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Domestic Relations

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DOMESTIC RELATIONS

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This third annual survey of New Mexico domestic relations law updates the law from April 1981 to March 1982. During the Survey year, the New Mexico Supreme Court decided a number of cases in the important area of jurisdiction under the Parental Kidnapping Prevention Act.[1] Decisions in the areas of custody, visitation, and child support also broke new ground and showed an increased willingness by the supreme court to take strong action against irresponsible behavior by parties toward each other and toward their children.

I. JURISDICTION AND CONFLICT OF LAWS

Since the last Survey there has been significant litigation in the area of jurisdiction under the PKPA;. these cases will be discussed in a subsequent section of this article.[2] Two other jurisdiction cases did not involve the PKPA. In *Church v. Church,*[3] Wife sued Husband in tort, contract, and equity, seeking damages based on conduct which occurred while the parties were married and residing in Virginia. Wife had supported Husband during medical school; upon graduation, Husband asked for a divorce. Wife claimed Husband defrauded her by pursuing an extra-marital relationship, by not intending to stay married once he completed medical school, and by falsely repesenting his medical education as an investment of the marriage.[4] The trial court dismissed Wife's complaint, holding that the complaint failed to state a claim upon which relief could be granted.[5]

The New Mexico Court of Appeals examined Wife's complaint to see if it stated causes of action cognizable under the laws of Virginia. Virginia law applied because Wife's claims arose out of a course of conduct

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1. 28 U.S.C. § 1738A (Supp. IV 1980) [hereinafter referred to as PKPA].

2. See *infra* Section II.A for a discussion of these cases.

3. 96 N.M. 388, 630 P.2d 1243 (Ct. App. 1981). For further discussion of this case, see Johnson, *Commercial Law, ante* at 293.

4. 96 N.M. at 390, 630 P.2d at 1245.

5. *Id.*

occurring in Virginia.[6] The court of appeals reviewed the Virginia law applicable to Wife's tort, contract, and equitable claims and found that the facts alleged presented valid claims for relief.[7] The court of appeals reversed the trial court and directed it to reinstate the complaint.

Separate from the instant lawsuit, Mr. and Mrs. Church were also litigating a suit for dissolution of their marriage. The court of appeals took note of this second suit and observed that cases arising out of a wife putting her husband through school "are no longer uncommon."[8] The court also noted that "this fact situation (wife putting husband through school) and the resultant disputed claims have been resolved in terms of property or alimony awards in divorce proceedings."[9] Because the instant suit arose out of commitments made during the marriage relationship, Wife's claims could have been resolved in the action for dissolution. Nevertheless, the court of appeals allowed her to bring the instant suit independently of the action for dissolution. In the interest of judicial economy, a party should bring all of her claims at the same time in the same suit. Although Wife surely deserved her day in court on these claims, she should have litigated them in the action for dissolution.

Murphy v. Murphy[10] was primarily concerned with jurisdiction to determine custody of the children. The case arose prior to the effective date of the PKPA or the New Mexico Uniform Child Custody Jurisdiction Act,[11] and the facts illustrate the distressing state of affairs which the PKPA and the NMUCCJA will hopefully ameliorate.[12] The custody liti-

6. *Id.* at 392, 630 P.2d at 1247. The choice of Virginia law, which allows suits between spouses based on tort, does not offend New Mexico public policy. *See* Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978).

7. 96 N.M. at 397, 630 P.2d at 1252.

8. *Id.* at 391, 630 P.2d at 1246.

9. *Id.*

10. 96 N.M. at 401, 631 P.2d 307 (1981).

11. N.M. Stat. Ann. §§ 40-10-1 to -24 (Cum. Supp. 1982) [hereinafter referred to as NMCCJA]. The effective date of the NMCCJA is July 1, 1981. 1981 N.M. Laws ch. 119, § 26. The effective date of the PKPA is December 28, 1980. *See* 28 U.S.C. § 1738A (Supp. IV 1980).

12. In *Murphy,* the parties were married in Oklahoma. The New Mexico trial court granted Wife a dissolution of marriage and custody of the childen. Husband nevertheless filed for divorce in Oklahoma, where he obtained a default decree which granted him a divorce and custody of one child, and which declared the New Mexico decree of dissolution invalid. 96 N.M. at 403, 631 P.2d at 309. Husband came to New Mexico and moved for a decree invalidating the New Mexico dissolution. The New Mexico trial court set aside its decree of dissolution, but retained jurisdiction over custody. The parties, apparently frustrated with the courts, met on their own in Colorado and drafted a settlement agreement. The Oklahoma trial court, however, ratified only part of that agreement. The parties wound up back in New Mexico where Wife had previously applied for an order to show cause why Husband and his attorney should not be held in contempt for failure to abide by previous custody orders of the New Mexico court. The trial court found Husband and his attorney in contempt, jailed them briefly and enjoined Husband from bringing custody proceedings in any other court. *Id.* at 404–405, 631 P.2d at 310–11.

The case eventually reached the New Mexico Supreme Court which held that New Mexico did not have to give full faith and credit to the Oklahoma decree, and that New Mexico had jurisdiction

gation between Mr. and Mrs. Murphy resulted in conflicting and overlapping New Mexico and Oklahoma court orders, including determinations that the other state's rulings were invalid. The New Mexico Supreme Court eventually decided that New Mexico had jurisdiction to determine custody; in its opinion the court also discussed, inter alia, the contempt power and full faith and credit.

II. CUSTODY & VISITATION

A. Parental Kidnapping Prevention Act

Since its enactment, the PKPA has been at the center of child custody litigation in New Mexico. It has become a crucial instrument in settling the kind of questions that plagued both courts and litigants in cases like *Murphy v. Murphy.*[13]

In *State ex rel. Valles v. Brown,*[14] a consolidation of two cases, the supreme court ruled that the PKPA pre-empted New Mexico case law and discussed the purposes of the PKPA and its two-pronged test for jurisdiction.[15] In discussing the underlying purposes of the PKPA, the supreme court stressed the psychological damage done to children who are the victims of child snatching. Congress enacted the PKPA to eliminate the damage to children "which is often severe and sometimes irreversible and irreparable. . . ."[16] The means of doing this is "by requiring states to give full faith and credit to custody decrees [of other states]."[17] Thus "the long line of New Mexico cases which permits a New Mexico court to modify an out-of-state issued child custody decree based solely on the

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to decide custody. The supreme court also stated that the contempt citation against Husband and his attorney was improper because neither Husband nor his attorney had violated a formal order of the court. The court held that contempt could not be predicated upon "failure to abide by an agreement, or obey an order stipulated to by the parties but neither signed nor entered by the court." *Id.* at 408, 631 P.2d at 314.

13. 96 N.M. 401, 631 P.2d 307 (1981). *See supra* note 12.

14. ___ N.M. ___, 639 P.2d 1181 (1981). In the consolidated cases, *State ex rel. Valles v. Brown* and *Miller v. Love,* the supreme court was asked to issue alternative writs of prohibition. For further discussion of *Valles,* see Note, *Domestic Relations—Interpretation of the Parental Kidnapping Prevention Act: State ex rel. Valles v. Brown, post* at 527 [hereinafter cited as Note].

15. Under the PKPA, the court must undertake a two-pronged jurisdictional analysis.

> According to the PKPA, a New Mexico court may *only* modify a child custody decree issued in another state when:
>
> 1. New Mexico has jurisdiction under its own law . . . and under the PKPA . . . *and*
> 2. The state which issued the child custody decree no longer has jurisdiction under the PKPA and its own law . . . *or* has declined to exercise [it]. . . .

___ N.M. ___, 639 P.2d at 1184 (citations omitted) (emphasis by the court). See also Kelsey and Montoya, *Domestic Relations, Survey of New Mexico Law: 1980–1981,* 12 N.M.L. Rev. 325, 358–60 for a discussion of the PKPA.

16. ___ N.M. at ___, 639 P.2d at 1184.

17. *Id.*

physical presence of the child and a substantial change of circumstances is pre-empted by the PKPA."[18]

In the first *Valles* case, *Miller v. Love*,[19] the parties had lived in New Mexico for about five years when Wife left and took the children to Arizona. Husband brought the children back to New Mexico without Wife's consent. Wife sued for dissolution and custody in Arizona. The Arizona trial court found that Husband had unlawfully removed the children from that state and ordered Husband to return the children to Wife. Husband meanwhile sued for dissolution and custody in New Mexico. Wife came to New Mexico and appeared in Bernalillo County District Court to contest that court's jurisdiction and to seek enforcement of the Arizona decree. The New Mexico trial court gave full faith and credit to the Arizona decree and awarded custody of the children to Wife.[20]

The New Mexico Supreme Court disagreed. Arizona did not satisfy any of the five jurisdictional grounds of the PKPA.[21] Because Arizona did not have jurisdiction under the PKPA, New Mexico was not required to give full faith and credit to Arizona's decree. The supreme court then considered whether New Mexico had jurisdiction to decide custody under its own laws and under the PKPA.[22] The trial court, which had incorrectly given full faith and credit to the Arizona decree, never reached this

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18. *Id.*

19. ___ N.M. ___, 639 P.2d 1181 (1981). *See supra* note 14.

20. ___ N.M. at ___, 639 P.2d at 1182.

21. ___ N.M. at ___, 639 P.2d at 1185. Under the PKPA, a state can determine custody if it has jurisdiction to do so under its own laws *and* meets one of the following five conditions:

> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
>
> (B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
>
> (C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in any emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;
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> (D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or
>
> (E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

28 U.S.C. § 1738A(c)(2) (Supp. IV 1980).

22. *See supra* note 21.

question. The supreme court therefore remanded the case to the trial court to decide if New Mexico had jurisdiction to determine custody.[23]

In the second *Valles* case, *State ex rel. Valles v. Brown*,[24] the parties were divorced in Washington where the court had awarded custody to Wife. With Wife's consent, Husband brought their daughter to New Mexico for a visit. He then petitioned in New Mexico for custody. The trial court denied full faith and credit to the Washington decree because it was modifiable, and awarded custody to Husband.[25]

The New Mexico Supreme Court employed the two-pronged PKPA test and reversed. It held that Washington had jurisdiction and that the Washington court intended to retain jurisdiction.[26] If Washington has jurisdiction and is exercising it, the PKPA mandates that New Mexico must respect that jurisdiction and cannot determine custody.

The lesson of *Valles* is that the helter skelter jurisdictional competition exemplified by *Murphy* is a relic of the past. The game now has uniform rules. New Mexico must apply the provisions of the PKPA to each case to determine if it must give full faith and credit to a foreign decree, or may decide custody on its own.

Belosky v. Belosky[27] is another example of the revolution in custody jurisdiction effected by the PKPA. An Ohio decree gave Wife custody of the parties' two children, but, as modified, prohibited her from permanently removing them from the state. She nevertheless moved to New Mexico with the children and petitioned the New Mexico trial court to modify the Ohio decree to allow her to remain in New Mexico with the children. Meanwhile the Ohio court had granted Husband temporary emergency custody of the children.[28]

Prior to the passage of the PKPA, New Mexico would have found the "temporary emergency" Ohio decree modifiable and would have declined to enforce it. However, the supreme court in *Belosky* found that, under the PKPA, Ohio had jurisdiction and intended to retain it. Therefore, New Mexico did not have jurisdiction to modify the Ohio decree and must give it full faith and credit.[29] Finality is no longer the litmus test

23. ___ N.M. at ___, 639 P.2d at 1185.

24. ___ N.M. ___, 639 P.2d 1181 (1981). *See supra* note 14.

25. ___ N.M. at ___-___, 639 P.2d at 1182-83.

26. The supreme court noted that the Superior Court Commissioner of Washington had by affidavit stated that Washington was willing to hear the case. *Id.* at ___, 639 P.2d at 1186. The use of such affidavits would seem to be sufficient evidence to establish that a state intends to continue to exercise its jurisdiction.

27. 97 N.M. 365, 640 P.2d 471 (1982). For further discusison of this case, see Note, *supra* note 14.

28. 97 N.M. at 366, 640 P.2d at 472.

29. *Id.* at 366-67, 640 P.2d at 472-73.

for the enforceability of foreign decrees; instead New Mexico will enforce those foreign decrees which comply with the jurisdictional requisites of the PKPA.

B. Contempt

A series of cases during the Survey year analyzed the contempt power and its use in the domestic relations area. In *Gedeon v. Gedeon,*[30] the New Mexico trial court issued a temporary restraining order placing temporary custody of both children with Wife. The children went to Colorado to visit Husband over Christmas vacation. Husband did not return the children on the agreed date and Wife asked that he be held in contempt. The trial court found Husband in contempt of its custody order and fined him $500 a day until he complied.[31] The supreme court held that the fine was an appropriate way for the court to enforce its mandate.[32]

The supreme court also discussed the contempt power in two recent decisions involving husbands who failed to pay child support. In *State ex rel. Department of Human Services v. Rael,*[33] Rael, an indigent, moved for court-appointed counsel to represent him at a contempt proceeding brought to enforce an order of child support. The trial court denied Rael's motion and he filed an interlocutory appeal. Rael argued on appeal that, because he faced the possibility of imprisonment, he was entitled to a lawyer at the contempt proceeding.[34] The supreme court noted that this was a question of first impression in New Mexico.

The supreme court rejected Rael's argument that the possibility of imprisonment triggered the right to counsel; it was rather the civil or criminal nature of the proceeding that was determinative. The court noted that the purpose of punishing Rael was to secure his compliance with the trial court's order; therefore this was a civil contempt proceeding.[35]

The supreme court stated that "due process does not require that appointed counsel be provided in every instance in which an indigent defendant faces civil contempt charges that might subject him to incarceration."[36] In civil contempt proceedings to enforce child support, the issues are usually not complex.[37] Furthermore, unlike criminal proceedings, "the defendant's liberty interest is not . . . full-blown . . ." because he " 'has the keys to his own prison.' "[38] However, the supreme

30. 96 N.M. 315, 630 P.2d 267 (1981).
31. *Id.* at 315–16, 630 P.2d at 267–68.
32. *Id.* at 316–17, 630 P.2d at 268–69.
33. 97 N.M. 640, 642 P.2d 1099 (1982).
34. *Id.* at 642, 642 P.2d at 1101.
35. *Id.* at 643, 642 P.2d at 1102.
36. *Id.* at 644, 642 P.2d at 1103.
37. The issues are whether a currently effective order exists, whether the defendant knew about it, whether the defendant failed to comply, and whether he has the ability to comply. *Id.*
38. *Id.*

court refused to establish a hard and fast rule. It recognized that the trial court must be given the discretion to decide when fundamental fairness requires the presence of counsel at a civil contempt proceeding.[39]

In *Niemyjski v. Niemyjski*,[40] the supreme court again considered the appropriateness of incarceration as a punishment for civil contempt. The trial court sentenced Husband to ten days in jail for failure to pay child support. Husband argued on appeal that incarceration was an impermissibly severe punishment for civil contempt.[41] The supreme court disagreed and stated that if courts adopted Husband's position:

> it would throw the entire system of enforcement of child support . . . into chaos. Any person ordered to make payments could merely ignore the court order until enforcement is sought knowing he could not be jailed for his refusal to obey the court order. We cannot follow such illogical reasoning that strips the court of the authority to enforce its orders.[42]

Husband also argued that he could not pay child support because he had substantial business and personal expenses during the relevant period. The supreme court showed a marked lack of sympathy for his claim, stating: "If he did so, it was bad judgment on his part and clearly a willful violation of his obligation. It is unfortunate that he ignored *his most important single obligation,* namely *the support of his minor child.*"[43]

C. *Visitation*

In *Montero v. Montero*,[44] the district court granted Wife custody of the children and granted Husband specified visitation rights, including two months summer visitation. Wife moved from New Mexico to Texas and then petitioned the New Mexico trial court for a decrease in Husband's summer visitation. The trial court held the parties had originally contemplated residing in the same general area, and that Wife's move to Texas was a material change in circumstance justifying a decrease in Husband's visitation![45]

The supreme court first held that the standard used in custody cases, "the best interests of the children," should be applied in visitation cases and "in all matters dealing with the well-being of the minor children."[46] The court then observed that there was nothing in the final decree which evidenced an intent that Husband's visitation rights be dependent upon

39. *Id.* at 645, 642 P.2d at 1104.
40. 98 N.M. 176, 646 P.2d 1240 (1982).
41. *Id.* at 177, 646 P.2d at 1241.
42. *Id.*
43. *Id.* (emphasis by the court).
44. 96 N.M. 475, 632 P.2d 352 (1981).
45. *Id.* at 476, 632 P.2d at 353.
46. *Id.*

Wife remaining in the vicinity where the parties lived at the time of the dissolution. Wife was responsible for the change of circumstances, and its effect was to place a greater burden on Husband to exercise his visitation.[47] If courts accepted Wife's reasoning, the custodial parent would have an ex parte method of undermining visitation. The supreme court reversed the trial court, stating that "[s]uch an inequitable result cannot be tolerated."[48]

In *Lopez v. Lopez,*[49] the supreme court observed that the custodial parent often frustrates the reasonable visitation envisaged in a decree. If a trial court thinks there may be disagreement over visitation, it should specify in the decree "the times, places and circumstances of visitation."[50] In setting visitation, the trial court should focus on "the well-being of the child" and not on the desires of the parents.[51]

In *Lopez,* Husband moved for a change of custody. The trial court found a long history of problems over visitation and noted that Wife had previously been held in contempt for failure to comply with Husband's visitation rights. The trial court awarded custody to Husband, primarily because of Wife's interference with Husband's visitation rights.[52]

The supreme court upheld the trial court's action, relying on "the modern trend that when the custodial parent intentionally . . . frustrate[s] . . . visitation . . . a change of custody is an appropriate action."[53] This radical remedy should put attorneys, if not the parties themselves, on notice that if custodial parents undermine visitation rights, they may forfeit custody itself.

III. ALIMONY

In the area of spousal support, *Lovato v. Lovato*[54] is of special interest because of its strong language in support of rehabilitative alimony. The

47. *Id.* at 477, 632 P.2d at 354.
48. *Id.*
49. 97 N.M. 332, 639 P.2d 1186 (1981).
50. *Id.* at 334, 639 P.2d at 1188.
51. *Id.* at 335, 639 P.2d at 1189.
52. *Id.* at 333–34, 639 P.2d at 1187–88.
53. *Id.* at 334, 639 P.2d at 1188.
54. 98 N.M. 11, 644 P.2d at 525 (1982).

Ellsworth v. Ellsworth, 97 N.M. 133, 637 P.2d 564 (1981), should also be mentioned. The trial court had determined that Wife's needs would be adequately met by payments from real estate contracts she had received as her share of the community property. Therefore, the court declined to award her any alimony.

The New Mexico Supreme Court stated that, when considering whether to make an award of alimony, the trial court should look at the amount of community property distributed to the wife. But the trial court must do more than calculate the value of the property at the time of dissolution; it must look at the nature of the assets awarded, and must consider, inter alia, whether they will appreciate or depreciate.

The supreme court noted that the real estate contracts awarded Wife would diminish in value as

parties were divorced in 1977. The court granted Wife custody of their seven minor children and ordered Husband to pay $600 a month for child support and alimony.[55] Wife asked for alimony "because she intended to be a full-time homemaker and mother."[56]

In 1980, Husband moved for a reduction in his support payments. At that time only three of the children, aged 10, 13, and 14, were still at home. Wife was still receiving $600 a month from Husband. She had made no effort to find employment or job training since the divorce. While Husband's income had increased, he had also remarried and acquired three additional children.[57]

The trial court denied Husband any immediate relief and he appealed. On appeal, he argued that alimony should be used as a vehicle for Wife's economic rehabilitation, providing her with support while she sought employment or training. Wife countered that she had no employment experience or skills, was unable to support herself, and was not obligated to give up her chosen status as mother and homemaker.[58]

The supreme court sided with the husband. The court noted approvingly that other jurisdictions had encouraged the spouse receiving alimony to seek employment or training, and stated: "It is *preferable* to use alimony as a method of allowing a divorced spouse to gain personal independence by helping the person disadvantaged by the marriage and the divorce to extricate himself or herself from such a position."[59]

The supreme court found that Wife had taken no steps to improve her situation and had spent her child support and alimony money for items other than family necessities. Based on these findings, the supreme court held that the trial court had abused its discretion in denying Husband's request for relief from his alimony payments.[60] It instructed the trial court to "modify the alimony obligations to the extent necessary to encourage [Wife] to assume the responsibility for her own care and support."[61]

Lovato is important both for its reasoning and its holding. The supreme

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they were paid off, while the business property awarded to Husband was likely to appreciate in value. The court found no evidence that the trial court had considered the contrasting nature of the assets awarded. The supreme court remanded the case to the trial court to review the issue of alimony in light of the suggested reevaluation of the property division. *Id.* at 136, 637 P.2d at 567.

55. 98 N.M. at 12, 644 P.2d at 526. The trial court awarded Wife child support of $75 per child per month and alimony of $75 per month for a total of $600. It also provided that as each child was emancipated, alimony would increase by $75 per month. Thus the total support paid to Wife would remain fixed at $600 per month. At the time Husband moved for relief, his monthly payments consisted of $225 for child support and $375 for alimony.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 13, 644 P.2d at 527 (emphasis added).

60. *Id.*

61. *Id.*

court expressed a strong preference for the use of alimony to support a spouse *while* he or she gains the training, skills, or job experience necessary to achieve financial independence. Alimony should usually contain the seeds of its own termination. The court did not, however, promulgate an inflexible rule. *Lovato* does not require an older spouse who has been a homemaker in a long-term marriage to enter the work force to support herself. *Lovato* does, however, speak to younger women capable of employment. It suggests that they may no longer be able to elect the profession of homemaker with the expectation of continuing spousal support. The supreme court told Mrs. Lovato to take steps to seek outside employment, notwithstanding the fact that she still had three of her ex-husband's children under her care. The supreme court directed the trial court to adjust Mrs. Lovato's spousal support to the extent necessary to start her on the road toward personal financial independence.

IV. STATUTE OF LIMITATIONS

In *Plaatje v. Plaatje*,[62] Husband was a military officer who began receiving retirement benefits in 1972. The parties were divorced in 1973. Wife knew about Husband's retirement benefits at that time, but made no claim to them. She said she did not learn she had a right to share in his retirement benefits until July 1977. It was not until July 1978, however, that Wife sued for her share of those benefits.[63] The trial court dismissed her complaint as barred by the statute of limitations.

Husband argued that Wife's action was barred under New Mexico's general purpose statute of limitations which sets a four-year limitation for "all other actions not herein otherwise provided for and specified. . . ."[64] Wife had brought suit under N.M. Stat. Ann. §40-4-20,[65] and argued that that statute was a timeless grant of authority to sue for division of property. The New Mexico Supreme Court agreed with Husband that section 37-1-4 was the appropriate statute of limitations.[66] The supreme court further held, however, that the four-year period did not run from the date of dissolution, but from the date that each installment became due.[67] Thus Wife was eligible to recover her share of all install-

62. 95 N.M. 789, 626 P.2d at 1286 (1981).
63. *Id.*
64. *Id.* at 790, 626 P.2d at 1287. N.M. Stat. Ann. §37-1-4 (1978).
65. N.M. Stat. Ann. §40-4-20 (1978), provides that:

> The failure to divide the property on dissolution of marriage shall not affect the property rights of either the husband or wife, and either may subsequently institute and prosecute a suit for division and distribution, or with reference to any other matter pertaining thereto, which could have been litigated in the original proceeding for dissolution of the marriage.

66. 95 N.M. at 790, 626 P.2d at 1287.
67. *Id.* at 790–91, 626 P.2d at 1287–88.

ments paid to Husband during the four years prior to her filing suit in 1978.

Although the supreme court held that the statute of limitations did not bar Wife's claim, the court was clearly unhappy with the outcome. Wife knew of the benefits in 1973 and had unreasonably delayed in bringing her action. Husband in the meanwhile had supported himself with the benefits. The supreme court made a point of suggesting to the trial court that "there may be other equitable doctrines which would bar her recovery of the monies received by her former husband in the past."[68]

V. PROPERTY DIVISION

A. Form of Title

Holding property "as Husband and Wife" or "as joint tenants" leads many people to believe that they own half of the property. A number of cases decided during the Survey year demonstrate that "titles" can often be misleading. Parties should instead look to the source of funds used to purchase the property.[69] In *Hughes v. Hughes*,[70] Husband had acquired the marital residence by inheritance from his mother. During the marriage, he executed a deed transferring the residence to himself and his wife as joint tenants. Wife argued that the residence had become community property. The supreme court disagreed, stating that the deed "creates a presumption that a joint tenancy is created unless there is evidence showing the contrary."[71] The court noted that "there is nothing in the record to indicate that its present ownership is other than by joint tenancy," and held that Husband did not intend to make a gift of the residence to the community.[72]

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68. *Id.* at 791, 626 P.2d at 1288.

69. In Espinda v. Espinda, 96 N.M. 712, 634 P.2d 1264 (1981), the mortgage and deed to the marital residence were both in the names of Husband and Wife. The money to purchase the property, however, came from Husband's separate funds. The New Mexico Supreme Court held that the residence was Husband's separate property. See also First Nat'l Bank in Albuquerque v. Abraham, 97 N.M. 288, 639 P.2d 575 (1982), in which the supreme court held that a note, because it was contracted for during marriage, was a community debt even though Husband took it out in his name alone. The court also held that the renewal note was not binding on Wife because it was signed by Husband after their divorce.

70. 96 N.M. 719, 634 P.2d 1271 (1981). On a separate issue of first impression, the *Hughes* court held that federal civil service disability benefits earned during the marriage were community property. For further discussion of this issue, see Note, *Community Property—Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: Hughes v. Hughes*, 13 N.M.L. Rev. 193 (1983).

71. 96 N.M. at 725, 634 P.2d at 1277. See N.M. Stat. Ann. § 47-1-16 (1978), which reads in part: "An instrument conveying . . . title to real or personal property to two or more persons as joint tenants . . . shall be prima facie evidence that such property is held in a joint tenancy. . . ."

72. 96 N.M. at 725, 634 P.2d at 1277.

B. Life Insurance

In *In re Estate of Schleis,*[73] the issue was whether dissolution alone extinguishes an ex-spouse's beneficial interest in an insurance policy. The decree of dissolution granted Husband ownership of an insurance policy on his life. After his death, Husband's personal representative and his ex-wife litigated the distribution of the death benefits.[74] The supreme court held that dissolution per se does not extinguish a spouse's beneficial interest in the life insurance policy of the other spouse. Where, as in *Schleis,* the decree merely granted ownership of the policy to Husband, Wife's beneficial interest survived. Wife's interest could have been extinguished only if Husband had changed the beneficiary or if the policy itself divested Wife of beneficial ownership upon dissolution.[75]

C. Community Property

Portillo v. Shappie[76] is a case of particular interest in the area of community property. In 1950 Manuel Portillo married Frances Montano. They moved into a two-room adobe structure which she owned as her separate property, and resided there continuously through the twenty-six years of their married life. Portillo made substantial improvements to the property using community funds and his own labor. He doubled the size of the original structure and added a separate apartment. Shortly before her death, Montano deeded the property to her daughter, Ida Shappie.[77]

Portillo made no claim of ownership to the property, nor did he contest the transfer of the property to Ida Shappie. He asked the trial court to impose an equitable lien on the real estate on behalf of the community. The trial court found that the present value of the property was $33,400, and the increase in value due to the improvements was $24,900. However, the court limited Portillo's community lien to $2800, the value of the money and labor he invested in the improvements.[78]

The New Mexico Court of Appeals upheld the trial court's $2800 award.[79] The supreme court granted certiorari to decide the value of the community lien. The court framed the issue as: "what is the proper measure of the community's recovery when the community has invested

73. 97 N.M. 561, 642 P.2d 164 (1982).

74. *Id.* at 561–62, 642 P.2d at 164–65.

75. *Id.* at 562–63, 642 P.2d at 165–66.

76. 97 N.M. 59, 636 P.2d 878 (1981). For further discussion of this case, see Alcock, *Estates and Trusts, post* at 395.

77. 97 N.M. at 59–60, 636 P.2d at 878–79.

78. *Id.* at 60, 636 P.2d at 879.

79. *Id.* See Shapiro, *Domestic Relations and Juvenile Law, Survey of New Mexico Law: 1979–1980,* 11 N.M.L. Rev. 135, 140 (1980), for a discussion of the New Mexico Court of Appeals decision.

its labor and funds in improving the separate realty of one of the spouses."[80] The court noted that this was a question of first impression in New Mexico.

The supreme court stated that it would "look to general principles of community property law for guidance."[81] The court noted that "courts of New Mexico have long struggled with the meaning of 'rents, issues and profits' of property in the context of community investments of funds and labor in the separate . . . property of one of the spouses."[82] No single method of apportionment has ever been adopted. Instead, the courts have endeavored to do "substantial justice" on the facts of each case.

The supreme court acknowledged the Spanish civil law rule that limited the community's recovery to the cost of the improvements made to the separate property.[83] The court emphasized, however, that while it would look to the principles of Spanish and Mexican civil law for guidance, it would not be bound by any particular civil law rule or precedent. In *Portillo,* in order to accomplish its aim of doing "substantial justice," the supreme court rejected the Spanish civil law rule.[84] The years of effort and skill that Manuel Portillo invested in the property had resulted in a tremendous increase in value. The court stated that the *increase in value* of this separate property "represents the rents, issues and profits of community property, and to deny the community the right to a lien for that amount would do substantial injustice under the facts of this case."[85] The supreme court reversed the trial court and the court of appeals, and awarded Manuel Portillo a community lien of $24,900 in the separate property homestead.[86]

D. Retirement

McCarty v. McCarty[87] has, like a lightning rod, concentrated attention on the divisibility of governmental retirement benefits earned by one

80. 97 N.M. at 60, 636 P.2d at 879.
81. *Id.* at 61, 636 P.2d at 880.
82. *Id.* at 62, 636 P.2d at 881.
83. *Id.* at 63, 636 P.2d at 882.
84. *Id.* at 64, 636 P.2d at 883.
85. *Id.*
86. *Id.* For a discussion of the effects of *Portillo,* see Ellis, *The Impact of Portillo v. Shappie on New Mexico Community Property Law,* State Bar of New Mexico, Section on Women's Legal Rights and Obligations Newsletter, vol. III, no. 3, at 6 (May 31, 1982) (available from the New Mexico State Bar Office). In his article, Professor Ellis discussed the following questions presented by *Portillo:*

> (1) What kind of property is subject to the holding—community residence only, house only, non-income producing only? (2) What kind of community contribution is necessary to bring the holding into play—improvement only, mortgage payments, tax and insurance payments? (3) How much discretion do trial courts have in deciding whether or not to apply *Portillo* to a given fact situation?

Id. at 8.
87. 453 U.S. 210 (1981). In *McCarty,* the Supreme Court held that military retirement benefits were not subject to division upon dissolution of marriage. A recent federal law overruled *McCarty. See infra* note 89.

spouse during coverture. Although *McCarty* dealt specifically with military retirement, in dicta the supreme court also addressed civil service and other government retirement programs. The strong trend throughout the nation has been to grant the non-pensioned spouse, usually the wife, an interest in the retirement benefits of the governmental employee spouse.[88] *McCarty,* with its specific holding that military retirement benefits were not divisible, had stood as the exception to the general trend.

Congress has now overruled *McCarty* in the Uniformed Services Former Spouses' Protection Act.[89] This law, which took effect on February 1, 1983, provides, inter alia, that military retirement benefits are subject to division by state courts; that the appropriate Secretary shall make direct payments of retirement pay to certain former spouses; and that certain former spouses will become eligible for medical benefits and commissary privileges.[90]

VI. SUPREME COURT COMMITTEE ON FAMILY COURT REFORM

On August 31, 1982, the New Mexico Supreme Court released the Proposed Rules and Forms drafted by the Supreme Court Committee on Family Court Reform. The Committee recommended the adoption of guidelines for the amount of child support to be paid by the non-custodial parent; the use of mediation; the establishment of a state-wide Marriage and Divorce Registry; the use of a model temporary domestic order; and the filing of statements of financial condition by both parties thirty days before the trial on the merits.[91] After receiving comments from the New Mexico Bar, the supreme court will decide which, if any, of the proposals it will adopt.

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88. *See, e.g.,* Hughes v. Hughes, 96 N.M. 719, 634 P.2d 1271; *see also supra* note 70.

89. Pub. L. No. 97-252, §§ 1001–1006, 96 Stat. 730 (1982) (to be codified in scattered sections of 10 U.S.C.). Section 1408 of the Act provides in part: "a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." The law thus appears to authorize state courts to review their post-June 25, 1981, decrees which, under the constraint of *McCarty,* classified military retired pay as the separate property of the member.

90. *See* Pub. L. No. 97-252, §§ 1001–1006, 96 Stat. 730 (1982) (to be codified in scattered sections of 10 U.S.C.).

91. Proposed Rules and Forms, Supreme Court Committee on Family Court Reform (Proposed Draft 1982). The child support guidelines proposed by the Committee were 20% of the non-custodial spouse's net income for the first child, 10% for the second child, 8% for the third child, and 8% for each additional child. The court would issue the domestic order automatically; the order would restrain both parties from harassing each other and from abusive conduct, and from wasting or disposing of community assets. The statement of financial condition would include documents on community assets and liabilities, separate property, monthly income and expenses, and estimated child support obligation.

CONCLUSION

In domestic relations, perhaps more than in any other area of law, the parties have paid an indifferent obedience to the mandates of the courts, and, by and large, they have gotten away with it. Compliance with orders of child support and alimony is abysmal; parents deny visitation at whim or use it to accomplish a de facto change of custody. Sanctions are either wanting altogether or applied too irregularly to have a general deterrent effect.

The New Mexico Supreme Court, in the cases reported during the Survey year, has grown increasingly impatient with this state of affairs. The court expects adults to behave responsibly toward each other and the children they brought into the world. The supreme court is no longer willing to tolerate the irresponsibility of husbands who do not support their children, wives who make no effort to achieve financial independence, and custodial parents who obstruct visitation.

The supreme court is now supporting the efforts of trial courts to deal with abusive and irresponsible conduct. Incarceration for contempt, reduction of alimony, and change of custody are some of the measures taken to make divorced adults behave in a responsible fashion. The decisions made and the language used by the supreme court provide some hope that judges will have better success in enforcing the humane usages which, in the domestic area, have been routinely flouted for so long.