSA 1978 or" in the first sentence of Paragraph (5), and added the second sentence of Paragraph (5).

The 1997 amendment, effective April 11, 1997, in Paragraph A(5) added the last sentence and added Subparagraphs A(5)(a) and A(5)(b), and added Subsections E and F.

Law reviews. — For annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born, 84 A.L.R.4th 655.

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 [department of health], 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 [department of health] 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.

ANNOTATIONS

Bracketed material. — The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

Substantial compliance with written consent requirement. — In a proceeding for dissolution of marriage, although no signed document of consent to artificial insemination was introduced, verified pleadings by the husband and wife acknowledging the husband as the child's natural father constituted substantial compliance with the requirements of this section. Lane v. Lane, 1996-NMCA-023, 121 N.M. 414, 912 P.2d 290.

Law reviews. — For annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of surrogate parenting agreement, 77 A.L.R.4th 70.

Rights and obligations resulting from human artificial insemination, 83 A.L.R.4th 295.

Determination of status as legal or natural parents in contested surrogacy births, 77 A.L.R.5th 567.

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.

ANNOTATIONS

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).

Standing to bring action. — Twenty-year-old child was "interest party" entitled to bring action for paternity and past child support under the Uniform Parentage Act. State ex rel. Salazar v. Roybal, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

Adult child. — The court was not required to apply the "best interests of the child" standard to an action for paternity and retroactive child support, where the child was over the age of majority and had not developed a close emotional bond with the presumed parent; moreover, the child, not the alleged father, is the party legally entitled to advance the "best interests" theory. Tedford v. Gregory, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Standing to bring action.

A putative grandparent has standing as an interested party under Subsection A of this section to bring an action to establish a parent-child relationship for the purpose of establishing the grandparent as either the maternal or paternal grandparent of a child in order to obtain visitation privileges under Section 40-9-2 NMSA 1978. Gutierrez v. Connick, 2004-NMCA-017, ___N.M.___, 87 P.3d 552.

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.

ANNOTATIONS

Law reviews. — Annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

Adult child. — Twenty-year-old child was "interested party" under 40-11-7 NMSA 1978, and therefore entitled to bring action for paternity and past child support under the Uniform Parentage Act. State ex rel. Salazar v. Roybal, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

This article authorizes an adult daughter to pursue a cause of action for retroactive child support against her alleged father, in conjunction with a paternity action, prior to her twenty-first birthday. Tedford v. Gregory, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Suit need not commence before putative father's death. — Statute does not require children who were fathered outside of marriage to bring support action before their father died in order to make support claims against the estate. Kesterson v. DeLara, 2002-NMCA-004, 131 N.M. 430, 38 P.3d 198, cert. denied, 131 N.M. 564, 40 P.3d 1008 (2002).

40-11-9. Parties.

The child may be made a party to the action. If the child is a party and a minor, he shall be represented by his general guardian or a guardian ad litem appointed by the court, or both. The custodian may act as guardian under this section. The court may align the parties.

History: Laws 1986, ch. 47, § 9; 1993, ch. 287, § 4.

ANNOTATIONS

Cross references. — For guardians ad litem for minors, see 38-4-10 to 38-4-12 NMSA 1978.

The 1993 amendment, effective June 18, 1993, substituted "may" for "shall" in the first sentence and "the child is a party and" for "he is" in the second sentence, and added the present third sentence.

Child not automatically party.---Nothing in the statute indicates that a child is automatically a party by virtue of the fact that a child could benefit from the proceedings. Webb v. Menix, 2004-NMCA-048, ____N.M.____, ____P.3d_____.

Noncustodial parent not general guardian. — A mother who did not have custody was not a "general guardian" with standing to challenge her former husband's paternity. Sparks ex rel. Haley v. Sparks, 114 N.M. 764, 845 P.2d 858 (Ct. App. 1992).

Collateral estoppel. — Daughter's claim for paternity and retroactive child support was not barred by collateral estoppel, as she was neither a party to the divorce proceeding nor in privity with her mother as to the original decree; however, mother's husband was barred by collateral estoppel from asserting a claim for reimbursement of child support expenses. Tedford v. Gregory, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

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.

ANNOTATIONS

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 pretrial hearing, the judge, hearing officer 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. Based upon the evaluation, the judge, hearing officer or master may enter an order for temporary support consistent with the child support guidelines as provided in Section 40-4-11.1 NMSA 1978.

B. If the parties accept a recommendation made in accordance with Subsection A of this section, judgment shall be entered accordingly.

C. If a party refuses to accept a recommendation made in accordance with Subsection A of this section and 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; 1993, ch. 287, § 5.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection A, inserted "hearing officer" in the first sentence and added the last sentence.

40-11-12. Blood and genetic 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 qualified as 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. This accreditation of the testing facility must be admissible without the need for foundation testimony or other proof of authenticity or accuracy unless an objection has been made in writing not later than twenty days before a hearing on the testing results. The court shall admit into evidence, for purposes of establishing paternity, the results of any genetic test that is of a type generally acknowledged as reliable by accreditation bodies designated by the secretary of human services and performed by a laboratory approved by such an accreditation body unless an objection has been made in writing not later than twenty days before a hearing, at which the results may be introduced into evidence.

D. If a putative father refuses to comply with an order for testing pursuant to this section, the court shall enter a judgment of parentage against him.

E. If the mother refuses to comply with an order for testing pursuant to this section, the court may dismiss the case without prejudice.

History: Laws 1986, ch. 47, § 12; 1989, ch. 56, § 2; 1993, ch. 287, § 6; 1997, ch. 237, § 18.

ANNOTATIONS

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".

The 1993 amendment, effective June 18, 1993, added Subsections D and E.

The 1997 amendment, effective April 11, 1997, added "and genetic" to the section heading, added the last two sentences to Subsection C, and made a stylistic change in Subsection D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights, 87 A.L.R.4th 572.

40-11-13. 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.

ANNOTATIONS

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of father for retroactive child support on judicial determination of paternity, 87 A.L.R.5th 361.

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. Jury trial is not available in actions to establish parentage. 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.

D. A default order must be entered upon a showing of service of process on the defendant or any other showing required by state law.

History: Laws 1986, ch. 47, § 14; 1997, ch. 237, § 19.

ANNOTATIONS

The 1997 amendment, effective April 11, 1997, added the second sentence in Subsection A, and added Subsection D.

No right to jury trial. — In a paternity proceeding the putative father is not entitled to a jury trial because such right did not exist at common law or by statute at the time the New Mexico Constitution was adopted. State ex rel. Human Servs. Dep't v. Aguirre, 110 N.M. 528, 797 P.2d 317 (Ct. App. 1990).

Law reviews. — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For annual Survey of New Mexico Family Law, see 17 N.M.L. Rev. 291 (1987).

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. The court shall order child support retroactive to the date of the child's birth, but not to exceed twelve years unless there is a substantial showing that paternity could not have been established and an action for child support could not have been brought within twelve years of the child's birth pursuant to the provisions of Sections 40-4-11 through 40-4-11.3 NMSA 1978; provided that, in deciding whether or how long to order retroactive support, the court shall consider:

(1) whether the alleged or presumed father has absconded or could not be located; and

(2) whether equitable defenses are applicable.

D. A determination of parentage and adjudication of support is binding on:

(1) a signatory on an acknowledgment of paternity;

(2) a nonresident party subject to the court's jurisdiction pursuant to Section 40-6A-201 NMSA 1978; and

(3) the child, if:

(a) the determination was based on an acknowledgment of paternity and the acknowledgment is consistent with the results of genetic testing;

(b) the child was a party or was represented in the proceeding by a guardian ad litem;

(c) there is a stipulation or admission in the final order that the parties are the parents of the child; or

(d) in a proceeding to dissolve a marriage or establish support, a final order expressly identified the child as a "child of the marriage", "issue of the marriage", "child of the parties" or similar words that indicate the parties are the parents of the child and, if applicable, the court had personal jurisdiction over any nonresident party pursuant to Section 40-6A-201 NMSA 1978.

E. Support judgments or orders ordinarily shall be for periodic payments which may vary in amount. In the best interest of the child, a lump-sum payment or the purchase of an annuity may be ordered in lieu of periodic payments of support; provided, however,

nothing in this section shall deprive a state agency of its right to reimbursement from an appropriate party should the child be a past or future recipient of public assistance.

F. In determining the amount to be paid by a parent for support of the child, a court, child support hearing officer or master shall make such determination in accordance with the provisions of the child support guidelines of Section 40-4-11.1 NMSA 1978.

G. Bills for pregnancy, childbirth and genetic testing are admissible as evidence without requiring third-party foundation testimony and constitute prima facie evidence of amounts incurred.

History: Laws 1986, ch. 47, § 15; 1989, ch. 56, § 4; 1993, ch. 287, § 7; 1997, ch. 237, § 20; 2001, ch. 215, § 1; 2004, ch. 41, § 4.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, rewrote Subsection E to the extent that a detailed comparison would be impracticable.

The 1993 amendment, effective June 18, 1993, added the last sentence of Subsection C and substituted "court, child support hearing officer or master" for "court or child support hearing office" in Subsection E.

The 1997 amendment, effective April 11, 1997, deleted "or children" following "of the child" near the beginning of Subsection E, and added Subsection F.

The 2001 amendment, effective June 15, 2001, inserted the material following "NMSA 1978" in Subsection C; added Subsection D and renumbered the remaining subsections accordingly; in Subsection E, substituted "nothing in this section shall deprive" for "a lump-sum payment shall not thereafter deprive" and "be a past or future recipient" for "become a recipient".

The 2004 amendment, effective May 19, 2004, amended Subsection C to limit retroactive child support by adding: "but not to exceed twelve years unless there is a substantial showing that paternity could not have been established and an action for child support could not have been brought within twelve years of the child's birth".

Judgment awarding mother retroactive child support affirmed. — Where mother's conduct supports the determination that she waived child support by denying father's paternity, destroying the baby clothing he sent, and testifying that she did not want anything from him and mother knew she was entitled to child support from father, yet she did not seek support for twelve years from the child's birth in 1986, and she actively denied father's paternity, the evidence established the elements of waiver by acquiescence, and the court's judgment awarding mother retroactive child support beginning December 1998 is affirmed. Webb v. Menix, 2004-NMCA-048, ____N.M.____, ___P.3d_____.

Application to fathers not denying paternity. — Retroactive support provisions of Uniform Parentage Act apply to fathers who do not deny paternity of their children but never formally acknowledge their paternity or assume legal responsibility for their support. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Deviations from child support guidelines. — In judgment for paternity and retroactive child support, trial court erred in departing from the statutory child support guidelines without first determining the amount due under the guidelines, in failing to clearly indicate how it arrived at its award, and in failing to explain its deviations from the guidelines. Tedford v. Gregory, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Pregnancy and childbirth costs. — Trial court erred in holding that mother did not have standing to seek reimbursement of pregnancy and childbirth costs under this section; although not the real party in interest, mother had standing because she had incurred the costs. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Right of retroactive support not waived by mother's inaction. — Because retroactive child support is for the benefit of the child as well as the custodial parent, the right to such retroactive support was not deemed to have been waived by the mother's failure to request child support or institute proceedings. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Medical coverage alone not "child support." — Child support obligation was not met merely by father's provision of medical insurance for child, where such coverage was required by the Mandatory Medical Support Act, Section 40-4C-2 NMSA 1978, and was in addition to, not in lieu of, father's support obligations under the child support guidelines. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

Law reviews. — For note, "Search and Seizure Law: State v. Cardenas-Alvarez: The Jurisdictional Reach of State Constitutions - Applying State Search and Seizure Standards to Federal Agents," see 32 N.M.L. Rev. 531 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Postmajority disability as reviving parental duty to support child, 48 A.L.R.4th 919.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 A.L.R.4th 1170.

Action to avoid child support obligation against public policy. — Father's legal claims against mother, based on contraceptive fraud, to recover compensatory damages for the "economic injury" of supporting a child were not cognizable in New Mexico courts because they contravene the public policy of this state. Wallis v. Smith, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, cert. denied, 130 N.M. 254, 23 P.3d 929 (2001).

40-11-16. Costs.

The court may order reasonable fees of counsel, experts and the child's guardian and other costs of the action and pretrial proceedings, including blood or genetic tests, to be paid by any party in proportions and at times determined by the court, but not to exceed twelve years unless there is a substantial showing that paternity could not have been established and an action for child support could not have been brought within twelve years of the child's birth. 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; 2004, ch. 41, § 5.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, inserted "or genetic" in the first sentence.

The 2004 amendment, effective May 19, 2004, amended this section to limit fees and costs for child support by adding: "but not to exceed twelve years unless there is a substantial showing that paternity could not have been established and an action for child support could not have been brought within twelve years of the child's birth".

Scope of appellate review. — Appellate court will review the district court's findings and conclusions as to trial costs and reasonable attorney fees that relate to the nature of the proceedings, the complexity of the case, the abilities of the parties' attorneys, and the parties' economic disparities. Webb v. Menix, 2004-NMCA-048, ____N.M.____, ___P.3d_____.

Award of costs and fees to child. — Absent a showing of cause, it was error to deny costs and attorney's fees to daughter, who prevailed in action against father for paternity and retroactive child support, and presented evidence of her inability to pay these costs and her father's ability to do so. Tedford v. Gregory, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Fee award held insufficient. — In light of financial disparity between mother and father, and the $1,890 in unpaid attorney's fees outstanding, it was error to only award her $600 in fees. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

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.

ANNOTATIONS

Cross references. — For enforcement of judgments, see 39-1-1 to 39-1-20 NMSA 1978 and 39-5-1 to 39-5-23 NMSA 1978.

Application to fathers not denying paternity. — Retroactive support provisions of Uniform Parentage Act apply to fathers who do not deny paternity of their children but never formally acknowledge their paternity or assume legal responsibility for their support. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 975 P.2d 392.

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 [department of health] 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.

ANNOTATIONS

Cross references. — For the vital statistics bureau of the department of health, see 24-14-3 NMSA 1978.

Bracketed material. — The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and creates a new 9-7-4 NMSA

1978, relating to the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

40-11-23. Limitation.

An action to determine a parent and child relationship under the Uniform Parentage Act [40-11-1 NMSA 1978] shall be brought no later than three years after the child has reached the age of majority.

History: Laws 1986, ch. 47, § 23; 1989, ch. 56, § 6; 2004, ch. 41, § 6.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, designated the formerly undesignated provisions as Subsection A, and added Subsection B.

The 2004 amendment, effective May 19, 2004, deleted Subsection B.

Applicability. — This article's twenty-one-year statute of limitations applies to claims for paternity and for claims for past child support based on such paternity. State ex rel. Salazar v. Roybal, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

Action for back child support. — The trial court erred in applying the "catch-all" statute of limitations of 37-1-4 NMSA 1978 to a cause of action for back child support. Rather, in order to effectuate the purposes of this act, the applicable statute of limitations for support proceedings is that of this section. Padilla v. Montano, 116 N.M. 398, 862 P.2d 1257 (Ct. App. 1993).

This article authorized an adult daughter to pursue a cause of action for retroactive child support against her alleged father, in conjunction with a paternity action, prior to her twenty-first birthday. Tedford v. Gregory, 1998-NMCA-067, 125 N.M. 206, 959 P.2d 540, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Department without standing after child reaches majority. — The department's child support enforcement division could not bring action for paternity and past child support on behalf of twenty-year-old child; although such action could be maintained by the child, its outcome had no bearing upon the department, and therefore department had no standing. State ex rel. Salazar v. Roybal, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

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 shall create a "domestic relations mediation fund" of the judicial district. Money in the fund shall be used to offset the cost of operating the domestic relations mediation program and the supervised visitation program. Deposits to the fund shall include payments made through the imposition of a sliding fee scale pursuant to Sections 40-12-5 and 40-12-5.1 NMSA 1978, distributions pursuant to Section 34-6-40 NMSA 1978 and the collection of the surcharge provided for in Section 40-12-6 NMSA 1978.

History: Laws 1987, ch. 153, § 4; 2001, ch. 201, § 1.

ANNOTATIONS

The 2001 amendment, effective June 15, 2001, deleted "that establishes a domestic relations mediation program pursuant to Section 5 of the Domestic Relations Mediation Act" following "A judicial district"; inserted "and the supervised visitation program" at the end of the second sentence; substituted "Sections 40-12-5 and 40-12-5.1 NMSA 1978, distributions pursuant to Section 34-6-40 NMSA 1978" for "Section 5 of the Domestic Relations Mediation Act"; and substituted "Section 40-12-6 NMSA 1978" for "Section 6 of that act".

40-12-5. Domestic relations mediation program.

A. A judicial district may establish a domestic relations mediation program by court rule approved by the supreme court. The district court may employ or contract with a counselor to provide consultations, evaluations and mediation in domestic relations cases involving children.

B. Parents may request of the court the services of the domestic relations mediation program for consultations, evaluation or mediation. Parents shall enter the program when ordered to do so by the court.

C. Parents shall pay the cost of the domestic relations mediation program pursuant to a sliding fee scale approved by the supreme court. The sliding fee scale shall be based on ability to pay for the specific service rendered by the counselor. The fees shall be paid to the district court to be credited to the fund.

History: Laws 1987, ch. 153, § 5.

ANNOTATIONS

Cross references. — For mediation form for First Judicial District Court, see LR1-Form H.

For child custody mediation sliding fee scale for Third Judicial District Court, see LR3-Appendix B.

For rule relating to domestic relations mediation for Fifth Judicial District Court, see LR5-504.

For child custody mediation sliding fee scale for Ninth Judicial District Court, see LR9-Appendix B.

40-12-5.1. Supervised visitation program.

A. A judicial district may establish a "supervised visitation program" by local court rule approved by the supreme court. The supervised visitation program shall be used when, in the opinion of the court, the best interests of the child are served if confrontation or contact between the parents is to be avoided during exchanges of custody or if contact between a parent and a child should be supervised. In a supervised visitation program, the district court may employ or contract with a person:

(1) with whom a child may be left by one parent for a short period while waiting to be picked up by the other parent; or

(2) to supervise visits among one or both parents and the child.

B. A parent may request the services of the supervised visitation program or the court may order that the program be used.

C. Parents shall pay the cost of the neutral corner program pursuant to a sliding fee scale approved by the supreme court. The sliding fee scale shall be based on ability to pay for the service. The fees shall be paid to the district court to be credited to the fund.

History: Laws 2001, ch. 201, § 2.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 201 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

40-12-6. Domestic relations mediation fees; district court clerk to collect.

In addition to fees collected pursuant to Section 34-6-40 NMSA 1978 for the docketing of civil cases, in any judicial district which has established a domestic relations mediation program, the district court clerk shall collect a surcharge of thirty dollars ($30.00) on all new and reopened domestic relations cases.

History: Laws 1987, ch. 153, § 6.

ARTICLE 13
Family Violence Protection

40-13-1. Short title.

Chapter 40, Article 13 NMSA 1978 may be cited as the "Family Violence Protection Act".

History: Laws 1987, ch. 286, § 1; 1999, ch. 142, § 1.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, substituted "Chapter 40, Article 13 NMSA 1978" for "this act".

40-13-1.1. Legislative findings; state policy; dual arrests.

The legislature finds that domestic abuse incidents are complex and require special training on the part of law enforcement officers to respond appropriately to domestic abuse incidents. The state of New Mexico discourages dual arrests of persons involved in incidents of domestic abuse. A law enforcement officer, in making arrests for domestic abuse, shall seek to identify and shall consider whether one of the parties acted in self defense.

History: Laws 2002, ch. 34, § 2 and Laws 2002, ch. 35, § 2.

ANNOTATIONS

Duplicate laws. — Laws 2002, ch. 34, § 2 and Laws 2002, ch. 35, § 2 enact identical new sections of law effective March 4, 2002. Both have been compiled as 40-13-1.1 NMSA 1978.

40-13-2. Definitions.

As used in the Family Violence Protection Act [this article]:

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 by a household member against another household member resulting in:

(1) physical harm;

(2) severe emotional distress;

(3) bodily injury or assault;

(4) a threat causing imminent fear of bodily injury by any household member;

(5) criminal trespass;

(6) criminal damage to property;

(7) repeatedly driving by a residence or work place;

(8) telephone harassment;

(9) stalking;

(10) harassment; or

(11) harm or threatened harm to children as set forth in the paragraphs of this subsection;

D. "household member" means a spouse, former spouse, family member, including a relative, parent, present or former stepparent, present or former in-law, child or co-parent of a child, or a person with whom the petitioner has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for purposes of this section; and

E. "order of protection" means a court order granted for the protection of victims of domestic abuse.

History: Laws 1987, ch. 286, § 2; 1993, ch. 109, § 1; 1995, ch. 23, § 3.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection C, inserted "by a household member against another household member" in the introductory language, added the paragraph designations, added Paragraphs (2) and (5) through (11), and made several minor stylistic changes; and, in Subsection D, substituted "including a relative, child" for "present or former household member or", added "or a person with whom the petitioner has had a continuing personal relationship" at the end of the first sentence, and added the last sentence.

The 1995 amendment, effective June 16, 1995, in the first sentence in Subsection D, inserted "parent, present or former step-parent, present or former in-law" following "relative" and inserted "or" preceding "co-parent".

Domestic abuse. — Where the facts of a case, taken as a whole, show repeated incidents that come within the terms of Subsection C of this section, the evidence does make out a case of domestic abuse. Lujan v. Casados-Lujan, 2004-NMCA-036, ___N.M.____, 87 P.3d 1067, cert. denied, 2004-NMCERT-003 ___N.M.___, 88 P.3d 261.

Trial in metropolitan court. — All acts of domestic abuse as defined in Subsection C should be tried on-record in the metropolitan court. State ex rel. Schwartz v. Sanchez, 1997-NMSC-021, 123 N.M. 165, 936 P.2d 334.

40-13-3. Petition for order of protection; contents; indigent petitioners; standard forms.

A. A victim of domestic abuse may petition the court under the Family Violence Protection Act [this article] for an order of protection.

B. The petition shall be made under oath or shall be accompanied by a sworn affidavit setting out specific facts showing the alleged domestic abuse.

C. The petition shall state whether any other domestic action is pending between the petitioner and the respondent.

D. If any other domestic action is pending between the petitioner and the respondent, the parties shall not be compelled to mediate any aspect of the case arising from the Family Violence Protection Act unless the court finds that appropriate safeguards exist to protect each of the parties and that both parties can fairly mediate with such safeguards.

E. Any action brought under that act is independent of any proceeding for annulment, separation or divorce between the petitioner and the respondent.

F. Any remedies granted are in addition to other available civil or criminal remedies.

G. 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 respondent shall not be considered.

H. 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; 1993, ch. 109, § 2.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection C, deleted the following language which formerly appeared at the beginning of the subsection: "No petitioner is required to file for annulment, separation or divorce as a prerequisite to obtaining an order of protection. However, the", inserted "The" at the beginning of the subsection, and deleted the former last sentence which read "If an action is pending, the petition shall be filed in the court which has jurisdiction over the pending action"; added Subsections D, E, and F and redesignated the remaining subsections accordingly; and substituted "respondent" for "alleged perpetrator of the domestic abuse" in the second sentence of Subsection G.

Availability of simple forms for victims. — Because the legislature has recognized that many people who are the victims of domestic violence are unable to obtain counsel, it has mandated that simplified forms be available for such people to use. Lujan v. Casados-Lujan, 2004-NMCA-036, ____N.M.____, 87 P.3d 1067, cert. denied, 2004–NMCERT-003 ___N.M.___, 88 P.3d 261.

40-13-3.1. Costs of criminal processes associated with domestic abuse offenses.

An alleged victim of domestic abuse shall not be required to bear the cost of:

A. filing a criminal charge against an alleged abusing household member;

B. the issuance or service of a warrant;

C. the issuance or service of a witness subpoena; or

D. the issuance or service of a protection order.

History: Laws 1995, ch. 176, § 1.

ANNOTATIONS

Cross references. — For provisions regarding forbearance of costs for alleged victims of domestic abuse, stalking or sexual assault, see 30-1-15 NMSA 1978.

For domestic violence offender fund, see 31-12-12 NMSA 1978.

For provisions regarding district court cost and fees, see 34-6-40 NMSA 1978.

For provisions regarding metropolitan court jurisdiction, see 34-8A-3 NMSA 1978.

For provisions regarding metropolitan court rules, see 34-8A-6 NMSA 1978.

For provisions regarding magistrate costs, see 35-6-3 NMSA 1978.

40-13-3.2. Ex parte emergency orders of protection.

A. The district court may issue an ex parte written emergency order of protection when a law enforcement officer states to the court in person, by telephone or via facsimile and files a sworn written statement, setting forth the need for an emergency order of protection, and the court finds reasonable grounds to believe that the petitioner or the petitioner's child is in immediate danger of domestic abuse following an incident of domestic abuse by a household member. The written statement shall include the location and telephone number of the respondent, if known.

B. A law enforcement officer who receives an emergency order of protection, whether in writing, by telephone or by facsimile transmission, from the court shall:

(1) if necessary, pursuant to the judge's or judicial officer's oral approval, write and sign the order on an approved form;

(2) if possible, immediately serve a signed copy of the order on the respondent and complete the appropriate affidavit of service;

(3) immediately provide the petitioner with a signed copy of the order; and

(4) provide the original order to the court by the close of business on the next judicial day.

C. The court may grant the following relief in an emergency order for protection upon a probable cause finding that domestic abuse has occurred:

(1) enjoin the respondent from threatening to commit or committing acts of domestic abuse against the petitioner or any designated household members;

(2) enjoin the respondent from any contact with the petitioner, including harassing, telephoning, contacting or otherwise communicating with the petitioner; and

(3) grant temporary custody of any minor child in common with the petitioner and the respondent to the petitioner, if necessary.

D. A district judge shall be available as determined by each judicial district to hear petitions for emergency orders of protection.

E. An emergency order of protection expires seventy-two hours after issuance or at the end of the next judicial day, whichever time is latest. The expiration date shall be clearly stated on the emergency order of protection.

F. A person may appeal the issuance of an emergency order of protection to the court that issued the order. An appeal may be heard as soon as the judicial day following the issuance of the order.

G. Upon a proper petition, a district court may issue a temporary order of protection that is based upon the same incident of domestic abuse that was alleged in an emergency order of protection.

H. Emergency orders of protection are enforceable in the same manner as other orders of protection that are issued pursuant to the provisions of the Family Violence Protection Act [this article].

History: Laws 1999, ch. 142, § 2.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 142, § 3, makes the act effective on July 1, 1999.

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 domestic abuse has occurred, the court shall enter an order of protection ordering the respondent to refrain from abusing the petitioner or any other household member. The court shall specifically describe the acts 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 the 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 that 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 the petitioner's property or the joint property of the parties except in the usual course of business or for the necessities of life and require the parties to account to the court for all such transferences, encumbrances and expenditures made after the order is served or communicated to the party restrained in court;

(5) order the respondent to reimburse the petitioner or any other household member for expenses reasonably related to the occurrence of domestic abuse, including medical expenses, counseling expenses, the expense of seeking temporary shelter, expenses for the replacement or repair of damaged property or the expense of lost wages;

(6) order the respondent to participate in, at the respondent's expense, professional counseling programs deemed appropriate by the court, including counseling programs for perpetrators of domestic abuse, alcohol abuse or abuse of controlled substances; and

(7) order other injunctive relief as the court deems necessary for the protection of 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. If an action relating to child custody or child support is pending or has concluded with entry of an order at the time the petition for an order of protection was filed, the court may enter an initial order of protection, but the portion of the order dealing with child custody or child support will then be transferred to the court that has or continues to have jurisdiction over the pending or prior custody or support action.

D. No order issued under the Family Violence Protection Act [Chapter 40, Article 13 NMSA 1978] shall affect title to any property or allow the petitioner to transfer, conceal, encumber or otherwise dispose of the respondent's property or the joint property of the parties.

E. Either party may request a review hearing to amend the order. An order of protection involving child custody or support may be modified without proof of a substantial or material change of circumstances.

History: Laws 1987, ch. 286, § 5; 1993, ch. 109, § 3; 2001, ch. 15, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection A, in the first sentence of the introductory paragraph, deleted "an act of" preceding "domestic abuse" and deleted "household member" following "respondent", substituted "the acts" for "in clear language understandable to the respondent the behavior" in the second sentence of the introductory paragraph, made a minor stylistic change in Paragraph (2), and inserted "require the parties" in Paragraph (4); added the second sentence in Subsection C; and added the second sentence in Subsection E.

The 2001 amendment, effective July 1, 2001, inserted Paragraphs A(5) and (6), which add provisions for financial remedies and counseling programs for victims of domestic abuse, and renumbered the remaining paragraph accordingly.

Child custody. — As far as child custody matters are concerned, the Family Violence Protection Act is to be used only in emergency situations and as a temporary remedy that is limited in scope. Lucero v. Pino, 1997-NMCA-089, 124 N.M. 28, 946 P.2d 232.

Expiration of custody order. — Issue of whether an order transferring child custody under the Family Violence Protection Act should have been declared void under Rule 1-060B (4) NMRA was moot since the order had expired. Lucero v. Pino, 1997-NMCA-089, 124 N.M. 28, 946 P.2d 232.

Double jeopardy. — Where provision in Order Prohibiting Domestic Violence (OPDV) prohibiting "battering in any manner" contained all elements of the statutorily defined offense of battery, a criminal prosecution for battery following a contempt proceeding for violating the OPDV violated defendant's right against double jeopardy. State v. Powers, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454.

40-13-6. Service of order; duration; penalty; remedies not exclusive.

A. An order of protection granted under the Family Violence Protection Act [this article] shall be filed with the clerk of the court and a copy shall be sent by the clerk to the local law enforcement agency. The order shall be personally served upon the

respondent, unless he or his attorney was present at the time the order was issued. The order shall be filed and served without cost to the petitioner.

B. An order of protection granted by the court involving custody or support shall be effective for a fixed period of time not to exceed six months. The order may be extended for good cause upon motion of the petitioner for an additional period of time not to exceed six months. Injunctive orders shall continue until modified or rescinded upon motion by either party or until the court approves a subsequent consent agreement entered into by the petitioner and the respondent.

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. State courts shall give full faith and credit to tribal court orders of protection and orders of protection issued by courts of other states. A protection order issued by a State or tribal court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if:

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

E. A person convicted of violating an order of protection granted by a court under the Family Violence Protection Act is guilty of a misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978. Upon a second or subsequent conviction, an offender shall be sentenced to a jail term of not less than seventy-two consecutive hours that shall not be suspended, deferred or taken under advisement.

F. In addition to any other punishment provided in the Family Violence Protection Act, the court shall order a person convicted to make full restitution to the party injured by the violation of an order of protection and order the person convicted to participate in and complete a program of professional counseling, at his own expense, if possible.

G. In addition to charging the person with violating an order of protection, a peace officer shall file all other possible criminal charges arising from an incident of domestic abuse when probable cause exists.

H. The remedies provided in the Family Violence Protection Act are in addition to any other civil or criminal remedy available to the petitioner.

History: Laws 1987, ch. 286, § 6; 1993, ch. 109, § 4; 1995, ch. 176, § 3; 1997, ch. 59, § 1; 1999, ch. 48, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted "local law enforcement agency" for "to the state police or to the municipal police of the city in which the court is located" in the first sentence; in Subsection B, in the first sentence, inserted "involving custody or support" and substituted "six" for "three", substituted "six" for "three" in the second sentence, and added the third sentence; added Subsections D through G and redesignated former Subsection D as present Subsection H.

The 1995 amendment, effective July 1, 1995, deleted the first part of the last sentence of Subsection A which read, "If the petitioner has been found by the court to be unable to pay court costs", and substituted "abuse" for "violence" in Subsection G.

The 1997 amendment inserted "filed and" preceding "served" in the last sentence of Subsection A. Laws 1997, ch. 59 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 20, 1997, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

The 1999 amendment, effective July 1, 1999, in Subsection D added "and orders of protection issued by the courts and other states" at the end of the first sentence, added the second sentence, and added Paragraphs (1) and (2).

Double jeopardy. — Where defendant had been convicted of contempt, a misdemeanor, for violating a domestic violence protective order and sentenced to jail time, double jeopardy did not bar prosecution of defendant for the offenses of stalking and harassment stemming from the same conduct that gave rise to the contempt adjudication. State v. Gonzales, 1997-NMCA-039, 123 N.M. 337, 940 P.2d 185.

Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the Order Prohibiting Domestic Violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. State v. Powers, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454.

Intent of act. — The Family Violence Protection Act clearly reflects its intent that each violation shall be subject to a separate prosecution and punishment. State v. McGee, 2004-NMCA-014, ___N.M.___, 84 P.3d 690, cert denied, 2004-NMCERT-001 ___N.M. ___, 85 P.3d 802.

"Contact" is not limited to direct communication. State v. McGee, 2004-NMCA-014, ___N.M.___, 84 P.3d 690, cert denied, 2004-NMCERT-001 ___N.M. ___, 85P.3d 802.

Double jeopardy.

Where the order of protection clearly and unambiguously ordered defendant not to "contact" victim, each and every time defendant called victim on two separate dates in the same year, he made a "contact" with victim in violation of the order of protection. Because the legislature has made its intent clear that each violation will be punished separately, defendant's right to be free from double jeopardy in sentencing was not violated. State v. McGee, 2004-NMCA-014, ___N.M.___, 84 P.3d 690, cert denied, 2004-NMCERT-001 ___N.M. ___, 85 P.3d 802.

40-13-7. Law enforcement officers; emergency assistance; limited liability; providing notification to victims when an abusing household member is released from detention; statement in judgment and sentence document.

A. A person who allegedly has been a victim of domestic abuse may request the assistance of a local law enforcement agency.

B. A local law enforcement officer responding to the request for assistance shall be required to take whatever steps are reasonably necessary to protect the victim from further domestic abuse, including:

(1) advising the victim of the remedies available under the Family Violence Protection Act [this article], 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 including a written statement in the attendant police report to indicate that the arrest of the abusing household member was, in whole or in part, premised upon probable cause to believe that the abusing household member committed domestic abuse against the victim; and

(6) advising the victim when appropriate of the procedure for initiating proceedings under the Family Violence Protection Act or criminal proceedings and of the importance of preserving evidence.

C. The jail or detention center shall make a reasonable attempt to notify the arresting law enforcement agency or officer when the abusing household member is released from custody. The arresting law enforcement agency shall make a reasonable attempt to notify the victim that the abusing household member is released from custody.

D. 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. Any jail, detention center or law enforcement agency that makes a reasonable attempt to provide notification that an abusing household member is released from custody is immune from civil liability to the extent allowed by law.

E. A statement shall be included in a judgment and sentence document to indicate when a conviction results from the commission of domestic abuse.

History: Laws 1987, ch. 286, § 7; 1995, ch. 54, § 1.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "Providing notification to victims when an abusing household member is released from detention; statement in judgment and sentence document" in the section heading, added the language beginning "and including a written statement" at the end in Paragraph (5) of Subsection B, added Subsections C and E, redesignated former Subsection C as Subsection D, and added the second sentence in Subsection D.

Provisions of Article not to be pretext for search. — An arrest under the Family Violence Protection Act was not authorized where the victim of abuse was no longer in danger and the arrest of the alleged abuser was a mere pretext to search for drugs. State v. Miller, 1997-NMCA-060, 123 N.M. 507, 943 P.2d 541.

40-13-8. Domestic violence pilot program created; purpose; domestic violence commissioner; duties.

A. The "domestic violence pilot program" is established in the eleventh judicial district. The domestic violence pilot program shall be implemented in the Gallup office, division two of the eleventh judicial district, for the purpose of assisting the district judge in that office with the administration of domestic violence cases.

B. A "domestic violence commissioner" shall administer the domestic violence pilot program. The commissioner shall:

(1) be a lawyer licensed to practice law in New Mexico; and

(2) have at least five years of experience in the practice of law.

C. The domestic violence commissioner shall perform tasks pursuant to the provisions of the Family Violence Protection Act [this article], including:

(1) review petitions for indigency;

(2) interview petitioners;

(3) determine if petitioners' requests for temporary restraining orders should be granted;

(4) conduct hearings on the merits of petitions; and

(5) prepare recommendations to the district court regarding disposition of requests for orders of protection.

History: Laws 1992, ch. 107, § 1.

ARTICLE 14
Adult Adoptions

40-14-1. Short title.

This act [40-14-1 to 40-14-15 NMSA 1978] may be cited as the "Adult Adoption Act".

History: Laws 1993, ch. 296, § 1.

ANNOTATIONS

Cross references. — For the Adoption Act, see Chapter 32A, Article 5 NMSA 1978.

40-14-2. Definitions.

As used in the Adult Adoption Act [40-14-1 to 40-14-15 NMSA 1978]:

A. "adoptee" means any adult who is the subject of an adoption petition;

B. "adult" means any individual who is eighteen years of age or older;

C. "court" means the district court;

D. "parent" means the biological or adoptive parent;

E. "person" means an individual;

F. "petitioner" means any person who signs a petition to adopt under the Adult Adoption Act; and

G. "resident" means a person who, immediately prior to filing an adoption petition, has lived in the state for at least six months or a person who has become domiciled in the state by establishing legal residence with the intention of maintaining the residence indefinitely.

History: Laws 1993, ch. 296, § 2.

40-14-3. Jurisdiction.

The court shall have original jurisdiction over proceedings arising under the Adult Adoption Act [40-14-1 to 40-14-15 NMSA 1978].

History: Laws 1993, ch. 296, § 3.

40-14-4. Venue.

A. A petition for adoption may be filed in any county where:

(1) a petitioner resides; or

(2) the adoptee resides.

B. A court that has jurisdiction under the Adult Adoption Act [40-14-1 to 40-14-15 NMSA 1978] may decline to exercise jurisdiction any time before entering a decree if the court finds that under the circumstances of the case it is an inconvenient forum to make a determination. In that case, the court shall transfer the proceedings on any conditions that are just.

History: Laws 1993, ch. 296, § 4.

40-14-5. Who may be adopted; who may adopt.

A. Any adult may be adopted.

B. Residents who are one of the following may adopt:

(1) any adult who has been approved by the court as a suitable adoptive parent pursuant to the provisions of the Adult Adoption Act [40-14-1 to 40-14-15 NMSA 1978]; or

(2) a married adult, without the spouse of the married adult joining in the adoption if:

(a) the non-joining spouse is a parent of the adoptee;

(b) the adult who is adopting and the non-joining spouse are legally separated; or

(c) the failure of the non-joining spouse to join in the adoption is excused for reasonable circumstances as determined by the court.

History: Laws 1993, ch. 296, § 5.

40-14-6. Consent to the adoption.

A. Consent to the adoption shall be required of the adoptee or a person legally authorized to consent on behalf of the adoptee if the adoptee is incapacitated and unable to consent to the adoption.

B. A consent shall be in writing, signed by the adoptee and shall state the following:

(1) the date, place and time of execution;

(2) the date and place of birth of the adoptee and any names by which the adoptee has been known;

(3) the name of the petitioner;

(4) that the adoptee has been advised of the legal consequences of the adoption by independent legal counsel or a judge;

(5) that consent to an adoption cannot be withdrawn;

(6) that the adoptee is voluntarily and unequivocally consenting to the adoption; and

(7) that the adoptee has received or been offered a copy of the consent.

C. In cases when the consent is in English and English is not the first language of the consenting person, the person taking the consent shall certify in writing that the document has been read and explained to the person whose consent is being taken in that person's first language, by whom the document was read and explained and that the meaning and implications of the document are fully understood by the person giving the consent.

D. A consent to adoption shall be signed before and approved by a judge who has jurisdiction over adoption proceedings, within or without this state, and who is in the jurisdiction in which the adoptee or the petitioner resides.

E. The consent shall be filed with the court in which the petition for adoption has been filed before adjudication of the petition.

F. In its discretion, the court may order counseling.

G. A consent to adoption shall not be withdrawn prior to the entry of a decree of adoption unless the court finds, after notice and an opportunity to be heard is given to the petitioner and the adoptee, that the consent was obtained by fraud. In no event shall a consent or relinquishment be withdrawn after the entry of a decree of adoption.

History: Laws 1993, ch. 296, § 6.

40-14-7. Petition; content.

A petition for adoption shall be filed and verified by the petitioner and shall allege:

A. the full name, age and place and duration of residence of the petitioner and, if married, the place and date of marriage; the date and place of any prior marriage, separation or divorce; and the name of any present or prior spouse;

B. the date and place of birth of the adoptee;

C. the birth name of the adoptee, any other names by which the adoptee has been known and the adoptee's proposed new name;

D. where the adoptee is residing at the time of the filing of the petition;

E. that the petitioner desires to establish a parent and child relationship between himself and the adoptee;

F. the relationship, if any, of the petitioner to the adoptee;

G. whether the adoptee is foreign born, and if so, copies of the adoptee's passport and United States visa shall be attached as exhibits to the petition;

H. the length and nature of the relationship between the petitioner and the adoptee and the degree of kinship, if any;

I. the reason the adoption is sought;

J. the names and addresses of any living parents or children of the adoptee;

K. a statement as to why the adoption would be in the best interests of the petitioner, the adoptee and the public; and

L. whether the petitioner or the petitioner's spouse has previously adopted any other adult person and, if so, the name of the person and the date and place of the adoption.

History: Laws 1993, ch. 296, § 7.

40-14-8. Petition; caption.

The caption of a petition for adoption shall be styled "In the Matter of the Adoption Petition of (Petitioner's Name)".

History: Laws 1993, ch. 296, § 8.

40-14-9. Notice of petition; service; waiver.

A. A copy of the petition for adoption shall be served by the petitioner on the following individuals, unless receipt of a copy of the petition has been previously waived in writing:

(1) the adoptee;

(2) the parents of the adoptee;

(3) the legally appointed conservator or guardian of the adoptee;

(4) the spouse of any petitioner who has not joined in the petition;

(5) the spouse of the adoptee;

(6) the surviving parent of a deceased parent of the adoptee; and

(7) any other person designated by the court.

B. The notice shall state that the person served shall respond to the petition within twenty days if the person intends to contest the adoption and shall also state that failure to respond in a timely manner will be treated as a default.

C. Provision of notice for the adoptee and the legally appointed conservator or guardian of the adoptee shall be made pursuant to the Rules of Civil Procedure for the District Courts.

D. As to any other person for whom notice is required under Subsection A of this section, service by certified mail, return receipt requested, is sufficient. If the service

cannot be completed after two attempts, the court shall issue an order providing for service by publication.

E. The notice required by this section may be waived in writing by the person entitled to notice.

F. Proof of service of the notice on all persons for whom notice is required shall be filed with the court prior to any hearing that affects the rights of those persons.

History: Laws 1993, ch. 296, § 9.

40-14-10. Response to petition.

A. Any person who responds to a notice of petition for adoption shall file a verified response to the petition within the time limits set forth in Section 12 of the Adult Adoption Act [40-14-12 NMSA 1978].

B. The verified response shall be made pursuant to the Rules of Civil Procedure for the District Courts and, in addition, shall allege the relationship, if any, of the respondent to the adoptee.

History: Laws 1993, ch. 296, § 10.

40-14-11. Appointment of attorney for incompetent adoptee.

Upon motion of any party, or upon the court's own motion, the court may appoint an attorney for an adoptee whom the court finds to be incompetent. Payment for the appointed attorney shall be assessed against the parties in the court's discretion.

History: Laws 1993, ch. 296, § 11.

40-14-12. Adjudication; disposition; decree of adoption.

A. The court shall conduct a hearing on the petition for adoption. The petitioner and the adoptee shall attend the hearing, unless the court waives a party's appearance for good cause shown by the party. As used in this subsection, "good cause" includes burdensome travel requirements.

B. The petitioner shall present and prove each allegation set forth in the petition for adoption by clear and convincing evidence.

C. The court shall grant a decree of adoption if it finds that the petitioner has proved by clear and convincing evidence that:

(1) the court has jurisdiction to enter a decree of adoption affecting the adoptee;

(2) the adoptee has consented to the adoption;

(3) service of the petition for adoption has been made or dispensed with as to all persons entitled to notice;

(4) at least thirty days have passed since the filing of the petition for adoption;

(5) the petitioner is a suitable adoptive parent and the best interests of the petitioner, adoptee and the public are served by the adoption; and

(6) if the adoptee is foreign born, the adoptee is legally free for adoption.

D. In addition to the findings set forth in Subsection C of this section, the court, in any decree of adoption, shall make findings with respect to each allegation of the petition.

E. If the court determines that any of the findings for a decree of adoption have not been met or that the adoption is not in the best interests of the petitioner, adoptee or the public, the court shall deny the petition.

F. The decree of adoption shall include the new name of the adoptee and shall not include any other name by which the adoptee has been known or the names of the former parents. The decree of adoption shall order that from the date of the decree, the adoptee shall be the child of the petitioner and accorded the status set forth in Section 13 of the Adult Adoption Act [40-14-13 NMSA 1978].

G. A decree of adoption shall be entered within six months of the filing of the petition.

H. A decree of adoption may not be attacked upon the expiration of one year from the date of the entry of the decree.

History: Laws 1993, ch. 296, § 12.

40-14-13. Status of adoption and petitioner upon entry of decree of adoption.

A. Once adopted, an adoptee shall take a name agreed upon by the petitioner and the adoptee and approved by the court.

B. After adoption, the adoptee and the petitioner shall sustain the legal relation of parent and child as if the adoptee were the biological child of the petitioner and the petitioner were the biological parent of the child. The adoptee shall have all rights and be subject to all the duties of that relation, including the right of inheritance from and through the petitioner, and the petitioner shall have all rights and be subject to all duties of that relation, including the right of inheritance from and through the adoptee.

History: Laws 1993, ch. 296, § 13.

40-14-14. Birth certificates.

A. Within thirty days after an adoption decree is entered, the petitioner shall prepare an application for a birth certificate in the new name of the adoptee showing the petitioner as the adoptee's parent and shall provide the application to the clerk of the court. The clerk of the court shall forward the application:

(1) for a person born in the United States, to the appropriate vital statistics office of the place, if known, where the adoptee was born; or

(2) for all other persons, to the state registrar of vital statistics. In the case of the adoption of a person born outside the United States, if requested by the petitioner, the court shall make findings, based on evidence from the petitioner and other reliable state or federal sources, on the date and place of birth of the adoptee. The findings shall be certified by the court and included with the application for a birth certificate.

B. The state registrar of vital statistics shall prepare a birth record in the new name of the adoptee in accordance with vital statistics laws.

History: Laws 1993, ch. 296, § 14.

40-14-15. Recognition of foreign decrees.

Every judgment establishing the relationship of parent and child by adult adoption issued pursuant to due process of law by the tribunals of any other jurisdiction within or without the United States shall be recognized in this state, so that the rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the judgment were issued by the courts of this state.

History: Laws 1993, ch. 296, § 15.