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Domestic Relations and Juvenile Law

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DOMESTIC RELATIONS AND JUVENILE LAW

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No survey of developments in New Mexico domestic relations law has ever been published in this law review. Instead, the law review has customarily contained articles on topics of special relevance to the domestic relations field. Juvenile law, in contrast, has been surveyed from this broad perspective. This article will therefore focus primarily on developments in domestic relations law, and will include discussion of these recent developments in general terms and references to further reading. Recent juvenile law will also be surveyed, but more briefly, since many of the recent cases in juvenile law were discussed in the last issue.[1]

I. DOMESTIC RELATIONS

A. Conflict of Laws.

One line of recent decisions in the domestic relations field exposes some problems peculiar to New Mexico concerning the conflict of laws arising out of the division of property upon divorce. These cases are the progeny of the well-known *Hughes v. Hughes* decision.[2] In 1978, the New Mexico Supreme Court in *Hughes* decided that where there is substantial property in New Mexico to be divided and characterized in a divorce proceeding and where most of the property can be traced to property acquired in a common-law state, the court will apply the law of the common-law state to decide the characterization and extent of each party's interest in or right to the property. The characterization of the property by the court under the law of that state, according to *Hughes,* must take into account the applicable law of the other state, including all the inchoate rights, incidents of ownership, claims, other rights and legal relations of both spouses under that state's law. The New Mexico Supreme Court thereby developed a conflict of laws rule to protect the spouses in a divorce where most

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1. *See Children's Right Symposium,* 10 N.M.L. Rev. 235-429 (1980).

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

or all of the property involved is traceable to separate property acquired in a common-law jurisdiction.[3]

The *Hughes* formula creates difficult problems for the attorneys representing the parties in such cases. Under *Hughes,* the attorneys must research the law of the other state and guess what the courts there would have done with the property under the relevant circumstances. They must also be prepared to litigate the issue and to consider the tendency of a New Mexico court to treat all property acquired during marriage as if it were community property. Because the court's principal aim in these cases is to protect each spouse at dissolution of marriage, the court will apply the law of the other state consistent with the principle stated in *Hughes* that the basic level of inquiry is the purpose to be achieved by the litigation.[4]

The *Hughes* approach was applied, for example, in the recent case of *Stephens v. Stephens.*[5] The issue before the supreme court in *Stephens* was the characterization and division of military retirement benefits. The court held that the law of the "home state" or domicile formally designated by the military employee would be applied to characterize the property, regardless of where the serviceman actually resided when the benefits were earned. In *Stephens,* the state designated by Colonel Stephens was Tennessee. The New Mexico court held that a Tennessee court, applying Tennessee law, would have divided marital property as it deemed "equitable," considering the wife's contributions to the care, production, and maintenance of the husband's estate, the care of the children, the relative financial conditions of the parties, and any relevant misconduct. The result was that the court, applying Tennessee law, awarded one-half of Colonel Stephen's retirement benefits to his wife; in effect, the court treated his retirement benefits as if they were community property.

The court continued to follow the *Hughes* approach in *Brenholdt v. Brenholdt,*[6] which resolved the issue of what law applies in determining rights in property located in several states. In the process, however, the court ignored potential problems that could arise from

3. For a more complete analysis of *Hughes v. Hughes, see* Note, *In-Migration of Couples from Common-law Jurisdictions: Protecting the Wife at Dissolution of Marriage,* 9 N.M.L. Rev. 113 (1978-79). The court in *Hughes* was careful to point out that California had a more direct approach to the problem through its quasi-community property statute. 91 N.M. at 346, 573 P.2d at 1201.

4. 91 N.M. at 345-47, 573 P.2d 1200-02. Rule 44 of the New Mexico Rules of Civil Procedure requires the issue of foreign law to be pleaded or raised by some other form of notice, and also provides that the ordinary rules of evidence do not apply when the court is making its determination of foreign law. The court's ruling on foreign law is deemed an issue of law, subject to the broader scope of appellate review applicable to issues of law.

5. 93 N.M. 1, 595 P.2d 1196 (1979).

6. ___N.M. ___, 612 P.2d 1300 (1980).

the application of some traditional conflict of laws rules regarding the property located in these states.[7] The New Mexico rule of characterizing property by tracing the funds used to purchase it to the time of acquisition thus creates convoluted and confusing guesswork for both attorneys and the courts when the search ends in funds and property acquired outside New Mexico. A quasi-community property statute might relieve some of these difficulties.[8]

The extent to which a New Mexico court will strain to validate lengthy cohabitation in New Mexico by recognizing a common-law marriage under the law of another state was demonstrated recently in the case of *In re Estate of Willard.*[9] In *Willard,* the court of appeals affirmed a district court decision which held that two people living together in New Mexico for ten years, one of whom had been married and divorced from another spouse during the ten-year period, were common-law spouses under Texas law, even though they were domiciled in New Mexico the entire time. The court found that the Willards had entered into an agreement to live as husband and wife in Texas and had satisfied other Texas requirements for a valid common-law marriage based on their visits to Texas five or six times a year. When one spouse died, the other had a valid claim against the New Mexico estate of the deceased spouse because the marriage in Texas was also valid in New Mexico under traditional conflict of laws rules.

In *Brister v. Brister,*[10] the New Mexico Supreme Court continued to take a traditional approach to the conflict of laws when it confirmed that New Mexico courts will apply New Mexico law in determining the modification of alimony, regardless of where the parties

7. In *Brenholdt,* real property had been acquired in Arizona and New Mexico with community earnings while the spouses resided in New Mexico. Previously, while in Ohio, they had acquired property in Ohio and California with separate earnings. The supreme court held that New Mexico law would apply to determine their rights to the property in Arizona and New Mexico; Ohio law would determine their rights to the property in Ohio and California. The court did not address or reconcile the traditional conflict of laws rule which states that the law of the state of the situs of real property controls in deciding questions of title and ownership. The Second Restatement of the Conflict of Laws takes the traditional view that the law of the situs of real property exclusively governs with respect to the rights of the parties. R. Weintraub, Commentary on the Conflict of Laws 398-99 (2d ed. 1980). The New Mexico court also failed to address the issue of whether a New Mexico decision would be enforceable against the property acquired in Arizona. It is unclear if an award of title to real property in a divorce decree of one state is always enforceable in another state where the real property is located. *See* Fall v. Eastin, 215 U.S. 1 (1909); *see also* R. Weintraub, *supra,* at 404-08.

8. California's quasi-community property statute still requires a California court to look at whether the property would have been community property if it had been acquired in the same manner with the same funds and the parties had been living and working in California. Cal. Civ. Code § 4803 (Supp. 1980).

9. 93 N.M. 352, 600 P.2d 298 (Ct. App. 1979).

10. 92 N.M. 711, 594 P.2d 1167 (1979).

are living. The court in *Brister* held that if the original alimony award has been made by a New Mexico court, even though the wife is living out of state with another man and her state of domicile has different standards for modification, New Mexico law will control to modify the award. The court did not inquire into which state had the most significant interest. Instead, its decision implied that the location of the court originally awarding alimony is the controlling factor.[11] The court also held that, under New Mexico law, evidence of the effect of contributions from a cohabiting male upon the financial need of the divorced wife could be included to show the changed circumstances needed to modify alimony.

The enforceability of foreign judgments in the domestic relations field was also the subject of recent cases. Full faith and credit was granted to an Indiana divorce decree by the supreme court in *Barker v. Barker*[12] notwithstanding an objection that was raised concerning personal jurisdiction. In *Barker*, the issue was whether a foreign decree should be given full faith and credit where service was made upon a New Mexico respondent under an Indiana court rule and not under a statute enacted by the Indiana Legislature. The court found that the decree was entitled to full faith and credit if there were minimum contacts and notice adequate to satisfy the due process clause of the United States Constitution. Since the Indiana trial rule regarding long-arm service had been tested in Indiana and found constitutional, the court held that New Mexico was obligated to give the judicial rule the effect of law. In addition, the court found that if full faith and credit was expressly given to a foreign judgment in a final order of a New Mexico court, the order could be amended more than 30 days after its entry to reduce it to a domestic judgment enforceable in New Mexico under Rule 60(b)(6) of the Rules of Civil Procedure.

When the enforcement of a foreign judgment based on a claim for alienation of affections is opposed, a public policy argument may be effective, as is shown by the recent case of *Thompson v. Chapman.*[13] The court of appeals held in *Thompson* that there was no claim for alienation of affections if an estrangement resulted in divorce. The court announced that it would abolish the remedy for damages based

11. In contrast, if the wife was living in New Mexico and the husband in another state, and the wife attempted to enforce her alimony award through the Revised Uniform Reciprocal Enforcement of Support Act, N.M. Stat. Ann. § § 40-6-1 to -41 (1978), the applicable law in determining the duty of husband's support would probably be the other state's law as the responding state under section 40-6-7.

12. 94 N.M. 162, 608 P.2d 138 (1980).

13. 93 N.M. 356, 600 P.2d 302 (Ct. App. 1979).

upon alienation of affections, if it had the power, because the claim, in its opinion, was no longer viable.[14]

B. Spousal Support and Property Division.

Prior to 1979, New Mexico decisions addressing property issues in a divorce frequently involved tangled factual and legal questions of characterization, evaluation, and division. In particular there were questions concerning the appropriate characterization and evaluation of interests in farms, houses, businesses, and professional practices. More general treatment was given to issues of spousal support. The appellate courts usually reiterated the legal standards for granting alimony or affirmed an alimony award as being within the discretion of the trial court.[15] Thus, before 1979 there was little New Mexico precedent establishing factual parameters for an inadequate award of alimony.[16] During 1979 and 1980, New Mexico courts began to structure an approach to this issue. Controversial and significant decisions were made in the area of property division as well, particularly with respect to the evaluation of professional practices and the clarification of proof standards for community and separate property characterization. Since the close of the *Survey* year, significant cases in the area of property division and spousal support were decided by the courts. They will be discussed briefly here and surveyed more fully in subsequent issues.

Perhaps the most controversial recent decision in the area of property division concerned the evaluation of a professional practice in *Hurley v. Hurley.*[17] In *Hurley,* the supreme court held that, although a medical license could not be deemed an item of community property divisible upon divorce, the goodwill of a medical practice growing out of the use of the license was divisible as community property,

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14. At least twenty-five states have abolished the claim for alienation of affections by statute: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *See* Note, *The Suit of Alienation of Affections: Can Its Existence Be Justified Today?,* 56 N. Dak. L. Rev. 239, 247 (1980). In a recent case, the State of Washington judicially abolished it. *See* Wyman v. Wallace, ___Wash. ___, 615 P.2d 452 (1980).

15. *See* Michelson v. Michelson, 86 N.M. 107, 110, 520 P.2d 263, 266 (1974); Muckleroy v. Muckleroy, 84 N.M. 14, 498 P.2d 1357 (1972).

16. In contrast, California appellate courts over the past decade defined such factual parameters in cases where there was also a substantial property division. A useful analysis of the California decisions up to 1978 can be found in Fain, *The Effect of Property Distribution on Spousal Support in California,* 5 Community Prop. J. 187 (1978). More recent decisions in California concerning alimony are discussed in another context in Gillman, *Alimony/Spousal Support: From Punishment to Rehabilitation,* 7 Community Prop. J. 135 (1980).

17. ___N.M. ___, 615 P.2d 256 (1980).

even though it was not readily saleable and was difficult to evaluate.[18] New Mexico thus follows a line of California decisions with similar holdings.[19]

In *Portillo v. Shappie*,[20] the court of appeals followed a previous line of decisions in New Mexico holding that a community lien on separate property is limited only to the actual sums invested and the value of community labor.[21] The facts in *Portillo* highlight the inequities that may result from this rule.[22]

The lesson to be learned from *Higginbotham v. Higginbotham*[23] is that former spouses should avoid subsequent oral modifications of the division of property in a divorce decree. The divorce decree stated that the money from the sale of a residence should be divided equally after the divorce, but the parties then orally agreed, subsequent to the divorce, to use the funds to repair a second house. One of them relied on the agreement and used the funds for that purpose. The supreme court held that under these circumstances, the oral agreement constituted a new contract, which replaced the terms of the original decree. The oral agreement discharged the original judgment and could be specifically enforced under the doctrine of part performance.

A new method of evaluating the community property interest in a profit-sharing plan was endorsed by the supreme court in the recent case of *Ridgway v. Ridgway*.[24] Periodic payments under a promis-

18. "Goodwill" under this decision appeared to be equated with a professional's superior earning power. Some of the factors considered by the court in evaluating goodwill, for example, were the length of time the professional had practiced, his or her success, age, and health, the past profits of the practice, and the practice's fixed resources.

19. *See In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); Golden v. Golden, 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (1969). A line of Texas decisions holding differently is discussed in Welch, *Discovery and Valuation in a Divorce Division Involving a Closely-Held Business or Professional Practice*, 7 Community Prop. J. 103, 118-19 (1980). The issue of the evaluation and nature of professional goodwill is fully discussed in Adams, *Is Professional Goodwill Divisible Community Property?*, 6 Community Prop. J. 61 (1979).

20. 19 N.M. St. B. Bull. 604 (Ct. App. July 3, 1980).

21. *Id. See* McElyea v. McElyea, 49 N.M. 322, 163 P.2d 635 (1945); Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010 (1944).

22. In *Portillo*, a house brought into the marriage by the wife doubled in size and increased in value from $8,500 to $33,400 in significant part because of improvements made with community funds. The community lien on the house, however, was only $2,800, or the sums originally invested in materials and hired labor. The court determined that N.M. Stat. Ann. § 40-3-8(C) (1978), which states that the rents, profits, and issues of separate property are also separate property, was consistent with the view that the community was not entitled to a share in the increased value of the house caused by the improvements. No offset was allowed for the rental value of the property which was used as a residence. The court stated that because neither husband nor wife could be excluded from the other's dwelling, the rental offset would be against public policy. This decision appears to limit prior case law holding a rental offset valid. *See* Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010 (1944).

23. 92 N.M. 412, 589 P.2d 196 (1979).

24. 94 N.M. 345, 610 P.2d 749 (1980). Profit-sharing plans could be appropriately evaluated, the court held, by using the undiscounted, current actual dollar value of the vested

sory note to effect an equal division of community property, secured by a lien on the separate property of the maker of the note, was also held appropriate and not deemed payment of alimony.

Finally, the court of appeals directly addressed the problematic issue of transmutation of community property under section 47-1-16 of the New Mexico statutes. In the case of *In re Estate of Fletcher*,[25]

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interest in the plan. Defined benefit plans, on the other hand, could appropriately use the discounted "present value" method employed by accountants, the court said. Attorneys should be aware that the valuation and division of pension plans is an area full of uncertainty. A good, general article on pension plans is Hardie & Reisman, *Employee Benefit Plans and Divorce: Type of Plan, Date of Retirement, and Income Tax Consequences as Factors in Dispositions*, 5 Community Prop. J. 179 (1978); *see also* Annot., 94 A.L.R.3d 176 (1979). Providing economic protection for one spouse when all the pension benefits are in the name of the other spouse is full of risk, moreover. The IRS has recently held in a private letter ruling that a plan may be forfeited in a separate property state under the anti-alienation provision of I.R.C. § 401(a)(13) if attached to pay support arrearages under a court order and the participant is not in pay status. I.R.S. Letter Ruling Rep. (CCH), Letter Ruling No. 8010051 (Dec. 12, 1979). In a community property state where there is a division of property on divorce, however, one-half of the benefits from a self-employed spouse's Keogh plan may be transferred to another Keogh plan on behalf of the other spouse without jeopardizing the tax exempt status of the plan or creating income tax consequences at the time of the transfer. I.R.S. Letter Ruling Rep. (CCH), Letter Ruling No. 8014082 (Jan. 11, 1980). However, while I.R.S. Letter Ruling Rep. (CCH), Letter Ruling No. 8009103 (Dec. 10, 1979) states that a division of several individual plans as part of an equal division of community property will not result in income until distributions are made to the holder of the plan, and then will only result in income to the holder, transferring a plan entirely to one spouse may result in income to the other spouse when benefits are distributed under I.R.S. Letter Ruling Rep. (CCH), Letter Ruling No. 7952045 (Sept. 25, 1979). A short but pertinent discussion of the tax aspects of dividing pension plans is presented in a newly revised and updated work. M. Walker, Tax Consequences of Divorce in New Mexico 41 (1979) (copies are available through the New Mexico Society of Certified Public Accountants). If an attorney looks to Social Security benefits as a form of economic protection, the attorney should recall that if the parties are married for ten years or more, a former wife is entitled to one-half of the social security benefits of her former husband, provided that she does not remarry. She cannot receive any of them, however, until she is at least 62 *and* her former husband is entitled to and is receiving benefits. 42 U.S.C. § 402(b)(1)(A)-(B) (1976).

25. ____N.M. ____, 613 P.2d 714 (Ct. App.), *cert. denied*, ____N.M. ____, 615 P.2d 991 (1980). Ordinarily, transmutation must be proven by clear and convincing evidence. Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952). Where community real property is held in joint tenancy, however, the court found that section 47-1-16 changed this proof requirement to a preponderance of the evidence and made a joint tenancy deed prima facie evidence of transmutation. The court noted recent authority in support of its decision in Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M.L. Rev. 1 (1974). Other cases were distinguished by the court on the ground that they concerned the source of funds and hence the character of the property, not transmutation of the property. *See* Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963); Shanafelt v. Holloman, 61 N.M. 147, 296 P.2d 752 (1956). In the recent case of Corley v. Corley, 92 N.M. 716, 594 P.2d 1172 (1979), where a deed was mistakenly filled out by a realty company in joint tenancy to husband and wife, an approach was taken similar to these other cases to avoid the effect of section 47-1-16. The court found that the property involved had been purchased with the separate funds of one spouse and was not community property before the joint tenancy deed was signed. The clear and convincing evidence standard was applied to negate any claim of transmutation from separate property to community property before the signing of the deed. The court also found that the deed did

the court held that, to overcome the presumption of community property applicable to property acquired during marriage, a party not only had the burden of going forward with the evidence, but also had the burden of persuading the court that the property was that party's separate property, not community property.[26]

In 1980, for the first time, the supreme court squarely addressed the adequacy of an alimony award in the dissolution of a long-term marriage where there was substantial community property. In *Hurley v. Hurley,*[27] the supreme court held that it was an abuse of discretion for a district court to award only $1,000 a month alimony to a 49-year-old wife who had been married for 25 years, when the earning capacity of the wife was $15,000 a year, the earning capacity of the husband was $121,000 a year, and the community property, though extensive, was not liquid. The court explained that the wife should not be required to sell her share of property to meet daily expenses, and that she had demonstrated both a greater need than was met by the $1,000 award and the husband's ability to pay.[28]

The limitations of settlement agreements concerning alimony and the court's absolute power over the modification of alimony were reasserted in the recent case of *Brister v. Brister.*[29] The court held in *Brister* that it could ignore a private settlement agreement specifying the amount and term of alimony once it was incorporated into a divorce decree, and could subsequently modify the original alimony award on the basis of need and ability to pay. Support contributed by a person cohabiting with the former spouse, however, could be considered.

Additionally, in *In re Estate of Lord*[30] an oral ante-nuptial contract was held void because it contained an agreement to marry for which the consideration was care and support. Parties cannot by

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not even vest the property in the parties as joint tenants because the wife had paid no consideration. Moreover, commingling of separate funds in a bank account did not create a transmutation of separate property to community property unless the separate property was unable to be traced.

26. Cancelled checks from a separate bank account were not necessary to satisfy this burden of proof. A simple reconciliation of deposits and expenditures from the bank account with supporting testimony were deemed sufficient.

27. ___N.M. ___, 615 P.2d 256 (1980).

28. The wife also was awarded $500 per month in child support. The supreme court thus followed the California cases which hold it an abuse of discretion to fail to award substantial alimony to the wife in a long-term marriage where there is a significant disparity in income and little liquid community property. *See* discussion in the authorities cited in note 16 *supra.* The award of attorney's fees to the wife in *Hurley* was also held inadequate and the issue remanded for reconsideration, taking into account the attorney's actual accounting figures. Appellate fees and costs were also awarded to the wife.

29. 92 N.M. 711, 594 P.2d 1167 (1979).

30. 93 N.M. 543, 602 P.2d 1030 (1979).

agreement alter their legal relations. Because the duty of care and support was binding upon the parties by virtue of their marriage, the agreement was unsupported by consideration, was against public policy, and could not be specifically enforced.

C. Child Support.

The New Mexico Supreme Court placed a limitation on child support awards made in connection with a divorce in the final episode of *Spingola v. Spingola,*[31] when the court decided that a New Mexico divorce decree could not impose an obligation of post-minority child support. Although the settlement agreement involved in *Spingola* required post-minority support in the form of contributions for a college education, the court construed the child support statute[32] to mean that the court's subject matter jurisdiction over child support ends when the child reaches majority. It held that the court's jurisdiction cannot be extended by the terms of a settlement agreement incorporated into a divorce decree.[33] The court did not consider, however, whether a separate agreement concerning post-minority support and not incorporated into a decree can be enforced under a contractual theory.

A recent New Mexico case concerning federal child support excluded consideration of a stepfather's income in determining a mother's eligibility for benefits under Aid to Families with Dependent Children [hereinafter AFDC].[34] In *Barela v. New Mexico Department of Human Services,*[35] the court of appeals held that the stepfather's income could not be presumed to be available for purposes of determining eligibility for AFDC support because a stepfather who has not adopted his stepchild has no obligation under New Mexico law to support the child. Under federal regulations, a stepfather's income could be considered, however, if it was *"actually* available for current use on a regular basis."[36]

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31. 93 N.M. 598, 603 P.2d 708 (1979). The first *Spingola* case can be found at 91 N.M. 737, 580 P.2d 958 (1978).

32. N.M. Stat. Ann. § 40-4-7 (1978).

33. *See* similar decisions from other states in Annot., 99 A.L.R.3d 322 (1980). The general standards for child support established in the well-known, first *Spingola* case are more thoroughly analyzed in *Note: Guidelines for Modification of Child Support Awards: Spingola v. Spingola,* 9 N.M.L. Rev. 201 (1978-79).

34. 42 U.S.C. § § 601-662 (1976 & Supp. II 1978).

35. 94 N.M. 288, 609 P.2d 1244 (Ct. App. 1979), *cert. denied,* ____N.M. ____, 614 P.2d 546 (1980).

36. 94 N.M. at ____, 609 P.2d at 1247 (emphasis in original). The *Barela* opinion was consistent with the opinion of the Tenth Circuit issued in the same year. Nolan v. C. de Baca, 603 F.2d 810 (10th Cir. 1979), *cert. denied,* 100 S. Ct. 2927 (1980). The two opinions are inconsistent however, with Duran v. New Mexico Dep't of Human Servs., 19 N.M.

The court further developed standards for determining the right to AFDC benefits in *New Mexico Department of Human Services v. Garcia.*[37] Affirming the New Mexico Department of Human Services' interpretation of Regulation 221.722, the supreme court held that evidence of a natural father's voluntary payments toward the support of his illegitimate children, his acknowledgement of paternity, and the evidence of his long-term relationships with the children found in the record considered as a whole meant that the father's contributions would be considered to determine the mother's eligibility for AFDC benefits.

Lastly, the "AFDC Recipient Work Incentive Act,"[38] which became law in 1980, funds a pilot program[39] that provides day care for children both of former welfare recipients who become gainfully employed and of employed persons eligible for welfare. House Bill 77,[40] on the other hand, which would have provided a state tax credit based on day care costs for families earning less than $12,000 per year, died in the Senate Finance Committee.

D. Child Custody, Visitation, and Guardianship.

Perhaps the most significant, though most confusing, recent decision in the area of child custody was *Schuermann v. Schuermann.*[41] In *Schuermann,* a father was awarded custody of his two male children long after a divorce decree had awarded custody to the mother. The change of custody was based upon a showing of changed circumstances and a showing that it was in the best interests of the children. The correct test for determining a change of custody from the mother to the father was at issue. The supreme court stated that, contrary to the mother's argument which had some support in earlier cases,[42] it is not necessary for a father to prove that the integrity, morality, and character of a mother has changed so that the children are no longer receiving proper care.

Ironically, while the court affirmed the "best interests of the child" test and rejected the alternative test urged by the mother because it

St. B. Bull. 340 (Ct. App. April 17, 1980), where such income was considered because it was community property. *Duran* was recently reversed by the New Mexico Supreme Court. 19 N.M. St. B. Bull. 963 (October 16, 1980). Community property principles cannot be applied, the court held, to conflict with controlling federal regulations which preempt the field, even though a spouse has a vested right to one-half of the other spouse's income under New Mexico community property law.

37. 94 N.M. 175, 608 P.2d 151 (1980).
38. N.M. Stat. Ann. § § 27-2-37 to -40 (Supp. 1980).
39. The Act provided $500,000 to set up the pilot program.
40. H.R. 77, 34th Legis., 2d Sess. (1980).
41. 19 N.M. St. B. Bull. 253 (March 20, 1980).
42. *See In re* Briggs, 91 N.M. 84, 570 P.2d 915 (1977).

would cause contesting parents to "promulgate each other's negative qualities,"[43] the court held that the "morality, character or integrity" standard is still relevant in determining the capacity of the custodial parent and whether this capacity has changed sufficiently to require a change of custody. Contesting parents thus will continue to "promulgate each other's negative qualities."

Schuermann did, however, clarify the supreme court's position on awarding attorney's fees in change of custody cases. Where a custody contest develops, and the financial resources of the contesting parents differ substantially, the more affluent parent will be ordered to pay part or all of the less affluent parent's costs and attorney's fees. It is expected that this holding will have a more serious effect upon working fathers if the family structure is traditional.

Recent decisions also addressed procedural questions in the area of custody and guardianship. In *Thatcher v. Arnall,*[44] the probate court was found to have no subject matter jurisdiction in guardianship cases. The court held that only the children's court and the district court have concurrent jurisdiction to decide these questions.

The validity of a contempt order based on a violation of visitation rights was explored in the recent case of *Baker v. Baker.*[45] The father in *Baker* was a serviceman who had custody of his child. Notice was served upon him in Germany of a contempt action filed against him in New Mexico for failure to abide by the visitation provisions in his divorce decree. Although a notice to stay was filed under the Soldier and Sailor's Relief Act,[46] the contempt sanction against him was held valid because the father did not demonstrate that he had requested and been refused leave to present his case in court. The court also noted that no personal jurisdiction over the child is required for a court to hold the father in contempt in a case concerning visitation.

An attempt to enact the Uniform Child Custody Jurisdiction Act failed during the 1979 New Mexico Legislative Session. New Mexico is now one of only four states which have not adopted the Uniform Act.[47] The State Board of Bar Commissioners, however, has approved a new draft of the Act for consideration by the 1981 Legislature.[48]

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43. 19 N.M. St. B. Bull. at 254.
44. 94 N.M. 306, 610 P.2d 193 (1980).
45. 93 N.M. 463, 601 P.2d 433 (1979).
46. 50 U.S.C. App. § § 501-548, 560-574 (1976).
47. *See* 9 U.L.A. Uniform Child Custody Jurisdiction Act (Supp. 1980). The Act is reviewed in Annot., 96 A.L.R.3d 968 (1979). The states which have not yet adopted the Act are New Mexico, West Virginia, Massachusetts and South Carolina. The District of Columbia, the Virgin Islands, and Puerto Rico also have not adopted it.
48. Telephone conversation with M. Lynch, Member of the Joint Committee on Uniform Child Custody Jurisdiction Act, October 3, 1980.

A new statute[49] provides that reasonable visitation provisions for grandparents may be included in a divorce decree or be granted within six months after entry of a divorce decree. These visitation rights can be required if the court finds that visits by the grandparents are in the best interests of the child.

II. JUVENILE LAW

A. Child Abuse and Neglect.

An expected constitutional attack on the child abuse and neglect statute[50] was defeated by the court of appeals in *Health and Social Services Department v. Natural Father and Natural Mother.*[51] Two mentally retarded parents whose children were subjects of a neglect proceeding challenged the statute on the constitutional ground of vagueness. They contended that the relevant definition of a neglected child[52] was so vague that persons of ordinary intelligence could not guess its meaning. The court of appeals held that the statutory language gave adequate notice and that simple differences of opinion about the meaning of the words do not make the statute vague. The court followed other jurisdictions which have upheld the constitutionality of similarly worded statutes.[53] The court also affirmed the factual findings, which supported by clear and convincing evidence the conclusion that the children were neglected.

The criteria for terminating a mentally ill mother's parental rights, due to child neglect, were set out by the court of appeals in *Health and Social Services Department v. Smith.*[54] The mother's lack of fitness as a parent had been proved as required by section 40-7-4(A)(3) of the New Mexico statutes.[55] The court of appeals held that evidence that the child was dependent and neglected by the mother satisfied the statute.[56] The appellate court pointed out that a district

49. N.M. Stat. Ann. § § 40-9-1 to -4 (Supp. 1980).

50. N.M. Stat. Ann. § § 32-1-3(L), -34(A) (1978).

51. 18 N.M. St. B. Bull. 670 (Ct. App. Sept. 6, 1979).

52. The definition under attack in the statute described a neglected child as one lacking proper parental care and control or other care and control necessary to his well-being because of the faults or habits of his parents or because of their neglect to provide them; or a child whose parents cannot discharge their duties because of mental incapacity. N.M. Stat. Ann. § 32-1-3(L)(2), (3) (1978).

53. *See* Minor Children of F. B. v. Caruthers, 323 S.W.2d 397, 401 (Mo. Ct. App. 1959); *In re* D.T., 89 S.D. 590, 237 N.W.2d 166 (1975); *In re* Neglected Child, 130 Vt. 525, 296 A.2d 250 (1972). *See also* Vorholt, *Application of the Vagueness Doctrine to Statutes Terminating Parental Rights*, 1980 Duke L.J. No. 2 at 350.

54. 18 N.M. St. B. Bull. 138 (Ct. App. Mar. 1, 1979).

55. N.M. Stat. Ann. § 40-7-4(A)(3) (1978).

56. The findings were: 1) the mother failed to perform the natural and legal obligations of care and support due to mental illness; 2) the child had been subjected to mental or emotional harm; 3) the mother's illness was continuing; and 4) such continuing illness would cause the child further harm.

court is not required to make independent findings of the four statutory elements concerning parental neglect; the only necessary finding is that the parent is unfit. The court held that the findings in the district court order were fully supported by the evidence.[57]

In an attempt to provide official police protection in cases of abuse, a new statute[58] gives police the express power to intervene in domestic disturbances. Under this law, the police may make an arrest without a warrant, given probable cause to believe an assault and battery upon a family member has occurred. The statute protects spouses as well as children. The peace officer may also remain with the victim, assist the victim in getting to a shelter, or help the victim obtain proper medical attention.[59]

B. Delinquents and Children in Need of Supervision (CHINS).

The 1972 New Mexico Children's Code, which is applicable to delinquency and CHINS (children in need of supervision) cases, was thoroughly surveyed by this law review in 1976.[60] Another recent article has examined problems arising out of conflicts between the 1972 Code and the 1976 Children's Court Rules as revised in 1978.[61] Procedural and constitutional issues not discussed in these articles, however, have been the subject of several recent cases.

Courts have imposed and enforced strict application of time limits under the Children's Code and Children's Court Rules in recent cases. Motions to extend custody at an institution were refused and a child was released when the 30-day period required for a hearing had elapsed.[62] The procedural rules for an adjudicatory hearing were held applicable to motions to extend custody and were strictly applied by the court. Similarly, a petition for delinquency was dismissed when a

57. It is to be expected that in cases involving Indian children, neglect and abuse proceedings, termination of parental rights and adoptions will be considerably more complicated and may require deferral to an Indian tribal court on grounds of primary jurisdiction under the 1978 Indian Child Welfare Act, 25 U.S.C. § § 1901-63 (Supp. 1979). *See* Wamser, *Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus,* 10 N.M.L. Rev. 413 (1980).

58. N.M. Stat. Ann. § 31-1-7 (Supp. 1980).

59. *Id.* § 31-1-7(C).

60. Children's Court procedure in these cases under the 1972 Children's Code was thoroughly explored in Harris, *Children's Court Practice in Delinquency and Need of Supervision Cases under the New Rules,* 6 N.M.L. Rev. 331 (1975).

61. *See* Lauer, *The New Mexico Children's Code: Some Remaining Problems,* 10 N.M.L. Rev. 341 (1980). This article discusses recent cases through 1979 in terms of conflicts in time limits for commencing certain procedures; problems of admissions of guilt in consent decrees; waiver of the child's right to counsel; the parent's right to counsel; the use of admissions and confessions; the confusing standard for litigating the child's need for care and rehabilitation; disposition and proportional sanctions; the standard for transfer to the district court for criminal prosecution; and confidentiality problems concerning delinquency and neglect proceedings.

62. State v. Doe, 19 N.M. St. B. Bull. 140 (Ct. App. Feb. 14, 1980).

child who had admitted committing the delinquent act in question was held for more than four days following a court-ordered psychiatric evaluation, and disposition of his case had not been made within 75 days.[63] The court in this case construed the statute and ordered the dismissal consistent with the underlying statutory intent that children's court matters must be handled promptly. In another case, hearings on a petition to revoke probation did not occur within 30 days, and the petition was dismissed.[64]

Recent cases also delineated the standing and power of certain officials in children's court proceedings. A probation parole officer was found to have authority to file a petition for extension of parole supervision.[65] Special masters, however, have no power to hear petitions to revoke probation without prior approval by the New Mexico Supreme Court.[66]

In addition to the cases interpreting and applying time limits and the power of officials, several important decisions clarified constitutional issues of the rights of children. In *State v. Montoya*,[67] the children's court dismissed with prejudice a delinquency petition based on allegations of vehicular homicide, reckless driving, and driving while intoxicated. Subsequently, an indictment reinstating the same charges was filed in district court. The court of appeals held that no double jeopardy claim lay where the original dismissal was based on a finding of lack of jurisdiction in the children's court.

The fourth amendment was held to apply to a child and was held violated when a medical exam was taken by a doctor at the State Juvenile Detention Home without the child's consent.[68] Motions to suppress the evidence could be made before trial as well as during trial; moreover, failure to file a pre-adjudicatory motion to suppress did not constitute a waiver of the child's right to move to exclude the evidence.

The constitutional right to a trial by jury was also held applicable to children's court proceedings and was not waived by the child's failure to demand a jury trial within 10 days as required by statute.[69] The court held, consistent with the standard applied in adult felony cases, that waiver must be intelligent and express.[70]

63. State v. Doe, 93 N.M. 31, 595 P.2d 1221 (Ct. App. 1979).
64. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).
65. State v. Doe, 18 N.M. St. B. Bull. 241 (Ct. App. Apr. 12, 1979).
66. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).
67. 93 N.M. 346, 600 P.2d 292 (Ct. App. 1979).
68. State v. Doe, 93 N.M. 143, 597 P.2d 1183 (Ct. App. 1979).
69. State v. Doe, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980). The statutory provision involved was N.M. Stat. Ann. § 32-1-31(A) (1978).
70. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968). The problem of intelligent waiver by a child is discussed in connection with the waiver of Miranda rights in Harris, *Chil-*

CONCLUSION

Recent New Mexico cases have addressed significant problems in the areas of domestic and juvenile law. The cases clarified, among others, issues concerning awarding attorney's fees in change of child custody cases, evaluating pension plans, proving transmutation of community property, and evaluating professional practices. The constitutionality of the child neglect statute also was upheld. New precedent established more definite criteria for determining adequate alimony awards upon divorce. The constitutional right to trial by jury was held applicable to cases in the children's court. Recent decisions also revealed some continuing problems in deciding conflict of laws issues involving property divisions upon divorce and in applying the standards for a change in child custody. The 1981 Legislature may be the forum for resolving some of the problems in these areas arising under present New Mexico law.

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dren's Waiver of Miranda Rights and the Supreme Court's Decisions in Parham, Bellotti *and* Fare, 10 N.M.L. Rev. 379 (1980).