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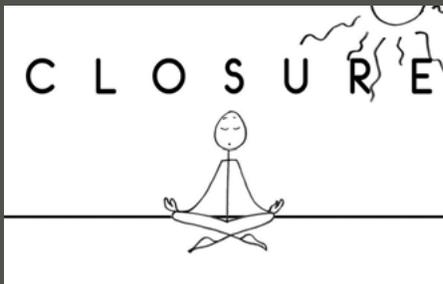


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# After the Supreme Court Decision: Same-sex Marriages Still Need Protections

By Dorene A. Kuffer

On June 26, 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015), that states must both permit same-sex couples to marry in their states and recognize same-sex marriages that were formed in other states. So, “marriage is marriage,” right? Not necessarily. In some areas, the law is unclear, while in others, additional protections are necessary to protect same-sex couples and their families.

## FAMILY CREATION

### Prenuptial and Postnuptial Agreements

With some same-sex couples, the decision to draft a prenuptial agreement is critical. Because same-sex couples did not have the right to marry while they were living together as committed couples, some combined finances, assets and debts. For the purposes of inheritance and divorce, New Mexico law recognizes that a marriage begins as of the date of the legal marriage, not when the couple combined finances as a household. Yet, many of these couples have had five, 10, 20, even 30 years of commingling finances and life before they could marry. It is imperative that assets and debts obtained during these years be “brought into the community” and that is done through a prenuptial or postnuptial agreement.

### Children Born of the Marriage

The Uniform Parentage Act in New Mexico, NMSA 1978, §§ 40-11A-101 to 903, presumes that a child born of a marriage is a child of both parties to that marriage. However, not all jurisdictions abide by that presumption, or other presumptions in the Uniform Parentage Act, and some may refuse to recognize the co-parent as a legal parent unless there is a formal adoption decree naming the co-parent as a parent of the child. This applies to heterosexual couples as well. The circumstances vary from state to state.

Because not everyone agrees with the *Obergefell* decision, states that previously did not recognize same-sex marriage may fail to recognize the legal parent

presumption with same-sex couples. Hence, co-parent adoption is important to protect the child’s relationship with the non-biological parent.

Post-*Obergefell*, several states have refused to recognize the presumption of parentage. For instance, a New York court stated that the presumption could be defeated by showing that another person is the child’s biological father. *Matter of Paczkowski v.*

“So, “marriage is marriage,” right?”

*Paczowski*, 128 A.D.3d 968, 10 N.Y.S.3d 270 (2015). Here’s a look at other states’ approaches to parentage:

- In November 2015, the Illinois Supreme Court upheld a trial court’s finding of non-existence of a parent-child relationship of a presumed father who had signed a voluntary acknowledgment of paternity. *In re A. A., a Minor*, No. 118605 (Ill. Nov. 19, 2015). Even though the presumed father had raised the child since birth, the court held that the trial court was correct in establishing a parent-child relationship with a biological parent and erasing the parent-child relationship of the presumed parent. The court cited to an earlier case in which a biological

father successfully challenged the parentage of a woman’s husband – to rebut the **marital** presumption – based on biology alone. The effect of the ruling in *In re A.A.* was to allow the parents of the biological father to gain custody of the child and sever the relationship the child had since birth with the presumed father. It is clear that the Illinois courts will be open to disallowing a marital presumption in a same-sex marriage since they have done so in an opposite-sex marriage.

- In September 2015, the Alabama Supreme Court ruled that it will not recognize a same-sex adoption granted in Georgia and declared the Georgia adoption “void.” *Ex parte E.L.*, No. 1140595 (Ala. Sept. 18, 2015) (not yet reported in the Southeastern Reporter). This decision raises interesting questions regarding the Full Faith and Credit Clause and its application to orders of adoption. The adoptive mother has asked the U.S. Supreme Court to review the decision. The U.S. Supreme Court has issued a stay of the decision pending its decision on the petition for writ of certiorari. If the Alabama Supreme Court decision is allowed to stand, it is possible that couples there will not be able to legitimize their relationships with their children. Moreover, the decision will provide an avenue for states that do not wish to recognize same-sex relationships to harm families. Alabama was one of a handful of states that refused to abide by federal district court rulings that

invalidated prohibitions on same-sex marriage when its Supreme Court ordered Alabama officials to deny marriage licenses to same-sex couples.

The law in this area is developing and decisions are being issued by states every week. It is important to inform your same-sex clients that it is still necessary to adopt their children, even if there are presumptions of parentage that apply. You must also draft appropriate estate planning and guardianship documents to ensure your clients' children will not go to other family members should the biological or primary-adopting spouse die.

Also, advise your clients that a birth certificate does not prove parentage. That is true for heterosexual people as well. A birth certificate is only evidence. The key to parentage lies in the statutes, and a court order is the best "proof" of parentage. An order of parentage is second to an adoption order, especially if the order of parentage relies upon the presumptions in the Uniform Parentage Act.

## FAMILY MAINTENANCE

If a couple was married in a recognition state and then moved to a non-recognition state, it is possible for purposes of estates, taxes, Social Security and other benefits that post-*Obergefell*, their marriage will be recognized back to the original date of marriage. That is because *Obergefell* found bans on same-sex marriage to be unconstitutional and therefore void *ab initio*.

The U.S. Department of the Treasury and the Internal Revenue Service announced proposed regulations in October 2015 providing that a marriage of two individuals, whether of the same sex or the opposite sex, will be recognized for federal tax purposes if that marriage is recognized by any state, possession or territory of the U.S. (80 FR 64378). The proposed regulations would also interpret the terms "husband" and "wife" to include same-sex spouses and opposite-sex spouses.

**In New Mexico, property will be divided according to the community property rules.**

The Social Security Administration announced in August 2015 it would apply the *Obergefell* ruling retroactively and process pending spousal benefits claims for same-sex couples that lived in non-recognition states. All post-*Obergefell* claims will be processed and recognized.

In December 2015 the IRS issued guidance on the application of *Obergefell* to qualified retirement plans under Section 401(a) of the Tax Code and health and welfare plans, including Section 124 cafeteria plans. Notice 2015-86. Even though most same-sex marriages had been recognized for federal tax law purposes



The proposed regulations will apply to all federal tax provisions where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA and claiming the earned income tax credit or child tax credit.

The proposed regulations would not treat registered domestic partnerships, civil unions, or similar relationships not denominated as marriage under state law as marriage for federal tax purposes. This rule protects individuals who have specifically chosen to enter into a state law registered domestic partnership, civil union, or similar relationship rather than a marriage, because they can retain their status as single for federal tax purposes.

after *United States v. Windsor*, 570 U.S. \_\_\_, 133 S.Ct. 2675 (2013), the IRS issued this guidance to assist plan sponsors and to answer additional questions.

## FAMILY DISSOLUTION

Post-*Obergefell*, divorce is divorce. In New Mexico, property will be divided according to the community property rules. That means that if your clients had a longstanding relationship before they got married and did not execute a prenuptial agreement, any previously acquired assets and debts will not be considered community property. This is because the law will only recognize as "community assets and debts" those that were accrued or incurred during the period of the actual marriage. Without a prenuptial agreement,

the couple will have a bifurcated divorce proceeding, meaning:

- Assets/debts acquired during the marriage will be allocated pursuant to the domestic relations laws.
- Assets/debts acquired before the marriage will be divided using basic contract law, under which assets and debts are divided based on whose name is on the title or the debt and what contribution each party made toward acquiring the asset. This process may serve a great injustice to the party who financially contributed less because that person may have contributed to the household in other than financial means (which has some value to the parties) or they could

have been “promised” equal shares of the assets at divorce or break-up by the other party. However, the court will have no choice but to apply the law and divide the assets according to financial contribution only.

If one of the parties dies and there is no pre-nuptial agreement, the treatment of the assets will also be bifurcated:

- Assets acquired during marriage will be automatically transferred to the surviving spouse.
- Assets acquired before marriage will be treated differently and may be transferred to the deceased’s family members rather than the surviving spouse.

## CONCLUSION

While the *Obergefell* Court held that all marriages are to be recognized by all states, it did not erase all the issues for same-sex couples contemplating marriage. The *Obergefell* decision has resolved the big issues of same-sex marriage, but many questions are unresolved for families of same-sex couples. Be mindful of the ever-changing legal environment in this area and advise your clients of the pitfalls that still exist. ■

*Dorene A. Kuffer is a New Mexico board-certified family law specialist practicing at the Law Office of Dorene A. Kuffer, PC, in Albuquerque.*



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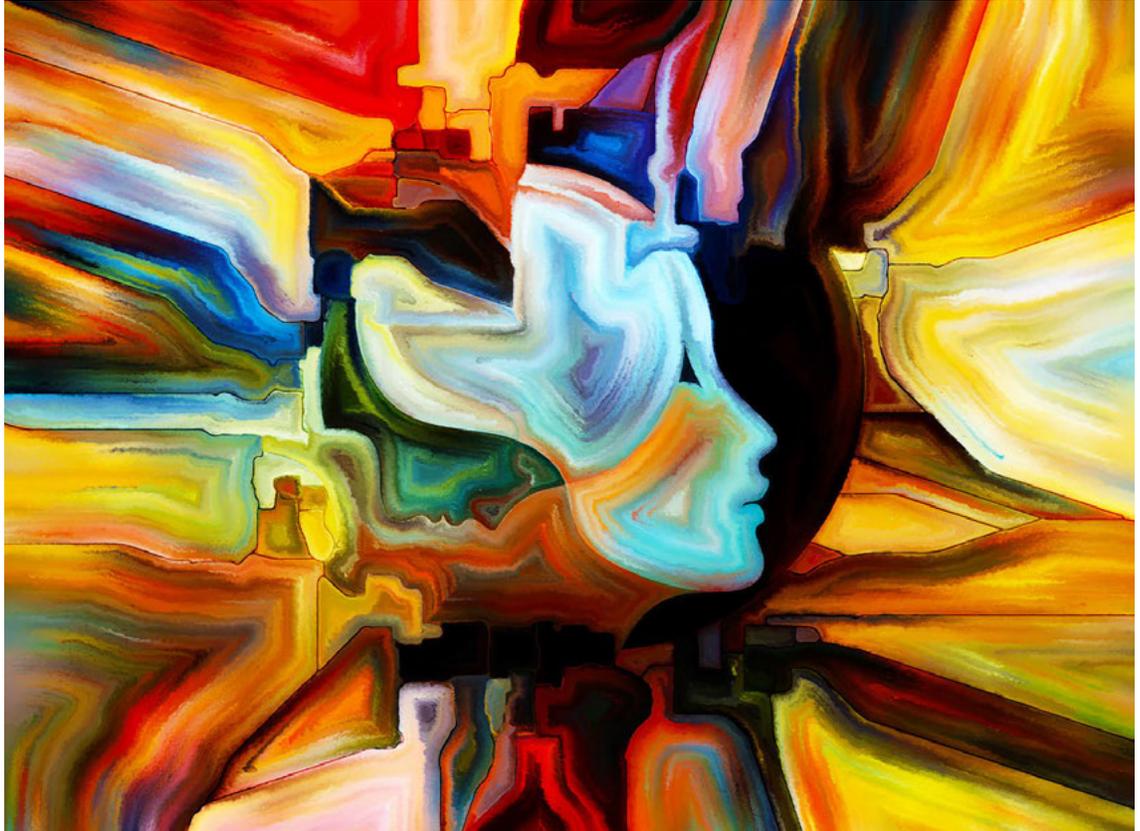
# DIVORCE

## *with Incapacitated or Disabled Parties*

By Mary Ann R. Burmester

Perhaps it's a function of my age (early 50s) and the number of years I've been practicing law (approaching 30), but I am encountering more divorces in which parties with physical and/or mental impairment play a significant role in negotiating a fair and practical settlement or in having to litigate property division, child custody and financial support. As both a lawyer and a gerontologist, many of my clients are getting divorced in the golden years (age 60 and up) or are grandparents raising grandchildren. Frequently one, and sometimes both, parties are dealing with their own physical disabilities, chronic and sometimes terminal illnesses and/or mental health issues, ranging from severe depression to bipolar disorder to varying degrees of actual dementia.

I also see more cases in which PTSD is a factor—for a parent returning from active-duty military service or for one spouse struggling with long-term abusive behavior by the other spouse. Chronic substance abuse, particularly inappropriate use of prescription opioid drugs, is another growing problem. Sometimes one spouse/parent accuses the other (or each other) of drug or alcohol abuse or claims that the physical impairment of a party renders him or her unfit to parent (at least without supervision) or incapable of providing adequate financial support for him- or herself or the children. When one spouse already has a court-ordered guardian and conservator, sometimes the



adult children interject themselves in the divorce proceedings, to try to preserve their anticipated inheritance. Then the divorce turns into a pre-probate fight. This article poses questions the attorney should consider when representing or opposing a party who is disabled or incapacitated.

### Varying Levels of Impairment

I see three categories of persons with an impairment:

- Permanent physical disability, with a clear mind and legal mental capacity is not an issue. The disability may be “static” such as permanent blindness, paralysis or amputation, or “progressive” such as Multiple Sclerosis, ALS (Lou Gehrig’s disease), or congenital heart failure.
- Mental impairment rising to the level of legal incapacity necessitating the

appointment of a legal guardian and conservator.

- The gray area in between where a person’s physical or mental impairment is intermittent or progressive that has not reached the level where a guardian is required but the person’s judgment or ability to function is questionable on a given day or for periods of time.

Such impairments impact how an attorney deals with parties when they are your own client or opposing party, and how a judge assesses the situation before making a ruling. Impairments are crucial in determining how one addresses issues such as co-parenting abilities and the safety of minor children, an impaired person’s ability to provide financial support for the children and for him- or herself or the ex-spouse (alimony), and what constitutes a reasonable division of property and debts

given the medical treatment needs of an impaired party.

## Legal Capacity

To form a valid, binding contract, such as a divorce settlement agreement or parenting plan, the law requires both parties to have the mental capacity to understand the terms of the agreement, to voluntarily enter into it, and to be able to abide by the terms. To participate in an evidentiary hearing or trial, a party must understand the nature of the proceedings and be able to work with his or her attorney to provide effective assistance of counsel. Lawyers are simply not qualified to make a medical or mental health diagnosis of our clients or opposing parties. When there are signs a party may have a serious physical or mental health condition that calls into question legal capacity, the appropriate medical and mental health professionals should be brought in to assess the situation. If necessary, obtain a court order for the evaluation. Otherwise, the settlement agreement may be void or the party's participation in the trial may be overturned on appeal if he or she is later determined to have lacked capacity at the time the contract was signed or trial held.

## Community Property Division

Because New Mexico is a community property state, property and debt allocation is supposed to be straightforward once you properly identify and characterize the community or separate nature of the assets and liabilities. In theory, both spouses should receive approximately equal net assets. However the court is charged with making an "equitable" division, which doesn't always mean "one-half". Consideration must be given to the following:

- Can the party manage the assets?
- Is there a trust to manage the assets or does one need to be created?
- Is the disabled person receiving SSDI, Veteran's Disability, or other government benefits?
- Are the minor children receiving dependent benefits from the disabled parent?
- Will the award of property make the party ineligible for government benefits?



- Does the incapacitated person need more than half of the assets to maintain a reasonable standard of living post-divorce?
- What is "equitable" under the circumstances?

## Alimony and Child Support

The harder component is figuring out alimony in a sufficient amount and duration

**Impairments are crucial in determining how one addresses issues ...**

to enable the impaired spouse to receive proper treatment. This is especially true when the paying spouse objects to financially supporting an ex-spouse she thinks caused his or her own impairment, as in the case of drug/alcohol abuse or volunteering to serve in the military. Until alimony is addressed, a lawyer cannot determine the gross income figures to use in calculating child support. The Child Support Guidelines look at both parents' gross incomes, adjusted for alimony, to determine base support for children. Also, New Mexico law allows for the imputation of income for voluntarily unemployed or under-employed parents. Frequently the paying parent complains that the impaired parent just needs to "get his or her act together" and get a well-paying job, not recognizing or accepting the reality that a mentally impaired parent cannot obtain or maintain regular employment unless and until the impairment is addressed, if possible. A proper medical and mental health diagnosis is key to the alimony issue. Key considerations include:

- Is the person's condition treatable?
- What does treatment entail logistically? At what cost?
- How much is the health insurance premium for the disabled parent post-divorce?
- How realistic is it for the spouse to find employment and keep the job long-term?
- How will working impact medical treatment?

## Co-Parenting after Divorce

Coming up with an appropriate visitation plan when a parent is impaired or ill is quite challenging. Children need to be safe, but they also need to have meaningful time with both parents, particularly if one parent is dying. If both parents can put aside their own anger and fears, they should be able to come up with a plan that enables them to co-parent after the divorce. Working with a good family therapist can help the adults see the needs of the children from the children's perspective. Otherwise, an expert child custody evaluator or a Guardian ad Litem may need to be appointed to investigate how the parent's disability or capacity issues impact the ability to parent and to co-parent, and to make recommendations to the judge on what arrangement serves the best interests of the children—both in the near future and in the long-term.

## Overlap of Divorce and Guardianship Proceedings

A person who has been declared legally incapacitated can be divorced. Most frequently, it is the non-incapacitated spouse who seeks to end the marriage, but the court-appointed guardian and conservator can file the divorce petition on behalf of the incapacitated adult.

If the spouse is already under a guardianship, then a guardian and conservator needs to be appointed in the divorce proceedings. Usually, the same guardian and conservator appointed under the probate code in the PQ case seeks to be appointed to the same role in the divorce (DM case).

*continued on page 14*

# ◀◀◀ Rewinding the Clock:

## In Extreme Cases, Parental Rights Can be Voluntarily Terminated

By Tamara Hoffstatter

A boy we'll call Robby D was adopted as a one year old, but by the time he was 13, things were a mess. Everything had been tried to help him, but he was only getting worse. Robby D continued to be a source of imminent danger and harm to his parents and younger brother. He had been in and out of treatment facilities, worked with numerous therapists, tried multiple medications and experienced many treatment foster placements—at this point there were no other treatment options. Yet he continued to threaten his family, hiding weapons of attack and intimidating them with graphic images of graffiti depicting the “bloody demise” of his mother. He physically assaulted a younger sibling routinely.

Robby D was placed in treatment foster care, at which point he was eligible for Medicaid. However, if he were to be discharged from treatment foster care and returned home to the family, he would lose his eligibility for Medicaid. That meant he would lose services he needed, because the cost of the high level of services he required was more than what the family could afford. With the discharge of Robby D looming, the parents became afraid of what would happen to them and their younger son once he came home.

Sometimes parents may need to relinquish their parental rights. These are extreme circumstances, and reasons vary from the parents simply being unable to control



their children to a question of the safety of the family. Many of these situations are not the result of abuse, abandonment, or fault of the adoptive parents. In these circumstances, a voluntary relinquishment of parental rights may be in order. Under very specific circumstances these relinquishments can be obtained in New Mexico.

For the safety of the younger sibling, the safety of the parents, and to enable Robby D to have the treatment he needed, the parents decided to seek a voluntary relinquishment of their parental rights under NMSA 1978, Section 32A-5-24 (2009), which, in relevant part, permits relinquishment to the Children, Youth and Families Department: 32A-5-24. Relinquishments to the department.

A. When a parent elects to relinquish parental rights to the department, a petition to accept the relinquishment shall be filed ( . . . )

B. In all hearings regarding relinquishment of parental rights to the department, the child shall be represented by a guardian ad litem ( . . . )

C. If a proposed relinquishment of parental rights is not in contemplation of adoption, the court shall not allow the relinquishment of parental rights unless it finds that good cause exists, that the department has made reasonable efforts to preserve the family and that relinquishment of parental rights is in the child's best interest. Whenever a parent relinquishes the parent's rights pursuant to this subsection, the parent shall remain financially responsible for the child. The court may order the parent to pay the reasonable costs of support and maintenance of the child.

The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a

reasonable payment.

D. When a parent relinquishes the parent's rights under this section, the parent shall be notified that no contact will be enforced by the court ( . . . )

Pursuant to Section 32A-5-24, the parents were able to obtain their desired relief. While the case of Robby D was one where the child was originally adopted by the parents, a relinquishment of parental rights pursuant to Section 32A-5-24 can be granted regarding

both naturally born and adopted children alike. In cases where there is no active abuse and neglect proceeding and where there is no contemplation of adoption, a relinquishment of parental rights to CYFD can be granted when good cause is shown to exist to accept the relinquishment of parental rights. Specifically, pursuant to Section 32A-5-24 (C), along with a good cause showing for the relinquishment, the court must be satisfied that CYFD had made reasonable efforts to preserve the family, and that relinquishment of parental rights was in the child's best interests. During the proceeding, the child is required to be represented by a guardian ad litem. *See* § 32A-5-24 (B). The parents may be required to remain financially responsible for the child post relinquishment, but aside from potential payment of financial support, a no-contact order completely prohibiting any contact between the child and the parents will be enforced, *See* § 32A-5-24 (C) & (D).

In the case of Robby D, no other viable options presented for protecting the parents and the younger child, nor for providing Robby D the care he



“**The voluntary relinquishment of parental rights is not the remedy for the parent who is “tired of being a parent.”**”

needed to address his mental illness and his emotional issues. The decision to relinquish parental rights was a difficult one for the parents. However, because the family had dedicated itself to pursuing every avenue possible to prevent the relinquishment from becoming necessary, and due to strict understanding and adherence to the relevant statute providing this option for relief, they were successful. Obtaining the relinquishment became a cooperative and smooth process between the parents as former legal custodians and CYFD, which ultimately assumed the role of legal custodian.

Parenting is for life. No child is perfect. No parent is perfect. Raising children is never easy. It is one of the most challenging, most frustrating, and most rewarding experiences that an individual

will ever experience. All parents find themselves in situations from time to time where they are at the very limits of their patience, wondering how in the world their child was able to push their buttons to the brink of frustration, but then coming down from that frustration as part of the normal cycle of understanding and patience that goes hand in

hand with raising a child. The voluntary relinquishment of parental rights is not the remedy for the parent who is “tired of being a parent.” Rather, it is extraordinary relief – the concept of the relinquishment of parental rights may seem difficult and perhaps impossible – and the statute provides relief to families in extreme situations. The process exists for the family that believes wholeheartedly that parenting is for life, yet understands that sometimes, parenting requires the wisdom and understanding of knowing when to let go. ■

*Tamara Hoffstatter is an attorney with the Law Office of Dorene A. Kuffer, PC. Her practice is limited to family law, adoption and guardianship.*

# Quit Fighting: Get a Parenting Plan

By Maria Montoya Chavez and Martha Kaser

We often ask children whose parents are divorcing, “If you had three wishes, what would they be?” The two of us have interviewed hundreds of children over the years. Many children will say they want to go to Disney World, or ask for a superpower like the ability to fly through space. Some children will say they want piles of money or peace on earth. But about 90 percent of them will simply say, “I wish Mom and Dad would quit fighting. And I wish I could see them both.”

You can help your clients sort out the best options for setting up a parenting plan after a divorce or relationship breakup— included among those are voluntary agreements, family court services, parenting coordinators, a guardian ad litem, an 11-706 ruling or a trial on the merits.

Children are the civilian casualties of divorce. While they did not cause the divorce, the way the parents handle post-divorce parenting can have lifelong consequences. It’s not divorce that causes the greatest harm to children, but the conflict between their divorcing parents. Emotions run high, routines are disrupted and conflict is high when parents split up. That’s confusing and terrifying for children. If parents cannot resolve their differences peacefully, they risk serious emotional harm to their children.

It’s important to know that children of different ages and temperaments react differently. Some withdraw, while some act out at school. Young children may



“... the way the parents handle post-divorce parenting can have lifelong consequences.”

regress by losing language or toilet training skills. Children of all ages may become aggressive or clingy or quickly learn to manipulate their parents when they know that the parents are not working together as a team to raise them. None of these scenarios is good for them.

Yet the good news is that none of these outcomes is inevitable. If the parents find constructive and peaceful ways to settle their differences regarding the children, they can provide for the mutual care of their children through a parenting plan without causing additional harm.

## Voluntary Agreement

The best option, by far, is having the parents reach a voluntary agreement that takes into account the needs of their children. Many parents can do this. Sometimes they can meet privately. Sometimes, if both counsel agree to the overall non-confrontational strategy, the parties and counsel can create a parenting plan with the assistance of a mediator or settlement facilitator. The agreement memorializes the current status quo for the children with respect to their school, activities, religion, medical care and residence, and provides a plan for daily and holiday time with both parents. Supreme Court forms found at [www.nmcourts.gov/lcgi/pros\\_lib/index.htm](http://www.nmcourts.gov/lcgi/pros_lib/index.htm) provide a basic format that parents can follow.



## Family Court Services

Many district courts have a court program that offers mediation or further assistance in custody disputes. This is generally less expensive than other options and allows the parties to retain decision-making authority regarding their children and division of parental time. In mediation, the parties meet with a court clinician or court-appointed neutral third party who facilitates an open discussion of the custody issues involved. The neutral party can make suggestions consistent with the child's developmental needs; however, the neutral party cannot tell the parties how to resolve the issues. Mediation is not an evaluation process and, therefore, recommendations typically are not made to the court as a result of this process. However, in some districts, temporary recommendations may be made if the neutral party has serious concerns about the safety or well being of the children based on information presented in mediation.

For example, in Bernalillo County the Second Judicial District Court Clinic consists of trained staff who specialize in child development and understand age-appropriate parenting schedules based on the children's needs. Parties must have an order to be referred to the Court Clinic, which can be done by stipulation or by filing a motion and obtaining a Court Clinic Referral Order. If the mediation is not successful, the parties may request further assistance such as a Priority Consultation, which is conducted when

a critical issue has come to the court's attention or an advisory consultation, which is considered a form of custody evaluation.

The First Judicial District (Santa Fe, Rio Arriba, and Los Alamos counties) has a similar division called Family Court Services, while the Third Judicial District (Dona Ana County) has a mediation division for domestic matters. In both jurisdictions, parties are automatically ordered to attend a mediation session when a divorce petition involving children is filed.

## Parenting Coordinator

A Parenting Coordinator is an increasingly popular option for divorcing parents. The PC is a neutral third party who can help parents as a sort of coach and "traffic cop" as they make difficult decisions about their children.

The PC is a legal or mental health professional with special expertise in family dynamics and family law. This person works with high-conflict parents on an ongoing basis to resolve parenting disputes as they arise. The PC may be given arbitration authority to make decisions when the parents cannot agree. Most PCs use a combination of mediation techniques, family therapy, and individual and joint meetings with parents (and sometimes children) to help them reach agreement on discrete issues. Some families use a PC for years after their divorce so they can stay out of the court system.

A court order of appointment should be entered so there is no question as to the PC's authority or scope of work. The court order may contain the scope of work, or it can reference the scope of work, which can be contained in a separate document. The scope of work agreement defines the parameters for confidentiality, whether the PC will testify in court, how the PC will be paid, whether the PC will attend court sessions, how decisions will be memorialized (letter, court order, email, etc.), what the contact with counsel will be, what level of access the PC will have with the children and how matters that are not within the PC's powers should be spelled out.

Typical problems that PCs address include specifying holiday, vacation or regular parenting time; developing uniform rules for homework, discipline and bedtimes at both homes; helping parents agree on how they will contact each other and try to resolve problems themselves; specifying how to object to a PC's decision; and interpreting or implementing provisions of the parenting plan.

The major benefits of this approach are:

- It is faster than litigation.
- It costs less than litigation.
- It fosters better co-parenting relationships through collaboration.

Detailed information about Parenting Coordination can be found at the Association of Family and Conciliation Courts' website, [www.afccnet.org](http://www.afccnet.org), under publications (see *Guidelines for Parenting Coordination*, 2005, Association of Family and Conciliation Courts).

## Guardian Ad Litem

In any proceeding when custody of a minor child is contested, the court may appoint a guardian ad litem or the parties can stipulate a specific individual to serve as a GAL.

A GAL's role is to advocate zealously for his or her clients, which in this case are the children. A GAL appointed under Rule 1-053 NMSA is a "best interests attorney" who provides independent services to protect the child's best interests without being bound by the child's or either party's directive or objectives. The GAL makes findings and recommendations to the court.

The GAL serves as an investigative tool for the court and investigates the situation by interviewing the child face-to-face outside the presence of both parents and counsel; interviewing both parents; conducting home visits; and speaking with health care providers, teachers, coaches, counselors and others familiar with the child. Because the GAL is an arm of the court, the court generally adopts the GAL's recommendations. Typically, a GAL requires a retainer of \$3,500 or higher, which is usually equally divided between the parties. This process basically takes most of the parenting decisions away from the parents when the parents cannot agree.

### Custody Evaluation/ Rule 11-706 Evaluators

A custody evaluation is the last resort for resolving parenting disputes. Parents are candidates for custody evaluations when all other available means have failed or been refused, when one or both parents has a mental disorder, where there are serious allegations of abuse against one parent or where the parents are in such high conflict that they will not agree to

any reasonable parenting plan. Custody evaluations can be helpful when a child has special needs and the parents do not agree how to fulfill these needs.

A custody evaluation can be expensive—as much as \$2,000 for each adult or child in the family, plus additional costs for contacting secondary sources such as stepparents or close relatives residing in the home and sometimes additional charges for court testimony. The approved protocol for custody evaluations requires clinical interviews of parents and children, psychological testing, home visits, parent-child observations and contact with collateral sources such as teachers, coaches, therapists, babysitters and childcare providers and family friends.

A custody evaluation can take months to complete, depending upon the cooperativeness of the parties, availability of collateral sources and the evaluator's availability. Custody evaluations are contentious, and the number of licensed psychologists willing to undertake this work is steadily shrinking, causing more delay in getting the final report and recommendations. In the meantime,

practitioners need to think about what is happening to the children of the parties and the parties as the process moves forward very slowly.

Seek a psychologist who is trained and licensed to do the sometimes-extensive testing that goes into an evaluation. The American Psychological Association has published custody evaluation guidelines, available at [www.apa.org](http://www.apa.org). In New Mexico, judicial districts refer parties for evaluation by a number of different mental health professionals, including master's-level therapists. However helpful these referrals may be, they do not constitute a true custody evaluation unless a licensed psychologist does them.

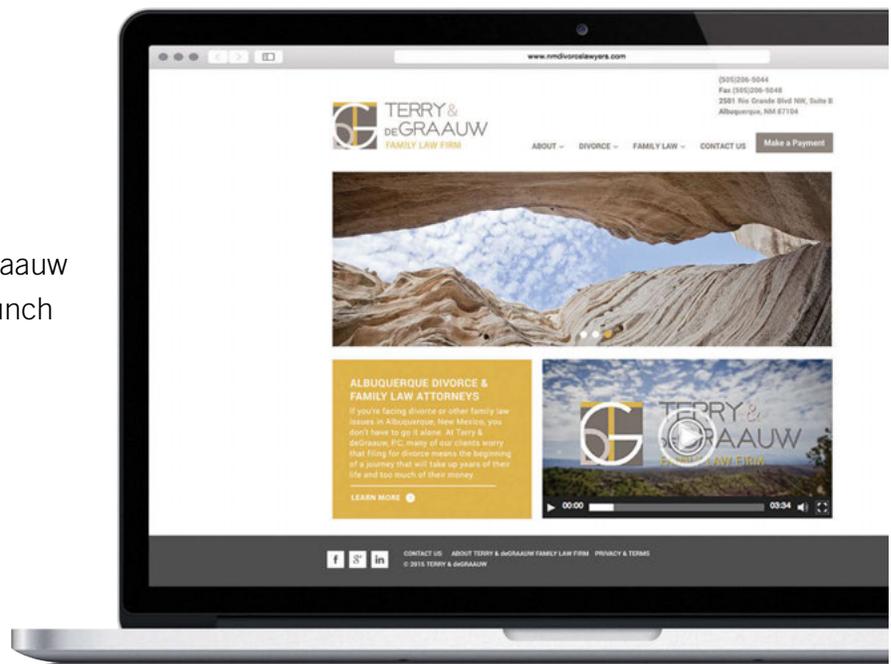
Most courts in New Mexico prefer to have the custody evaluation psychologist function under New Mexico Rule of Evidence 11-706, making the psychologist the "court's expert." Not only does this save considerable money, but it also bestows upon the psychologist the duty of neutrality. The order of appointment of the custody evaluator should clearly state that he is functioning as "an arm of the court" in performance of his or her duties.

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## Quit Fighting: Get a Parenting Plan

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If the results of the custody evaluation are not to the client's liking, most courts permit objections to be filed within ten days of receiving the report, and a hearing will be held on the objections. As a practical matter, objections are seldom granted. The standard for overturning the evaluator's objections is high.

Occasionally, a parent will seek a second opinion from a different psychologist. APA Guidelines on second opinions state that the second-opinion psychologist (who is not appointed as a Rule 11-706 expert) does not retest the parties. Instead, the second opinion is a review of the process and scoring followed by the 11-706 expert to see if national standards were followed. Again, the likelihood of overturning an 11-706 evaluation is slim.

A custody evaluation is the "nuclear option" for divorcing parents. Whether the results are good or bad, the process of having had a custody evaluation often causes irreparable damage to the parents' ability to co-parent in the future. While they can be helpful, custody evaluations should be used with caution.

## Trial on the Merits

If a case doesn't settle, it goes to trial. That is, if the court does not have a court program, if mediation fails, if a party does not like the recommendations of a GAL or custody evaluator and if objections are filed, the matter will proceed to a trial on the merits. This could entail taking depositions; serving discovery; preparing exhibits, testimony and arguments; and subpoenaing teachers, doctors and family members to testify at the trial. If a case proceeds to this point, it can be expected that the parties are in an expensive high-conflict situation and that children are being negatively affected.

## Conclusion

Parents have various options for resolving custody issues. If parties are unable to come to an agreement regarding the terms of a parenting plan, they need to be prepared for a long, contentious, invasive and emotionally stressful ride. The reality is that it's in the parents' and children's best interests if parties can make a good faith effort to work with one another

without the intervention of a GAL, custody evaluator, or the court. There is no better way to be good parents than to retain control of the co-parent decision-making and to spend money on the children instead of litigation costs.

Attorneys and parents have a whole toolbox of options for determining how the parents will co-parent after a divorce or separation. The voluntary, client-guided options concerning their children are usually most effective and long lasting among the choices available. Attorneys should be sure that they are aware of all options available to them. Parenting decisions and processes are not "one size fits all" matters. ■

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## Divorce with Incapacitated or Disabled Parties

*continued from page 8*

If a spouse's mental capacity becomes highly questionable after the divorce proceedings commence, the divorce may need to be put on hold until that spouse is properly evaluated. Such evaluation may take place prior to, or in conjunction with, a separate guardianship case.

Before a court can strip an adult of the right to make decisions about his or her property or how to raise children, the judge must find the person "legally incapacitated". This involves the opinion of a Qualified Health Professional, a "Home Visitor", and Guardian ad Litem appointed to represent the alleged incapacitated adult – all indicating the person cannot make sound decisions for

him- or herself any longer. The person seeking to be appointed guardian and conservator usually has his or her own attorney. The guardian and conservator need not be the same person. Sometimes trust companies and special agencies are appointed if no immediate family members step up to be appointed to look out for the incapacitated adult's interests. The soon-to-be ex-spouse cannot serve as a guardian or conservator because of the inherent conflict of interest in the divorce.

For more information, refer to the *Handbook for Guardians and Conservators: A Practical Guide to New Mexico Law*, published by the Office of the Attorney General and revised by the New Mexico

Guardianship Association, Inc. The guide covers the protected persons' rights, as well as the powers and duties of a guardian or conservator. It also includes appendices of relevant resources and forms. The bottom line is the overlap of divorce and guardianship proceedings makes the process longer and costs more money, but it is necessary if the divorcing party truly cannot look out for himself. ■

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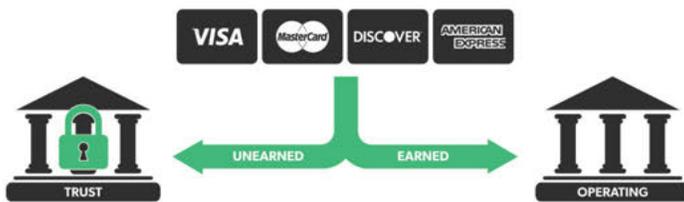
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