

BAR BULLETIN

September 4, 2019 • Volume 58, No. 18



Tunnels End, by David Rudolph (see page 3)

www.davidrudolph.com

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Family Law Section



How to Practice Series



Parentage and Issues in Domestic Violence



Friday, Sept. 6, 2019

9 a.m.–4:45 p.m.

5.5 G 1.0 EP

Live at the State Bar Center
Also available via Live Webcast!

\$99 Audit/Non-Member not seeking CLE credit
\$265 Government and legal service attorneys,
Young Lawyers Division and Paralegal Division members
\$295 Standard/Webcast Fee

Attendees receive

- Specially curated deskbook
- Customizable form templates
- Start to finish training
- Core practice skills



30th Annual Appellate Practice Institute



Friday, Sept. 13, 2019

8:15 a.m.–4:45 p.m.

6.7 G

Live at the State Bar Center
Also available via Live Webcast!

\$99 Audit/Non-Member not seeking CLE credit
\$253 Appellate Practice Section, government and legal service attorneys,
Young Lawyers Division and Paralegal Division members
\$265 Standard Fee
\$295 Webcast Fee



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From the New Mexico Court of Appeals

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Meetings

September

- 6**
Health Law Section Board
9 a.m., teleconference
- 7**
Employment and Labor Law Section Board
Noon, State Bar Center
- 8**
Business Law Section Board
4 p.m., teleconference
- 9**
Prosecutors Section Board
Noon, teleconference
- 13**
Appellate Practice Section Board
Noon, teleconference
- 13**
Bankruptcy Law Section Board
Noon, U.S. Bankruptcy Court, Albuquerque
- 14**
Children's Law Section Board
Noon, Children's Court, Albuquerque
- 17**
Solo and Small Firm Section Board
11 a.m., State Bar Center
- 17**
Senior Lawyers Division Board
3:30 p.m., State Bar Center
- 19**
Public Law Section Board
Noon, Legislative Finance Committee, Santa Fe
- 19**
Elder Law Section Board
Noon, State Bar Center

Workshops and Legal Clinics

September

- 4**
Divorce Options Workshop
6-8 p.m., State Bar Center, Albuquerque, 505-797-6000
- 17**
Legal Workshop for Seniors
Presentation: 10-11:15 a.m.; POA/AHCD
Workshop: 11:30 a.m.-1 p.m., Alamo Senior Center, Alamogordo, 505-797-6005
- 25**
Legal Workshop for Seniors
Presentation: 10-11:15 a.m.; POA/AHCD
Workshop: 11:30 a.m.-1 p.m., Las Vegas Senior Center, Las Vegas, 505-797-6005
- 25**
Consumer Debt/Bankruptcy Workshop
6-8 p.m., State Bar Center, Albuquerque, 505-797-6000
- 26**
Legal Workshop for Seniors
Presentation: 10-11:15 a.m.; POA/AHCD
Workshop: 11:30 a.m.-1 p.m., Deming Senior Center, Deming, 505-797-6005
- 27**
Common Legal Issues for Senior Citizens Workshop
Presentation: 10-11:15 a.m., POA/AHCD
Workshop: 11:30 a.m.-1 p.m., Munson Senior Center, Las Cruces, 1-800-876-6657

October

- 2**
Divorce Options Workshop
6-8 p.m., State Bar Center, Albuquerque, 505-797-6022

About Cover Image and Artist: The art David Rudolph has created throughout his career has been a progressive merger of memory and aesthetics that the Cubists and the Futurists represented. He strives to live his work life through the use of planes, surfaces, and dimension. His earlier art consisted mainly of sculpture and furniture design. In later years, Rudolph made the realization that paintings are a seamless continuation of his sculptural work. For more, visit www.davidrudolph.com.

Notices

COURT NEWS

New Mexico Supreme Court Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at <https://supremecourt.nmcourts.gov/>. To view all New Mexico Rules Annotated, visit New Mexico OneSource at <https://nmonesource.com/nmos/en/nav.do>

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources, including Westlaw, LexisNexis and HeinOnline. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building Hours: Monday-Friday 8 a.m.-5 p.m. Reference and Circulation Hours: Monday-Friday 8 a.m.-4:45 p.m. For more information, call 505-827-4850, email libref@nmcourts.gov or visit <https://lawlibrary.nmcourts.gov>.

Administrative Office of the Courts

Notice of Online Dispute Resolution

The New Mexico Judiciary implemented online dispute resolution in debt and money due cases in early June in district and magistrate courts in the Sixth and Ninth judicial districts. The pilot program expanded to the Second Judicial District Court and the Bernalillo County Metropolitan Court later in June. The free service allows the parties to negotiate online to quickly resolve debt and money due cases without appearing in court. If a resolution is reached, the ODR system will prepare a stipulated settlement agreement and electronically file it in court. The plaintiff's attorney or a self-represented plaintiff will receive an email notification to begin ODR after the defendant files an answer to the complaint. Once the plaintiff makes an offer for possibly settling the dispute, an email goes to the defendant with an opportunity to respond. During the first two weeks of negotiations, the parties can request the help of a trained online mediator. If no agreement is reached after 30 days, the case will move forward in court. ODR notices will be emailed to the parties from no-reply@newmexi-

Professionalism Tip

With respect to my clients:

I will advise my client against tactics that will delay resolution or which harass or drain the financial resources of the opposing party.

cocourtsdmd.modria.com. The parties should check their inbox, spam and junk mailboxes to ensure they receive the ODR notices.

Second Judicial District Court Destruction of Exhibits:

Pursuant to 1.21.2.617 FRDS (Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy exhibits filed with the Court, the Domestic (DM/DV) for the years of 1984 to 2008 including Criminal single case(s) CR-1983-36306, CR-1986-41147, CR-1991-02346, CR-1994-00531, CR-1994-00553, CR-2000-04292, CR-2001-01101, but not limited to cases which have been consolidated. Cases on appeal are excluded. Parties are advised that exhibits may be retrieved beginning through Oct. 2. Should you have cases with exhibits, please verify exhibit information with the Special Services Division, at 841-6717, from 8 a.m. 4 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel for the plaintiff(s) or plaintiffs themselves and defendant's exhibits will be released to counsel of record for defendants(s) or defendants themselves by Order of the Court. All exhibits will be released IN THEIR ENTIRETY. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Second Judicial District Court Destruction of Tapes and Logs

In accordance with 1.17.230 NMAC, Section 1.17.230.502, taped proceedings on domestic matters cases in the range of cases filed in 1975 through 1993 will be destroyed. To review a comprehensive list of case numbers and party names or attorneys who have cases with proceedings on tape and wish to have duplicates made should verify tape information with the Special Services Division (505) 841-6717 from 8:00 am-5:00 pm Monday through Friday. Aforementioned tapes will be destroyed after October 1, 2019.

Eleventh Judicial District Court

Suspension of Subsection (C) of Local Rule LR11-302

LR11-302 (C) states: "As a sanction for all other technical violations, the probationer shall be incarcerated for five (5) days." The Judges of the Eleventh Judicial District Court have decided that effective immediately, subsection (C) of LR11-302 is suspended indefinitely. The remainder of LR11-302 remains in effect.

Bernalillo County Metropolitan Court Volunteers are Needed for Legal Clinics

The Legal Services and Programs Committee of the State Bar and the Bernalillo County Metropolitan Court hold a free legal clinic the second Friday of every month from 10 a.m. until 1 p.m. Attorneys answer legal questions and provide free consultations at the Bernalillo County Metropolitan Court, 9th Floor, 401 Lomas Blvd NW, in the following areas of law: landlord/tenant, consumer rights, employee wage disputes, debts/bankruptcy, trial discovery preparation. Clients will be seen on a first come, first served basis and attendance is limited to the first 25 persons.

STATE BAR NEWS

Annual Appellate Practice Section

30th Annual Appellate Practice Institute

The 30th Annual Appellate Practice Institute will be held Sept. 13 at the State Bar Center and via webcast. The entire morning of the institute is devoted to Prof. Timothy P. Terrell's presentation "Writing to Persuade." Prof. Terrell, who teaches at Emory University School of Law, is a nationally known author and speaker on the subject of legal writing. He is the coauthor of *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* (3d ed., 2008, Practising Law Institute). The presentation will be a must for lawyers

and judges interested in improving their legal writing skills. The institute also will include reports from the Supreme Court and Court of Appeals and segments on recent developments and on improving docketing statements. The institute provides 6.7 G. Visit <https://cle.nmbar.org/nmsbf/courses/8098/sections/16548> to register and for more information. The section has a limited number of full or partial stipends available to Appellate Practice Section Members who want to attend. Apply by email to Tom Bird at tcb@keleher-law.com. Applications must be received by Friday, Sept. 3 and should contain a short statement of interest in the seminar and an explanation of the need for financial assistance. Stipend amounts may vary based on the number of applications and the applicants' needs.

New Mexico Judges and Lawyers Assistance Program Attorney Support Groups

- Sep. 9, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- Sep. 16, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- Oct. 7, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

Employee Assistance Program: Managing Stress Tool for Members

The Solutions Group, the State Bar's free Employee Assistance Program, announces a new platform for managing stress. My Stress Tools is an online suite of stress management and resilience-building resources which includes: training videos, relaxation music, meditation, stress tests, a journaling feature and much more. My Stress Tools helps you understand the root causes of

your stress and gives you the help you need to dramatically reduce your stress and build your resilience. Your Employee Assistance Program is available to help you, 24/7. Call at 866-254-3555.

Solo and Small Firm Section Fall Lunch Talk

The Solo and Small Firm Section will be hosting their first fall lunch talk on Sept. 17 from noon-1 p.m. at the State Bar. The guest speaker will be the owner of the New Mexico United soccer team, Peter Trevasiani. Trevasiani will speak on the legal aspects of running a professional sports franchise, agent dealing, franchise fees, marketing, stadium lease and more. Please see the SSFS webpage for more information.

UNM SCHOOL OF LAW Law Library Hours Fall 2019

Through Dec. 31

Building and Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	Closed.

Reference

Monday–Friday	9 a.m.–6 p.m.
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Holiday Closures

Thanksgiving: Nov. 28-29

Winter Break: Dec. 23-Jan. 1, 2020

OTHER BARS Albuquerque Bar Association Luncheon

May it peeve the court! Join the Albuquerque Bar Association for a panel discussion featuring Judge Amber Chavez-Baker, Judge Josh Allison, Judge Cindy Leos, and Judge Lisa Chavez-Ortega moderated by Judge Alan Malott (ret.). The panel will discuss pointers, do's and don'ts and other practice tips when appearing before judges in the Second Judicial District. The lunch will take place Sept. 10 at the Embassy Suites, 1000 Woodward Pl NE, Albuquerque, NM 87102. There will be a networking time from 11:30 a.m.-1 p.m. and the lunch and CLE will take place from noon-1 p.m.. The cost is \$30 for members, \$35 for non-members, \$5 walk-up fee. Register for lunch by 5 p.m. Sept. 6.

Albuquerque Lawyers Club September Meeting

The Albuquerque Lawyers Club announces the start of its 2019-2020 season. Membership dues for the term are \$250 and

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www.lawpay.com/nmbar

includes nine lunches and guest lectures from fascinating local and national speakers. Non-members are also welcome for a single-visit fee of \$35. Membership information is available online at www.ABQLawyers.org. Kicking off the new season on Sept. 4 is guest speaker Sam Donaldson, formerly of ABC News. The Albuquerque Lawyers Club is Albuquerque's oldest attorney group. ALC has brought attorneys and other members of the community together for friendly conversation, social networking and interesting speakers. Previous speakers have included public figures, cultural figures, and members of the judiciary. For more information, visit www.ABQLawyers.org or 505-844-3558.

National Conference of Bar Examiners Nationwide Practice Analysis Survey by the Testing Task Force

Attorneys across the country have the opportunity to participate in the NCBE Testing Task Force 2019 practice analysis survey, which will gather current data on the knowledge, skills, abilities, other characteristics and technology newly licensed lawyers use to accomplish the job tasks they perform. This survey is part of the Task Force's three-year study to consider the content, format, timing and delivery

methods for the bar exam to ensure it keeps pace with a changing legal profession. The results of the practice analysis, which will be published at the beginning of next year, will be used by NCBE to develop the next generation of the bar exam and will benefit the profession as a whole. To participate in the survey on behalf of New Mexico and learn more about the study, visit <https://www.testingtaskforce.org/2019PASurvey>.

Oliver Seth American Inn of Court 2019-2020 Schedule

The Oliver Seth American Inn of Court meets on the third Wednesday of the month from Sept. to May. The meetings always address a pertinent topic and conclude with dinner. If you reside/practice in Northern New Mexico and wish to enhance your skills, meet some pretty good lawyers and some pretty nice judges too, please send a letter of interest to: Honorable Paul J. Kelly, Jr., U.S. Court of Appeals - Tenth Circuit, Post Office Box 10113, Santa Fe, New Mexico 87504-6113.

Twelfth Judicial District Bar Association Bench & Bar Conference

Join the Twelfth Judicial District Bar Association for its annual bar conference on Sept. 13, from 9 a.m. to 4:15 p.m., at the Villiage Lodge in Ruidoso. The Conference will offer 5 general and 2 ethics/professionalism credits. Topics include human trafficking of children and youth, copyright law for business clients, state of the Twelfth Judicial District, State Bar programs and benefits and changes in the Bar Bulletin and civility and professionalism. To register, email nm12thbarassociation@gmail.com.

OTHER NEWS Workers' Compensation Judge Leonard J. Padilla Reappointed

New Mexico Workers' Compensation Administration (WCA) Acting Director Verily A. Jones announced the reappointment of Leonard J. Padilla to serve a second, five-year term as a workers' compensation judge for the WCA. Workers' compensation judges hear and decide disputes over benefits due to injured workers. By law, workers' compensation judges are appointed for an initial one-year term,

which may then be followed by subsequent five-year appointments. Padilla was initially appointed to a one-year term, which

began Aug. 31, 2013.

New Mexico Defense Lawyers Association Announcement of 2019 Award Winners

The New Mexico Defense Lawyers Association is pleased to announce that Meena H. Allen has been selected as the 2019 Outstanding Civil Defense Lawyer of the Year and Brett C. Eaton as the 2019 Young Lawyer of the Year. The awards will be presented at the NMDLA Annual Meeting Awards Luncheon and Golf Outing on Sept. 13 at Santa Ana Golf Club in Santa Ana Pueblo. For registration information and details, visit www.nmdla.org or call 800-426-3265.

New Mexico Legal Aid Second Annual Fiesta for Justice

Each year New Mexico Legal Aid helps thousands of low-income families navigate the civil legal system. Because of NMLA's hard work, these families can access and keep safe housing, crucial food and income, and personal safety. NMLA needs your help to continue this important work. On Sept. 21, NMLA will hold its Second Annual Fiesta for Justice at Tiguex Park in Albuquerque. The Fiesta for Justice will feature music, games, food and prizes. We ask you to consider sponsoring and attending this wonderful event. For more information and to R.S.V.P., visit www.newmexicolegalaid.org or call 505-243-7871.

Legal Education

September

- | | | |
|--|---|---|
| <p>4 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>12 Workplace Trends and Legal Update Conference
5.2 G
Live Seminar
Northern New Mexico Human Resources Association
www.nnmhra.shrm.org/</p> | <p>19 Litigation and Argument Writing in the Smartphone Age (2017)
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>6 How to Practice Series: Parentage and Issues in Domestic Violence
5.5 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>12 Better Outcomes for Divorcing Clients
1.0 G
Live Seminar
Divorce Lending Association
www.divorcelendingassociation.com</p> | <p>19 Pretrial Practice in Federal Court (2018)
2.5 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>6 Ethics, Disqualification and Sanctions in Litigation
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>13 30th Annual Appellate Practice Institute
6.7 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 What Drug Dealers and Celebrities Teach Lawyers About Professional Responsibility (2018)
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>7 Everything Old is New Again: The Latest Issues in the World of Ethics
1.0 EP
Live Seminar, Santa Fe
American College Of Trial Lawyers NM Chapter</p> | <p>13 Annual Bench and Bar Conference
5.0 G, 2.0 EP
Live Seminar
12Th Judicial District Bar Association</p> | <p>19 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>7 From Glorieta to DC: A New Mexico Police Shooting Goes to the Supreme Court(White v. Pauly)
1.0 G
Live Seminar, Albuquerque
American College Of Trial Lawyers NM Chapter</p> | <p>14 Annual Bankruptcy Picnic and CLE
1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Regional Conference on Child Abuse and Neglect
11.0 G, 1.0 EP
Live Seminar
Administrative Office Of The District Attorneys
www.nmdas.com</p> |
| <p>9 Your Title Tool Kit
5.0 G, 1.0 EP
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com</p> | <p>17 Trust and Estate Planning for Collectibles, Art and Other Unusual Assets
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Retail Leases: Restructurings, Subleases and Insolvency
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 The Link Between Animal Abuse and Human Violence
11.2 G
Live Seminar
Positive Links
www.thelinknm.com</p> | <p>17 Yellow Brick Road
1.0 EP
Live Seminar, Albuquerque
Albuquerque Community Foundation
www.albuquerquefoundation.org</p> | <p>20 2019 Tax Symposium
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location/course type, course provider and registration instructions.

- | | | |
|---|---|---|
| <p>21 Practical Tips for Trial Preparation
12.7 G
Live Seminar, Ruidoso
Michael Stout</p> | <p>25 Civil Trial—Everything You Need to Know
11.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com</p> | <p>26 Orientation and Ethics of Pro Bono
2.0 EP
Live Seminar
Volunteer Attorney Program
505-814-5033</p> |
| <p>24 The Ethics of Representing Two Parties in a Transaction
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 Volunteer Attorney Program Orientation
2.0 EP
Live Seminar, Albuquerque
Volunteer Attorney Program
www.lawaccess.org</p> | <p>27 2019 Advanced Collaborative Law Symposium: Mapping the Road to Effective Collaboration
6.5 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |

October

- | | | |
|--|---|---|
| <p>4 Complex, White Collar and Federal Death Penalty Cases
6.0 G
Live Seminar
New Mexico Criminal Defense Lawyers
www.nmcdla.org</p> | <p>11 Student Loans in Bankruptcy: How to Help Graduates Who Can't Pay
2.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>16 Going Over: Employment Law Issues When a Key Employee Leaves for a Competitor
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>4-5 Parenting Coordinator--Two Day Basic Training
9.2 G, 2.0 EP
Live Seminar, Las Cruces
Third Judicial District Court-CSED
www.thirddistrictcourt.nmcourts.gov</p> | <p>11 Ethics in Discovery Practice
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>16 Hybrid Education-From Mediation to Social Media
2.0 EP
Live Seminar, Albuquerque
New Mexico Association Of Legal Administrators
www.nmala.org</p> |
| <p>8 "Founding Documents": Drafting Articles of Incorporation & Bylaws, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>12 Taking Effective Depositions
7.0 G, 1.0 EP
Live Seminar, Albuquerque
James Wood Law
www.albuquerqueinjurylawfirm.com</p> | <p>22 What to Do When a Partner Leaves? Non-Competition for Departing Owners
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 "Founding Documents": Drafting Articles of Incorporation & Bylaws, Part 2
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>14 Basic Practical Regulatory Training for the Electric Industry
28.5 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU
business.nmsu.edu</p> | <p>23 How to Practice Series: Demystifying Civil Litigation, Pt. 1 (2018)
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>11 Primers, Updates, and Practical Advice in the Current Health Law Environment
5.5 G, 1.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>16 Auto Injuries Advanced Plaintiff Strategies
5.0 G, 1.0 EP
Live Seminar, Santa Fe
NBI, Inc.
www.nbi-sems.com</p> | <p>23 The Fear Factor: How Good Lawyers Get Into Ethical Trouble (2018)
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |

Celebrating Excellence

2019 ANNUAL AWARD WINNERS

Photos by Cassandra Scott

The Annual Awards recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession. The 2019 Annual Awards were presented on Aug. 2 at Hotel Albuquerque in conjunction with the 2019 Annual Meeting.



JOHN P. "JACK" BURTON

Distinguished Bar Service – Lawyer Award

Burton has been a member of the State Bar for more than 50 years. He has practiced with the Rodey Law Firm since graduating from law school. He has served on many State Bar practice sections, on the Senior Lawyers Division Board of Directors and on the Board of Bar Commissioners.



TIFFANY CORN

Distinguished Bar Service - Nonlawyer Award

Corn is currently the senior victim-witness specialist with the Second Judicial District Attorney's Office in the Special Victim's Unit. She works directly with victims of violent crime. In her seven years there, she has advocated for more than 1,500 survivors.



THE HONORABLE STAN WHITAKER

Justice Pamela B. Minzner Professionalism Award

Chief Judge Whitaker was appointed to Criminal Court with the Second Judicial District Court where he presides over felony criminal matters. He has also served as assistant district attorney, prosecutor, special commissioner for domestic violence and assistant U.S. attorney.

SECOND JUDICIAL DISTRICT JUDICIAL SUPERVISION AND DIVERSION PROGRAM

Outstanding Legal Program Award

The Second Judicial District Judicial Supervision and Diversion Program consists of 31 court professionals who have specialized knowledge and provide SJDC criminal judges with public safety risk assessments of individuals facing criminal charges and to provide supervision over those individuals who are released by a Judge subject to conditions of supervision.



Members of the SJDC attended the ceremony to accept the award.



REBEKAH REYES

Outstanding Young Lawyer of the Year Award

Reyes is a senior trial attorney in the Special Victim's Unit of the Bernalillo County District Attorney's Office. She has continually advocated for the strengthening of child abuse laws in New Mexico and has pushed for changes within the courtroom to minimize the trauma sustained by victims who must testify in front of their abusers at trial.



THE HONORABLE NAN G. NASH

Seth D. Montgomery Distinguished Judicial Service Award

Judge Nash joined the Second Judicial District Court in 1993 and retired in 2019 as chief judge of the court. She continues to serve as the co-chair of the Access to Justice Commission and as a consultant to the Bernalillo County Criminal Justice Coordinating Council.

ROBERT J. ANDREOTTI

Robert H. LaFollette Pro Bono Award

Andreotti represents airmen, mechanics and aviation companies. He has more than 25 years of experience in the aviation community, including experience as a flight instructor, an engineer and an attorney. Andreotti was unable to attend the Annual Awards ceremony.

50TH ANNIVERSARY PRACTITIONER AWARDS

The State Bar also recognized attorneys who have been practicing law for 50 years at the Annual Meeting.



President Jerry Dixon (pictured at right) presented certificates of recognition to the attorneys who could attend the ceremony: Walter Gilbert Bryan, Frank N. Chavez, Donald L. Jones, Jefferson R. Rhodes, Hon. Jay G. Harris and Bradford H. Zeikus.

Congratulations!

Thank you for your service to the State Bar and the New Mexico legal community.

Richard A. Bachand
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Oct. 14, 2019
Tanoan Country Club, Albuquerque
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All proceeds benefit the State Bar Foundation.



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17th Annual Art Contest

Through the years, the Children's Law Section Art Contest has demonstrated that communicating ideas and emotions through art and writing fosters thought and discussion among youth on how to change their lives for the better. This year's theme is designed to encourage youth from around the state who have come in contact with the juvenile justice and/or the child welfare systems to think about how they want and will market themselves to the world. Using materials funded by the Section's generous donors, contestants will create a canvas to demonstrate their idea of their future self.

HOW CAN I HELP? Support the Children's Law Section Art Contest by way of a donation that will enable contest organizers to purchase supplies, display artwork, provide prizes to contestants and host a reception for the participants and their families. Art supplies and contest prize donations are also welcome.

To make a tax deductible donation, visit www.nmbar.org/ChildrensLaw or make a check out to the New Mexico State Bar Foundation and note "Children's Law Section Art Contest Fund" in the memo line. Please mail checks to:

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For more information contact Alison Pauk at alison.pauk@lopnm.us.

Save the Date
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A Message from Chief Justice Judith K. Nakamura

Dear Colleagues:

This edition of the *Bar Bulletin* contains a complete listing of end-of-the-year vacancies on many Supreme Court committees, boards, and commissions. Our committees, boards, and commissions play a critical role in assisting the Court with its regulation of the practice and procedures within our courts and the broader legal community. Anyone who has ever served on one of the Court's committees, boards, or commissions can attest to how challenging and rewarding the work can be. In filling these vacancies, the Court strives to appoint attorneys and judges who are able to regularly attend committee meetings and who are committed to generously volunteering of their time, talent, and energy to this important work.

The Court strives to solicit volunteers from throughout the state who will bring geographical balance and seeks to ensure that each committee, board, and commission contains a balanced representation from the various practice segments of our bar. To achieve these goals, we need volunteers representing the broad spectrum of our bench and bar who come from all corners of this great state.

Should you have interest in serving on multiple committees, in your letter of interest, please prioritize up to three committees, boards, or commissions and discuss your qualifications for serving on each. Letters of interest and resumes should be submitted by September 30, 2019, to the Chief Clerk of Court.

On behalf of the entire Supreme Court I extend my sincere appreciation to all of you who are willing to volunteer to be a part of this important function within our legal system.

Sincerely,

Judith K. Nakamura
Chief Justice

New Mexico Supreme Court Committees, Boards, and Commissions Notice of 2019 Year-End Vacancies

The Supreme Court of New Mexico is seeking applications to fill upcoming year-end vacancies on many of its committees, boards, and commissions. Applicants will be notified of the Court's decisions at the end of the year. Unless otherwise noted below, any person may apply to serve on any of the following committees, boards, and commissions:

Appellate Rules Committee (1 general member position)

Board of Bar Examiners (1 general member position)

Children's Court Rules Committee (1 prosecuting attorney, 1 respondent's attorney)

Code of Judicial Conduct Committee (1 district judge position, 1 general member position)

Code of Professional Conduct Committee (5 general member positions)

Disciplinary Board (3 attorney positions)

Judicial Branch Personnel Grievance Board (1 judicial non-supervisory employee position)

Language Access Advisory Committee (1 academic in a relevant field affiliated with a NM university, 1 signed language interpreter position with credentials recognized by NM AOC (currently working in NM state courts), 1 certified language access specialist)

NM Children's Court Improvement Commission (1 foster parent position, 1 public education representative position, 1 youth treatment provider position)

NM Commission on Access to Justice (2 general member positions)

Rules of Evidence Committee (2 general member positions)

Statewide ADR Commission (1 magistrate judge position, 1 general member position)

Tribal-State Judicial Consortium (1 State judge position, 2 Tribal judge positions)

UJI-Civil Committee (1 district judge position, 1 general member position)

UJI-Criminal Committee (4 general member positions)

Anyone interested in volunteering to serve on one or more of the foregoing committees, boards, or commissions may apply by sending a letter of interest and resume to Joey D. Moya, Chief Clerk, by mail to P.O. Box 848, Santa Fe, NM 87504, by email to nmsupremecourtclerk@nmcourts.gov, or by fax to 505-827-4837. The letter of interest should describe the applicant's qualifications and may prioritize no more than 3 committees of interest.

The deadline for applications is Monday, Sept. 30.





Corrections to the 2019–2020 Bench & Bar Directory

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NM Human Services Department
Office of General Counsel
PO Box 2348
Santa Fe, NM 87504-2348
505-827-7231 F 505-827-7729
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Elizabeth J. Travis

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Carolyn A. Wolf

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Active Members

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The Allison Law Firm PC
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F 866-375-7551
michael@allison-lawfirm.com

Ault, Monica 505-216-6265
Monica Ault Law LLC
2019 Galisteo St #C2
Santa Fe NM 87505-2168
monica.aultlaw@gmail.com

Gayle-Smith, Paul Michael 575-635-2504
Law Offices of Paul M Gayle-Smith
4 Roe Dr
Hyde Park, NY 12538-2315
elawyer@gayle-smith.com
www.gayle-smith.com

Note: Information for members is current as of April 2, 2019. Visit www.nmbar.org/FindAnAttorney for the most up-to-date information. To submit a correction, contact Pam Zimmer, address@nmbar.org.

U.S. Court of Appeals 10th Circuit

www.ca10.uscourts.gov

Judge Joel M. Carson
U.S. Court of Appeals
Joe Skeen Federal Building
P.O. Box 2606
Roswell, NM 88202
575-578-6140 F 575-578-6139

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Taos County Courthouse
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Taos NM 87571
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COLFAX COUNTY (#0809)
Leon Karelitz Judicial Complex
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Raton NM 87740
575-445-5585 F 575-445-2626

UNION COUNTY (#0818)
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Chief Judge Emilio J. Chavez
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Division II
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Division III
Judge Jeff Foster McElroy
(retiring effective Oct. 31, 2019)
575-751-8624 F 575-751-3353

Court Executive Officer
Kasey Daniel
575-751-8613

Court Manager

Bernabe Struck
575-751-8601 575-751-1281

Court Clerk Office

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Court Monitors

575-751-8625

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Special Commissioner
Catherine Oliver
575-751-8614

University of New Mexico School of Law

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Office of the Dean

Sergio Pareja

Dean and Professor of Law

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International Business Transactions
505-277-0995 pareja@law.unm.edu

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective Aug. 16, 2019

PUBLISHED OPINIONS

A-1-CA-36391	State v. M Figueroa	Affirm/Reverse/Remand	08/12/2019
A-1-CA-36619	State Engineer v. T Romero	Affirm	08/13/2019

UNPUBLISHED OPINIONS

A-1-CA-36409	State v. R Apodaca	Affirm	08/14/2019
A-1-CA-35311	State v. J Barela	Affirm	08/15/2019
A-1-CA-36445	Board of Education v. Public Education Dept.	Reverse/Remand	08/15/2019
A-1-CA-36450	State v. A Ford	Affirm/Reverse	08/15/2019
A-1-CA-36749	B Rodriguez v. J Smith	Affirm/Reverse/Remand	08/15/2019
A-1-CA-36774	T Schroeder v. R Hill	Affirm	08/15/2019
A-1-CA-37628	State v. R Martinez	Affirm	08/15/2019
A-1-CA-37752	State v. P Humphries	Affirm	08/15/2019
A-1-CA-37820	State v. C Jackson	Affirm	08/15/2019
A-1-CA-37919	State v. S Tucker	Affirm	08/15/2019
A-1-CA-37961	State v. K Joey, Sr.	Affirm	08/15/2019

Effective Aug. 23, 2019

PUBLISHED OPINIONS

A-1-CA-36284	P Rogers v. Board of County Commissioners	Dismiss	08/22/2019
A-1-CA-37208	State v. D Edwards	Affirm	08/22/2019
A-1-CA-36369	NM Construction Industries Div. v. Y Cohen	Reverse/Remand	08/23/2019

UNPUBLISHED OPINIONS

A-1-CA-35721	M Sanchez v. J Lujan	Reverse/Remand	08/22/2019
A-1-CA-36243	State v. N Stammer	Affirm	08/22/2019
A-1-CA-36245	State v. D Florez	Reverse/Remand	08/22/2019
A-1-CA-36538	State v. J Stoesser	Reverse/Remand	08/22/2019
A-1-CA-37257	State v. P Vallejo	Reverse	08/22/2019
A-1-CA-37630	State v. F Garcia	Affirm	08/22/2019
A-1-CA-37815	Enchanted Care Solutions v. M Macres	Affirm	08/22/2019
A-1-CA-35224	State v. Z Kriesel	Affirm	08/23/2019
A-1-CA-35611	Woodmont Paseo v. NM Utilities	Affirm/Reverse/Remand	08/23/2019
A-1-CA-36075	Nationstar Mortgage v. A Bird	Affirm	08/23/2019
A-1-CA-36734	C Miller v. New Mexico Heart Institute	Affirm/Reverse	08/23/2019
A-1-CA-37289	C Miller v. NM Heart Institute	Affirm/Reverse	08/23/2019
A-1-CA-37304	C Miller v. NM Heart Institute	Affirm/Reverse	08/23/2019
A-1-CA-37480	Bank of America v. L Benavidez	Affirm	08/23/2019

Slip Opinions for Published Opinions may be read on the Court's website:

<http://coa.nmcourts.gov/documents/index.htm>

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-024

No. A-1-CA-35816 (filed December 28, 2018)

CARRIE BECK HOPKINS
f/k/a CARRIE DENISE BECK,
Petitioner-Appellant,

v.

ALLAN BENTON WOLLABER,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF LOS ALAMOS COUNTY

Matthew J. Wilson District Judge

Released for Publication July 2, 2019

CARRIE HOPKINS
Los Alamos, NM
Pro Se Appellant

AARON J. WOLF
JULIE S. RIVERS
Santa Fe, NM
for Appellee

Opinion

J. Miles Hanisee, Judge

{1} Carrie Beck Hopkins (Mother) appeals pro se the district court's order permitting her ex-husband, Allan Benton Wollaber (Father), to relocate with their children (Son and Daughter) (collectively, Children) to Massachusetts. In addition to raising various due process claims, none of which we find persuasive, Mother challenges what she perceives to be the district court's termination of joint legal custody and grant of sole legal custody to Father.¹

{2} We conclude that the district court's order did not terminate, but rather modified, joint custody by awarding primary physical custody to Father. We affirm that aspect of the district court's ruling but, concluding that the district court's order is ambiguous as to legal custody, remand with instructions that the district court amend its order to clarify that Mother and Father continue to share joint custody of Children.

BACKGROUND

{3} Upon their divorce in January 2013, Mother and Father (collectively, Parents) agreed to joint custody and a parenting plan that included a time-share schedule for Son and Daughter, then ages seven and five respectively. Under the original parenting plan, Mother was generally responsible for Children during the week, and Father was responsible for Children on weekends. Although the parenting plan was amended at various times to modify Parents' timesharing arrangement to alternating weeks of responsibility and address other issues, legal custody of Children remained joint in Mother and Father.

{4} At some point in 2015 Father began exploring a possible relocation to Boston, Massachusetts, but indicated an unwillingness to move without Children. In February 2016 Father formally filed for a "change of custody and to relocate with" Children to Boston, requesting "that he be awarded sole legal custody and that he be permitted to relocate with [Children] prior to the upcoming 2016-2017

school year." The district court referred the parties to Family Court Services for an advisory consultation and expedited the schedule because Father had already obtained new employment in Boston and hoped to relocate with Children by Fall 2016. Upon completion of the consultation process, advisory consultant Gary Lombardo recommended that "[C]hildren primarily reside with Father and relocate with Father to the Boston, Massachusetts area." Lombardo's report also included a recommendation that "Father maintain sole legal custody" of Children.

{5} A two-day hearing was held in July 2016. At the end of the hearing, the district court granted Father's motion to relocate with Children and adopted Lombardo's recommendations in full "without modification." The district court's written order said nothing about legal custody, i.e., whether Parents would retain joint custody or whether joint custody was being terminated and sole custody being awarded to Father. Mother moved for reconsideration and to stay the district court's order. From the district court's denial of both motions, Mother appeals.

DISCUSSION

{6} Mother makes two arguments on appeal: (1) the district court erred in "terminating the joint custody award[.]" granting Father sole custody, and permitting Father to relocate Children to Boston; and (2) the district court's "termination of joint custody" deprived Mother of her constitutional right to due process of law. We address each issue in turn.

I. The District Court's Custody Determination

{7} Mother argues that the district court erred by "terminating the joint custody award" and awarding Father sole custody absent a finding that "there was a substantial and material change in circumstances justifying termination of joint custody." Mother contends that a custodial parent's long-distance relocation "is not necessarily" a basis for terminating joint custody because "parents can—and do—continue to share joint custody of their children even when they do not live in the same state." Mother additionally challenges

¹As we discuss herein, custody is of two types in New Mexico: legal and physical. For clarity and purposes of this opinion, we hereinafter use the statutory terms "joint custody" or "sole custody" to refer to the two types of legal custody provided for in New Mexico. We take care to avoid use of the generic term "custody"—except to reflect where and how it is used in the record, or where contextually appropriate in our discussion—because of the inherently ambiguous nature of the term and the confusion that ensues (as evidenced by this case) when parties and courts fail to distinguish between and specify which type of custody is at issue.

that aspect of the district court's order permitting Father to relocate Children to Boston. She argues that Father failed to meet his burden of demonstrating that it was in Children's best interest to move with Father and that the district court erred by granting Father's motion to relocate without considering the needs and best interests of Children.

{8} We first address whether the district court's ruling indeed effectuated termination of Mother's legal custodial rights or merely modified Parents' existing custody arrangement to accommodate Father's relocation. We then resolve whether the district court erred in modifying custody by awarding primary physical custody to Father.

Standard of Review

{9} "We review a district court's child custody determination for abuse of discretion." *Hough v. Brooks*, 2017-NMCA-050, ¶ 18, 399 P.3d 387, cert. denied, ____ P.3d ____ (No. S-1-SC-36387, May 4, 2017). To the extent the issues presented involve construction of New Mexico's custody statutes, our review is de novo. See *id.* ¶¶ 20, 21 (noting that the question of whether New Mexico's joint custody statute, NMSA 1978, § 40-4-9.1 (1999), applies to the facts of that case "is an issue of statutory construction that we review de novo").

A. The District Court Order Modified and Did Not Terminate Joint Custody

{10} We begin by noting that it is not entirely clear whether the district court appreciated, much less intended, that its ruling might, in fact, result in termination of joint custody. The district court's order neither states—from the standpoint of *legal* custody—that joint custody was being terminated nor expressly grants Father sole custody. Rather, the district court's order adopts "without modification" Lombardo's recommendations, which included that "Father maintain sole legal custody." But that recommendation reflects a critical misunderstanding of the preexisting legal status, i.e., that Father had never, in fact, been awarded "sole legal custody."² It is unclear what Lombardo's apparent belief that Father had already been granted sole custody—evinced by his recommendation that Father *maintain* sole custody—was based upon, or that Lombardo or the

district court understood the legal significance of that particular recommendation. But by adopting Lombardo's recommendations wholesale and without modification or clarification, the district court arguably terminated joint custody and, at the very least, rendered uncertain the legal custodial status of Mother and Father.

{11} We conclude that the district court's order is ambiguous because it does not clearly address, or certainly and unequivocally resolve the threshold question of whether Mother's joint custody status was terminated and the related question of whether sole custody was awarded to Father. See *Allred v. N.M. Dep't of Transp.*, 2017-NMCA-019, ¶ 23, 388 P.3d 998 (explaining that "[a] judgment must be certain and unequivocal such that it disposes of the matters at issue between the parties [such] that they will be able to determine with reasonable certainty the extent to which their rights and obligations have been determined" (alterations, omission, internal quotation marks, and citation omitted)), cert. denied, ____ P.3d ____ (No. S-1-SC-36235, Jan. 12, 2017). We, therefore, proceed to construe the order to determine the district court's intention, i.e., whether it intended to terminate joint custody or merely modify Parents' existing custody arrangement. See *id.* ("Our goal in construing an ambiguous judgment is to determine the intention and meaning of the author." (alteration, internal quotation marks, and citation omitted)). To aid our construction, we look to the judgment, pleadings, and entire record. See *id.* (explaining that "if the meaning [of a judgment] is obscure, doubtful, or ambiguous, the judgment, pleadings, and entire record may always be resorted to for the purpose of aiding in the construction thereof" (internal quotation marks and citation omitted)); see also *Fed. Nat'l Mortg. Ass'n v. Chiulli*, 2018-NMCA-054, ¶ 14, 425 P.3d 739 (explaining that "when an order or judgment has some ambiguity or uncertainty, it may be construed in the light of the pleadings, other portions of the judgment, findings, and conclusions of law").

{12} We begin, however, with a discussion of the differences between (1) legal and physical custody, and (2) modification

and termination of custody, a discussion intended to clarify important distinctions in the law that were blurred, confused, and conflated in this case, leading to the ambiguity we must now resolve. These clarifications are important because different legal standards apply—and the party seeking a change in legal custody bears a different evidentiary burden—when termination of joint custody, as opposed to modification of physical and/or legal custody, is sought. We explain.

1. Legal Versus Physical Custody, and Termination Versus Modification of Custody

a. Legal Versus Physical Custody

{13} In the context of determining the custody of children upon dissolution of marriage in New Mexico, "custody" is defined as "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[.]" Section 40-4-9.1(L)(2); see *In re Guardianship of Ashleigh R.*, 2002-NMCA-103, ¶ 13, 132 N.M. 772, 55 P.3d 984 ("Legal custody is a status created by court order and vests in a person [or persons] the right to determine where and with whom a child will live."). New Mexico statutorily recognizes two types of legal custody: (1) "joint custody," in which custody of a child is awarded to two parents, Section 40-4-9.1(L)(4), (2) "sole custody," which awards custody of a child to one parent, Section 40-4-9.1(L)(8). Joint custody is presumed to be in the best interests of a child when an initial custody determination is made. Section 40-4-9.1(A).

{14} An award of joint custody entitles each parent to (1) "significant, well-defined periods of responsibility for the child"; (2) "responsibility for the child's financial, physical, emotional and developmental needs during that parent's periods of responsibility"; and (3) the right to be consulted by the other custodial parent "on major decisions involving the child before implementing those decisions[.]" Section 40-4-9.1(J). In other words, joint custody "give[s] to both parents an equal voice in the children's education, upbringing, and general welfare." *Strosnider v. Strosnider*, 1984-NMCA-082, ¶ 18, 101 N.M. 639,

²The record indicates that the first time any mention of sole custody occurred was in Dr. Priscilla Roberts' December 2015 priority consultation report, in which she departed from earlier recommendations that "Mother and Father maintain joint custody" and for the first time recommended that "Father have sole legal custody." However, Dr. Roberts' December 2015 recommendations were never adopted due to Parents' respective objections. Instead, the parties proceeded to the advisory consultation in preparation for a custody hearing on Father's February 2016 motion for "change of custody."

686 P.2d 981 (internal quotation marks and citation omitted). By contrast, where sole custody is awarded to one parent, the noncustodial parent enjoys merely the right of “visitation,” which is defined as “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.” Section 40-4-9.1(L)(9). A noncustodial parent, i.e., a parent who is not granted or is terminated from joint custody, necessarily does not share the same decision-making rights and parenting status that the custodial parent enjoys. Thus, there is legal—as well as social—significance to being designated a joint custodian and, concomitantly, to having one’s joint custodial rights terminated. See *Taylor v. Tittman*, 1995-NMCA-034, ¶ 14, 120 N.M. 22, 896 P.2d 1171 (“Termination of joint custody and the award of sole custody to one of the parents is a matter of great importance.”).

{15} Physical custody refers simply to the period of responsibility for which each parent—whether custodial or noncustodial—has physical care and supervision of the child or children. See NMSA 1978, § 40-10A-102(14) (2001) (defining “physical custody” as “the physical care and supervision of a child”); *Jaramillo v. Jaramillo*, 1991-NMSC-101, ¶ 14 n.4, 113 N.M. 57, 823 P.2d 299 (explaining that “the term ‘physical custody’ is synonymous with other terms used in Section 40-4-9.1, including the term ‘residence,’ and, importantly, the term ‘period of responsibility’” (citation omitted)). In general, physical custody may be shared, meaning that each parent has physical custody approximately one-half of the time, or one parent may be designated as the primary physical custodian, meaning that “the child resides with that parent more than half the time.” *Jaramillo*, 1991-NMSC-101, ¶ 14.

{16} Importantly, while physical and legal custody are related, the specific types of legal custody (joint or sole) and physical custody (shared or primary) are neither mutually dependent nor mutually exclusive.³ Thus in a situation where the parents have joint custody, physical custody may be shared, or either parent may be designated primary physical custodian, which status is subject to change without necessarily affecting legal custody. See § 40-4-9.1(L)(4) (providing that “[j]oint custody

does not imply an equal division of the child’s time between the parents”); *Taylor*, 1995-NMCA-034, ¶¶ 2-3 (explaining that the parties originally shared “joint legal custody” with the father being awarded “primary physical custody” and that upon a later motion by the mother, a new order was entered that “continued joint custody but changed the award of primary physical custody” from the father to the mother); *Jaramillo v. Jaramillo*, 1985-NMCA-062, ¶ 15, 103 N.M. 145, 703 P.2d 922 (explaining that “[a]n award of joint custody . . . may at times require the [district] court to adopt a specific finding indicating which parent, in the child’s best interest and welfare, should be awarded primary physical custody of the child”). In other words, legal custody does not automatically determine or establish the terms of physical custody. Likewise, the designation or modification of physical custody neither dictates nor necessarily bears on either the type of legal custody awarded or whether there should be a change in legal custody, i.e., from joint to sole or sole to joint. Indeed, as we next discuss, the applicable standards and evidentiary showings that must be made to modify custody (physical or legal), on the one hand, and terminate joint custody, on the other, differ.

b. Modification Versus Termination of Custody

{17} Custodial inquiries begin with the well-established rule that once custody has been initially determined, “[e]very presumption is in favor of the reasonableness of the original decree” and “the burden is on the moving party to satisfy the court that circumstances have so changed as to justify the modification” of custody. *Schuermann v. Schuermann*, 1980-NMSC-027, ¶ 4, 94 N.M. 81, 607 P.2d 619 (internal quotation marks and citation omitted). As this Court has explained, this rule “is based upon policy grounds recognizing that[] frequent changes . . . are difficult for children to adapt to even under the best of circumstances.” *Campbell v. Alpers*, 1990-NMCA-037, ¶ 20, 110 N.M. 21, 791 P.2d 472 (alteration, internal quotation marks, and citation omitted). The Legislature has provided that “[t]he court may modify and change any order . . . in respect to the . . . custody, maintenance or education of the children whenever circumstances render such change proper.” NMSA 1978, § 40-4-7(G) (1997). We have interpreted

this to mean that “a court may modify a custody order only upon a showing of a substantial change in circumstances affecting the best interests and welfare of the child, and a showing that such change of circumstances has occurred since the entry of the prior custody order.” *Campbell*, 1990-NMCA-037, ¶ 20.

{18} Termination of joint custody is, no doubt, a type of custody modification, but one that is specially governed by a separate statute. In 1986 the Legislature for the first time adopted the presumption in favor of joint custody in initial custody determinations. Compare 1981 N.M. Laws, ch. 112, § 1(a) (providing that “[i]n any proceeding in which there is at issue the custody of a minor, the court should first consider an award of joint custody of the minor if it is in the best interests of the minor”), with 1986 N.M. Laws, ch. 41, § 1(A) (providing that “[t]here shall be a presumption that joint custody is in the best interest of a child in an initial custody determination”). At the same time and following the establishment of that presumption, it specifically provided that:

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*.

Section 40-4-9.1(A) (emphasis added). In light of how the Legislature elected to define joint custody and its recognition in that definition of the fundamental nature and importance of the rights attendant to parenting, it is unsurprising that the Legislature established a different standard by which termination of joint custody—which effectively terminates one parent’s right to an equal voice in the child’s upbringing, see *Strosnider*, 1984-NMCA-082, ¶ 18—is to be determined. Thus, in accordance with the special standard established in Section 40-4-9.1(A), a district court shall not terminate joint custody unless the party moving for termination has met his or her burden of proving that there has been (1) “a substantial and material change in circumstances” (2) that has “affect[ed] the welfare of the child” (3) “such that joint custody is no longer in the

³Indeed, even a noncustodial parent, i.e., a parent without legal custody, enjoys physical custody of his or her child(ren) during periods of visitation. See § 40-4-9.1(L)(9).

best interests of the child[.]” and (4) that the circumstances providing the basis for the proposed termination did not exist at the time the joint custody order was originally entered.

{19} Where a moving party fails to meet its burden or the record contains no evidence that termination was, in fact, sought, termination of joint custody is improper, though the terms of the continuing joint custody arrangement may otherwise still be modified. See *Taylor*, 1995-NMCA-034, ¶¶ 6, 17 (holding that “the district court erred in terminating joint custody and awarding [the m]other sole custody” where the record indicated that “neither party addressed the possibility of terminating joint custody[.]” but affirming other provisions modifying joint custody, including permitting the mother to relocate with the child to Japan, the father’s periods of responsibility, and “any other provisions that are not inconsistent with continuation of joint custody”).

2. The District Court’s Ruling Affected Modification, Not Termination, of Joint Custody and Modified the Physical Custody Arrangement

{20} Returning to the district court’s ruling in this case and applying the foregoing, we conclude for the following reasons that the district court intended not to terminate Mother’s joint custody rights but rather to modify joint custody by awarding primary physical custody to Father and permitting Father to relocate Children to Boston.

{21} First, neither the district court’s ruling from the bench nor its written order reflecting its oral ruling contains any indication that it considered, much less applied, Section 40-4-9.1’s specific standard for terminating joint custody. Instead, the district court’s order reflects that it treated the case as a custody *modification*, necessitated by Father’s impending relocation, and applied the standard for modifying custody. This is most clearly evidenced by the district court’s statement that “[t]he burden of proof as to whether it is in the best interest of the parties’ minor children to relocate out of state with Father or remain in New Mexico with Mother does not lie with either party.” This rule, while a proper statement of New Mexico law, applies in cases involving a relocating

custodial parent’s request to *modify* joint custody, not terminate it. See *Jaramillo*, 1991-NMSC-101, ¶¶ 5, 7, 26-27 (adopting a “procedure for relocation disputes” in cases in which joint custody in both parents is “continued” but one parent seeks modification of the joint custody arrangement in order to accommodate a long-distance relocation). That a parent’s relocation may support, even necessitate, *modification* of a joint custody arrangement does not support the altogether different conclusion that a custodial parent’s proposed relocation justifies *termination* of joint custody. Indeed, a parent’s relocation, alone, cannot establish the basis for terminating joint custody absent a showing that the relocation is “affecting the welfare of the child” and that “joint custody is no longer in the best interests of the child.” Section 40-4-9.1(A). Thus, had the district court intended to terminate joint custody, it would have been error to do so by relying on and applying the standard set forth in *Jaramillo*. We, therefore, presume that the district court’s application of *Jaramillo* indicates that it intended only to modify—not terminate—joint custody. See *Holcomb v. Rodriguez*, 2016-NMCA-075, ¶ 28, 387 P.3d 286 (explaining that “where the record is unclear, we presume regularity and correctness of the district court’s actions” (alteration, internal quotation marks, and citation omitted)).

{22} Second, to the extent the district court and Lombardo believed that Father’s relocation either necessitated or itself provided a basis for terminating joint custody and awarding sole custody to Father, we conclude that this mistaken belief was based on a misunderstanding of the distinctions and relationship between legal and physical custody and improper use of the term “sole custody” during the proceedings. This is most evident in Lombardo’s testimony at the custody hearing, where he explained that one of the reasons he recommended that Father have “sole legal custody with the exception of changes to [C]hildren’s religious upbringing” is that it is “pretty common in long-distance relocation scenarios for there to be sole legal custody for the decision-making” that the parent with physical custody of the children would logically be tasked

with making given that the other parent would have “a significant difficulty in having all the facts necessary to make those kinds of on-the-ground decisions in a community where they’re not residing.” In other words, because Father would be in Boston with Children and would have a better understanding of the local schools, activities, medical facilities, neighborhoods, etc., Lombardo recommended that “Father make all decisions regarding [Children’s] education, child care, health care, ongoing activities, and residence.” But the pragmatic need for Father to have decision-making authority out of logistical convenience does not supply a sufficient legal basis to terminate Mother’s legal custody of Children, particularly when increased decision-making authority could be allocated to Father without terminating joint custody.⁴ See § 40-4-7(G) (providing that the district court “may modify and change any order . . . in respect to the . . . custody . . . of the children whenever circumstances render such change proper”) and § 40-4-9.1(J)(5)(d) (providing that “[a]n award of joint custody means that . . . decisions regarding major changes in a child’s life may be decided by . . . allocating ultimate responsibility for a particular major decision area to one legal custodian”). {23} Moreover, we note that other aspects of Lombardo’s recommendations further support the interpretation that what Lombardo was recommending was not, in fact, termination of joint custody but rather modified joint custody with primary physical custody in Father. First, Lombardo recommended that “Father not change the children’s religious upbringing without Mother’s prior written approval[.]” a recommendation plainly inconsistent with a goal of terminating Mother’s custodial rights. See § 40-4-9.1(L) (2) (providing that “the authority and responsibility” to make decisions regarding the child’s religion is encompassed within an award of “custody”). Additionally, Lombardo recommended that Mother be listed as a parent on all forms and that Father “immediately provide Mother with the relevant information” regarding decisions Father was empowered to make. Lombardo explained that the reason for these recommendations was that

⁴We note that the other reason given by Lombardo—that there had been “a substantive challenge in the co-parenting relationship” between Mother and Father, meaning that Parents were engaging in “parallel” rather than cooperative parenting and decision-making—is also an insufficient basis for terminating a parent’s joint custody. Cf. *Alfieri v. Alfieri*, 1987-NMCA-003, ¶ 27, 105 N.M. 373, 733 P.2d 4 (explaining that it has been “recognized that a custodial parent’s demonstrated lack of cooperation [with the other parent] and refusal to follow prior court orders concerning visitation may constitute grounds for a change of custody *in an extreme case*” (emphasis added)).

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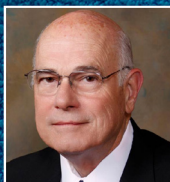
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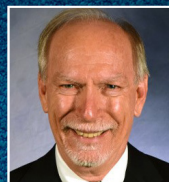
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Representing Juveniles:

Abuse/Neglect vs. Parental Custody

by Kathryn E. Terry



There are many different areas in which a lawyer can represent a child: abuse/neglect proceedings, juvenile justice cases, guardianship cases, probate cases, civil litigation cases, and parental custody cases. This article focuses on representing a child in abuse/neglect cases and parental custody cases from my experience as an attorney for children in New Mexico.

In both systems, the child's attorney can file motions and request relief. In custody cases, however, the judge has broader discretion, while in abuse/neglect cases the state has authority over the placement of the child. This decision can only be overturned by a showing of abuse of discretion. Therefore, even if a child, a child's attorney, and the judge disagree with the placement, the state's decision will stand unless it is shown that the state abused its discretion. In custody cases, the judge has complete discretion over the time-sharing schedule and physical custody of a child.

Abuse/Neglect Cases

Abuse/neglect cases involve children who have been taken into custody by the state and are in foster care, relative placement care, or another type of out-of-home placement. See NMSA 1978, § 32A-4-1, *et seq.* In these cases, the state is the legal custodian of the child and is responsible for the child's placement, education, scheduling and ensuring the child receives medical, dental, counseling services, and visitation with parents or other family members. All parties to an abuse/

neglect case, including children, have a statutory right to counsel under the Children's Code.

For children under 14 years old, the child is appointed a guardian ad litem (GAL), an attorney who advocates for the child's best interests. The GAL ensures the child has necessary state services, safe and appropriate placement, and time with family members. The GAL also checks that social workers and other agents of the state are following stated policies and laws. While a child's wishes are important and are to be considered, a GAL advocates for the best interests of a child.

For children over 14, the child is represented by a youth attorney. If a child is under 14 at the time a case

starts but turns 14 prior to the case ending, the GAL can become the child's youth attorney. In this role, the attorney is appointed to advocate for the child's wishes. This can be a difficult role when a child wants something that is contrary to his or her best interests, such as wishing to return to an abusive parent. In these situations, the attorney can use the phrase "my client has stated . . ." or "my client wants . . ." to indicate to the Court that a child wants something that is contrary to his or her best interests.

The attorney also has standing to challenge the evidence provided by the state or the parents. Additional responsibilities include meeting with the child prior to any proceeding, attending treatment team meetings if the child is in treatment foster care, attending individualized education plan meetings if the child is in special education, communicating with mental health professionals treating the child (with the child's consent if the child is over 14), reviewing medical or mental health reports for the child, representing and protecting the child's cultural needs, and advocating for a child's right under federal laws such as the Americans with Disabilities Act and Individuals with Disabilities Education Act.

Abuse/neglect cases tend to follow specific phases: custody, adjudication, judicial review, permanency, termination of parental rights, and dismissal. Each phase is dictated by federal timelines based largely on the needs and timeline of

the child. Children are now required to attend all hearings, unless there is good reason for the child not to attend. Good reason can include a therapeutic recommendation from the child's counselor that that child should not attend a hearing, a child is in school, or it would be traumatic for a child to be in the courtroom. A child 14 or older can choose not to attend hearings. At each hearing, the GAL or youth attorney reports the child's progress to the court, voices the concerns, and states the child's wishes.

Custody. In New Mexico, almost all cases begin with a plan to reunify the family and send the child home to the parents. When a child is alleged to have been abused or neglected, the state files a petition and an affidavit outlining the abuse or neglect. If the petition is granted, an ex-parte custody order is entered allowing for the state to have temporary legal custody and for out-of-home placement of the child. The first hearing that occurs is a custody hearing with expanded rules of evidence to determine whether there is probable cause to keep the child in state custody. The hearing officer or judge does not make a determination regarding the parents' actions but decides whether the child should remain in state custody for further proceedings. This hearing is required to be held ten days after the ex-parte custody order is signed. NMSA 1978, § 32A-4-18. The appointment of the child's attorney occurs at the time the custody hearing is scheduled, therefore the GAL

or youth attorney has only a few days to prepare for the custody hearing. From the custody hearing, a general assessment plan is developed in which the parents and the child are ordered to attend assessments and follow recommendations.

Adjudication hearing. Sixty days after the custody hearing is held, the court is required to hold an adjudication hearing—a trial to determine if the parents abused or neglected their children. NMSA 1978, § 32A-4-29. The adjudication hearing pertains only to events that occurred from the time the state was contacted regarding potential abuse or neglect until the time of the custody hearing. The child's attorney will often take a position regarding the state's case, but the burden of proof is on the state, not on the child. By this point in the case, the GAL or youth attorney should have met with the child and interviewed foster parents, teachers, and other people close to the child. The attorney may also have observed a supervised visit between the child and the parents. The GAL or youth attorney can question and call witnesses at the adjudication hearing, but this is not required. The attorney for the child will again give a report to the court regarding how the child is doing and will let the court and the state know if there are any other services the child needs. If the court determines there was no abuse or neglect, the case is dismissed and the child is returned home. Sometimes there will still be recommendations for counseling.

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During divorce, sometimes we do things we regret.

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Divorce *without* Court



by Mary Ann R. Burmester

Divorce is hard enough without the stress of going to court and having a stranger in a black robe make binding decisions that affect every aspect one's life. Fortunately, mediation and collaborative divorce are two excellent alternates to the court divorce process. Part one discusses mediation and part two discusses collaborative divorce.

Part One –

Mediation and related options:

Typically, couples want to make the divorce process as painless, quick and inexpensive as possible. Mediation can be used to settle the divorcing couple's issues before or after the divorce petition is filed. Custody and financial issues can be resolved together or separately through private mediation, court-affiliated mediation, and settlement facilitation.

Private Mediation:

Private mediation is definitely worth consideration. In private mediation the parties pay a neutral professional, who does not represent either party, to help negotiate an acceptable agreement.

While therapists and accountants can and do serve as private mediators, it is best to use a domestic relations lawyer-mediator, especially if the couple wants the mediator to draft the settlement agreement and court pleadings, or to review and revise pro se forms completed by the couple. The couple can tap the expertise of other professionals while still using an agreed lawyer-mediator. If the parties need expertise in financial matters, they can consult an agreed accountant or divorce financial planner. An experienced child psychologist or family therapist can help the parents work through disputes concerning the children.

The private mediator must remain neutral throughout the relationship with the parties to insure a successful divorce mediation. The parties should meet together with the lawyer-mediator at the initial consultation. This prevents the potential conflict of interest that may arise if the lawyer-mediator meets

separately with either spouse. Also, all communications between the parties and the mediator should be sent simultaneously. This keeps everyone on the same page and prevents the appearance of one party trying to get the mediator to take his or her side.

Private mediation can take place in one or more meetings. Participation by well-prepared parties will result in more productive meetings. Before the mediation meeting, the parties need to provide the mediator with documents necessary:

- To allocate property and debt, both community and separate;
- To address custody, if applicable, a draft parenting plan;
- To calculate child support, the allocation of time-sharing, the gross income of each parent, the cost of the child's health insurance, the work-related daycare expenses, and additional expenses such as private school tuition; and
- To evaluate the need for alimony, the average monthly income and expenses of each spouse.
- If an agreement is reached, it must be memorialized in pleadings that are submitted to the judge for review, approval and filing. The lawyer-mediator or the parties' lawyers may draft and submit these documents. The parties pay for the private mediator and their lawyers' time preparing for and attending the mediation.

!! ...mediation and collaborative divorce are two excellent alternates to the court divorce process. !!

Family Court Services:

Mediation through services affiliated with specific courts is different than private mediation. Court-affiliated mediation usually focusses on child custody, visitation and co-parenting issues. The mediator does not address child support, alimony, and property and debt division. The parties share the court affiliated mediation fees, allocated in accordance with their relative incomes. If an agreement is reached, the family court mediator submits it to the court.

Settlement Facilitation:

Settlement facilitation is a form of mediation that is usually ordered by the judge. It can also be agreed upon by the parties or their attorneys. A neutral professional, usually a lawyer or a



lawyer-accountant or psychologist team, serves as settlement facilitator. Settlement facilitation is usually done in one meeting, either half-day or full-day. Often, there is more arm-twisting and time pressure involved in settlement facilitation than in private mediation. For example, the parties may not be able to get a trial date set until they have engaged in the settlement facilitation process.

The settlement facilitator will offer an opinion on the various resolutions proposed and on how a particular judge may rule if the case goes to trial. A good settlement facilitator provides a “reality check” for the parties.

As in private mediation, the parties provide financial information to the facilitator in advance. In addition, the parties may each provide a statement of what it proposes as a resolution to the issues. As in private mediation, if an agreement is reached, it must be memorialized in pleadings that are submitted to the judge for review, approval and filing. The parties pay the facilitator for his or her time. If the parties are represented, they must also pay their attorneys for representation at the settlement facilitation.

Mediation, including settlement facilitation, does not work for all divorcing couple. For example, if there is a history of imbalance of power in the relationship, the subordinate spouse may give up too much in the settlement to avoid further conflict. This often occurs when there is a history of domestic abuse. Another example is where one of the spouses knows the entire financial picture and the other does not. If there is a lack of trust or poor information sharing, one spouse may hold on to unreasonable expectations about the amount of child support, alimony and property he or she should receive in the divorce. Although mediation is not easy or inexpensive, most divorcing couples prefer to settle their disagreements through mediation, to going through the time, emotional trauma and financial expense of a trial. The couple retains more control over the outcome than when a judge makes the decisions. Each

When parties reach an agreement they can live with, they are more likely to honor its terms...

party knows what is most important to moving on, and knows what they must have and what they can live without.

Part Two –

Collaborative Divorce:

Collaborative divorce allows couples to resolve their conflicts through a series of constructive meetings between the two spouses and a professional team.

The parties enter into a contract before divorce proceedings are initiated. In the contract they commit to transparency regarding finances and to honesty about what is best for their children and for each other. As with mediation, the objective is to empower the couple to decide the outcome without resorting to the court for resolution. To that end, a team of professionals, which usually consists of a lawyer for each spouse, a neutral financial analyst, a neutral mental health professional or “divorce coach”, and a parenting coach.

The team’s financial analyst helps the parties focus on a financial settlement that takes into account the short and long term well-being of both parties. The team’s mental health professional, or divorce coach, helps both sides reach a level of emotional understanding necessary to negotiate in good faith. This can mean working through the anger, hurt, sadness and frustration that often comes with the death of the marriage. The team parenting coach talks to both parents to find out what is really motivating their custody concerns, and to urge the consideration of their children’s development over time.

There are many reasons to see the collaborative divorce process through. If the process fails, the lawyers are disqualified from representing the spouses in court and the professional team members cannot testify as experts for a single party in court. The “carrot” in collaborative divorce is the parties’ financial investment in the process, its privacy, and control of the negotiations through the team effort. The “stick” is losing the team support if one party pulls out, and the financial and emotional detriment caused when the case

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Setoffs May Protect Marital Property Settlements in Chapter 13 Bankruptcy Proceedings

by Don F. Harris

A recent New Mexico bankruptcy court case has offered family and bankruptcy lawyers a new way to protect an ex-spouse owed money or property when the other ex-spouse files for Chapter 11 or 13 bankruptcy.

Many Marital Settlement Agreements (“MSAs”) will create debts that flow from one ex-spouse to the other. Often those MSAs have obligations that go both ways. For instance, an MSA might require one ex-spouse to pay four credit cards and a student loan, and the other ex-spouse is to pay a lump sum property settlement, some other credit cards, alimony, and child support.

Such mutual debts can function as setoffs, and these offer the most potential protection for each spouse.

A more familiar setoff arises when a bank has lent money to a borrower and the borrower has a deposit account at the same bank. If the borrower has defaulted on the loan to the bank, the bank need not allow the borrower to withdraw money from the deposit account.¹ The Bankruptcy Code treats the right to setoff the same way it treats a lien.² A lien, or secured claim, on a property allows a creditor to look to that property to enforce the debt. For instance, a car lender can seize the vehicle when the loan is in default. Someone with a right to setoff can, in effect, seize the money (by withholding it) owed to the party in default.

The bankruptcy code states, in relevant part:

[T]his title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case³

Property settlements included in MSAs can be discharged in Chapter 13 bankruptcy cases, but not those under Chapter 7. Although a property settlement cannot be discharged by an



individual in Chapter 11 either, a debtor could potentially spread out property settlement debt arising from a divorce over many years. Family and bankruptcy lawyers will often look out for property settlements after a divorce, and recognize that the debt can, potentially, be eliminated in a Chapter 13 case.

But what about setoffs in such settlements?

In re Williams, a 2018 case, addresses this issue and is potentially helpful for family lawyers evaluating setoffs created in divorce judgments.⁴

In *Williams*, I represented Steve Williams, whose ex-wife Tanya had filed a Chapter 13 bankruptcy. Tanya and Steve were divorced not long before the bankruptcy was filed. Their MSA required Steve to pay Tanya a monthly lump sum to include alimony and her share of Steve’s military pension, as the marriage did not have enough overlapping years with the military service for the government to divide the pension. In return, Tanya was required to pay certain debts, including a Wells Fargo credit card that was in the name of both parties.

When Tanya filed her Chapter 13 petition, she stopped paying the Wells Fargo credit card. Steve continued paying the alimony

and the monthly property settlement payments. This forced Steve to also pick up the Wells Fargo tab while continuing to pay Tanya. Steve was retired and on a fixed income. He was not happy that the deal he struck in the MSA was immediately threatened by the bankruptcy filing.

The problem for Tanya was that Steve was paying her money under the same MSA that required her to pay the Wells Fargo account on Steve's behalf. This created obligations going in opposite directions, which in turn created a right to setoff.

I filed a secured claim in the bankruptcy case for Steve, and I objected to the Chapter 13 Plan for "not providing for" (i.e. ignoring) Steve's secured claim. The judge ruled in Steve's favor, and the case ultimately was converted to a Chapter 7 case. The parties settled regarding the offsetting claims.

By comparison, a family lawyer might go into state court and ask for a "credit" against alimony or property settlement payments for debts that the ex-spouse had to pay, but should not have. It is the same concept.

Williams is a very important and well-reasoned opinion. It is also helpful for family practitioners in general as it goes through the common law of setoff, an issue that can arise in family court cases involving MSAs. *Williams* does not address whether a child support obligation could be a setoff in a Chapter 13 bankruptcy proceeding, as that issue was not presented. Some state courts have held that child support cannot be set off against other debts.⁵ *Williams* also does not address the interesting

issue of whether a family law attorney can transform a property settlement into a Domestic Support Obligation—generally child support and alimony, not dischargeable in any bankruptcy proceeding—through artful drafting.⁶

If a Chapter 13 bankruptcy is pending, an existing MSA and the issue of setoffs should be raised first in the bankruptcy court rather than state court. It could violate the bankruptcy automatic stay to proceed to state court while a Chapter 13 case is pending.⁷ Although state courts can address this issue after the bankruptcy is complete, best practice would be to ask the bankruptcy court for relief. ■

Don Harris is recognized as a bankruptcy specialist by the American Board of Certification, and he devotes a substantial portion of his practice to family law.

Endnotes

¹ *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995); 11 U.S.C. § 553.

² 11 U.S.C. § 506(a)(1).

³ 11 U.S.C. § 553(a)

⁴ *In re Williams*, 2018 WL 3559098 (Bankr. D.N.M. 2018).

⁵ E.g., *Koren v. Koren*, 279 A.D.2d 829 (N.Y. Sup. Ct. 2001).

⁶ See 4 Collier on Bankruptcy ¶ 523.11[6] (16th ed) (label in agreement not controlling, but may help).

⁷ *In re Foster*, 574 B.R. 19 (Bankr. D. Maine 2017) (ex-wife sanctioned by bankruptcy court for seeking to modify divorce orders without getting permission from bankruptcy court).

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Making Babies, With and Without Sex

by Sheryl L. Saavedra, Esq. and Harold O. Atencio, Esq.

“My biological clock is TICKING LIKE THIS (foot stomping) and the way this case is going, I ain’t never getting married [or having babies]! — *My Cousin Vinny*.

The options for adoption (babies created through sex) and assisted reproductive technology (babies created without sex) are changing, with advances in technology and changes in social norms. There are more single mothers choosing to parent their children. There are more women electing to delay their child-bearing years in favor of career advancement. There are more non-traditional couples who wish to raise children. Each of these changes in parental culture is taking place on a global scale. As a result, more and more individuals and couples are turning to alternative ways to create their families. This raises new issues for attorneys helping clients navigate the legal process.

Adoption:

Adoption has historically been a popular method for growing or creating a family for infertile couples and in those instances where caring for a child born to a family member becomes necessary. Today, fewer newborns are available for adoption. Birth control efforts have largely been more effective among teenagers as birth control becomes more readily available and sex education becomes more widespread. A society with fewer unplanned pregnancies is a society with fewer newborn children available for adoption.

It is also more socially acceptable for a woman to choose to raise her child as an unwed mother. Young women that opposed abortion, but were not finished with their education or financially secure, would consider placing their child for adoption in previous decades. Today, those same women are finding ways to raise their children with the help of



government assistance, family assistance and plain grit.

The way adoptive parents are selected has also changed from adoption agencies selecting a potential adoptive family to birth parents selecting an adoptive family based on the attractiveness of the adoptive family’s profile—usually presented online, using expensive videos. When Angelina Jolie and Brad Pitt wanted to adopt another child, they had their pick. However, a couple in their 40’s with a high school education and a low paying job at Walmart might never be selected by a birth mother to adopt her child.

In New Mexico, the Children, Youth and Families Department continues to be an inexpensive resource for potential adoptive parents; however, many of the

children available for adoption from CYFD are drug and alcohol exposed in utero or, if older, have been traumatized for a significant portion of their young lives. Many of the children that have been in CYFD custody will need a parent that is educated and equipped to raise a child with bonding and attachment issues or other special needs. CYFD also has a legal mandate to attempt to place children with relatives, prior to finding a non-relative adoptive placement. A whole industry of legal representation now exists to represent foster parents who want to intervene in the abuse and neglect case to advocate for a child whom they may have had in their custody for several years, sometimes since birth.

The cost of adoptions has increased by a factor of four and adoption matters are not easily litigated *pro se*. The federal



surviving the freeze and thaw necessary for long term storage.

Increasingly, individuals and couples seeking to have children are more concerned with having a child than with taking the appropriate legal steps to ensure that parentage issues are properly addressed. There have been cases in which a cooperative sperm donor gets sued for child support by the State when the same sex female couple splits up and the custodial parent obtains state financial assistance. *Mintz v. Zoernig*, 2008-NMCA-162, 198 P.3d 861. Litigation has ensued between same sex couples disputing custody of a child when both parents were raising the child that is genetically

adoption tax credit, which has recently increased from a maximum of \$13,810 to a maximum of \$14,080 per adoption does provide some assistance to families adopting a child, but excludes step-parent adoptions. See 26 U.S.C. §23.

Second parent adoptions are another option for step-parents or where the parties simply elect to cohabitate or co-parent. Second parent adoptions can also involve any other person that serves in the role of parent or primary caretaker of a child, including a grandparent, close friend, or other relative. The second parent adoption is a way of protecting a child from an absent parent or foster care in the event of the custodial biological parent's terminal illness or death.

Delayed family creations may result in scenarios where parents are waiting longer and longer to have children, only to find that when they are ready, they are unable because of advanced age or subsequent medical conditions. Because there is a limited supply of children available for adoption nationally, potential adoptive parents may wish to consider artificial reproductive technology to create families.

Artificial Reproduction:

Options in artificial reproductive technology (ART) include sperm donation, artificial insemination, egg retrieval/egg donation, in vitro fertilization (IVF), intracytoplasmic sperm injection (ICSI), embryo donation, gestational carriers (rent a womb), pronuclear transfers and spindle nuclear transfer (three parent DNA). Potential parents are sometimes able to utilize their own genetic gametes, sperm or eggs if they want a child that is genetically related to them. Recently, vitrification methods to freeze human eggs have given women the ability to freeze their eggs at a time when their fertility is at its highest without the need to know who the genetic father of the child will be. Previously, only embryos had a high rate of successfully

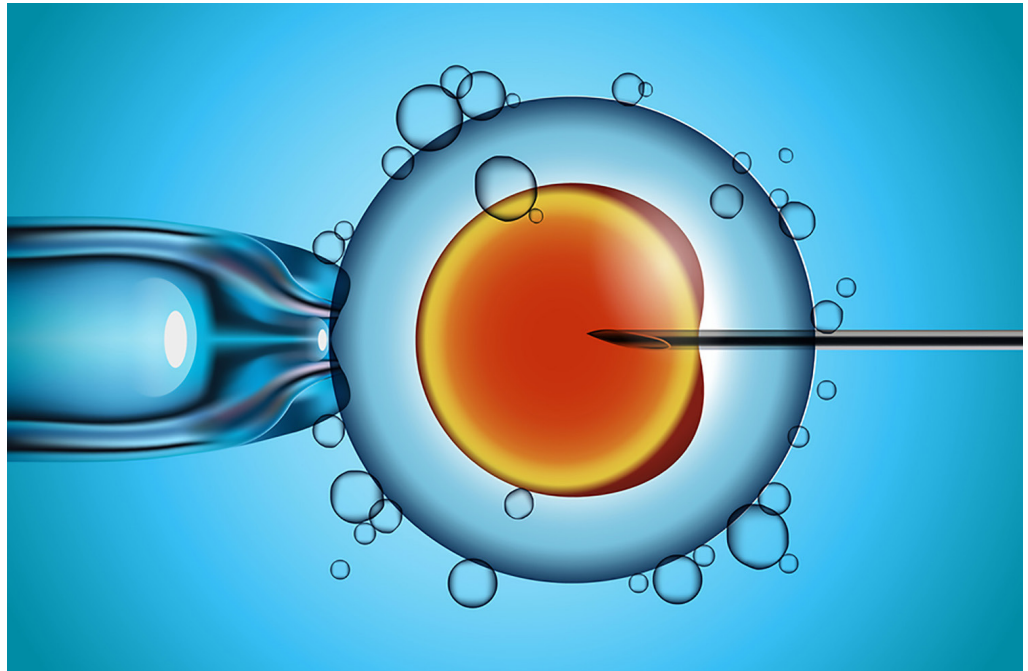
only the child of one of the parents. *Chatterjee v. King*, 2012-NMCA-019, 280 P.3d 283. On more than one occasion, a gestational carrier has refused to allow selective reduction of one or more fetuses in a multiple fetus pregnancy when requested to do so by the intended parent(s). *Cook v. Harding*, 190 F.Supp.3d 921 (C.D. Cal. 2016).

Consultations and properly drafted contracts are more important than ever. Ethical considerations can be complicated. Assisted reproduction is occasionally referred to as collaborative reproduction. This is because both the intended parent(s), the individual or individuals who intend to raise the child and the gamete donor(s) and/or the gestational carrier will begin the process with the same goal—the creation and birth of a healthy child for the intended parents to raise and support. However, the interests of the parties to an assisted reproductive contract may diverge during the pregnancy or after the birth. A misunderstanding of their rights and obligations at the beginning of the process, or a failure to consider all the ramifications of the contractual agreements, together with the fact that a pregnant woman has certain constitutionally protected rights, may result in problematic outcomes.

The cost of finding an agreeable donor, a gestational carrier and a highly qualified reproductive endocrinologist can be extreme. Gestational carrier services run between \$25,000 and \$40,000, in addition to her expenses. Gestational carrier companies charge between \$20,000 and \$25,000. The endocrinologist can charge \$10,000 and up. Legal fees for counsel representing each side can be \$2,000 to \$6,000. As technology advances, some of the costs involved may be reduced; however, the trend has been that gestational carrier fees are increasing rather than decreasing. Intended parents or parents without financial resources often seek a donor or gestational carrier willing to volunteer, creating a whole other host of legal issues.

As adoption becomes less available, ART becomes a more viable and sought-after option. ART gives the intended parent(s) the ability to select a donor or gestational carrier rather than waiting for a birth parent to select them. The intended parent(s) can contract with a gestational carrier regarding health and safety concerns that are not possible to address in adoption. For example, a gestational carrier contract frequently restricts a carrier's right to travel in areas where Zika is a risk, what a carrier will eat, whether a carrier may engage in certain sports, and can even require drug and/or alcohol testing during pregnancy to protect the unborn child in ways that are not practicable in adoption.

Overall, ART is becoming more common and adoption less common. This is also true on an international scale. Intended parents are traveling and contracting with gestational carriers from other countries when the home state of the intended parent(s) does not permit them to enter into a contract with a gestational carrier. Ironically, in those cases, in order to avoid limitations on single or same sex intended parents, attorneys will use adoption law to secure parental rights following the birth of a child born through ART.



While adoption is more budget friendly than ART, the cost of both adoption and ART gives the wealthy an advantage. This is not to say that there are not options for those of lesser means, but those individuals and families will need to be more creative or lucky in their search for a child if they are not able to create a child through their own sexual encounters. ■

Sheryl L. Saavedra has been practicing family law for 25 years and is an attorney with Batley Powers Family Law, P.A. Harold O. Atencio owns Peak Legal Group, has been practicing Adoption and Assisted Reproduction for over 25 years and is a fellow of the Academy of Adoption and Assisted Reproduction Attorneys. Hal and Sheryl are husband and wife, practicing similarly, but separately.

Divorce without Court

continued from page 6

ends up in court. The incentives to stay the collateral divorce course make it an excellent option for resolving a divorce.

After the divorce is finalized, the collaborative divorce process provides the parties with the continued support of the professional team that helped craft the divorce agreements. This is a valuable resource for the parties when questions regarding parenting and financial issues arise post-divorce.

Although paying for two lawyers, a financial expert, a divorce coach and a parenting coach may sound exorbitant, the parties are actually getting the most for their money in collaborative divorce. The idea of the team is to utilize the correct skill set at the most cost-efficient price. The parties pay the professional who has the expertise to assist on each issue of contention.

Conclusion:

Mediation and collaborative divorce provide alternatives to litigating a divorce or custody case and are well worth considering. When parties reach an agreement they can live with, they are more likely to honor its terms than when the terms are imposed by a stranger in black robes. With an agreed resolution the entire family is better able to move forward to the next chapter in life. ■

Mary Ann R. Burmester has been practicing family law for more than 30 years. She practices with NM Divorce & Custody Law LLC. She serves on the board of directors of the State Bar Family Law Section and the New Mexico Collaborate Practice Group and is a fellow of the American Academy of Matrimonial Lawyers.

Parents may take a plea to avoid a trial. These proceedings are civil, not criminal, therefore the plea agreement can only be used in further abuse/neglect proceedings and cannot be used in any criminal case. If a criminal case is pending, a parent may receive use immunity so nothing in the abuse/neglect case can be used in the criminal proceeding. From the trial or plea, the court will order a treatment plan with specific services for the child and the parents.

Judicial review. Ninety days after the adjudication hearing, the court holds an initial judicial review. This is an opportunity for the court to obtain information on whether the parents are working through their treatment plans, how the child is doing in the out-of-home placement, whether the child has moved, and whether any changes need to be made to placement, visitation, or treatment plans. The state must demonstrate that it is making reasonable efforts to reunify the child and the parents.

Permanency hearing. Six months after the initial judicial review, the court holds a permanency hearing. At this hearing, the state is responsible for recommending either reunification if the parents are making progress, or that the plan should be changed to guardianship, adoption, or a planned permanent living arrangement. If a child is with family members who are partly working their plans, but need more time, guardianship might be an appropriate option. If the parents are not working their plan and not making any progress in eliminating the causes and conditions that brought the child into custody and the child is under 17 years old, the plan is likely to be changed to adoption. The plan can be changed back to reunification if a parent begins making progress.

For a child 16 or older who does not want to be adopted, the state can create an independent living plan for the child. This involves an assessment of the child's skills and needs, along with an application for the child and the social worker to complete. In New Mexico, a child living independently can receive benefits such as Medicaid, a housing stipend, tuition for college or trade school in New Mexico, and additional supports for finding a job or enrolling in school. Some of these benefits can be available until the child is 26. The youth attorney for the child is responsible for assisting the child with the applications, making sure the appropriate appointments and assessments are done, and advising the child on the child's rights and responsibilities throughout the process.

Termination of parental rights. If a parent continues to fail to make progress with his or her treatment plan, the state can file a motion for termination of parental rights. The state has the



burden of proving that it made reasonable efforts to help the parents and that the parents failed to make sufficient progress or change the concerns that led to the state taking custody of the child. In New Mexico, if the state does not file the motion for termination of parental rights and the child is over 14, the child has a right to file the motion and request attorney fees be paid by the state. If a parent does not wish to go through a trial on the motion for termination of parental rights, a parent can voluntarily relinquish his or her rights to the child.

Dismissal. Subsequent permanency hearings are held every six months until the child is returned home, adopted, or the case is otherwise dismissed. Once the adoption, guardianship, or transition to independent living is complete, the case is dismissed. A case is also generally dismissed when a child turns 18, by which point one of the above events is likely to have occurred.

Parental Custody Cases

In contrast to an abuse/neglect case, in a parental custody case a child does not have any statutory or rule-based right to an attorney. Instead, the appointment of an attorney for a child is discretionary, based on the facts, circumstances, and needs of the child. Here, a child can be appointed a GAL in a parental custody case regardless of the child's age. The GAL is required to investigate by interviewing all parents or parties involved in the case, interviewing the child, interviewing mental health professionals and any other professionals the GAL deems necessary, and reviewing any documentation the GAL deems necessary. In custody cases the GAL have more active role in making formal recommendations to the court for the best interests of the child, including legal or physical custody, time sharing, choice of school, choice of religion, extracurricular activities, or any other issue that is disputed between the parents. The GAL can be appointed for a limited purpose (determining what school the child should attend) or for more general purposes. The GAL, as an advocate for the child, often

provides suggestions and guidelines for the parents on issues such as communication.

Pursuant to New Mexico Statutes, when a child is 14 or older and the court is considering a change in custody, the court is required to consider the child's wishes. The court is still required to act in the child's best interests. In practical terms, children who are 17 and whose parents are in a high-conflict custody case are likely going to have more say in where they spend their time. Teenagers often "vote with their feet" as they get closer to turning 18. An attorney representing an older teenager can help that child voice concerns and can help the child and parents better communicate so they can improve their relationship and decrease conflict.

The appointment of a GAL is rule-based in New Mexico, not statutory-based. There are no set phases or timelines for ongoing parental custody cases, and appointments can have a specific duration or can be indeterminate. Additionally, the appointment of a GAL can occur at the beginning of a case, for example in a particularly contentious divorce proceeding, or after years of litigation. If no expiration date is included in the order appointing a GAL, the only event that would automatically trigger the end of the GAL's appointment is a child turning eighteen. If the child still requires a GAL after the expiration date set out in the order, either parent or the GAL can request that the appointment be extended. Similarly, if there is no expiration date, either parent or the GAL can request termination of the GAL's appointment.

A GAL in a parental custody case often has wide discretion and, upon the agreement of the parties, can be given arbitration authority for certain decisions. Once recommendations are made, if a parent objects to the recommendation, the GAL gives an oral report regarding the investigation and the recommendations and can be questioned by the parents or the parents' attorneys. GALs can also call witnesses and cross-examine any witnesses who are called by the parents.

In custody cases, a GAL also has the role of being a referee between the parents. GALs are usually appointed in high-conflict custody cases, when the parents cannot agree on decisions for their child. Often the parents have been through multiple professionals, including a parent coordinator, a custody



evaluation, or additional mental health assessments prior to the appointment of the GAL. Sometimes the case has been pending for a long time as the judge has attempted to work out the disputes between the parties. Often, the appointment of a GAL is a last-resort option. In custody cases the GAL is an arm of the court that serves as the court's eyes and ears in helping the court determine what decisions are in the child's best interests.

Conclusion

In each system, the attorney gives the child a voice by reporting to the parties and to the court what the child wants and how things look from the child's point of view. An attorney appointed in a parental custody case may have more authority to make recommendations to the court about specific issues, whereas an attorney appointed in an abuse/neglect proceeding is more of a check and balance. In both, attorneys have an opportunity to change the outcome for a child. In custody cases, that change might be decreasing the conflict between two parents or creating a less disruptive time-sharing plan. In abuse/neglect cases, the change might be providing a better home and a more stable foundation for a child. These changes can fundamentally affect how a child develops, what opportunities the child might have in the future, and the child's mental health. Being an attorney for a child, regardless of the system, is a powerful role that comes with specific duties and significant responsibilities. ■

Kathryn Terry practices family law with a passion for the welfare of children. She served on the board of the Children's Law Section of the New Mexico State Bar for eight years

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I hope you enjoyed my article in this month's edition of the *New Mexico Lawyer*.

I am certified by the American Board of Certification in the areas of Business Bankruptcy Law and Consumer Bankruptcy Law. I also devote a considerable amount of my practice to complex family cases and divorces.

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Please contact me with your questions and I look forward to working with you to help your clients.

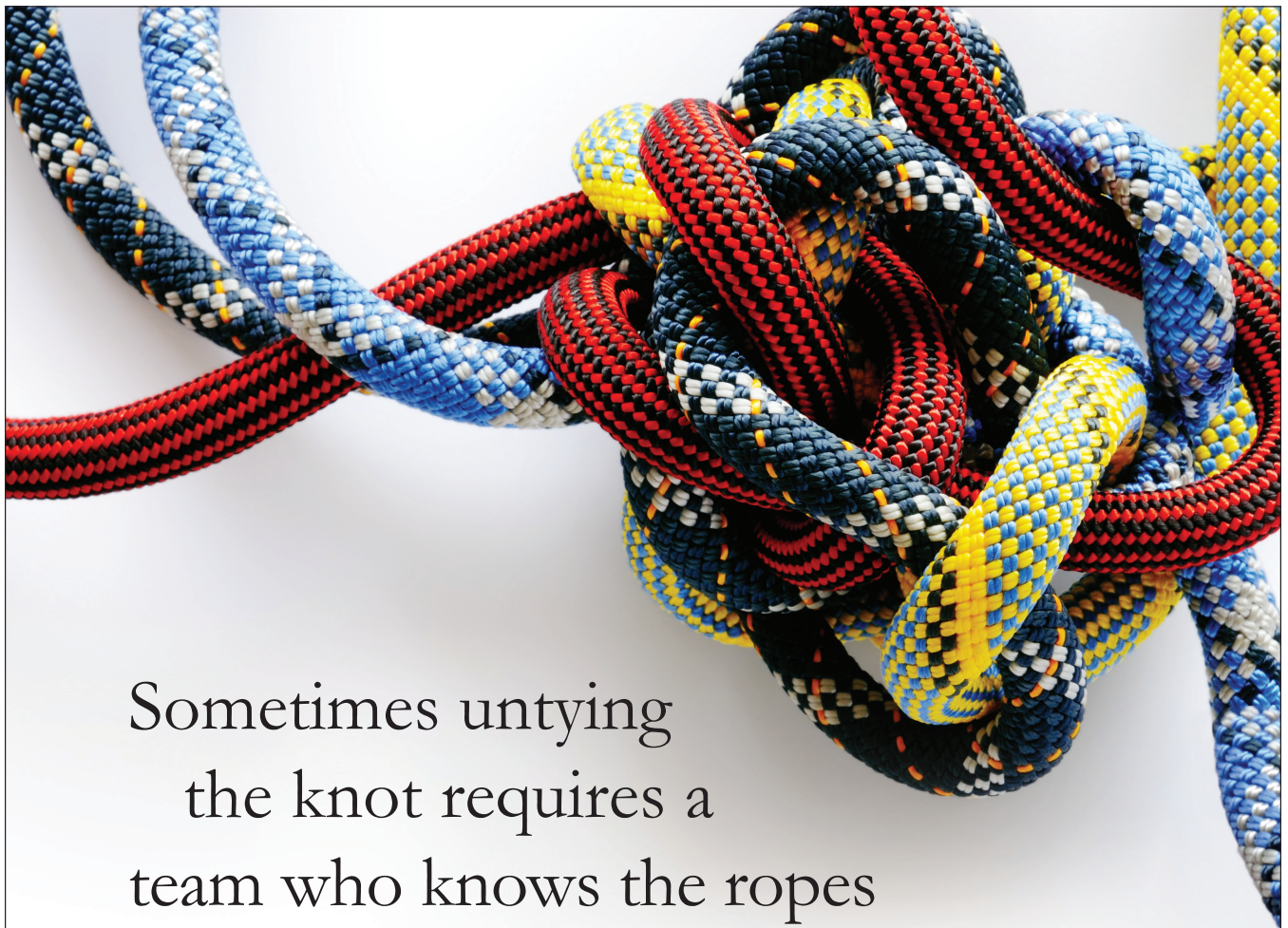
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he believed it was important for Mother “to be able to obtain information for herself, to be able to evaluate and know for herself . . . how [Children] are doing and what kinds of treatment they’re receiving.” Finally, Lombardo described his timesharing recommendation as providing Mother with “seven opportunities for extended visitation” throughout the year, including a six-week period during Children’s summer break, which Lombardo noted was “pretty good frequency given the long-distance relocation.” In other words, Lombardo’s timesharing recommendation included “significant, well-defined periods of responsibility” for Children consistent with an award of joint custody. *See* § 40-4-9.1(J) (1) (providing that “[a]n award of joint custody means that . . . each parent shall have significant, well-defined periods of responsibility for the child”).⁵ Thus, by all indications, Lombardo’s recommendations sought to maintain for Mother an “equal voice” in Children’s upbringing, i.e., joint custody, to the extent practicable under the circumstances. *See Strosnider*, 1984-NMCA-082, ¶ 18.

{24} Finally, on the entire record before us it is apparent that even if Father intended to seek sole legal custody, he failed to present the sort of proof necessary to have the court grant such a request under the applicable statutory standard. Indeed, on appeal Father identifies nothing other than his relocation as a “substantial and material change” to support a change in custody, cites *Jaramillo*, 1991-NMSC-101, then goes on to list evidence supporting each of the best-interest factors to support modification of custody in accordance with *Jaramillo*. This reflects one of two things: either that Father did not intend to terminate joint custody and sought only to modify custody and prove that it was in Children’s best interests to relocate with him to Boston in order to be granted primary physical custody, or that Father did not understand, and thus could not meet, his burden to effectuate termination of joint custody. In either case, we are satisfied that the absence of the kind of evidence necessary to terminate a parent’s legal custody—particularly Father’s failure to even identify, much less prove, a change of circumstance sufficient to warrant termination—further supports an interpretation of the district court’s order as modifying rather than terminating joint custody.

{25} For the foregoing reasons, we conclude that the district court did not intend to terminate joint custody, that its order affected modification—not termination—of joint custody in order to allow Father to relocate with Children to Boston, and that Mother and Father continue to share joint custody in Children. The next question, then, is whether the district court’s modification of joint custody should be affirmed.

B. The District Court Did Not Abuse its Discretion in Modifying Legal and Physical Custody and Permitting Father to Relocate to Massachusetts

{26} Upon a party’s motion to modify an existing joint custody arrangement due to a custodial parent’s relocation, it “becomes incumbent on the [district] court to consider as much information as the parties choose to submit, or to elicit further information on its own motion . . . , and to decide what new arrangement will serve the child[ren]’s best interests.” *Jaramillo*, 1991-NMSC-101, ¶ 27. “The guiding principle in child custody determinations is the best interests of the child.” *Hough*, 2017-NMCA-050, ¶ 28. “In such a proceeding, neither parent will have the burden to show that relocation of the child[ren] with the removing parent will be in or contrary to the child[ren]’s best interests.” *Jaramillo*, 1991-NMSC-101, ¶ 27. Rather, “[e]ach party will 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[.]” *Id.* Ultimately, the district court must “adopt the arrangement or plan that it determines best promotes the child[ren]’s interests.” *Id.* The district court must consider the applicable statutory factors for determining what is in the children’s best interests, and its determination will be affirmed if its order reflects that it considered the relevant factors. *See Thomas v. Thomas*, 1999-NMCA-135, ¶ 16, 128 N.M. 177, 991 P.2d 7 (noting that “the trial court did not make point-by-point findings to correspond to the statutory factors” but concluding that the court’s order “sufficiently tracks the factors, indicating that the court considered them in making its decision”).

{27} Here, the district concluded that granting Father’s motion to relocate Children to Boston would be in the best interests of Children. In support of this conclusion, the district court made numerous

findings, including that: (1) Mother has “mental health issues” that “are difficult to correct”; (2) Father “is within the normal spectrum” according to the psychological testing that was administered; (3) “Father is more likely to promote co-parenting with Mother”; and (4) Children “are less likely to have problematic outcomes as adults and . . . more likely to have a quality relationship with each parent” if they “live primarily with Father[.]” Notably, Mother does not challenge whether these findings are supported by substantial evidence, meaning they are binding on this Court. *See Seipert v. Johnson*, 2003-NMCA-119, ¶ 26, 134 N.M. 394, 77 P.3d 298 (“An unchallenged finding of the trial court is binding on appeal.”). Rather, Mother principally complains that the district court failed to consider the wishes and needs of Children and “any negative impact on . . . Children that would be caused by a change in custody.” The record does not support this contention.

{28} The district court specifically acknowledged that Children “do not want to relocate with Father” and that “[t]hey would like to remain in Los Alamos where they go to school and where their friends are currently located.” The district court also noted that Children “are doing well in their current schooling.” In other words, the district court considered Children’s wishes regarding relocation and recognized that there were factors weighing in Mother’s favor and against permitting relocation. But the fact that certain factors weighed against relocation does not compel the conclusion that the district court erred by ordering relocation. Additionally, we disagree with Mother that the district court failed to consider the possible “negative impacts” on Children resulting from, or “risks” associated with relocation. The district court specifically found that Children “are at an age that gives them the biggest opportunity to adapt positively to any relocation with Father.” This finding is supported by Lombardo’s testimony that Children’s resilience, cognitive capacity, and ages were predictive of a successful relocation. And implicit in this finding is the district court’s acknowledgment, and rejection, of Mother’s argument that relocation could put Children at a “significant” risk “of acting-out and self-harming behaviors.” In other words, the record indicates that the district court considered all of the factors necessary in determining whether relocation was in the best interests of Children.

⁵Indeed, the district court’s order denying Mother’s motion for reconsideration includes a finding that Children “will still have significant blocks of time with their Mother.”

{29} We conclude that the district court did not abuse its discretion in modifying joint custody, awarding primary physical custody to Father, and granting Father's motion to relocate Children to Boston.

III. Mother's "Due Process" Arguments

{30} Mother argues that the district court's custody determination deprived Mother of her constitutional right to due process of law. She specifically contends that: (1) psychological evaluations relied on by the district court in its judgment "were not conducted in the ordinary manner"; (2) the district court erred by granting in part the motion for a protective order sought by Judy Baker, Children's therapist, thereby limiting Mother's ability to depose Baker and leading to Mother's "inability to cross-examine [Baker] on critical issues"; (3) "ordinary procedures for modifying joint custody were not followed"; (4) "there is both the appearance of bias, as well as actual bias" in this case, depriving her of her "procedural due process right to have her case decided in a fair and impartial way"; and (5) the result in this case constitutes a violation of her and Children's "substantive due process rights to pursue their familial relationships."

{31} Mother first argues that the district court's judgment "is also infirm because it rests on psychological testing conducted in a highly unorthodox and improper manner." While Mother includes this argument under the umbrella of "due process" violations, she provides no explanation of how admission of and the district court's reliance on psychological test results—even if arrived at through an "unorthodox" process—deprived Mother of due process. She does not even mention "due process" or cite a single authority in support of her conclusory contention that "[i]t should shock the judicial conscience that mental and emotional disorders that have never been diagnosed can be bandied about in [such a] fashion to deprive a parent of custody of her children." Instead, Mother effectively argues that the district court should not have adopted Lombardo's recommendations in light of Mother's expert Dr. Ned Siegel's opinion that Lombardo "did not give a fair and even presentation of . . . [P]arents' psychological states." But the district court, as the finder of fact, was free to give Dr. Siegel's opinion as much or as little weight as it deemed appropriate. See *State v. Armijo*, 2005-NMCA-010, ¶ 4, 136 N.M. 723, 104 P.3d 1114 (noting that "it is for the fact-finder to evaluate the weight of the evidence"). Because Mother wholly

fails to explain how the psychological testing and the district court's reliance thereon deprived her of due process, we consider this argument no further. See *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 ("We will not review unclear arguments, or guess at what [a party's] arguments might be."); *ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969 (explaining that this Court will not consider propositions that are unsupported by citation to authority).

{32} Mother next argues that she was "not afforded a fair process" because the district court limited her ability to question Baker. However, Mother fails to explain how the district court's restriction of her ability to question Baker resulted in a violation of Mother's due process rights and cites no authority to support her argument. See *Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed."); see also *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). Indeed, as our Supreme Court has explained, the opportunity to confront a witness in a civil, as opposed to criminal, proceeding "is not an absolute right. Instead the right [of due process] requires that parents be given a reasonable opportunity to confront and cross-examine a witness[.]" *In re Pamela A.G.*, 2006-NMSC-019, ¶ 12, 139 N.M. 459, 134 P.3d 746. To maintain a due process claim based on inability to cross-examine a witness, the party must "demonstrate that there is a reasonable likelihood that the outcome might have been different." *Id.* ¶ 14 (internal quotation marks and citation omitted). The record indicates that Mother questioned Baker extensively during her deposition and that Baker's counsel objected to very few of Mother's questions. Critically, Mother fails to demonstrate that the outcome here—modification of joint custody—might have been different had she been able to fully question Baker. We, therefore, conclude that Mother has failed to establish a due process violation resulting from entry of the protective order.

{33} Mother's next two arguments fare no better. Mother fails to demonstrate that the "ordinary procedures for modifying joint custody were not followed in this case" as

she claims, much less that any purported failure to follow "ordinary procedures" somehow deprived her of due process. Mother also has not identified any statements or actions by the district court, Dr. Roberts, or Lombardo that would indicate an improperly favorable mindset toward Father over Mother, meaning she has failed to overcome the presumption of impartiality as she must in order to demonstrate the type of bias needed to support a due process claim. See *Am. Fed'n of State, Cty. & Mun. Emps. v. Bd. of Cty. Comm'rs of Bernalillo Cty.*, 2015-NMCA-070, ¶ 10, 352 P.3d 682 (explaining that "[t]he burden of overcoming the presumption of impartiality rests on the party making the assertion of bias" and that "any alleged prejudice on the part of the decision-maker must be evident from the record and cannot be based on speculation or inference" (alteration, internal quotation marks, and citation omitted)), *vacated on other grounds* by 2016-NMSC-017, 373 P.3d 989; *U.S. W. Commc'ns, Inc. v. N.M. State Corp. Comm'n*, 1999-NMSC-016, ¶ 41, 127 N.M. 254, 980 P.2d 37 (explaining that "not all allegations of bias or prejudice are of the type that render a proceeding fundamentally unfair").

{34} Finally, Mother's argument that the district court's termination of joint custody deprived her of her fundamental right to raise her children is both effectively mooted by our conclusion that joint custody was not terminated and also without merit. While it is true that "case law recognizes parents' fundamental constitutional right to raise their children[.]" *Ridenour v. Ridenour*, 1995-NMCA-072, ¶ 7, 120 N.M. 352, 901 P.2d 770, "case law also establishes that parents' right to raise their children is not beyond regulation in the public interest." *Id.* ¶ 8. "New Mexico case law establishes that parents' rights are secondary to the best interests and welfare of the children." *Id.* ¶ 10. Here, the district court's decision to modify custody to allocate certain decision-making authority to Father was based on a consideration of the best interests of Children as previously discussed. Mother's argument that the district court's ruling "wrongly interfered with the pursuit of Mother's parental relationship with . . . Children and deprived [her] of her constitutional right to due process of law" is simply unavailing. Under the district court's order and consistent with Lombardo's recommendations, Children "will still have significant blocks of time with . . . Mother." Additionally, Lombardo

explained that his recommendations, adopted by the district court, included that Mother be listed as Children's parent on all forms because he believed it was important for Mother "to be able to obtain information for herself, to be able to evaluate and know for herself how the kids are doing and what kinds of treatment they're receiving." Lombardo also recommend that Father be required to provide Mother with summaries of Children's medical and dental issues as they arose and were being addressed as well as information regarding any changes in Children's education,

residence, and ongoing activities. In other words, Mother's parental relationship with Children—while unavoidably impacted by the award of primary physical custody to Father and his relocation with Children to Boston—has been not only neither terminated nor interfered with in violation of Mother's substantive due process rights but, in fact, preserved and protected as much as conceivably possible under the circumstances.

{35} Based on the foregoing, we conclude that Mother's due process rights were not violated by the proceedings and custody determination in this case.

CONCLUSION

{36} We affirm the district court's order modifying joint custody, granting Father primary physical custody, and permitting Father to relocate Children to Boston. Because of ambiguity in that order, however, we remand with instructions that the district court amend its order in accordance with this opinion.

{37} **IT IS SO ORDERED.**

J. MILES HANISEE, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

MICHAEL E. VIGIL, Judge

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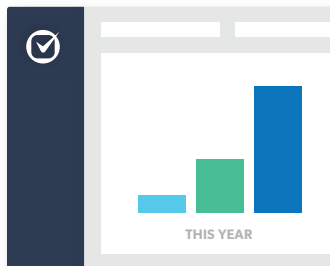
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Trial Attorney

Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based in either Curry County (Clovis) or Roosevelt County (Portales). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Email resume, cover letter, and references to: Steve North, snorth@da.state.nm.us.

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Public Education Department – Attorney Positions

The Public Education Department (PED) is seeking attorneys for its Office of General Counsel. In addition to practicing education law, attorneys may be relied on for advice on matters relating to contracts, procurement, employment, public records, federal and state government funding, and/or other governmental agency matters. Strong writing and interpersonal skills are essential. More details about positions and how to apply are provided on the State Personnel Office website at <http://www.spo.state.nm.us/>. Please check the website periodically for updates to the list of available positions.

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Senior Trial Attorney/ Deputy District Attorney Taos County

The Eighth Judicial District attorney's office is accepting applications for a Senior Trial Attorney/Deputy District Attorney in the Taos office. The Senior Trial Attorney position will handle a combination of misdemeanor and felony level cases, whereas the Deputy District Attorney position will handle primarily felony level cases. Senior Trial and Deputy District Attorney positions are mid-level to advanced level positions of which is a minimum of two (2) to four (4) years of criminal law experience is preferred, respectively. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please submit a letter of interest and a resume to Suzanne Valerio, District Office Manager, 105 Albright St., Suite L, Taos, New Mexico 87571, or submit electronically to svalerio@da.state.nm.us. Applications will be accepted until and attorney has been hired for the position.

RFP For Legal Services

The City of Elephant Butte is accepting Requests for Proposals (RFP) for Legal Services Invitation for Bid #19-20-002. Issued August 26, 2019. Deadline for questions September 6, 2019. Questions will be responded to by September 13, 2019. Bids Accepted and Opened by 4pm September 20, 2019. Evaluation of Bids September 23, 2019 9am. Recommended Award September 25, 2019. Contract awarded September 27, 2019. All dates except the Due Date for Proposals represent a tentative schedule. The City reserves the right to modify these dates at any time. CityofElephantButte.com

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Santa Fe City Attorney's Office seeks an assistant city attorney to serve as city prosecutor to enforce the city's criminal code and cover other matters as assigned by the City Attorney. Good people skills, strong academic credentials, excellent written and verbal communication skills and criminal prosecution experience are desired. Pay and benefits package are excellent and are partially dependent on experience. The position is located at the Municipal Court and reports to the City Attorney. This position is exempt and open at least until September 9, 2019 or until filled. Applications may be downloaded from website: www.santafenm.gov; or apply online at www.santafenm.gov.

Associate Attorney

Holt Mynatt Martínez, P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking associate attorneys with 1-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Prefer attorney licensed in New Mexico and Texas but will consider applicants only licensed in Texas. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to rd@hmm-law.com.

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RIO RANCHO, N.M. – The City of Rio Rancho seeks applicants interested in serving on its ethics panel. Panel members serve as needed for a term lasting three years. The Panel reviews complaints and determines whether elected or appointed officials have violated the City's Code of Conduct Ordinance, and whether to impose corrective action. The Panel determines also whether any complaint is frivolous, and whether a declaration to that effect is warranted. The panel consists of three regular members and one alternate member. The City Manager appoints panel members, subject to the Governing Body's (Mayor and City Council) confirmation. At a minimum, one member of the Panel must be a licensed attorney. Panel members are volunteers and receive no compensation or remuneration. No panel member may be affiliated with Rio Rancho's municipal government in any capacity, including, but not limited to, employment (including employment for which the salary is in any way funded by or through local government), appointment, or election. In addition, no panel member may hold elected public office or office with any political party within the City. Individuals interested in volunteering to serve on the Panel must submit a letter of interest and résumé by no later than 5 p.m. on Friday, Sept. 20. Those interested may apply via the City's website, www.rrnm.gov/ethics, or submit their documentation to the City Manager's Office located at Rio Rancho City Hall, 3200 Civic Center Circle. For additional information, please contact the City Manager's Office at (505) 891-5002. To learn more about the Code of Conduct Ordinance, please visit www.rrnm.gov/ethics. Follow Rio Rancho local government on Twitter (twitter.com/RioRanchoNM), and like it on Facebook (facebook.com/RioRanchoGov).

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Just as people rely on legal professionals, New Mexico attorneys looking for a home need the expertise of one of the state's most qualified, most experienced brokers. Find them at NMSelect.com. These brokers qualified for membership based on their ability to help buyers and sellers in all aspects of every transaction. Make one of them your co-counsel in your quest for a beautiful home.

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